

**THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: A TEST OF  
AFRICAN NOTIONS OF HUMAN RIGHTS AND JUSTICE**

By

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## DECLARATION

I certify that the work presented in this thesis: '**The African Court on Human and Peoples' Rights: A Test of African Notions of Human Rights and Justice**' is, to the best of my knowledge and belief, original, except as acknowledged in the text. I further certify that this work has not been submitted, either in whole or in part, for a degree at any other university or academic institution.

Name: Bello Ayodeji Aliu

Signature:

Date:



## **DEDICATION**

To God Almighty



UNIVERSITY *of the*  
WESTERN CAPE

## ACKNOWLEDGMENT

This has been a long journey for me, a journey I am grateful to God to have embarked on. A lot of lessons have been learnt and a lot of experience gained. To God be the Glory.

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## KEY WORDS AND PHRASES

1. Indigenous
2. Traditional African Society
3. Justice System
4. Human Rights
5. African Court
6. African Commission
7. Inter-American Court
8. European Court
9. African Union
10. African Charter



## ABSTRACT

The African Court on Human and Peoples' Rights (the Court) is the most recent of the three regional Human Rights Bodies. Envisioned by the African Charter on Human and Peoples' Rights, its structure was not planned until the Organisation of African Unity (OAU) promulgated a protocol for its creation in 1998.

The Court complements the protective mandate of the African Commission on Human and Peoples' Rights ('The Commission') and the Court has the competence to take final and binding decisions on human rights violations. Unlike its European and inter-American versions where their courts are integral parts of the cardinal instrument of the system *ab initio*, the establishment of the African Court was merely an afterthought.

At the initial, protection of rights rested solely with the Commission upon African justice system which emphasises reconciliation as it is a non-confrontational method of settlements. The Commission is a quasi-judicial body modelled after the United Nations Human Rights Committee without binding powers and with only limited functions covering examination of State reports, communications alleging violations and interpreting the Charter at the request of a State, the OAU or any organisation recognised by the OAU.

The thesis answers the question whether the adoption of the African Court means that the African model of enforcing human rights has failed or whether having the Court constitute a concession to the triumph of the western model of law enforcement.

The imperative of the 30<sup>th</sup> Ordinary Session of the OAU in 1994 where the creation of an African Court of Human and Peoples' Rights was viewed as the best way of protecting human rights across the region would be treated. The relevance of such an examination is highlighted by the fact that the African Charter did not make any provision for the establishment of a Court to enforce the rights guaranteed thereunder. If we are to assume that justice by reconciliation has failed and should be replaced by or complimented with justice by adjudication as the primary means of conflict resolution, what guarantees are there that the latter form of justice will not also fail?

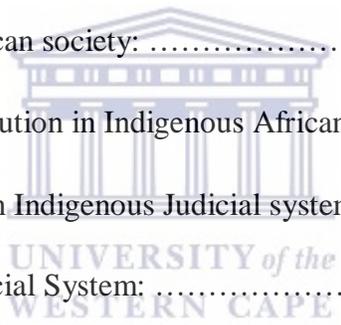
This thesis therefore will critically evaluate the African Court on Human and Peoples' Rights and assess its potential impact on the African human rights system. It will also probe the power of the Court and see whether a clear and mutually reinforcing division of labour between it and the African Commission can be developed to promote and protect human rights on the continent.

This research brings to focus an area that requires attention if the African human rights regime is to be effective. It put to test the criticism against the African Charter and the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights and also identified the present existing flaws in the African regional system. Furthermore, it ascertained whether or not, given the availability of other options, a regional Court is, in fact, the ideal mechanism for the protection of human rights in Africa.

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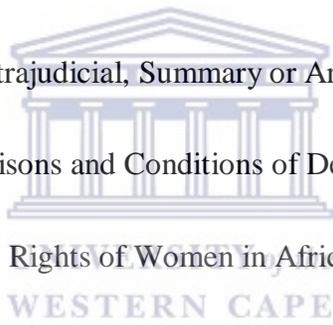
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## Chapter 1

### 1.1 INTRODUCTION

Hope and despair, illusion and disillusion, optimism and pessimism alternated in 20th century Africa. The first half of the century saw a denial of humanity by colonising forces who claimed to lead the African people from darkness to the light of ‘civilisation.’<sup>1</sup>

The journey towards an effective human rights system in Africa has been a long and gruelling one, though still far from being achieved, significant progress has been made. The African Commission on Human and Peoples’ Rights, which establishment was provided for by the African Charter,<sup>2</sup> has established some important working practices and jurisprudence, but these have been hampered by myriad of constraints among which are the fact that its recommendations are not legally binding on States, and they have therefore not been implemented, the Commission’s lack of visibility on the continent to the wider public and its inadequate resources.<sup>3</sup>

Without the power of enforcement, human rights would stand stripped of all value. International human rights treaties have thus made provisions for the creation of bodies which are tasked with the supervision of the principles contained in the texts of the instruments.

The continent of Africa, in the last two decades, has witnessed huge development as regards human rights development within the region. This modest development of human rights in the region, though steady, can be seen in the growth of norms and institutions set up for the promotion and protection of human rights in the continent. The African Court on Human and Peoples’ Rights, the latest entrance to the growing institution edifice after the African Commission on Human and Peoples’ Rights, stands out in particular.<sup>4</sup>

Despite the length of time involved in the drafting of the *Court’s Protocol*, not every situation was covered in the Protocol and several shortcomings have been identified in its text thereby casting doubt whether the Court can actually replace the reconciliation and non-confrontational

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<sup>1</sup> Conrad J *Au coeur des ténèbres* (1999)

<sup>2</sup> Article 30, African Charter on Human and Peoples Rights.

<sup>3</sup> George MukundiWachira, ‘African Court on Human and Peoples Rights: Ten years on and still no justice’ A report published by the Minority Rights Group International, 2008.

<sup>4</sup> Dan Juma, ‘Access to the African Court on Human and Peoples Rights: A case of the Poacher turned Game Keeper’ (2007) 4 *Essex Human Rights Law Review* 1.

values of Africans.<sup>5</sup> While some of these may have been legitimate accidental omissions, it has been suggested that others were deliberate omissions intended to give the African Court the opportunity to address them through its rules of procedure. One gaping omission in the Court's Protocol relates to the question of the admissibility of cases before the Court under its contentious jurisdiction.<sup>6</sup>

After the adoption of the Protocol, other events had happened with the most important one being the adoption of a Protocol by the Assembly of Head of States and Government<sup>7</sup> to merge the court with the African court of Justice established by the Constitutive Act of the AU<sup>8</sup> to form a single Court to be known as the African Court of Justice and Human Rights. This, in July, 2008, materialised<sup>9</sup> as a result of the adoption of the Protocol<sup>10</sup> by the African Union thereby creating a new African Court of Justice and Human Rights.<sup>11</sup>

Questions as to the procedural legality, in the light of the Law of treaties and the haste with which the merger was transacted has been raised by some people. Even more critical are the

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<sup>5</sup>African Indigenous justice system employs restorative and transformative principles in conflict resolution. Victims, offenders and the entire community are involved and participate in the definition of harm and search for resolution acceptable to all stakeholders. Extracted from Elechi Oko, 'Human Rights and the African Indigenous Justice System' (2004). A paper presented at the 18<sup>th</sup> International Conference of the International Society for the Reform of Criminal Law, August 8-12, 2004 at Montreal, Quebec, Canada.

<sup>6</sup> See Art 3 of the Courts Protocol. Art 4 of the Courts Protocol confers advisory jurisdiction on the Court: advisory opinions may be sought by a member state of the AU, the AU or any of its organs, or any African organisation recognised by the AU.

<sup>7</sup>The Assembly of Heads of State and Government of the AU (the Assembly) is the supreme organ with the functions of rule-making, creation of standards, and guidance of the administrative organs of the AU in the implementation of AU's standards and strategic goals. The Act, Articles 8 & 9; The decisions of the Assembly include: regulations, directives, recommendations, declarations, resolutions and opinions, among others (Rule 33 of the Rules of Procedure of the AU Assembly).

<sup>8</sup>The Constitutive Act of the AU (the Act) is the grundnorm of the African regional and sub-regional IOs, establishing a constitutional framework for the AU and its organs and linking the AU system with the other regional and sub-regional organisations. It aspires to create a system encompassing all the African regional international organisations with the aim of consolidating African unity, and ultimately creating an economic and political union on the model of the EU.

<sup>9</sup> Protocol of the Court of Justice of the African Union, adopted on 11 July, 2003, entered into force 11 February, 2008, AU Doc. Assembly/AU/Dec.25 (II). Article 2 of the Protocol established the African Court of Justice, hereinafter called the Court of Justice.

<sup>10</sup> Protocol on the Statute of the African Court of Justice and Human Rights, adopted 1 July 2008, Assembly/AU/Dec. 196 (XI) hereinafter referred to as the new Protocol. This is still to enter into force. As at 6<sup>th</sup> of August, 2010, only 5 States namely Libya (6<sup>th</sup> May, 2009), Mali (13<sup>th</sup> August, 2009), Burkina Faso (23<sup>rd</sup> June, 2010), Congo (14<sup>th</sup> December, 2011) and Benin (28<sup>th</sup> June, 2012) have ratified this Protocol while 30 out of the 53 countries have signed the protocol. See [au.int/en/sites/default/files/treaties/7792-sl-protocol\\_on\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_hr\\_0.pdf](http://au.int/en/sites/default/files/treaties/7792-sl-protocol_on_statute_of_the_african_court_of_justice_and_hr_0.pdf). (Accessed 18<sup>th</sup> October, 2016).

<sup>11</sup>Article 1 of the new Protocol establishes the African Court of Justice and human Right, hereafter referred to as the new Court.

attrition of some provisions in the instruments which the new Protocol replaces and the failure of the Africa Union to re-examine the normative and institutional problems of the African Charter on Human and Peoples' Rights<sup>12</sup> in general transition. Also, the linkages between the Court and the Commission, the limited direct access of individuals and non-governmental organisations before the Court and the new restrictive provisions on advisory opinions stand out in particular. With the merger now a *fait accompli*, the fundamental question remains whether the Court will bring home an effective system of protection or whether it has been a mere transition in name and anatomy. Some see it as a significant development in the institutionalisation of Human Rights in Africa.<sup>13</sup>

The coming into being of the Court brings in an era whereby Judgement delivered are to be made binding on infringing States unlike mere recommendations of the Commission.<sup>14</sup> The binding legal force behind the Judgement might be the missing impetus to make States comply.

## 1.2 Background to the Study

During the 1960s, when many African countries attained their independence, the desire for continental unity led to several attempts at establishing a pan-African organisation. Through the efforts of Emperor Haile Selassie of Ethiopia and President Sekou Toure of Guinea, the heads of 32 independent African states met in Addis Ababa, Ethiopia in May 1963 to establish the Organisation of African Unity (OAU). The Charter of the OAU was approved on 25 May, 1962 and signed on the next day by 30 Heads of State and Prime Ministers. The following decades saw 23 more states joining the OAU as they became independent.<sup>15</sup>

Besides the creation of the OAU, eradication of colonialism and the dismantling of apartheid was another major concern of the Charter.<sup>16</sup> In spite of its general expressions on human

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<sup>12</sup> The African Charter on Human and Peoples Rights adopted 27 June, 1981, entered into force 21 October, 1986, O.A.U.Doc. CAB/LEG/67/3/Rev. 5 hereinafter referred to as 'The Charter'.

<sup>13</sup> Frans Viljoen & Evarist Baimu, 'Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples Right and the African Court of Justice' (2004) 22 *NETH. Q. HUM. RT.S.* 241.

<sup>14</sup> The Commission is a supervisory body set up by the Charter with a mandate to promote and protect human rights in Africa as it is enshrined in the Charter. Before coming into existence of the Court, the Commission was the only body with competence with supra-national human rights. It will now play a complementary role with the Court as regards promoting and protecting human rights in the continent.

<sup>15</sup> Membership comprises of the independent mainland and island states and the Sahrawi Arab Democratic Republic (Western Sahara). History of the Organisation of African unity, Available at [www.au.int/en/history/oau-and-au](http://www.au.int/en/history/oau-and-au) (Accessed 18<sup>th</sup> October 2016).

<sup>16</sup> Article 111(6) of the OAU Charter.

rights, it, however, did not proclaim individual rights for African people. Its main focus was political unity, non-interference in the internal affairs of member states and the liberation of other African territories.<sup>17</sup>

Discussions regarding the creation of a human rights regime for Africa also began as early as 1961.<sup>18</sup> However, it was not until 1979, after several Africans had suffered at the hands of despotic rulers that the drafting of the African Charter on Human and Peoples' Rights (African Charter) began.<sup>19</sup> From the onset, the instrument focused attention on the need to Africanise international human rights and does not only guarantee individual rights but also provides for second and third generation group rights.<sup>20</sup> The Charter also tries to merge African values with international norms. It further guarantees civil and political rights including the equal protection of laws, rights to due process and freedom from ex post facto laws. The African Commission on Human and Peoples' Rights ('The Commission') was the only body victims of human rights violation in Africa looked onto for relief but unfortunately it has suffered many attacks for being toothless. The implementation of its recommendations was a major challenge.

Prior to 2004, Africa and Asia were the only regions with a human rights regime which had no judicial institution to uphold and enforce human rights on the continent. That changed on 25 January 2004 when the 53-members of the African Union ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (The Court).<sup>21</sup> The 15<sup>th</sup> instrument of ratification by the Union of

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<sup>17</sup> Okere O., 'The protection of Human Rights in Africa and The African Charter on Human and Peoples Rights: A comparative Analysis with the European and the American systems' (1984) 6 *Human Rights Quarterly* 147.

<sup>18</sup> The principal discussions took place during the following: Congress of African Jurists held in 1961 in Lagos, Nigeria; Congress of French speaking African Jurists, held in 1969 in Dakar, Senegal; United Nations Seminar held in 1969 in Cairo, Egypt; United Nations Seminar held in 1974 in Dar es Salaam, Tanzania; Conference of the International Commission of Jurists held in Dakar, in 1978; Conference of French speaking African Bar Association, held in Dakar in 1979; and a United Nations seminar held in Monrovia, Liberia in 1979.

<sup>19</sup> The African Charter was adopted in 1981 by the 18<sup>th</sup> Assembly of Heads of State and Government of the OAU, the official body of African states. It is also known as the Banjul Charter because a final draft of it was produced in Banjul, the capital of the Gambia. Mutuah I. M., 'The African Human Rights System: A Critical Evaluation' <http://hdr.undp.org/sites/default/files/mutua.pdf> (Accessed 18<sup>th</sup> October, 2016).

<sup>20</sup> OAU Charter, Arts. 1(e) & 11(c).

<sup>21</sup> OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), was adopted on 9 June 1999 at the Summit of Heads of State and Government and entered into force January 25, 2004, when the minimum number of ratification required was achieved. Tendai Nhenga: A Critical Analysis of the African Human Rights Enforcement Regime LLM Dissertation 18. Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda are the 25 States that have ratified the protocol. See [www.africa-court.org/index.php/about-us/mandate-mission-values](http://www.africa-court.org/index.php/about-us/mandate-mission-values) (Accessed on 18<sup>th</sup> October, 2016). The adoption of this

Comoros was deposited on the 26<sup>th</sup> December, 2003. The inauguration of the Court was the conclusion of a long and eventful journey that began with the call by the African Conference on the Rule of Law held in Lagos, Nigeria, in 1961 for the ‘creation of a court of appropriate jurisdiction’ to protect human rights on the continent of Africa.<sup>22</sup>

The events following the Lagos Conference manifested into the adoption of the African Charter wherein the issue of creating a court was carefully avoided<sup>23</sup> instead of a court, it was decided to ‘concentrate on the establishment of an African Commission on Human and Peoples’ Rights’<sup>24</sup> (herein after referred to as the Commission). The African Commission was thus established by the African Charter and remained as its sole supervisory body until June 1998 when the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights was ratified. As a result of pressure from different quarters, but mostly following civil society criticisms that trailed the work of the African Commission, the stage was set for the Organisation of African Unity (OAU), now the African Union (AU), to give serious thought to the establishment of an African Human Rights Court.<sup>25</sup> Meanwhile, to keep abreast of globalisation, avoid further marginalisation of the continent, and take up the challenge of development inherent in the dream of an African Renaissance or revival, African leaders felt compelled to replace the Organisation of African Unity (OAU) with the African Union (AU).<sup>26</sup>

Like other international human right instruments, the African Charter established a specialist body: African Commission on Human and Peoples’ Rights (African Commission) to oversee treaty performance by State parties. This body was established under Article 30 of the African Charter and was officially inaugurated on 2 November 1987 in Addis Ababa, Ethiopia when the

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Protocol has generated a lot of literature and reference is made to some of these and the official website of the African Union during the course of writing this thesis.

<sup>22</sup> The conference was convened by the International Commission of Juris and was attended by participants from around Africa. See Law of Lagos, reprinted in (1961) 3 *Journal of International Commission of Jurists* 9.

<sup>23</sup> See for example, Harrington J ‘The African Court on Human and Peoples Rights’ in M Evans and R Murray (eds) ‘The African Charter on Human and Peoples Rights: The system in Practice, 1986–2000’ (2003) 305, 309.

<sup>24</sup> Pityana N. B., ‘Reflections on the African Court on Human and Peoples Rights’ (2004) 4 *African Human Rights Law Journal* 121.

<sup>25</sup> The OAU which was established by the Charter of the Organisation of African Unity in 1963 was succeeded by the African Union (AU) in 2001. The Constitutive Act of the African Union (AU Act) was accepted in July 2000 and entered into force in May 2001. Text of the AU Act is reprinted in C Heyns and M Killander (eds), ‘Compendium of key human rights documents of the African Union’ (2006) 4. All reference to the OAU in the African Charter would be read as the AU in this thesis.

<sup>26</sup> See ‘Transition from the OAU to the African Union’ Available at [www.au2002.gov.za/docs/background/oau\\_to\\_au.htm](http://www.au2002.gov.za/docs/background/oau_to_au.htm) (Accessed 15th August, 2016).

OAU 23<sup>rd</sup> Assembly of Heads of States and Governments had elected its members in July of the same year. The African Commission was created with quasi-judicial functions and not with full judicial mandate. The rationale for this was to avoid the confrontational style of dispute resolution which is associated with the received judicial systems in Africa. The African Commission was perceived to epitomize an African sense of justice based on reconciliation and non-adversarial procedures.

Despite the initial optimism about the creation of the Commission, hopes that the body would robustly ensure the enjoyment of human rights on the continent have largely gone unrealised.

By the turn of the century, most critics were of the view that the African Commission has been a disappointment with respect to specific functions and its performance in general. The African Commission's failure to curb the widespread human rights violations on the continent came under severe criticism. Of most concern was its lack of judicial and enforcement powers. Calls for the creation of a regional human rights court, akin to that of Europe, grew louder.

Proposal for an African Court on human rights date back to 1961 when legal practitioners in Africa, judges and teachers of law invited governments to consider the adoption of an African Convention on human rights and the establishment of a court and safeguard the rights enshrined therein. This failed and in the late 1970s, when the African Charter on Human and Peoples' Rights was negotiated, the idea of setting up a Court was raised again. It was rejected on the ground that Africans prefer to settle disputes through negotiation and conciliation rather than through contentious proceedings, but the fear of many African States, that they would be subjected to the Judgements of an international body may have played a role.<sup>27</sup>

By early 1990, it became obvious that the African Commission was unable to act as a strong protector of human and Peoples' rights.<sup>28</sup> This thereby bolstered the efforts toward the establishment of a court in the region. The Commission's response was merely to issue a resolution condemning the human rights situation in the country.<sup>29</sup>

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<sup>27</sup> Naldi & Magliveras, 'The Proposed African Court of Human and Peoples Rights: Evaluation and Comparison' (1996) 8 *RADIC* 945.

<sup>28</sup> Example is the gross human rights violation in Nigeria that occurred between 1993 and 1998 during Abacha's regime highlights the weaknesses of the Commission's powers of implementation and investigation.

<sup>29</sup> Resolution on Nigeria of the 16<sup>th</sup> Ordinary Session of the African Commission on Human and peoples' Rights (25 October-3 November, 1994).

By 1994, the Organisation of African Unity's<sup>30</sup> Assembly formally requested the Secretary-General of the OAU to convene an expert meeting to discuss methods of enhancing the efficiency of the Commission and the establishment of a Court. On 9 June, 1998, the Assembly of Heads of States and Government, in Ouagadougou, Burkina Faso, adopted the Protocol on the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.<sup>31</sup>

## 1.2 Statement of the problem

The setting up of the Court was a milestone in the history of the African human rights regime. It was created with the aim of complementing the African Commission that has exercised continental oversight on human rights since 1987.<sup>32</sup> The Protocol creating the Court suggests that this judicial body will make the African human rights regime more effective in the promotion and protection of human rights.

In the light of the above fact that the African Commission was based on the idea of African justice which emphasises reconciliation and non-confrontation, the question then is does the adoption of the African Court mean that the African model of enforcing human rights has failed? Does having the Court constitute a concession to the triumph of the western model of law enforcement? These, the thesis will try to answer.<sup>33</sup>

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<sup>30</sup>Now known as 'African Union.'

<sup>31</sup>This thesis thus examine whether the problems of the Commission are attributable to the conceptual design of the African Commission as an embodiment of the African perspective of dispute resolution. Furthermore, it also tries to answer the question whether, if the Commission had properly and optimally used the African model of justice which is discussed in chapter 4 of this thesis, it would have performed better.

<sup>32</sup>The Court is presently located in Arusha, Tanzania.

<sup>33</sup>The thesis explores to see whether the Protocol makes room for such African based dispute resolution and to what extent. Also, should it have been rooted in African concepts of justice? It will examine why in June 1994, at its 30<sup>th</sup> Ordinary Session in Tunis, the OAU viewed the creation of an African Court of Human and Peoples' Rights as the best way of protecting human rights across the region. The relevance of such an examination is highlighted by the fact that the Banjul Charter makes no provision for a Court to enforce the rights guaranteed thereunder. If we are to assume that justice by reconciliation has failed, and should thereby be replaced by or complemented with justice by adjudication as the primary means of conflict resolution, what guarantees are there that the latter form of justice will not also fail? This thesis will therefore critically evaluate the new African Court on Human and Peoples' Rights and assess its potential impact on the African human rights system. It will probe the power of the Court and see whether a clear and mutually reinforcing division of labour between it and the African Commission can be developed to promote and protect human rights on the continent.

### **1.3 Research Questions'**

Having in mind the problem being quizzed, the questions in this study are as follows:

- a) Is the African value of reconciliation and non-confrontation upon which the African Commission was built compatible with the idea of western-style-Court systems?
- b) Where the answer in (a) above is in the affirmative, have those values been reflected in the conceptualisation of the African Human Rights Court and the proposed African Court of Justice and Human Rights?
- c) Does adequate promotion and protection of human rights require judicial enforcement mechanisms at the regional level?

### **1.4 The purpose and importance of the Research**

The main aim of this research is to bring to the spotlight an area that requires attention if the African human rights regime is to be effective. It will put to test the criticism against the African Charter and the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights and also identify the present existing flaws in the African regional human rights system. Furthermore, it will ascertain whether or not, given the availability of other options, a regional Court is, in fact, the ideal mechanism for the protection of human rights in Africa.

As the African Court on Human and Peoples' Rights is a relatively new institution this thesis will therefore inform (supported by its own research findings), prompt debate on the efficacy of this entity and make suggestions on ways of improving it.

### **1.5 Research Methodology**

The research was carried out by extensive deskwork while the use of textbooks provided information on the historical background of Africa's human rights regime. Journals assisted the researcher in providing information on current trends and analysis.

Having in mind that other regional system exists, a comparative approach to draw inspiration to the African human rights system was adopted by way of literature review.

The internet was also used as a source of information of current activities in the field of study and minimal informal consultations with experts in the field was done to provide the researcher with guidance.

## **1.6 Chapter Synopsis**

### **Chapter One: Introduction**

This is the introductory chapter. It introduces and delineates the focus of the study.

### **Chapter Two: Conception of the Enforcement of Human Right in Africa**

This chapter will focus on the African Charter on Human and Peoples' Rights. It discusses the historical development of the Charter, and critically analyse its content, application, implementation and enforcement. The chapter also discusses the Africa conception of 'rights' and their application to African cultural, social and economic realities.

### **Chapter Three: Notion of Justice**

This chapter will explore the concepts of justice and relate them to human rights from an African perspective. It demonstrates that human rights are the rationale for the quest for justice, peace, reconciliation and democracy in the society.

### **Chapter Four: The African Commission on Human and Peoples' Rights'**

This chapter will analyse and appraise the African Commission as an organ for the enforcement of human rights in Africa. This will necessitate a scrutiny into its structure, mandate, and rules of procedure. It will also determine whether the Commission reflects the African system of justice.

### **Chapter Five: The African Court on Human and Peoples' Rights**

This stage of the thesis will introduce the Protocol to the African Charter on Human and Peoples on the Establishment of an African Court on Human and Peoples' Rights. The chapter will critically analyse its provisions with particular focus on the constitution, jurisdiction and enforcement of the entity. It will also examine the relationship (if any) between the Court and the

Commission. It will also look at the situation where cases already reviewed by the Commission can be sent back to the Court for review. The retention or abolishment of the Commission will at this point be debated.

### **Chapter Six: Recommendations and conclusion**

This chapter provides an overview of the entire thesis. It concludes this study with recommendations for an effective African human rights system.



## CHAPTER TWO

### CONCEPTION OF THE ENFORCEMENT OF HUMAN RIGHTS IN AFRICA

#### 2.1 Introduction

A clear understanding of the background to the human rights regime in Africa is a prerequisite for a full appreciation of how the African human rights regime came into existence and how it operates. The purpose of this chapter is to set the tone of the study generally by discussing the historical developments of human rights in Africa. The chapter will lay a foundation for the examination of the relationship between human rights and culture in Africa. The chapter will also look at the historical development of the African Charter by critically analysing its content, application, implementation and enforcement. Furthermore, it will look at the African conception of rights and its application to African cultural, social and economic realities. A critique of the concept of human rights including questions as to their universality will also be done.

#### 2.2 Defining Human Rights

One of the initial questions in any inquiry for this research is to define what is meant by ‘human rights’. The term may be used philosophically or as an abstract which means a ‘special kind of moral claim’ which every human can invoke.<sup>34</sup> It is further described as ‘the manifestation of moral claims in positive laws’.<sup>35</sup> The concept (human rights) presupposes the existence of humans which finds its application in human interaction and thereby relational in nature.<sup>36</sup>

Definition according to Heyns and Steffiszyn<sup>37</sup> is crucial as this tells us ‘why’ especially in the international sphere where diverse cultures are involved, where positivist foundations are shaky and where implementation mechanisms are fragile. According to some schools of

<sup>34</sup> Frans Viljoen, ‘International Human Rights Law in Africa’ (2007) 4. See also Frans Viljoen, ‘International Human Rights Law: A Short History in UN Chronicle’ Article XLVI No. 1 & 2, January, 2009. Available at <http://unchronicle.un.org/article/international-human-rights-law-short-history> (Accessed 17<sup>th</sup> May, 2015).

<sup>35</sup> Viljoen cited an example of constitutional guarantees that serve as the basis to hold government accountable under national legal processes. See Frans Viljoen, ‘International Human Rights Law in Africa’ (2007) 4.

<sup>36</sup> Sustained human contact and the community require mutual respect as regards other Peoples’ life, respect of the child’s needs, of the elders’ age and wisdom among others. In a close society such as the traditional African society which does not have a centralised structure the reciprocity of expectations is always taken for granted and this does not need to be determined formerly because members of the society are socialised into their roles. Non-compliance carries the risk of social exclusion and at times, expulsion. See Meckled-Garcia & Cali B, ‘Lost in Translation: The Human Rights Ideal and International Human Rights Law’ in Meckled-Garcia & Cali B (eds), ‘The Legalisation of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law’ (2006) 10.

<sup>37</sup> Christof Heyns & Karen Steffiszyn (eds.), ‘Human Rights, Peace and Justice in Africa: A Reader’ (2006) 3.

thought the entire task of philosophy centres on meaning. They believe that how one understands the meaning of human rights will influence one's judgement on such issues as which rights are regarded as universal, which rights call for international pressures and which rights can demand programme for implementation.<sup>38</sup>

Human rights were also defined as 'those claims made by men, for themselves or on behalf of other men, supported by some theory which concentrates on the humanity of man, on man as a human being, a member of humankind...'<sup>39</sup> According to Cassese<sup>40</sup> who described rather than define the term, it is 'an ideology and normative 'galaxy' in a rapid expansion, with a specific goal: to increase safeguards for the dignity of the person. Human rights represent an ambitious (and in part, illusory) attempt to bring rationality into the political institutions and the societies of all states'. They are tenets that dominate the natural instinct, making man a 'social' rather than a 'natural' animal, and crystallise rules of behaviour to be respected by all persons and all nations. They are 'based on an expansive desire to unify the world by drawing up a list of guidelines for all governments, an attempt by the contemporary world to introduce a measure of reason into its history.'<sup>41</sup>

Justice Kayode Eso,<sup>42</sup> in the case of *(Dr) Mrs Olufunmilayo Ransom Kuti v Attorney-General of Nigeria*<sup>43</sup> described human rights as:

A right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilised existence, and what has been done by our (Nigerian) constitution since independence is to have these rights enshrined in the constitution so that the rights could be immutable to the extent of the non-immutability of the constitution itself.

Though the position in pre-colonial Africa cannot be idealised and far from being alike, there were established ways and means of arranging customs and wise leadership which led to effective consensus and legitimate dispute resolution then.

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<sup>38</sup>Christof Heyns & Karen Stefiszyn (eds.), 'Human Rights, Peace and Justice in Africa: A Reader' (2006)3.

<sup>39</sup> Dowrick FE (ed.), 'Human Rights, Problems, Perspectives and Texts', a series of lectures and seminar papers delivered in the University of Durham in 1978 (1979) 8-9. He also pointed out that human rights in essence combine ethical and political doctrines with rationalistic and theological roots. See also Arvind Sharma (ed.), 'The Worlds Religions after September 11' (2009) 39; George Uzoma, Des Obi & IksNwankwor (eds), 'The KPIM of Social Order: A season of Inquiry, Meaning and Significance in the Modern World' (2013) 285.

<sup>40</sup> Cassese A, Human Rights in a Changing World, (1990) 3.

<sup>41</sup> Cassese A (1990)158, see also Umozurike Oji U, 'The African Charter on Human and Peoples Rights' (1997) 3.

<sup>42</sup> Retired Justice of the Supreme Court of Nigeria.

<sup>43</sup> (1985) 2 NWLR (part 6) 211.

Some philosophers claimed that definitions of human rights are futile because they involve moral judgement that must be self-evident and that are not further explicable while some focused on the consequences of human rights and purpose.<sup>44</sup> To some jurists,<sup>45</sup> one should not be concerned with what is sought to be achieved by issuing a moral utterance but with that which is actually accomplished.<sup>46</sup> According to An-Na'im,<sup>47</sup> human rights are those claims which every human being is entitled to have and enjoy, as of right, by virtue of his or her humanity, without distinction on such grounds as sex, race, colour, religion, language, national origin or social group.<sup>48</sup>

According to Heyns and Stefiszyn,<sup>49</sup> the revitalisation of qualified or modified natural rights or core theories has strongly influenced conventional international human rights norms. The Universal Declaration of Human Right<sup>50</sup> reflects that influence, as seen in the Declaration's opening statement: 'whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'<sup>51</sup>

If one classifies a right as a claim against a government to refrain from certain acts, such as the obligation not to torture its citizens or deny them freedom of speech, religion, or emigration, then other difficulties arise. If a particular claim stems from a metaphysical concept such as the nature

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<sup>44</sup> Hart H.L., 'Definition and Theory of Jurisprudence' (1954) 70 *Law Quarterly Review* 37-46.

<sup>45</sup> See Salmond J, in 'Salmond on Jurisprudence' 12<sup>th</sup> Edition, 1966. See also Hohfeld WN, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1923) essay 1.

<sup>46</sup> The definition process is not easier when examining the term human rights. Sometimes right is used in its strict sense of the right holder being entitled to do something with a correlative duty in another. At times it is used to indicate immunity from having a legal status altered; sometimes it refers to a power to create a legal relationship. Each of these terms has been identified as rights but they all invoke different protections. For example, an alienable right, does it mean a right to which no expectations or limitations are valid? Or does one mean a prima facie right with a special burden on the proponent of any limitation? Or is it a principle that one must follow unless some other principle weighty enough to allow abridgment arises?

<sup>47</sup> Abdullahi Ahmed An-Na'im (ed), 'Expanding Legal Protection of Human Rights in African Context' in 'Human Rights under African Constitutions: Realising the Promise for Ourselves' (2003) 3.

<sup>48</sup> See also *Universality of Human Rights in a Pluralistic World, proceedings of the colloquium organised by the Council of Europe in Cooperation with the International Institute of Human Rights*, Strasbourg 17-19 April 1989; Cerna C.M. , 'University of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16 (4) *Human Rights Quarterly* 740-752.

<sup>49</sup> Cited in Ronald Cohen (ed), 'Human Rights in Pre-colonial Africa' in 'Human Rights and Governance in Africa' 1993. This is a collection of eleven essays, arising from a 1988 to 1989 Carter Lecture Series at the Centre for African Studies of the University of Florida.

<sup>50</sup> Adopted by the UN General Assembly on 10 December, 1948, it arose directly from the experience of the Second World War and represents the first global expression of rights to which all human beings are inherently entitled. It consists of 30 Articles which have been elaborated in subsequent International treaties, regional human rights instruments, national constitutions and other laws.

<sup>51</sup> Article 1 provides that all human beings are born free and equal in dignity. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

of humanity, or from a religious concept such as divine will, or from some other *a priori* concept, then the claim may really be an immunity to which normative Judgements should not apply. Where, however, the claim is based on certain interests such as the common good, other problems arise such as the need to determine what constitutes the common good, or the need to balance other societal interests, that may allow a wide variety of interpretations not supportive of individual human rights demands.

Where one speaks of privileges, other concerns arise. If the privileges are granted by the State, then presumably the State is entitled to make them conditional. Does the right of a State to derogate from some rights in an international covenant mean that the rights are, in fact, only privileges? Here too, the answer is connected to the moral strength and inviolability of the ‘right’ or ‘privilege’ that is involved. The definitional answers to these questions are obviously complex and fall outside the scope of this thesis.

To summarise, even where international law has established a conventional system of human rights, a philosophical understanding of the nature of rights is not just an academic exercise understanding the nature of the ‘right’ involved. It can help clarify one's consideration of the degree of protection available, the nature of derogations or exceptions, limitations, the priorities to be afforded to various rights, the question of the hierarchical relationships in a series of rights, the question of whether rights ‘trump’ competing claims based on cultural background, and similar problems. The answers to these questions may evolve over time through legal rulings, interpretations, decisions and pragmatic compromises, but how those answers emerge will be influenced, if not driven by, the moral justifications of the human rights in issue.

The philosophical justification and affirmation of the core principles of human rights as universal principles are highly significant and reassuring for the strength of human rights in rules for the world of nations. Rights that preserve the integrity of the person flow logically from the fundamental freedom and autonomy of the person, so does the principle of non-discrimination that must attach to any absolute conception of autonomy.<sup>52</sup> However, affirming such basic or

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<sup>52</sup>The traditional categorisation of three generations of rights, used in both national and international human rights discourse, traces the chronological evolution of human rights as an echo to the three-dimensional call of the French revolution: *liberté* meaning freedoms, civil and political or first generation rights (These rights, invoking and obtaining guarantees from autocratic governments that the individual should be left alone, were first contained in the English Bill of Rights of 1689, the Virginia Declaration of Rights of 1776 and the *Declaration des Droits de*

core principles is one thing; working out all the other elements of a complete system of rights such as international law seeks to provide is something else.

## 2.3 HUMAN RIGHTS IN AFRICA

### 2.3.1 Human Right and Pre-Colonial Africa

The debate on the existence of human rights as a concept in pre-colonial African legal thought is a very controversial one, and is hinged on another controversial subject: whether law existed in pre-colonial Africa. In dealing with this, the writer will look at the existence of law in the pre-colonial Africa/traditional African society and then follow it up with the debate concerning human rights.

Some western scholars have probed the notion of law in pre-colonial Africa and this originated from the historical obscurity given to the continent by early western historians. Hegel<sup>53</sup> in his *Philosophy of History*, positioned Africa outside history and civilisation and the reason for this lack of recognition of the existence of law in early African societies has been attributed to the fact that African societies in the pre-colonial era were very traditional in nature, governed by custom rather than law. The argument below shows that there were laws in pre-colonial Africa but they existed as customs.

To scholars in the 19<sup>th</sup> century, who tried to distinguish between custom and law, custom is absolutely rigid and obedience was ensured by the overwhelming power of group sentiment which was fortified by magic.<sup>54</sup> According to this argument, in the circumstance 'it was

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*L'Homme et du Citoyen* meaning Declaration of Man and Citizen of 1789); *égalité* meaning equality, socio-economic, or second generation rights (These rights, inspired by socialist philosophy and responding to increasing urbanisation and poverty in the rapidly industrialising world at the beginning of the 20<sup>th</sup> century, were first included in the 1917 Mexican Constitution. Under the heading Of Personal Guarantees (Title 1, Chapter 1), it is provided that [p]rimary instruction in public institutions shall be gratuitous (art.3). These provisions generally are not formulated as claims against the government (for example, the reconceptualization of property as being vested originally in the Nation (art. 27), combined with the guarantee that property shall not be expropriated except for reasons of public utility and by means of indemnification). See also the 1918 Constitution of the former Soviet Republic, and the 1919 Weimar Constitution of Germany) and *fraternité* meaning solidarity, collective or third generation rights (with the growing globalisation and a heightened awareness of overlapping global concerns, especially due to extreme poverty in some parts of the world, rights such as the right to a healthy environment, to self-determination and to development were developed). See Frans Viljoen (2007)6.

<sup>53</sup> Cited in *Alternative Histories And Non-written Sources: New Perspective from the South 4* (Proposal for an International Seminar organised by the South- South Exchange Programme for Research on History of Development (SEPHIS), Amsterdam, at La Paz, 12-15 May, 1999).

<sup>54</sup> Eze O, 'Human Rights in Africa: Some Selected Problems' (1984) 10. See also Rowley C. & Schneider F., 'The Encyclopedia of Public Choice' (2004) 344.

impossible to make any distinctions between legal, moral, or religious rules, which were all interwoven into the single rules of customary behaviour.<sup>55</sup>

To Eze, the argument that traditional societies did not possess a legal system was based either on inadequate information or lack of appreciation of the true nature of pre-colonial African societies. It is also based on the Western scholars' concept of law as emanating from the State on the other hand.<sup>56</sup>

It is often claimed that colonial Africa had no concept of human rights and therefore could not practice human rights;<sup>57</sup> as such, human rights are only achievable through liberal regimes which are a product of western culture.<sup>58</sup> According to Gyeke,<sup>59</sup> Motala<sup>60</sup> and Busia Jr.,<sup>61</sup> the concept of human rights was not alien to pre-colonial Africa and that human rights are deeply rooted in African cultural values. Making reference to the Akan culture in Ghana, Gyeke observed that the African conception of the individual as endowed with dignity underscores the belief that all human beings are equal. He buttressed this with the Akan maxim that 'all human beings are children of God; no one is a child of the earth.'<sup>62</sup> He stressed further that Africans believe in humanity which is an expression of the natural and moral rights of the individual. The individual's right must be appreciated within a communal context and this is because the group or community rights or interest according to him, generally override that of

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<sup>55</sup> Lloyd D, 'Introduction to Jurisprudence' (1972) 566. See also Mbodenyi MK, 'International Human Rights and their Enforcement in Africa' (2011) 54.

<sup>56</sup> Eze at 9. One would agree with Eze that defining law to be that which emanates from a State, as a particular form of societal organisation, ignores that law did exist outside the framework of a State in the modern sense. One would also agree with the reasoning that this argument has the implication that African societies operated in total legal vacuum before the Arabs and the colonialists overran the continent.

<sup>57</sup> Elechi O. O., 'Human Rights and the African Indigenous Justice System.' Paper presented at the 18<sup>th</sup> International Conference of the International Society for the Reforms of Criminal Law, 8-12 August, 2004, Montreal, Canada. Available at [www.isrc.org/papers/2004/elechi.pdf](http://www.isrc.org/papers/2004/elechi.pdf) (Accessed 22 March 2015).

<sup>58</sup> Elechi O.O. 'Human Rights and the African Indigenous Justice System.' A paper presented at the 18<sup>th</sup> International Conference of the International Society for the Reform of Criminal Law, 8-12, Montreal, Quebec, Canada. Available at [www.restorativejustice.org/rj-library/human-rights-and-the-african-indigenous-justice-system/5449/](http://www.restorativejustice.org/rj-library/human-rights-and-the-african-indigenous-justice-system/5449/)

(Accessed 15<sup>th</sup> August, 2016). See also Elechi O. O. 'Doing Justice without the State: The Afikpo (Ehugbo) Nigeria Model' (2006) 63. Durkheim in 1966 argued that there are ideally two types of societies, namely mechanical and organic. In societies characterised by mechanical solidarity, members of the society are highly integrated through their cultural and functional similarities. Mechanical solidarity prevailed in pre-industrial societies, and religion and law worked together, with little or no difference between the two. Mechanical solidarity as described by Durkheim was closest to acephalous societies, while his organic solidarity societies describe European societies with centralised state systems. He insisted that the law that prevailed in societies characterised by mechanical solidarity was basically repressive. What this means is that there is a lack of human rights in mechanical solidarity societies.

<sup>59</sup> Gyekye Kwame, 'African Cultural Values: An Introduction' (1996) 150.

<sup>60</sup> Motala Ziyad, 'Human Rights in Africa: A Cultural, Ideological and Legal Examination' (1989) *Hastings International and Comparative Law Review* 12, 373-410.

<sup>61</sup> Busia, Jr. N.K.A., 'The Status of Human Rights in Pre-Colonial Africa: Implications for Contemporary Practices' in Eileen McCarthy-Arnolds et al (eds.), 'Africa, Human Rights and the Global System' (1994) 225-250.

<sup>62</sup> Gyekye Kwame, 'African Cultural Values: An Introduction' (1996) 150.

the individual. The individual's membership of a community does not take away from him his dignity and by extension, his rights.<sup>63</sup>

According to Onwuachi,<sup>64</sup> African spiritual communalism is derived from the African indigenous principles of 'live and let's live; collective sharing, common concern for one another; sense of belonging together; social justice; economic progress and viability for all; and the African indigenous political process of participatory democracy.' In supporting this, Awa<sup>65</sup> argues that 'a society which believes in the values of equality, individual rights and human freedom will tend to evaluate quite highly any political systems which maximises opportunities for participation and in other ways promote these values.' African community makes the welfare and well-being of one the concern of all. Morality in Africa has a humanistic and a social basis rather than a religious foundation.<sup>66</sup> Moral values are derived in the main from Peoples' experience living in the community and this is informed by the Peoples' understanding of what is appropriate in inter-personal relationships. African moral values were not revealed to them by Supreme –being and any behaviour that is not directed towards the well-being of the individual and the community is viewed as wrong according to African cultural values.<sup>67</sup>

It is asserted that in traditional Africa, as well as in modern Africa, the individual is neither

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<sup>63</sup> This view is supported by Ifemesia who describes the Igbo tribe in Nigeria as humane. A humane living according to him is a way of life centred upon human interests and values, a mode of living evidently characterized by empathy, and by consideration and compassion for human beings. He said further that the Igbo humanness is deeply ingrained in the traditional belief that the human being is supreme in the creation, is the greatest asset one can possess, is the noblest cause one can live and die for. See Elechi O. O. 'Human Rights and the African Indigenous Justice System' (2000) 9.

<sup>64</sup> Onwuachi C. P., 'African Identity and Ideology,' (1977) IN FESTAC 77.

<sup>65</sup> Awa E.O. 'Igbo Political Culture: Nature and Role of Political Culture' in 'The Igbo Socio-Political System.' A paper presented at the Ahiajoku Lecture Colloquium in Owerri, Nigeria organised by the Ministry of Information, Culture, Youth and Sports in 1986. Available at [www.isrcl.org/papers/2004/Elechi.pdf](http://www.isrcl.org/papers/2004/Elechi.pdf) (Accessed 4<sup>th</sup> July, 2014).

<sup>66</sup> Gyekye (1996) 57.

<sup>67</sup> Gyekye said that such a basis of moral values enjoins a moral system that pursues human well-being. Thus, in African morality, there is an unrelenting pre-occupation with human welfare. What is morally good is that which brings about, or is supposed, expected or known to bring about, human well-being. This means, in a society that appreciates and thrives on harmonious social relationships, that what is morally good is what promotes social welfare, and in human relationships. It is also observed that morality is a corporate affair in African societies. It is recognised that the individual's wrong doing does not only affect the direct victim and his or her family, but also undermines the community's well-being. Since the community is an entity affected by criminal behaviour, community needs and concerns are to be addressed. This includes creating new positive relationships and or strengthening existing relationships and increasing community skills in problem solving. It is also important to note that the community also shares in the responsibility of the wrong-doing of its member. According to Mutua Makau in 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 *Michigan Law Journal* 1113, the emphasis on individual rights as against communal rights in Western societies is connected to their peculiar historical experience, which Africa lacks. As such, the pursuit of individual rights is neither natural nor universal. See Elechi E.O. (2000) 9.

autonomous nor alienated. The individual was always a member of an extended family or community and this membership bestowed the individual with rights and duties.<sup>68</sup> Within the framework of the group, an individual enjoys freedom of expression, freedom of religion, freedom of movement, freedom of association, the right to work and the right to education and failure to conform to the norms of the society could jeopardise the rights of the individual. This could occur because freedom of thought, speech and beliefs were considered communal rights. Conditions for enjoying these rights were guided by ‘the principle of respect.’<sup>69</sup> Here, respect involves respect for oneself and for others; respect for others varied according to age, ability and sex. Respect for others was very much a part of the normative structure of the legal system and it determined the extent to which freedom of speech could be expressed.<sup>70</sup>

Pre-colonial Africa can be broadly divided into two (2) types: those with advanced systems of government, with kings ruling over large areas, such as, the Hausa-Fulani emirates, the Yoruba, Benin, and Arochukwu kingdoms in Nigeria, and the Ashanti Kingdom in Ghana of West Africa; Bunyoro of Uganda in East Africa and Monomotapa in Central Africa; the Zulu, Swazi and Lesotho Kingdoms in the South and the Arab kingdoms in North Africa.<sup>71</sup> Executive, legislative and judicial powers were usually concentrated in the rulers, who designated their power to their officials and subordinates.<sup>72</sup> The greater part of Africa consisted of small communities with recognised heads that were Kings, elders, title holders or other functionaries.<sup>73</sup> In both types of societies, members were accorded full recognition that both the community and the heads sought to protect. The rights to life and property, for instance, are as old as human society and infringements on these had criminal consequences. With some notable exceptions, the kings were occasionally authoritarian and every society had its democratic processes. The Ashanti kings in Ghana were ritually warned against dictatorship and abuse of office before they assumed office.<sup>74</sup>

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<sup>68</sup> Motala Z., ‘The Protection of Human Rights in African Criminal Proceedings’ (1996) 381.

<sup>69</sup> Sarolta T, ‘The Modern world: Civilisations of Africa’ (2015) 116; Christof H & Karen S, ‘Human Rights, Peace and Justice in Africa: A Reader’ (2006) 37.

<sup>70</sup> Christof H & Karen S (2006) 37.

<sup>71</sup> Adedeji A, ‘Comparative Strategies of Economic Decolonisation in Africa’ in Mazrui A.A. (ed), ‘General History of Africa VIII: Africa since 1935’ (2003) 401.

<sup>72</sup> Umozurike U. O., ‘The African Charter on Human and Peoples’ Rights’ (1997) 15.

<sup>73</sup> Ajayi F. & Espie I. (eds.), ‘A Thousand Years of West African History’ (1965). See also Basil Davidson, ‘Old Africa Rediscovered’ 1970; Elias T. O., ‘Africa and the Development of International Law’ 1972; Elias T. O., ‘The Nature of African Customary Law’, 1962.

<sup>74</sup> Umozurike (1997) 15.

The individual's rights to food and shelter were respected in the traditional African societies. Almost everyone had access to land since land was owned both privately and communally, there was no wealthy class of land owners as we have today in post-colonial Africa. Land was a major means of economic production and all were encouraged to work because idleness carried a social stigma. The elders, being custodian of the community land, administered the land to the best interest of the lineage or community. The elders were not the owners of the land nor did they control the community land but they held it only in trust for the lineage or on behalf of the community.<sup>75</sup> An African traditional council allowed for free expression of all shades of opinions and everyone has full rights to express their mind on public questions. It was observed that the individual can assert his or her civil and political rights against violation by the leaders. There was recognition by the people that those entrusted with power were capable of abusing it and as such, assertion of political rights sometimes led to the removal of autocratic or corrupt leaders from office. This practice is geared towards safeguarding the individual's dignity, which is generally referred to as African humanism.<sup>76</sup>

The existence of law in pre-colonial Africa was a result of the stage of development of its societies in that era. While one may agree that the predominant socio-economic formations before colonial penetration were communalism, slave owning societies and feudalism; laws had to, and did exist to govern these societies and the relations within them.<sup>77</sup>

Scholars of African political, social and economic history agree that African societies in pre-colonial era achieved a reasonable degree of political, social and economic organisation that had the characteristics of modern States.<sup>78</sup> Davidson<sup>79</sup> observed that:

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<sup>75</sup>Traditional African societies were democratic and egalitarian, and allowed for the participation of all adults in decision making processes. Even in communities with Kings or Chiefs, decisions were reached only after full consultation with community members. All participating adults were free to express their opinions on issues before decisions were reached and all decisions reached were reached through consensus. No one was punished for holding opposing views on issues and no attempt was made to suppress any voice. In some cases, decisions on issues were differed until all the constituting members or groups of the community are represented. See Umozurike (1997) 15.

<sup>76</sup>In this regard, torture, killing and other abuses would be objectionable in terms of human rights. See Umozurike (1997) 15.

<sup>77</sup> Sociological, economic, historical and anthropological studies in the last three decades of the twentieth century have resulted in works that have thrown more light and provided useful information for a reasonably accurate appreciation and assessment of Africa's past political, social and economic formations. Elias T. O., 'The Nature of African Customary Law' (1962); Walter Rodney, 'How Europe Underdeveloped Africa' (1972); Basil Davidson, 'Old Africa Rediscovered' (1970). There may not have been legal studies focusing directly on the existence of law as a concept in pre-colonial Africa, these studies fairly incorporate the existence of law in the political, social and economic settings of pre-colonial Africa.

<sup>78</sup> According to Elias, in African Law although theories about social contract have not been formulated in this way, yet

Behind the obscurities of early West Africa History... one may reasonably detect iron smelting and international trade as underlying factors which had decisive influence in the hands of men who practiced them. Political and military concentration became possible and, at least for those who could rule, desirable alliances of interests emerged, became fused into centres of power, acquired geographical identity, reappeared as territorial states: even when, as was surely the case, the people of the riverside villages and the nomads following their herds would continue to live much the same way as they lived before.<sup>80</sup>

In the study of the Southern African societies, Gluckman<sup>81</sup> saw a traditional African society with a fairly advanced legal system. He observed that the body of law in Loziland consisted of rules of varying types and origin. These in their own right are the various sources of law as commonly defined in Western jurisprudence. He found that in Lozi, as in Western jurisdictions, these sources consisted of customs, judicial precedents; legislation of natural morality and of nations, good morals and equity.<sup>82</sup> The argument is that the judicial process in Loziland on the whole corresponded to, rather than differed from, the judicial process known in Western societies.

Meek<sup>83</sup> followed the same line with Gluckman, regarding traditional legal systems in Zululand, East Africa and West Africa. He was of the opinion that the mentality of 'primitive' peoples did not differ from that of Europeans, as was known by any European who had lived at close

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the indigenous ideas of government are not essentially dissimilar, at least in its presuppositions, to that of Grotius as well. See Elias T. O., 'Africa and Development of International Law' (1988)36. Kingdoms flourished in African as far back as the fourth century. In West Africa, there were the Ghana, Songhai, Mali and Walata empires. In the South-East, there was the Zulu Empire, in Central Africa the Kingdom of the Monomotapa, and in East Africa, the ancient Bunyoro Empire and the Buganda Kingdoms. Walter Rodney argued that up to the fifteenth century when the colonialist arrived in Africa, State formation was in an embryonic stage. The Western Sudanese techniques of political organization and administration reached many neighbouring regions and influenced the emergence of innumerable small states scattered throughout the coastal region from Senegal River to the Cameroon mountains. He argued further that the level of development between Europe and Africa was comparable based on the confirmation of the first Europeans to reach East and West Africa by sea. He however cautioned that it would be self-delusion to think that all things were at par, because the Europeans did not have an edge.

<sup>79</sup> Davidson B., 'Africa in History: Themes and Outlines,' 1974.

<sup>80</sup> Not only did pre-colonial Africa witness the emergence of States, but also there was some level of technological development and capacity, based among other things, on accepted separate territorial identity, to enter into international relations. In addition to the level of development, the structures of various African societies also had some effect on the development of the legal systems. According to Elias, African societies with strong centralised political systems tended to have a more advanced body of legal principles and judicial techniques than had those with more or less rudimentary political organisation. In the former, there were usually hierarchically graded courts ranging from the smallest chiefs to kings courts, with well-defined machinery for due enforcement of judicial decisions. In the latter, rules rather than rulers, functions rather than institutions, characterised the judicial organisation of these societies. He opines that the fact that in the latter, the legal arrangements, were informal in nature, should not be interpreted as an actual situation of chaos, since the mechanism of choosing the adjudicating elders for the settlement of disputes, as well as that of enforcing their decisions, followed clearly recognised patterns, even if the means adopted appeared casual to the unwary observer. See page 94.

<sup>81</sup> Gluckman M., 'The Judicial Process among the Bartose of Northern Rhodesia' (1967) 231 reprinted in Eze (1984) 11.

<sup>82</sup> Eze (1984) 231.

<sup>83</sup> Meek C.K., 'Law and Authority in a Nigerian Tribe' (1937) xiii reprinted in Eze at 11.

quarters with natives. It was therefore not to be expected that the norms governing conducts in these African societies should diverge very profoundly from that of early European societies.

The point being made here is not to get even with Western societies in selling the notion that the concept of law in pre-colonial Africa existed in much the same fashion as in the West. It is rather that those scholars who deny the existence of law in pre-colonial Africa tend to give the impression that African legal systems must be comparable to those in the more advanced societies of Western Europe in order to be valid. This notion is misleading in the sense that no two societies could actually be the same in terms of development of legal norms and socio-economic formations, at each stage of the evolution of human society, a legal system and indeed laws corresponding to a given state of socio-economic development existed to regulate it.<sup>84</sup>

Progressing with the argument whether human rights as a concept existed in pre-colonial Africa, many African scholars, as earlier stated in this chapter, have defended the existence of human rights concepts in pre-colonial Africa.<sup>85</sup> Howard and Donnelly are the Western scholars in the fore front of the argument that human rights did not exist as a concept in pre-colonial Africa.<sup>86</sup> To Howard, African proponents of the concept confuse human dignity with human rights. According to her,

The African concept of human rights is actually human dignity, of what defines 'the inner' (moral) nature and worth of the human person and his or her proper (political) relations with

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<sup>84</sup> Eze at 12. The writer will argue further that the whole colonial agenda of Europe was responsible for attempts to discredit the legal formation and development of pre-colonial African societies. It is unimaginable that societies would have gone along without an established legal order of things. The fact that religion or metaphysics is said to overwhelmingly influence African customs does not in any way discredit the attributes of the norms existing in these societies from being law. In Africa, as in other modern societies, certain mores deriving originally from religion or general morality have not only influenced the development of positive legal rules, but have in fact come to form part of them. The natural law argument that law derives from God or a Supreme Being has long been a substantial element of African legal philosophy, even though it may not have been couched into a thesis by any ancient African legal philosopher. It is nothing but a belief in religion as a source of law, which in turn was applied and enforced in modern European States.

<sup>85</sup> Scholars that have written on the existence of human rights in pre-colonial Africa include but not limited to Kwasi Wiredu, 'An Akan Perspective on Human Rights' in Abdullahi An-Na'im & Francis Deng (eds.), 'Human Rights in Africa: Cross-Cultural Perspectives' (1990) 243; Francis Deng, 'Cultural Approach to Human Rights among the Dinka'; in Abdullahi Ahmed AN-Naim & Francis Deng (eds.) 'Human Rights in Africa: Cross Cultural Perspectives' (1990) 261; MakauWa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of Language of Duties' (1995) 35 *Va. J. Intl L.* 339.

<sup>86</sup> Rhoda Howard, 'Group versus Individual Identity in African Debate on Human Rights', in 'Human Rights in Africa: Cross-Cultural Perspectives' (1990) 49; Rhoda Howard, 'Evaluating Human Rights in Africa: Some Problems of Implicit Comparisms' (1984) 6 *Human Rights Quarterly* 160. Jack Donnelly, 'Universal Human Rights in Theory and Practice' (1989) 34. See also, Vincent R. J., 'Human Rights and International Relations' (1986) 13-18.

society. Despite the twinning of human rights and human dignity in the preamble to the Universal Declaration of Human Rights and elsewhere, dignity can be protected in a society not based on rights. The notion of African communism, which stresses the dignity of membership in, and fulfilment of one's prescribed social role in a group (family, Kinship group, tribe), still represents accurately how many Africans appear to view their personal relationship to society.<sup>87</sup>

Donnelly also dismissed the notion that pre-colonial African societies knew the concept of human rights. He joins Howard in opining that the argument is now lame since the communitarian ideal has been destroyed and corrupted by the 'teeming slums' of non-Western States, the money economy, Western value and products; even if it could be agreed that societies based on communitarian ideals existed at a point in time in Africa.<sup>88</sup>

African scholars have risen in defence of the concept that human rights were in existence in pre-colonial Africa thereby disagreeing with Howard and Donnelly. Mutua dismissed the notion held by the two authors above that human rights are only possible in a post-feudal state and that the concepts of human rights are alien to specific pre-capitalist traditions and ideals such as Buddhism, Islam or pre-colonial African societies.<sup>89</sup> His interpretation of this view is that it is a suggestion that these traditions can make no normative contributions to the human rights corpus; and that societies governed under a centralised modern State necessarily Westernised through industrialisation and urbanisation and thus become fertile a ground for human rights to germinate.<sup>90</sup> Foremost of Mutua's criticism of the views of the two scholars is the implication in

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<sup>87</sup> See Rhoda Howard, 'Group Versus Identity in the African Debate on Human Rights' (1984) 165-166. This view has been criticised because it appeared that the scholar has a problem with the idea that African communal characteristics could harbour the concept of human rights within it. The fact that an African sense of well-being and due regard finds distinct expression in a group makes it impossible for Howard to equate human dignity with human rights. The concept of justice, unlike human rights, is rooted not in individual claims against the State but in the physical and psychic security of group membership as argued by Howard herself. Rather than agree that pre-colonial Africa had embedded in its notion of human dignity, the concept of human rights, Howard strongly insisted that although relatively homogenous, undifferentiated simple societies of pre-colonial Africa had effective means of guaranteeing what is now known as human rights, there was nothing specifically African about them. See Rhoda Howard, 'Evaluating Human Rights in Africa: Some Problems of Illicit Comparisons' (1984) 176. She referred to the situation as the communitarian ideal which represented typical agrarian, pre-capitalist social relations in non-state societies.

<sup>88</sup> Jack Donnelly, 'Universal Human Rights in Theory and Practice' (1984) 119.

<sup>89</sup> Mutua (1995) 335. See also Legesse, 'Human Rights in African Political Culture' in Kenneth Thompson (ed), 'The Moral Imperatives of Human Rights: A World Survey' (1980) 123-138; Nyerere J, Ujama 'Essays in Socialism' (1968) 106-108; Sivji I.G., 'The Concept of Human Rights in Africa' (1989) 12 and Mojekwu C. C., 'International Human Rights: The African Perspective' in Nelson J.L. & Green V. M (eds.), 'International Human Rights: Contemporary Issues' (1980) 85-95.

<sup>90</sup> Mutua at 356. I agree with Mutua that pre-colonial values have been undermined by change as a result of interaction between different cultures brought about by the colonisation of African peoples but that it will be difficult to believe that the change process arising from this interaction will totally or completely invalidate or eradicate them, the same way it will be difficult to imagine that the modernisation of Asia and the Arab world will

their works that only European liberalism can be the foundation for the concept of human rights. He argued that this view destroys the claim that human rights are universal. Universality of human rights does not derive from Western imposition of the concept on colonised societies; it rather means that the concept of what is articulated today as human rights is prevalent universally.<sup>91</sup>

African writers, in their attempt to counter the view on the lack of human rights in pre-colonial Africa, have tried to trace historical practices in some pre-colonial African societies that accord with the present day notions of human rights. Aside from the Akan of West Africa referred to earlier in this chapter, there is also the Akamba system of the East African people. According to Wiredu,<sup>92</sup> the Akamba believed that all members of the society were born equal and were supposed to be treated as such regardless of sex and age. Thus, the Akan society and the Akamba societies of Kenya are credited with having believed that the individual as an inherently valuable being was naturally endowed with certain basic rights. The existence of political rights in these societies is based on their practice of choosing their rulers. The Akamba justice system involved a trial with each party to a dispute appearing before the Council of Elders with his or her own jurors who rather than preside over the case advise the party on how to win the case. The case progressed to a finding with the appropriate punishment for the guilty or liable party, depending on the infringement or crime committed.<sup>93</sup> Fernyhough<sup>94</sup> also shared the view of the existence of human rights in pre-colonial Africa in reaction to the views expressed by Donnelly and Howard, noting how politicised the debate had become. According to him,

Fairly similar views have led to very different discussions. From one perspective the human rights tradition was quite foreign to Africa until Western, 'modernising' intrusions dislocated communities and denied newly isolated individuals access to customary ways of protecting their lives and human dignity. Human rights were alien to Africa precisely because it was a

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completely destroy the cultural norms and forms of consciousness evolved through Buddhism and Islam. It needs to be stressed that culture is dynamic, and the whole cultural interaction is the possibility of the interacting cultures to affect each other. The fact that the modern State is becoming a feature of African societal organisation does not eliminate the ability of pre-colonial norms to influence the lives of Africans. The view that the old ways have been eroded by modernisation is just a fact of the nature of culture, not that the old ways were not in existence or that they depend on the Western ideals to be legitimated. In fact, not all the old ways have been eroded. Every culture has the tendency of phasing out some of its mores as time progresses, especially those that cannot be said to be generally accepted by those or the majority within that culture.

<sup>91</sup> Wa Mutua M., 'Human Rights and Politics in Africa: Democratising the Rights Discourse' (1993) 1 *East Africa Journal of Peace and Human Rights* 250-255.

<sup>92</sup> Kwesi Wiredu, 49.

<sup>93</sup> Joseph Muthiani, 'Akamba from Within' (1984) 350.

<sup>94</sup> Timothy Fernyhough, 'Human Rights and Pre-colonial Africa', in Ronald Cohen et al (eds.) 'Human Rights and Governance in Africa' (1993) 39.

pre-capitalist society, social organisation. From the opposing viewpoint, there is a fundamental rejection of this as a new, if rather subtle, imperialism, and an explicit denial that human rights evolved only in Western political theory and practice, especially during the American and French revolutions, and not in Africa. Behind this protest is the very plausible claim that human rights are not founded in Western values alone but may also have emerged from very different and distinctive African cultural milieus.<sup>95</sup>

The fact that human rights were prevalent in pre-colonial Africa must be accepted. It existed more as a concept rather than a defined set of rights as later enumerated in the International Bill of Rights. The lack of a thorough definition by the content of what constituted human rights in pre-colonial Africa does not defeat the assertion of the existence of human rights in that African era. Human rights are dynamic and not all that are considered today as human rights were a part of the concepts at the time of formal articulation of the concept.<sup>96</sup>

Human rights therefore are not a purely Western idea neither did the concept of human rights originate from any part of the world or from liberal democracy as argued by some scholars. All people of the world do not assent to the same basic values and beliefs, but what is certain is that every society has been concerned with the notion of social justice, the relationship between the individual and his or her political authorities.<sup>97</sup>

African societies had stabilising factors which included the sense of obligation to one's relatives, the fear of the deity that was omnipotent and omniscient, and accountability to the Almighty for

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<sup>95</sup> Donnelly J (1989) 40-41.

<sup>96</sup> Vincent Orlu Nmehiemelle, 'The African Charter on Human and Peoples Rights and the Human Rights Question in Nigeria' (LL.M thesis, University of Notre Dame Law School, Notre Dame, Indiana, 1996) 23. He argued that the history of African pre-colonial development showed advanced state structures which recognised some notions of human rights, but that the formal articulation of human rights had its origin in Western legal and political philosophical thought, especially after the atrocities of the World Wars and the ravages of colonialism. See also Mbondenyi MK, *International Human Rights and their Enforcement in Africa* (2011) 67.

<sup>97</sup> Phillipson & Swain (eds) 'Language Rights in Post-Colonial Africa', in 'Linguistic Human Rights: Overcoming Linguistic Discrimination' (1994) 335, pointed out that the struggle for human rights is as old as the world history itself because it concerns the need to protect the individual against the abuse of power by the monarch, the tyrant or the State. What the West did provide was not a monopoly of ideas on the subject but rather greater opportunities for visions such as those to receive fuller consideration, articulation and eventual implementation. According to Eze, all societies recognise human rights. However, its manner of conceptualisation varies across different cultural settings. He asserts that pre-colonial Africa had a system of law which is similar to the systems of law in Western States. According to him, the difference is that in most traditional African societies, law existed outside the framework of a State in the modern sense. Obedience to the law was maintained through custom and religion as well as established patterns of sanction. These pre-colonial African societies had a high level of organisation in which political, economic and social control was maintained. See as cited by Concurring with the view of Eze, Gluckman, 'The Judicial Process among the Barotse of Northern Rhodesia', (1996) 272, argued that the functions and objectives of law in Africa is similar to that of other societies. According to him, the central objective of the Lozi jurisprudence for example, is the regulation of established and the creation of new relationships, the protection and maintenance of certain norms of behaviour, the readjustment of disturbed social relationships and the punishing of offenders against certain rules.

all human actions on earth. This had a restraining effect on human activities, since the good were expected to be appropriately rewarded and the wicked or their successors to be condemned.<sup>98</sup>

The description of pre-Christian and pre-Islamic Nigeria by Uchendu<sup>99</sup> holds good for Africa and provides the setting for the assessment of human rights. He found that the social order was ontologically-oriented and resolved problems with a few principles of organisation-kinship, reciprocity and redistribution.<sup>100</sup>

### 2.3.2 Human Rights in Colonial Africa

Colonialism, as an aspect of foreign intervention in Africa, impacted negatively on the relative dignity and human values which were enjoyed by Africans in the pre-colonial era. The Atlantic trade in African slaves<sup>101</sup> reached its height in the 18<sup>th</sup> century and was complemented by the Arab operators in East and Central Africa.<sup>102</sup> It is true that once Africa had been successfully conquered, British and French rule were relatively benign, but the history of the conquest of Africa, however, reveals massive violations of the rights to life and liberty.<sup>103</sup> Civil

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<sup>98</sup> Relating individuals rights to societal rights, Ake, 'The African Context of Human Rights', in 'Africa Today,' 1<sup>st</sup>/2<sup>nd</sup> Quarters (1987) 5-12; concluded by saying we put less emphasis on individual and more on the collectivity, we do not allow that the individual has any claim which may override that of the society. We assume harmony, not divergence of interests, competition and conflict; we are more inclined to think of our obligations to other members of our society rather than our claims against them.

<sup>99</sup> Uchendu V.C., 'Traditional and Social Order', except from lecture, University of Calabar, Calabar, Nigeria, 11 January, 1990. This is reproduced in TiyanjanaMaluwa (ed.), 'Law, Politics and Rights: Essays in Memory of Kader Asmal' (2013) 40. See also Umzurike at 19. The kinship principle provided the individual with a community whose moral order emphasised shared values, a sense of belonging, security and social justice. In such social order, duties preceded rights. The principle was clear: to enjoy your rights you must do your duty; and duty and right have a reciprocal relationship, and structurally both were balanced. The genealogical structure, whatever its depth, solved the dialectical problem of relating the present to the past and both to the future. It is a simple transformation embedded in the lineage system which incorporates the living, the dead and the unborn. By the principle of reciprocity, the living respects the ancestors and the traditions they left; the ancestors reciprocate by maintaining the priority of the living community and through re-incarnation, strengthen the living lineage. When the living dies, they join their ancestors.

<sup>100</sup> See also Marasighe L., 'Traditional Conceptions of Human Rights in Africa' in Welch C.E. and Alston P. (eds.), 'Human Rights and Development in Africa' (1989) 32-45; Adegbite L.O., 'African Attitudes to the International Protection of Human Rights' in Eide A & Schou A (eds.), 'International Protection of Human Rights,' proceedings of the Seventh Nobel Symposium, Oslo, September 25/27 (1967) 69-81.

<sup>101</sup> The Atlantic slave trade foreran colonialism in Africa and it began in 1510. Slave trade and colonialism in response to economic changes in Europe; the industrial revolution in Europe required cheap sources of raw materials produced by cheap labour; it also required a market for surplus goods. With the end of the slave trade in sight due to humanitarian sentiments against it, colonial subjugation of Africa was the desired alternative in the quest for the expansion of commercial activities. See Vicent Orlu Nmehielle, 'The African Human Rights System: Its Laws, Practice and Institutions' (2001) 17; also Amy Mckenna, 'The History of Western Africa' (2011) 29.

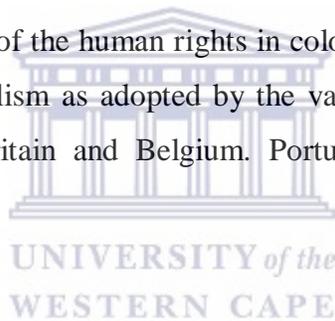
<sup>102</sup> Enough Africans were transported to the New World for the exploitation of its resources; attention was increasingly turned to the continent and its people, which were nearer to Europe.

<sup>103</sup> The British were often ruthless in their suppression of resistance, for example, every person in the market of the village of Muruka in Kenya was slaughtered to revenge the killing of one British soldier in 1902. Recalcitrant chiefs

and political rights as the contemporary world now defines them were certainly not practiced under colonial rule. In fact, the British initially opposed the U.N. passage of the Universal Declaration of Human Rights because they were afraid that the Declaration would oblige them to implement those rights in their colonies.<sup>104</sup> The congress of Vienna in 1815 considered that slave trade was repugnant to the principles of humanity and of universal morality.<sup>105</sup> In bilateral treaties with a number of states, Britain, which championed the abolition of slave trade, negotiated the end of the trade.<sup>106</sup>

The practice of preventive detention, a favourite weapon of African governments, is a direct heritage of the colonial era<sup>107</sup> and it is worthy to note here that colonial Africa experienced no political participation of any form to speak of. A few African members were allowed into Legislative Councils of Ghana and Sierra Leone as early as the 1920s, but all decisions of such councils could be overridden by the colonial executive and the colonial secretary.<sup>108</sup>

Broader discussions on the nature of the human rights in colonial Africa require the examination of the specific systems of colonialism as adopted by the various European powers. The major colonial powers were France, Britain and Belgium. Portugal and Spain also exacted some measure of colonial authority.



### **A. British Colonialism**

The British colonial administration made use of the policy of indirect rule, a situation whereby they utilised native chiefs for administration<sup>109</sup> in order to reduce costs. They created new chiefs

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were routinely exiled or detained. The Machine gun was used in Africa as early as the 1890s against indigenous Ugandan and Tanzania resistance. That such brutality was not confined merely to the 19<sup>th</sup> century imperialist phase is evidenced by the massive incarcerations of Mau Mau rebels in Kenya in the 1950s and by the confinement of Kenyan women and children to protective concentration camps. See Micheal Crowther, (eds.) 'West Africa Resistance: The Military Response to Colonial Occupation' (1971) 111-143; Ngugi Wa Thiongo, 'Detained: A Writers Prison Diary' (1981) 35; John Ellis, 'The Social History of the Machine Gun' (1975) 88.

<sup>104</sup> James Frederick Green, 'The United Nations and the Human Rights' (1956) 56 and reproduced by Rhoda Howards (1986)11.

<sup>105</sup> Umozurike at 19.

<sup>106</sup> The Berlin Treaty of 1885 was the first multilateral treaty that recognised the illegality of the slave trade; it also laid down the ground rules for the colonisation of the unoccupied parts of the continent. Parties were expected to communicate the acquisition of new areas to the others and maintain effective government. Thus the treaty not only followed the acquisitive exploits of the powers but actually encouraged the scramble for African territories by interested powers.

<sup>107</sup> Ngugi, at 44-51

<sup>108</sup> Howard Rhoda (1986) 9. These African members were appointed and not elected except for few municipal seats. Ordinary Africans had no political rights whatsoever and also there was no real independence of the judiciary. The local district commissioner was normally prosecutor, judge and jury, in fact, a patronising great white father. Only in the higher courts and the urban areas were separation of the judiciary and other organs of government established.

<sup>109</sup> The British made use of the administrative machinery that the natives had created. Under this system, each

at places where there were no chiefs. They (British) adopted two approaches by which they related with Africans, they either treated the African rulers as dependent on them, or allowed them to be independent. In both cases, African freedom of government was only on the condition that the British economic and political goals were helped and not hindered.<sup>110</sup>

The African Chief was the instrument of local government as he appointed all the local officials who were responsible to him. He, along with his appointed officials, presided over the law courts, which, as far as possible, applied African law. His agents levied taxes for the local treasury and part of the revenue was sent to the central government and the remainder kept for local improvements such as roads, sanitation, markets and schools and to pay salaries of local officials.<sup>111</sup>

It is true that the reason for the indirect rule is that the practice was facilitated by the reluctance of the British to turn their African colonies into Britons. This was rather race related than the usual reasons.<sup>112</sup> Lord Lugard<sup>113</sup> alluded to this reasoning as the essential nature of British indirect rule policy in Africa, he said:

Here, then, is the true conception of the interrelation of colour: complete uniformity of ideals, absolute equality in the paths of knowledge and culture, equal opportunity for those who strive, equal administration for those who achieve; in matters social and racial a separate path, each pursuing his interested traditions, preserving his own race purity and race pride; equality in things spiritual, agreed divergence in the physical and material.

After an initial conquest, the natives would be allowed to rule themselves as long as they behaved themselves, but once they failed, retribution was swift and a foreign Governor would be installed, as a guide to the remaining native government. They were skillfully controlled and

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colony was divided into regions under regional or chief administrators, each region into provinces under provincial commissioners, and each province into districts under district commissioners. Each district consisted of one or more traditional states, and the day to day affairs and local ordinances were left in the hands of traditional rulers and their council of elders. See Ayittey G., 'Africa Betrayed' (1992).

<sup>110</sup> Vincent Orlu Nmehielle (1996) 23.

<sup>111</sup> Boahen A.A. & Webster J.B., 'History of West Africa' (1970) 742. Two factors account for the adoption of the indirect rule by the British first, in 1860s, Britain was generally reluctant to extend direct rule over territories thousands of miles away, as that would entail considerable expense. Thus, the British colonisers were apparently interested in preserving African institutions to use them as intermediaries and to minimise the cost of administering the territories that would have resulted from direct utilisation of British labour. Secondly, Britain was more preoccupied with its Asian Empire, particularly India, than with its African possessions, which were to be prepared for eventual self-rule.

<sup>112</sup> See Eze 18. See also Ayittey at 86.

<sup>113</sup> Lord Lugard was the British Governor General who championed the amalgamation of Northern and Southern Protectorates of Nigeria in 1914 to form the present single entity known as Nigeria. See Lord Lugard, *The Dual Mandate in British Tropical Africa* (1965) 5 cited by Nmehielle at 22.

placed under the supervision of the colonial administrators; they could be removed or deported if they did not dance to the official tune.<sup>114</sup>

In the economic field, forced labour was practiced until well into the 1920s. During World War I, West Africans forcibly recruited into the British Army's carrier corps died by the thousands from exhaustion, inadequate provisioning and unhealthy living conditions.<sup>115</sup> The exploitation and subjugation witnessed during this period were done with impunity in deliberate violation of international standards, trade unions were not permitted until the 1920s and when they did exist, had very few rights.<sup>116</sup> According to M'baye, the application of these standards in the colonial territories appeared to be practically outside the purview of the ILO Conventions or the colonialists chose on their own not to apply them without any consequences.<sup>117</sup>

In the cultural field, the British, perhaps, unintentionally, undermined local pride and dignity by the introduction of the Christian churches and missionary schools, where members of recognised African elite learned to imitate white men in their mode of dressing and manner and to malign their own cultural heritage. Cultural diffusion, in which Africans might have made their own choices about which aspects of the Western morals they wished to adopt, was accompanied by cultural compulsion: the price of schooling was conversion to Christianity. Newly Westernised 'youngmen' challenged the authority of their elders, while the traditional relations between the

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<sup>114</sup> The policy of indirect rule sought to interfere as little as possible with indigenous institutions except in so far as they offended colonialist sensibilities. In some parts, Western education was withheld to ensure the continuation of the status quo and such preserves of traditional conservatism were often used to checkmate the drive for modernisation in other areas. This policy, in its most vicious form, incubated apartheid in South Africa. See generally, Myers JC, 'Indirect Rule in South Africa: Tradition, Modernity and the Costuming of Political Power' (2008) 4; Wiliam DJ & Jackson SJ, 'World History' (2010) vol. 2 at 633; Van der Merwe CG & Du Plessis JE, 'Introduction to the Law of South Africa' (2004) 14.

<sup>115</sup> Rhoda Howards at 9. Especially in the French colonies, forced labour was rampant. Here it was allowed if the public interest demanded it and if there was no other means of getting labour. The Colonialists were too ready to justify the use of forced labour. Article 421 of the Treaty of Versailles provided for the application of the International Labour Organisation Conventions in the colonial territories. The conventions were applicable in so far as local circumstances permitted and as determined by the colonial powers, which resulted in their almost complete exclusion. No freedom could be tolerated that challenged colonial domination. The rights to self-determination, freedom of speech, freedom of assembly etc. were combined within the limits of colonial domination and exploitation. Nationalist leaders were jailed for speaking up against colonial denial of the rights of self-determination. Political, economic, social and cultural developments were thus stultified.

<sup>116</sup> In Kenya, hundreds of thousands of Africans were expelled from their land to make way for white settlers, and African peasants were forbidden to grow profitable crops, such as coffee, in competition with the whites. See Heike Liebau, Katrin Bromber, Katharina Lange, Dyala Hamzah & Ravi Ahuja (eds.) 'The World in World Wars: Experiences, Perceptions and Perspectives from Africa and Asia' (2010) 278; Brett E.A., 'Colonialism and Underdevelopment in East Africa' (1978) 208.

<sup>117</sup> Keba Mbaye, 'Human Rights in Africa' in Karel Vasak (ed.) 'The International Dimensions of Human Rights' (1982) vol. 2 at 583.

sexes were distorted by the imposition of Western patriarchal ideals. In defence of the British, it can be noted that 'native' languages were not formally abolished, nor were the indigenous religious disallowed, except when their provisions, such as infanticide of twins were deemed contrary to 'natural justice.'<sup>118</sup> On the other hand, racial discrimination was commonplace;<sup>119</sup> in the field of family law, British colonial law accepted continuation of polygamy on the condition that it is not combined with other forms of marriage such as civil marriage.

The British colonial law must be looked at in its totality as it relates to their effects on the rights of the colonised people while not dismissing their positive impact on objectionable traditional practices. Colonial rule was authoritarian and the introduction of English law as the basis for local legal systems did not result in the colonial subjects enjoying the full rights of liberty, due process, free speech and other rights, which the common law is said to guarantee to the English themselves.<sup>120</sup> The convenient but ill-defined doctrine of indirect rule, supporting the powers of traditional rulers, the creation of special native courts to apply unwritten customary laws and administrative orders, the exercise of powers of political detention or deportation and use of laws of sedition and censorship framed more widely than in England, were all important intrusions upon the rule of law which preserved English liberties.<sup>121</sup>

The British recognised and provided for the application of customary law. Importantly, the policy of the British government in respect of customary law as well as Islamic law was to use both for the purpose of local administration in so far as possible, except when they had been varied or superseded by statutes and ordinances. The courts established by the British government had the duty of enforcing the native laws and customs as part of the laws of the land as far as they were not barbarous.<sup>122</sup>

Most colonial Supreme Court statutes contained provisions which prescribed two situations in which native law and custom would apply and which are:

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<sup>118</sup> Eze at 25.

<sup>119</sup> Rhoda Howards at 10.

<sup>120</sup> Vincent Orlu Nmeihelle, 'The African Human Rights System: Its laws, Practice and Institutions' (2001) 26.

<sup>121</sup> Osita C. Eze, 'Human Rights in Africa: Some selected Problems' (1984) 20.

<sup>122</sup> In Nigeria, most cases decided in the colonial era in the context of the availability of customary law as the law of the land applied this test. Cases such as *Oke Lanipekun and others v. Amao Ojetunde* (1944) A.C. 170; *Eshugbayi Eleko v. Nigerian Government* (1931) A.C. 662 at 673 to mention a few applied the test. See Hooker M.B., 'Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws' 129 See also Eze, note 1, at 20.

- (a) Where the parties to an action were natives;
- (b) Where neither party to a dispute had agreed to, or must be taken to have agreed, that its obligations should be regulated exclusively by some laws other than native customary law.<sup>123</sup>

It was further provided that where there was no express rule to regulate a matter in dispute, the court was to be guided by the principle of justice, equity and good conscience. In addition to making a distinction between Africans and Europeans, British colonial laws also contained the so-called repugnancy clause, which was generally formulated as follows:

Nothing in this Ordinance shall deprive the courts of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any native law and custom not being repugnant to natural justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any Ordinance or any rule, regulation, order, proclamation or by-law made under any Ordinance for the time being in force in the territory.<sup>124</sup>

On the basis of the repugnancy doctrine, the British abolished customary practices which were considered objectionable like the trial by ordeal, the custom of killing twins, caste systems and witchcraft.<sup>125</sup>

In British colonies with white settler regimes, the denial of fundamental human rights was emphasised. The administration established and maintained by means of law, a government and social system characterised by dictatorship and racial discrimination in such areas as the administration of justice, the development of representative institutions and agrarian administration. The essential repressive and discriminatory nature of the colonial system and its hostility to human rights is borne out by such powers as preventive detention and the restriction of the freedom of movement, conferred on the Commissioner of East African protectorate. Neither did the colonial legislature create adequate machinery, nor were fundamental and justiciable limitations of power placed on either the legislature or executive. The legislature had a wide range of freedom in the areas in which it could legislate and the emergency powers granted to it could only have exacerbated the denial of fundamental rights and freedoms.<sup>126</sup>

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<sup>123</sup> Nmehielle (2001) 25.

<sup>124</sup> See chapter 3 of Laws of Northern Rhodesia, section 17 (1954); Chapter 4 of Laws of the Gold Coast, section 74(1) (1936); Chapter 211, Laws of the Federation of Nigeria, section 19 (1948). See Oputa C. A., Crime and the Nigerian society in Elias T.O., Nwabara S.N. & Akpangbo C.O. (eds), 'African Indigenous Laws' (1975) 12.

<sup>125</sup> Oputa C. A., 'African Indigenous Laws' (1975) 12.

<sup>126</sup> See Ghai Y. & Mcauslan J.P.W.B, 'Public Law and Political Change in Kenya' (1970) 407-408.

## B. French colonialism

French colonial administration can be said to be characterised as more ‘direct rule’ compared to the British administration as traditional authorities were largely ignored. The difference between the British administration and the French administration is that the British were generally pleased to leave their acquisitions with their own traditions, and to take on a more paternal relationship with them. The French, on the other hand intended to teach the local population to be French, and to assimilate them into French ‘superior’ culture. The French idea about colonial policy was divided in to assimilation<sup>127</sup> and association.<sup>128</sup>

According to Nmehielle, the underlying factor for the French colonialism was that of political and cultural assimilation. With the system, the colony became a fundamental part of the mother country instead of a separate but protected state. The colonised people were expected to learn the French language and the motives behind this were based on the belief that the French culture was superior. French law and jurisprudence prevailed in these colonies as it was said that French colonialists felt that they had a *mission civilisatrice* as the policy was aimed at entirely turning the African into French in all aspects of his or her thinking.<sup>129</sup> Assimilation came about when the French were confronted by ‘barbarian’ people and they felt it was the duty of the French colonialists to civilise them and turn them into ‘Frenchmen.’<sup>130</sup>

As pointed out earlier, the possibility of acquiring French citizenship was opened to Africans then. Some even became members of the French parliament<sup>131</sup> but only few could take the

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<sup>127</sup> This approach had its origin in the French revolution wherein the belief was that equality, fraternity and freedom should apply to anyone who was French, regardless of race or colour; thus, rights of citizenship, including political rights, were extended to residents of the cantons of Saint-Louis in Senegal in the 1790s. However, people in the conservative, catholic and monarchist tradition in France were never happy with this; in fact, political rights to people in Senegal became weather vane of politics in France: when the republicans were dominant and controlled the constitution, the Senegalese had the vote, but when the monarchists were dominant, they did not. This approach was never applied anywhere else in Africa until after 1945. See Richard Fogarty, ‘Race and War in France: Colonial Subjects in the French Army,’ 1914-1918 (2008) 10.

<sup>128</sup> Roland Oliver & Anthony Atmore, ‘Africa since 1800’ (2005) 177; Norrie MacQueen, ‘Colonialism’ (2007) 85; Ruth Ginio, ‘French Colonialism Unmasked: The Vichy Years in French West Africa’ (2006) 153.

<sup>129</sup> Vincent O. Orlu Nmehielle (2001) 20.

<sup>130</sup> Wallace G.M., ‘French Approaches in Colonial Policy’ Available at [www.saylor.org/site/wp-content/uploads/2011/12/HIST252-French-Approaches-in-Colonial-Policy.pdf](http://www.saylor.org/site/wp-content/uploads/2011/12/HIST252-French-Approaches-in-Colonial-Policy.pdf) (11th August, 2016).

<sup>131</sup> On October 21, 1945, six (6) African were elected to the French Constitutional Assembly and they are Lamine Gueye from Senegal/Mauritania, Leopold Sedar Senghor from Ivory Coast/Upper Volta, Felix Houphouet-Boigny from Dahomey/Togo, Sourou Migan Apithy from Sudan-Niger, Fily Dabo Sissoko and Yacine Diallo from Guinea. They were all re-elected to the 2<sup>nd</sup> Constituent Assembly on 2 June, 1946. See Chafer Tony, The End of Empire in French West Africa: Frances Successful Decolonisation (2002) 62-63.

advantage of the offer. There were conditions that were to be satisfied by an African willing and wishing to acquire French citizenship under the assimilation policy of the French colonialists. Such persons were expected to have attained a certain level of education, including knowledge of the French language, and done military service, as well as not having contracted a polygamous marriage.<sup>132</sup> Assimilation granted rights to Africans in theory, equality to those few who were considered assimilated, but however, from the late 19<sup>th</sup> century until 1944, it was restricted and under attack.<sup>133</sup> Assimilation had to be modified on many occasions to what eventually became the second strand of French colonial policy which is the policy of association.<sup>134</sup>

The opposing idea was that the relationship between the conqueror and the conquered, of white and black people, should be one of 'association' and not one of merged identity. This system emphasised cooperation between the rulers and the ruled. It was supposed to respect the culture and political values and institutions of Africans and not turn them into black French people as done under assimilation. Like the dual mandate, it was asserted that economic development was for the mutual advantage of both France and to some extent Africans especially after 1918. Proponents referred approvingly to the British model of indirect rule and claimed the intention to rule more indirectly, retaining traditional custom and law. Conquering administrations like Faidherbe in Senegal had done this much earlier and for many of the same reasons as the British, it was cheaper and provoked less resistance.<sup>135</sup>

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<sup>132</sup> Ruth Ginio (2006) 114. See Umozurike (2001) 20.

<sup>133</sup> The great expansion of the French empire in the 19<sup>th</sup> century had brought about large numbers of Africans under French control and this provoked a far-ranging debate on colonial policy. There was a growing reaction in France against assimilation; some argued on racist grounds that Africans were inferior and thus incapable of full assimilation while others argued that the tremendous educational effort involved in making assimilation a reality was too much and that beyond some arithmetic and minimal literacy, training in agriculture and simple trade was more important. Also in the background was Algeria with a large, influential French settler population pushing for special privileges and rights as compared to the large Moslem population. However, there was a growing recognition that Africa had a very difficult culture. See Maurice Larkin, 'Religion, Politics and Preferment in France Since 1890: *Le Belle Epoque* and its Legacy' (2002) 3; BoahenAdu, 'Africa Under Colonial Domination, 1880-1935' (1990) Vol. 7 at 70.

<sup>134</sup> The French soon realised that French Laws could no longer be imposed on the people with different cultural and political backgrounds who had not attained a comparable level of economic development. Thus, customary laws and Islamic laws were applied by different institutions created for the purpose, subject to the qualification that they were not contrary to the principles of French civilisation. See ToyinFalola& Augustine Agwuele, 'African and the Politics of Popular Culture' (2009)76. See also Maurice Larkin, 'Religion, Politics and Preferment in France since 1890: *Le Belle Epoque* and Its Legacy' (2002) 3.

<sup>135</sup> The concept of association is said to have been developed and applied by Savorgnan de Brazza in Central Africa wherein the advocates believed that though assimilation was desirable, it was impracticable because non-Western people were racially inferior and would never be accepted, even if fully assimilated. The association would allow the colonised people to develop within their own cultures. See Donald Stark, *Urbanisation and Cultural Assimilation in*

In practice, however, implementation was always a bit superficial, at best; Africans and traditional authorities were used only at the very lowest level of the administration.<sup>136</sup> They were subordinate cogs in the bureaucracy for carrying out policies which were developed by expatriate French officials with no real consultation with Africans.<sup>137</sup>

African societies were carved up into ‘cantons’(districts), chiefs who were not adequately efficient or subservient were deposed and replaced, most times with little regard for traditional status. The kingdom of Dahomey,<sup>138</sup> which would have been an ideal candidate under the British system of ‘indirect rule’, was completely dismantled. No significant members of the royal family were employed by the colonial administration. New Chiefs were appointed for places where there were no known legal authorities by the French. At the end of the day, advisory councils were established in each level of the bureaucracy to provide knowledge about African law and custom but they had no power and not much influence and the effect of this is that there was a dual legal system in place which were the French law for the whites, *métis*, African residents of Saint-Louis and the few Africans in West Africa who were naturalised ‘*citoyens*’; ‘*sujets*’ were subjected to a system called ‘justice indigene’.<sup>139</sup>

Despite the name, it was not a real attempt to preserve or revive African law or justice but rather, French administrators, assisted by African assessors, dispensed civil and criminal justice ostensibly according to African law. This was done mostly according to what the white official decided was African law or more usually, according to what he thought was natural justice. This produced a great variation in the law and its administration. There was little machinery or penal provisions to curb an administrator. As a result, there were few appeals from his decisions. He could not execute on his own authority so he will present the evidence to his superior in

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British and French West Africa 1900-1960 obtained from [www.donaldstark.co.uk/baguette.html](http://www.donaldstark.co.uk/baguette.html). (Accessed on 25<sup>th</sup> March, 2014).

<sup>136</sup> Oliver Roland & Michael Crowther (eds), ‘The Cambridge Encyclopaedia of Africa’ (1981) 446.

<sup>137</sup> The French colony was part of France rather than a separate political entity and they had no intention of using traditional rulers as intermediaries. They allied themselves with African rulers in order to neutralise them until they could be eliminated or deposed at convenience while those who remained were put in the position of serving as agents of the colonial State rather than rulers in their own right. See Claire Griffiths, ‘Contesting Historical Divides in French-Speaking Africa’ (2013) 32.

<sup>138</sup> The Kingdom was conquered by the French in 1894 under General Dodds who dismembered the Kingdom. It was only the central province (the area around Abomey) that remained intact; the other provinces were put under direct French rule or made into new kingdoms. See AduBoahen (eds.), Africa under Colonial Domination 1880-1935 (1990) 17. See also Amy Mckenna, The History of Western Africa (2011) 83.

<sup>139</sup> Wallace (2011) 3.

order to get his decision confirmed.<sup>140</sup>

There was also a system called *indigénat* which allowed for administrative tyranny. With it, Governors could define certain offences by decree and persons could be tried summarily by local administrators. Very heavy obligations were placed on African population by the colonial administration such as prestation which is twelve (12) days of free labour or its money equivalent for public works and purposes, compulsory or forced labour paid at very low rates (conscription of labour) and conscription in wartime. Money taxes were designed to force Africans to grow export crops or to work.<sup>141</sup>

‘Association’, in practice, brought a greater degree of authoritarianism as it provided a rationale for withholding rights which were taken for granted in France<sup>142</sup> from African ‘sujets’. There was no development of rights in Francophone areas of Africa before 1945 and this was in sharp contrast to British colonies.<sup>143</sup>

Despite the system of colonial policy adopted by the French, at the political level, French colonialism meant that the traditional rights of African societies to participate in their own government were often postponed and were initially non-existent. Some scholars even believed that French colonial policies posed the gravest danger to indigenous African institutions, especially the great paramount chieftaincies, which were deliberately destroyed.<sup>144</sup>

Colonialism presented an enormous potential for the plunder, abuse, misrule and mistreatment of African natives without much check.<sup>145</sup> The *Statute de L’indigent* consisted of regulations that allowed colonial administrators to inflict punishment on African subjects without obtaining a court order or approval from the metropolis. It allowed the colonial officers to jail any African for up to two years without trial, to impose heavy taxes and punitive fines, or to burn the villages

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<sup>140</sup>Robert Aldrich, ‘Greater France: A History of French Overseas Expansion’ (1996); See also Crawford Young, ‘The African Colonial State in Comparative perspective’ (1994) 182.

<sup>141</sup>Melvin Page & Penny Sonnenburg (eds), ‘Colonialism: An International Social, Cultural and Political Encyclopedia’ (2003) 574.

<sup>142</sup>This includes the freedom of the press, trade unions, free speech among others.

<sup>143</sup>Knight M.M., ‘French Colonial Policy: The Decline of Association in the Journal of Modern History’ (1933) vol. 5 No. 2, 208-224.

<sup>144</sup>Ayittey at 86.

<sup>145</sup>Ayittey at 86, gave example of a Frenchman in his 20s, who just finished school and was entrusted with enormous colonial power. He would be posted to a colony as *commandant de cercle* with complete authority over some 200, 000 African natives. He could literally do as he pleased since his personal powers were granted by the *Statut de Lindigent*, the most hated feature of the colonial system in French West Africa.

of those who refused to pay. Traces of some of these methods can still be seen in the mode of operation of some African leaders today.<sup>146</sup> Some apologists of colonialism held out the improvement of the moral and material well-being of Africans as the fundamental purpose of European expansion. There is no doubt that profits and territories were the driving force as it was manifested in their administrative styles which were influenced by their national characteristics and economic circumstances.<sup>147</sup>

The description of human rights under the British rule serves to illustrate that the colonial power was not concerned to grant to its subjects, the rights held by citizens in the 'mother country', even given the limited definition of human rights prevailing at the time. What they did during the colonial period was to eliminate all overt inter-ethnic conflict; to abolish, where it existed, African domestic slavery; and to stop the expansion of African empires. Thus, a great deal of political conflict that might have occurred in a non-colonised Africa was deflected, only for it to emerge in some more violent form after colonisation.<sup>148</sup>

To compare human rights in contemporary Africa unfavourably with human rights in colonial period is to concentrate upon a very limited range of 'rights' namely peace, relative predictability and 'benign neglect' of indigenous ethnic groupings.<sup>149</sup>

All that the colonialists were interested in was to exploit the colonies. Their concern was more in siphoning off their resources, and this was facilitated by the various policies put in place by the colonial masters irrespective of which colonial power adopted them. Differences in method of achieving this objective were based on the philosophical and historical experiences of the colonisers. The French and Belgian practice of attempting to transform Africans into Frenchmen and Belgians respectively was only partially successful since very few Africans became assimilated into either the French or Belgian way of life.<sup>150</sup>

Colonialism disrespected African traditions and values, it relegated Africans to subservience in

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<sup>146</sup> The reign of the late General Sani Abacha, former Nigerian Military President can be cited as a good example as a lot of atrocities were committed. Notorious among these atrocities was the killing of human rights activist, Ken Saro-wiwa.

<sup>147</sup> Umozurike at 20.

<sup>148</sup> Rhoda Howard-Hassmann, 'Human Rights in Commonwealth Africa' (1986)12.

<sup>149</sup> Makau Mutua, 'Human Rights: A Political and Cultural Critique' (2002) 197; Rhoda Howard, 'Human Rights in Commonwealth Africa' (1986) 12.

<sup>150</sup> It should be observed that the French were able to increase the number of Francophone nations, a very important issue in the competition with the Anglophones.

all fields; it arrested and destroyed the internal dynamics of the evolution of African societies.<sup>151</sup> There is no doubt that by abolishing certain objectionable traditional practices that were prevalent in pre-colonial Africa, such as human sacrifice, slavery among others, which were carried over to colonial Africa, the colonialists did contribute to selective progressive development of human rights. On the balance, there is no arguing against the fundamental negative effects of colonialism on colonial and independent Africa.<sup>152</sup>

## 2.4 OVERVIEW OF THE INTERNATIONAL HUMAN RIGHTS LAW SYSTEM

The emergence of international human rights law as a significant dimension of world order and foreign policy for many powerful states has been described as the most exciting and surprising development in international law over the last decades. This is so because it brings law increasingly to bear on many important aspects of individual and group wellbeing, thereby improving greatly the prospect of humane governance on all levels of social existence.<sup>153</sup>

The international human rights regime developed mainly within the framework of the United Nations and later spread to the regional and sub-regional spheres. According to Piovesan<sup>154</sup> the ‘international human rights system reflects a contemporary ethical conscience that is shared among states, to the degree that these invoke the international consensus on minimum protective parameters with regard to human rights’.<sup>155</sup>

The Universal Declaration of Human Rights,<sup>156</sup> a Declaration which came to being as a result of the experience of the 2<sup>nd</sup> World War, represents what is believed to be the rights human beings are entitled to as an individual. The Declaration recognised that the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>157</sup> Although it is not binding since it is not a treaty, it is however, an expression of fundamental values which are shared by all members of the international community. It has had profound influence on the development of international human rights law.

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<sup>151</sup> Vincent Orlu Nmehielle (2001) 29.

<sup>152</sup> MeenaAnand, ‘Struggle for Human Rights: Nelson Mandela’ (2004) 45.

<sup>153</sup> Robin Bradley Kar, ‘Outcasting, Globalisation and the Emergence of International Law’ (2012) 121 *Yale Law Journal* 413.

<sup>154</sup> Piovesan Flavia, ‘Social, Economic and Cultural Rights and Civil and Political Rights’ (2006) 1 *SURInternational Journal on Human Rights* 21.

<sup>155</sup> Piovesan F (supra) 24.

<sup>156</sup> Adopted by the United Nations General Assembly on the 10<sup>th</sup> of December, 1945 at the Palais de Chaillot, Paris.

<sup>157</sup> Preamble to the General Assembly Resolution 217 (III) A.

At the normative level, the international human rights system is made up of general global and regional treaties on one hand and subsidiary specialised treaties on the other hand.<sup>158</sup> Global and regional treaties include the International Covenant on Civil and Political Rights (ICCPR)<sup>159</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>160</sup> at the United Nation level; and the African Charter on Human and Peoples' Rights (the African Charter),<sup>161</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>162</sup> the Arab Charter on Human Rights and the American Convention on Human Rights, at the regional level. Specialised treaties include the Convention on the Rights of a Child (CRC);<sup>163</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);<sup>164</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>165</sup> and the Convention on the Elimination of All Forms of Racial Discrimination

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<sup>158</sup> Sieghart A., 'The International Law of Human Rights' (1983)16.

<sup>159</sup> Resolution No. 2200A [XXI] 16 December, 1966. The UN General Assembly adopted the ICCPR and opened it for signature, ratification and accession on 16 December 1966. The Covenant entered into force on 23 March 1976 and it acknowledges that the recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. See UN General Assembly Resolution 2200A (XXXI) of 16 December 1966. As at today, all African States have either signed, ratified and acceded to the Covenant. See ICCPR Anniversary: Opportunity for Protection of Freedom of Speech, in Article 19 published on 23 March, 2012 and available at <http://www.article19.org/resources.php/resource/3001/en/iccpr-anniversary:-opportunity-for-protection-of-freedom-of-speech> (Accessed on 17<sup>th</sup> May, 2014).

<sup>160</sup> GA Res. 2200 (XXI) 21 UN GAOR Supp. (No.16) at 49. UN Doc. A/6316 (1966) 993 UNTS 3 entered into force 3 January, 1976. This is one of the Human Rights treaties which converted the ideals elaborated in the Universal Declaration into binding State obligations. In its attempt to realise social justice, it covers a wide scope of rights ranging from education, employment and the family, to minority language and cultures. See Frans Viljoen, International Human Rights Law in Africa Second Edition at 114. As at 31 December, 2011, 48 UN African Member States had ratified this Covenant while all except Sao Tome e Principe and Comoros had become party to at least one of the covenants. See Frans Viljoen, 'International Human Rights Law in Africa' (2007) 116.

<sup>161</sup> CAB/LEG/67/3 rev.5 21 I.L.M. 58 (1982).

<sup>162</sup> ETS 5; 213 UNTS 221.

<sup>163</sup> G. A. Res. 44/25 (1989); UN Doc. A/RES/44/25 (1989) Adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20<sup>th</sup> November, 1989. It entered into force on the 2<sup>nd</sup> of September, 1990 in accordance with Article 49. The Convention was the first to incorporate the complete range of international human rights, including civil, cultural, political and social rights as well as aspects of humanitarian law. See [www.unicef.org/crc/index\\_30177.html](http://www.unicef.org/crc/index_30177.html), (Accessed on 22<sup>nd</sup> March, 2012).

<sup>164</sup> CEDAW General Recommendations Nos. 19 and 20 adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/38. The Convention was adopted in 1979 by the UN General Assembly by votes of 130 to none with 10 abstentions. The Convention defines what constitute discrimination against women and set up an agenda for national action to end discrimination against women.

<sup>165</sup> GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) 197; UN Doc.A/39/51 (1984); 1465 UNTS 85. The Convention was adopted and it opened for signature, ratification and accession General Assembly resolution 39/46 of 10<sup>th</sup> December, 1984. It entered into force on 26<sup>th</sup> June, 1987 in accordance with Article 27 (1) after it was ratified by 20 States. For the drafting history of this Convention, see <http://legal.un.org/avl/ha/catcidtp/catcidtp.html> (Accessed on 31 May, 2014).

(CERD).<sup>166</sup>

International human rights law was established as a normative symbol of hope, summoning states to an internationally agreed upon minimum standard of behaviour and as a 'safety net' for individuals who are denied their rights under the domestic system, or who fall through the flaws of the national legal system<sup>167</sup> and international complaint mechanisms serve as a last hope when all other recourse fail.

The sub-regional and regional levels have advantage over the global level at the higher level of meeting and coherence between states, as they allow for greater norm-specification in the regional and sub-regional spheres; and the immediacy of interlocking interests, opening the possibility for faster response and improved implementation when states are closely bound by economic and political ties. At the global level, reaching an agreement on standards takes a lot of time and necessarily involves striking compromises in the interest of universal acceptance. Closer economic, cultural and political ties and common loyalties are likely to ensure better implementation and more immediate and effective 'mobilisation of shame'<sup>168</sup> as communities sharing common loyalties are likely to be in harmony with each other than those separated by vast geographical and psychological divides.<sup>169</sup>

The quest for a United Nation began as a result of the terrible atrocities committed during the Second World War. This made the people of the United Nation determined to reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women to resolve to combine their efforts to accomplish these aims<sup>170</sup> and in accomplishing these aims as enshrined in the Preamble to the United Nations Charter, seven Articles were specifically set aside to bring human rights within the agenda of the United Nations.<sup>171</sup>

Furthermore, the United Nations Charter also provided for International Cooperation in solving

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<sup>166</sup> The Convention was adopted and open for signature and ratification by General Assembly resolution 2106 (XX) of 21 December, 1965. It entered into force on the 4<sup>th</sup> of January, 1969 in accordance with Article 19. For the drafting history of this Convention, see <http://legal.un.org/avl/ha/cerd/cerd.html> (Accessed on 31 May, 2014).

<sup>167</sup> Viljoen (2007) 9.

<sup>168</sup> Drinan RF, 'Mobilisation of Shame: A World View of Human Rights' (2001). The author here traced the term mobilisation of shame to early Amnesty International campaigns. See also Viljoen, *International Human Rights Law in Africa* (2007)10.

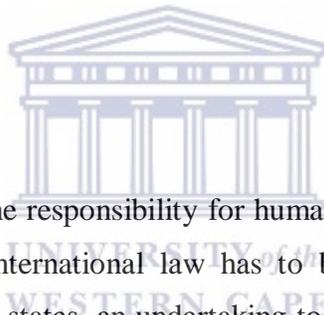
<sup>169</sup> Claud I. L., 'Swords into Ploughshares: The Problems and Progress of International Organisation' (1974) 103.

<sup>170</sup> Preamble to the United Nations Charter, Paragraph 2.

<sup>171</sup> Articles 1, 13, 55, 56, 62, 68 and 76 of the United Nations Charter.

international problems which involve economic, social, cultural, or humanitarian character in maintaining international peace and security<sup>172</sup> and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.<sup>173</sup> Article 1(3) is further complimented by Article 55 of the United Nations Charter by putting obligations on the United Nations and its Member States in order to ensure the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.

The General Assembly of the United Nations is, under Article 13 of the Charter of the United Nations, to initiate studies and make recommendations for the purpose of promoting and realising human rights and fundamental freedoms. The obligations by State Parties under Article 55 of the Charter would be realised by the State Parties under Article 56 pledging themselves to take joint and separate actions with the United Nations for the purpose of achieving the goals set out under Article 55.



#### 2.4.1 National Level

At the national level, states carry the responsibility for human rights due to its dominant role and for this to become meaningful, international law has to be introduced into the state. When international treaties are ratified by states, an undertaking to domesticate the treaties and comply with their provisions is given as the implementation and enforcement of International law has to take place locally because it is where rights are protected effectively.<sup>174</sup> Civil Societies play a major role domestically in raising awareness and hold governments accountable. They also exert external pressure in reinforcing and supplementing national protection.

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<sup>172</sup> Article 1(3) United Nations Charter.

<sup>173</sup> On the Objectives or Purposes of the United Nations, see Year Book of the United Nations (2004) 654.

<sup>174</sup> Ideally, the ratification of international law is supposed to be preceded by a compatibility study whereby a perfect overlap would be created between national law and international law. However, some states do not become party to international human rights treaties; they do not conduct compatibility studies and all states violate their treaty obligations from time to time. See Redson Edward Kapindu, 'From the Global to the Local: The Role of International Law in the Enforcement of Socio-economic Rights in South Africa', Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, (2009) 6. See also, Christina Dominice, 'The International Responsibility of States for Breach of Multilateral Obligations (1999) 10 *European Journal of International Law* 353-363. Also DavidKoplow, 'Indisputable Violations: What Happens When the United States Unambiguously Breaches A Treaty' (2013) vol. 37:1 at 53-74. Available at [www.fletcherforum.org/wp-content/uploads/2013/02/koplow\\_37-1.pdf](http://www.fletcherforum.org/wp-content/uploads/2013/02/koplow_37-1.pdf) (Accessed on 31 May, 2014).

## 2.4.2 Sub-regional Level

The sub regional level is basically focused on economic integration rather than the promotion and protection of human rights. This is due to the fact that they function at a level at which inter-country bonds may be assumed to be relatively strong. There are however, a number of sub-regional intergovernmental groups that include a concern for human rights within their regional mandates. The Economic Community of West African States (ECOWAS),<sup>175</sup> the Southern African Development Community (SADC),<sup>176</sup> the Economic Community of Central African States (ECCAS),<sup>177</sup> the East African Community (EAC),<sup>178</sup> the Common Market for Eastern and Southern Africa (COMESA),<sup>179</sup> the Community of Sahel-Saharan States (CEN-

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<sup>175</sup> The organisation was established in Lagos, Nigeria in May, 1975 and the founding members were Benin, Burkina Faso, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Sierra Leone and Togo. Following the report of a Committee of Eminent Persons appointed to review the founding Treaty, the ECOWAS Treaty was revised in 1993 and in 2000; Mauritania withdrew its membership from the organisation because of conflicting opinions on some of the decisions that were made during the Summit. The revised Treaty was adopted in 1993 and it entered into force on the 3<sup>rd</sup> of August, 1995. See [www.ecowas.int](http://www.ecowas.int) (Accessed on 18<sup>th</sup> March 2012). See also Solomon Ebobrah, *Critical Analysis of the human rights mandate of the ECOWAS Community Court of Justice* (2008) 6. Available at [http://www.escri-net.org/usr\\_doc/S\\_Ebobrah.pdf](http://www.escri-net.org/usr_doc/S_Ebobrah.pdf) (Accessed on 3<sup>rd</sup> June, 2014).

<sup>176</sup> The SADC was formally established in August 1992 in Windhoek, Namibia and it replaced the Southern African Development Coordination Conference (SADCC) which was established in 1980 in Lusaka during the Apartheid era. It is one of the regional economic communities recognised by the AU as building blocks for the African Economic Community and it has recently served as a platform for the adoption of protocols with implications for human rights. Presently, there are fifteen (15) member states which are Angola, Botswana, DR Congo, Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The text establishing the SADC was adopted on 17<sup>th</sup> August, 1992 and it entered into force on 30<sup>th</sup> September, 1993 and since it entered into force there has been two amendments to the original treaty. See [www.sadc.int](http://www.sadc.int) (Accessed on the 18<sup>th</sup> March 2015). See also, Solomon Ebobrah, 'Human Rights Realisation in the African Sub-Regional Institutions' in Manisuli Ssenyonjo (Ed), 'The African Regional Human Rights System: 30 years after the African Charter on Human and Peoples Rights' (2015) 282-300 at 298.

<sup>177</sup> The organisation was established in Libreville, Gabon in 1983 by the then leaders of the Central African Customs and Economic Union (UDEAC) and members of the Economic Community of the Great Lakes Region. The treaty was adopted on 18<sup>th</sup> October, 1983 and it entered into force in December, 1984. In 1999, Angola acceded to the Treaty after some years of participation as an observer and the present members are Angola, Burundi, Cameroon, Central African Republic, Chad, Congo-Brazzaville, DR Congo, Equatorial Guinea, Gabon and Sao-Tome & Principe. See [www.ceeac.eccas.org](http://www.ceeac.eccas.org) (Accessed on 18<sup>th</sup> March, 2015). See also, Viljoen, 'International Human Rights Law in Africa' (2007) 494.

<sup>178</sup> The East African Community was first established in 1967 but was defunct in 1977 and subsequently revived in 1999 with the adoption of a new Treaty by Kenya, Tanzania and Uganda. The treaty was signed in Arusha, Tanzania on 30<sup>th</sup> November, 1999 and it entered into force on the 7<sup>th</sup> July, 2000 after it was ratified by founding member states. The treaty was amended in December, 2006 and August, 2007 while its membership was increased also in 2007 with the accession of Burundi and Rwanda to the treaty. The EAC is recognised by the AU as a building block of the Africa Economic Community. See [www.eac.int](http://www.eac.int) (Accessed on 18<sup>th</sup> March 2015). See also Ebobrah, 'Human Rights Realisation in the African Sub-Regional Institutions' (2012) 294; Ruppel O.C., 'Regional Economic Communities and Human Rights in East and Southern Africa' in Bosl A and Diescho J (Eds.), 'Human Rights in Africa: Legal Perspectives on Their Protection and Promotion' (2009) 275-317 at 277.

<sup>179</sup> The treaty was signed on the 5<sup>th</sup> of November, 1993 in Kampala, Uganda and it entered into force on 8<sup>th</sup> December, 1994. COMESA is currently composed of Burundi, Comoros, Congo, Djibouti, Egypt, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

SAD),<sup>180</sup> the Inter-governmental Authority on Development (IGAD)<sup>181</sup> and the Arab Maghreb Union (AMU/UMA)<sup>182</sup> are the eight sub-regional communities in Africa officially recognised by the AU. In addition to these eight recognised regimes by the AU, the International Conference on the Great Lakes (IGGLR)<sup>183</sup> has also made great strides in human rights standard settings in Africa. It is pertinent to note here that all these international Organisations have contributed greatly to the development of human rights in Africa.<sup>184</sup>

### 2.4.3 Regional Level

The adoption of the Universal Declaration of Human Rights was followed by the creation of various regional instruments that address concerns of particular importance in the regional context. There are established, three regional human rights regimes, with a set of norms and institutions that are accepted by states as binding and each of these systems operates under the auspices of an intergovernmental organisation or international political body.<sup>185</sup> Africa, the

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See [www.comesa.int](http://www.comesa.int) (Accessed on 18<sup>th</sup> March, 2015).

<sup>180</sup> Established in 1998 in Tripoli, Libya during the summit instigated by the late Colonel Gadhafi and it became a regional economic community during the 30<sup>th</sup> Ordinary Session of the Conference of Heads of States and Government of the AU held in Lome, Republic of Benin on the 4<sup>th</sup> - 12<sup>th</sup> July, 2000. It became an observer at the UN General Assembly under Resolution A/RES/56/92. Presently, there are 23 member states. See [www.africa-union.org/root/au/res/cen\\_sad.htm](http://www.africa-union.org/root/au/res/cen_sad.htm) (Accessed on 18<sup>th</sup> March, 2015).

<sup>181</sup> It was established on the 21<sup>st</sup> March, 1996 as a replacement for the defunct Inter-governmental Authority on Drought and Development (IGADD) and the agreement establishing it was signed in Nairobi, Kenya. The current members are Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan and Uganda. It now operates as a regional economic community and it is recognised as one of the building blocks of the African Economic Community. See [www.igad.int](http://www.igad.int) (Accessed on 18<sup>th</sup> March, 2015).

<sup>182</sup> The treaty establishing it was adopted in Marrakech, Morocco on 17<sup>th</sup> February, 1989 by Algeria, Libya, Mauritania, Morocco and Tunisia. Although Morocco has pulled out of the AU, the UMA is recognised by the AU as one of the regional organisations in Africa. It must be pointed out here that though UMA is recognised by the African Union, it does not have any formal relation with the AU. See [www.maghrebarabe.org](http://www.maghrebarabe.org), (Accessed on 18<sup>th</sup> March, 2015).

<sup>183</sup> On the 19<sup>th</sup> and 20<sup>th</sup> November, 2004, the Heads of States and Government of Angola, the Central African Republic, Congo, the Democratic Republic of Congo, Kenya, Rwanda, Sudan, Uganda, Tanzania and Zambia met in Dar-es-Salaam, Tanzania under the umbrella of the United Nations and the African Union to discuss matters touching on the conflicts and persistent insecurity in the Great Lakes Region. One of the outcomes of the meeting was a declaration expressing their collective determination to tackle the issues of conflict and insecurity. The declaration became known as Dar-es-Salaam Declaration and constitutes the founding platform for the activities of the International Conference of the Great Lakes Region. Although the Conference of the Great Lakes is not one of the REC recognised by the AU, it has the potentials of contributing immensely to the realisation of human rights within the countries that make up the Great Lakes Region. See [www.icglr.org](http://www.icglr.org) (Accessed on 18<sup>th</sup> March, 2015).

<sup>184</sup> On the institutional decisions on the rights of people, see Nwauche E.S., 'Regional Economic Communities and Human Rights in West Africa and the African Arabic Countries' in Bosl and Diescho (Eds) (2009) 318 – 351. particularly at 319; *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria* ECW/CCJ/APP/12/07; *Essien v The Gambia* (2007) AHRLR 131.

<sup>185</sup> Freeman M, 'Human Rights: An Interdisciplinary Approach' (2002) 53. For a comparison of the three regional Human Rights Systems see Christof Heyns, Padilla D & Zwaak L, 'A Schematic Comparison of Regional Human Rights Systems' in Gomez Isa & De Feyter K (eds.), 'International Protection of Human Rights: Achievements and

Americas and Europe have established their regional instruments together with supporting machinery such as multilateral commissions and courts.<sup>186</sup> A considerable number of statements and documents of the regional meetings demonstrate that Asian states have in recent years been trying to address the absence of a regional human rights instrument and to uphold the Vienna Declaration which emphasised the fundamental role of the regional arrangements in the promotion and protection of Human Rights.<sup>187</sup> The Arab Charter on Human Rights eventually made its way through after the initial Charter which was drafted in 1994 was not ratified.<sup>188</sup>

It is pertinent to note that each regional system has originated from shared interest and a demand for the establishment of a framework for human rights protections; the European system came into being as a natural reaction to gross human rights violations perpetrated during World War II and a defence against all forms of totalitarianism.<sup>189</sup> It was believed by European states that human rights need to be respected so as to secure democracy and avoid dictatorship. The conflict between countries in Eastern and Western Europe enabled countries in the West to make an exclusive human rights system.<sup>190</sup> This can be said to be the best developed out of the three regions and it is referred to as the Council of Europe. The Council was founded in 1949 by 11 Western European states to promote human rights and the rule of law in post-World War II Europe, to avoid a regression into totalitarianism and to serve as a barricade against Communism.<sup>191</sup>

The Inter-American system (Organisation of American States) was designed to be an ideological

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Challenges' (2006) 545.

<sup>186</sup> These mechanisms include the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and Peoples Rights.

<sup>187</sup> Article 37 of the Vienna Declaration and Plan of Action states that, Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments and their protection... The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist. See also Jina Kim, 'Development of Regional Human Rights Regime: Prospect for and Implications to Asia' Available at [www.sylff.org/word\\_press/wp-content/uploads/2009/03/sylff\\_p7-1022.pdf](http://www.sylff.org/word_press/wp-content/uploads/2009/03/sylff_p7-1022.pdf) (Accessed on 15<sup>th</sup> March, 2015).

<sup>188</sup> The Charter entered into force in March 2008 after it was ratified by the 7<sup>th</sup> Member State. The revised Charter was Algeria (2006), Bahrain (2006), Iraq (2012), Jordan (2004), Kuwait (2006), Lebanon (2011), the United Arab Emirates (2008) and Yemen (2008) have all ratified the Charter. Egypt signed in 2004; Sudan signed in 2005 and Tunisia signed in 2004 but they are yet to ratify this Charter. See Oliver De Schutter, 'International Human Rights Law' (2014) 33.

<sup>189</sup> Robertson A. H. & Merrills J. G., 'Human Rights in the World: An Introduction to the study of the International Protection of Human Rights' (2014) 33.

<sup>190</sup> Robertson A. H. & Merrills J. G. 'Human Rights in the World: An Introduction to the study of the International Protection of Human Rights' (2014) 33.

<sup>191</sup> See [www.coe.int](http://www.coe.int) Accessed on 10<sup>th</sup> March, 2015.

framework to make a coalition against communist threats.<sup>192</sup> The Organisation of American States (OAS) was founded in 1948 to promote regional peace, security and development<sup>193</sup> with membership including all 35 states in the Americas.<sup>194</sup> The Inter-American regional human rights system was thought to be a springboard to defend effective political democracy in the region.

The African system was created by common interests shared among states. These common interests were safeguarding independence, collective security, territorial integrity and promoting solidarity.<sup>195</sup> The human rights system in Africa was adopted under the auspices of the Organisation of African Unity (OAU) but this has since being transformed into African Union.<sup>196</sup>

The fledging Arab and Muslim systems had also emerged and according to the Islamic world-view, the Holy Qur'an and other religious sources play a dominant role in the regulation of social life. All Muslims are bound to other believers in a code of life conduct based on the will of Allah.<sup>197</sup>

The Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Charter.<sup>198</sup> It has a frayed provision for the establishment of a human rights body thereby giving room for the appointment of another drafting group known as 'The High Level Panel.'<sup>199</sup> This panel was responsible for the drafting of the ASEAN Intergovernmental Commission on Human Rights Term of Reference.<sup>200</sup> This panel, in achieving its result, worked with the Working Group, the National Human Rights Institute and Civil Society Organisations<sup>201</sup> and by July 2009, the Term

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<sup>192</sup> Odeen Ishmael, 'Statement in the Permanent Council of the OAS during Discussion on the Inter-American Democratic Charter, OAS,' June, 2001; *The Declaration of Solidarity for the Preservation of the Political Integrity of the American States Against the Intervention of International Communism*, Tenth Inter-American Conference, March 1-28, 1954. States in the 10<sup>th</sup> Inter-American Conference at Caracas expressed serious concern about solidarity for the preservation of the political integrity of the American states against intervention.

<sup>193</sup> See [www.coe.int](http://www.coe.int)

<sup>194</sup> Viljeon, 'International Human Rights Law in Africa' (2007) 11.

<sup>195</sup> Makau W. Mutua, 'The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformation' (1993) 3 *Review of the African Commission on Human and Peoples Rights* 5.

<sup>196</sup> <sup>196</sup> [www.african-union.org](http://www.african-union.org). The African Union comprises of all African States, including Southern Sudan that has just attained independence except Morocco.

<sup>197</sup> Syed M, 'Human Rights in Islam: The Modern Approach' (2003) 140.

<sup>198</sup> Adopted at the 13<sup>th</sup> ASEAN summit held in Singapore in November 2007. See also, Tommy Koh, Rosario Manalo & Walter Woon (eds.) 'The Making of the ASEAN Charter' (2009) 49; Tae-Ung Baik, 'Emerging Regional Human Rights Systems in Asia' (2012)142.

<sup>199</sup> Dinal Shelton & Paolo GC, 'Regional Protection of Human Rights' (2013) 191.

<sup>200</sup> Yuval Ginbar, 'Human Rights in ASEAN: Setting Sail or Treading Water?' (2010)10 *Human Rights Law Review* 504-518.

<sup>201</sup> Dinah Shelton & Paolo CG (2010) 191.

of Reference was finalised and approved by the ASEAN Foreign Ministers.<sup>202</sup>

The Term of Reference of the ASEAN Intergovernmental Commission on Human Rights reiterates the cautious attitude of the Charter towards human rights. Its purpose is to ‘promote and protect human rights and fundamental freedoms of the people of ASEAN.’<sup>203</sup> Another ‘Purpose’ of the Term of Reference of the ASEAN Intergovernmental Commission of Human Rights named specific ‘international standards along with ‘international human rights instruments to which ASEAN Member States are parties’<sup>204</sup> as standards which the ASEAN Intergovernmental Commission of Human Rights must uphold.

The Arab Charter of Human Rights, on its part, establishes an Arab Human Rights Committee<sup>205</sup> which is made up of seven members. The members are elected via secret ballot; they are expected to serve in their personal capacity and to be fully independent and impartial when carrying out their functions.<sup>206</sup>

#### 2.4.4 Regional Characteristics

Regional characteristics are found mainly in legal arrangements. The rights in the European Convention of Human Rights and Fundamental Freedom (ECHR) and its Protocols focus mainly on civil and political rights, they do not contain provisions relating to self-determination and to the rights of minority groups, children, refugees and aliens.<sup>207</sup> The Social Charter on the other hand guarantees social and economic rights, but lacks an efficient implementation system. Unlike the ECHR, it depends on a monitoring procedure based on national reports indicating how European states implement the Charter in practice. For those who ratified the protocol that came into force in 1998, collective complaint of any violation of the Charter may be lodged with the European Committee of Social Rights and it may be argued that the relatively less binding

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<sup>202</sup> Adopted on the 20<sup>th</sup> July, 2009 at Phuket, Thailand during the 42<sup>nd</sup> ASEAN Ministerial Meeting. This Term of Reference is available at [www.asean.org/Doc-TOR-AHRB.pdf](http://www.asean.org/Doc-TOR-AHRB.pdf). (Accessed on 21 March, 2015).

<sup>203</sup> See Terms of Reference of ASEAN Intergovernmental Commission on Human Rights (2009) Paragraph 1.

<sup>204</sup> Terms of Reference of ASEAN Intergovernmental Commission on Human rights (2009) paragraph 6.

<sup>205</sup> Article 48 Arab Charter of Human Rights.

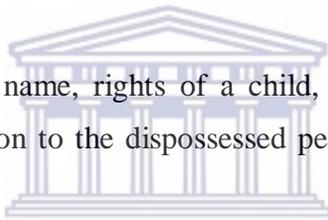
<sup>206</sup> Article 48(4) Arab Charter of Human Rights. The Committee examines State parties reports as submitted to it by member States periodically. The reports are discussed, commented on and necessary recommendations will be made where necessary in accordance with the aim of the Charter. See Olivier De Schutter (2014) 33. See also Rishmawi M, ‘The Arab Charter of Human Rights and the League of Arab States: An Update’ (2010) 10 *Human Rights Law Review* 169-178.

<sup>207</sup> Willem-Jan van der wolf, S. de Haardt & Global Law Association, ‘Global Human rights Law Collection’ (2008) vol. 11 Part 2 at 27. See also Hurst Hannum & Eileen Babbitt, ‘Negotiating Self-determination’ (2006) 71.

influence of the Charter shows lack of commitment of the Council of Europe.<sup>208</sup>

The American Convention on Human Rights (ACHR) deals with civil and political rights except in Article 2<sup>209</sup> and in one general provision on economic, social and cultural rights.<sup>210</sup> However, its two Protocols have a very weak protection mechanism, reserving the individual petition system only for the violations of the right to education and trade union rights.<sup>211</sup> The fact that the American system does not offer the same judicial protection to all economic, social and cultural rights as it does to civil and political rights shows that the influence of the ideological hegemony has been more powerful than any practical demand.<sup>212</sup> Instead, new provisions are recognised in the American Convention on Human Rights. Rights like the rights of reply,<sup>213</sup> right to property,<sup>214</sup> prohibition of expulsion from territory,<sup>215</sup> right of political asylum<sup>216</sup> and prohibition of collective expulsion of aliens<sup>217</sup> are not in the International Convention on Civil and Political Rights (ICCPR)<sup>218</sup> but are included in the jurisprudence of the Human Rights Committee and other United Nations documents.<sup>219</sup>

Provisions such as the right to a name, rights of a child, right to nationality and the lawful recovery and adequate compensation to the dispossessed people are not found in the European



<sup>208</sup> Malte Brosig, 'Human Rights in Europe: A fragmented Regime?' (2006) 133. See also Department of Foreign Affairs, Government of Ireland, Revised European Social Charter Collective Complaint Mechanism *International Law*, July 20, 2006. Available at [www.foreignaffairs.gov.ie/home/index.asp?id=5604](http://www.foreignaffairs.gov.ie/home/index.asp?id=5604) (accessed on 13<sup>th</sup> February, 2014).

<sup>209</sup> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

<sup>210</sup> Article 26 of the American Convention on Human Rights which deals with economic, social and cultural rights provide as follows: The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

<sup>211</sup> The American Convention has two Protocols namely on Economic, Social and Cultural Rights, and on the Abolition of the Death Penalty. See Jan Knippers Black, 'The Politics of Human Rights Protection' (2010) 40.

<sup>212</sup> Article 1.1 of the America Convention for example, stipulates that state parties should ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms but the additional protocol states that States parties should 'adopt the necessary measures' to achieving the full observance of the rights.

<sup>213</sup> American Covention, Article 14.

<sup>214</sup> *Ibid*, Article 21.

<sup>215</sup> *Ibid*, Article 22.5.

<sup>216</sup> *Ibid*, Article 22.7.

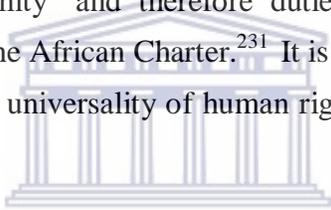
<sup>217</sup> *Ibid*, Article 22.9.

<sup>218</sup> Alex Conte & Richard Burchill, 'Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee' (2009) 4.

<sup>219</sup> Alex Conte & Richard Burchill, 'Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee' (2009) 4.

Convention.<sup>220</sup> The Convention is also complemented by treaties against torture,<sup>221</sup> the forced disappearance of persons,<sup>222</sup> gender violence,<sup>223</sup> and discrimination against persons with disabilities.<sup>224</sup> It must be noted that religious background, that is Catholic heritage, is reflected in the right to life, which is protected from the moment of conception.<sup>225</sup>

The African Charter, on its part, specifically recognises collective rights and it clearly indicates legal obligations of the community, family, society and nation. Its far-reaching recognition of rights includes the rights to development and the third generation of rights.<sup>226</sup> However, it does not specify the right to privacy which can be found both in the European Convention on Human Rights<sup>227</sup> and the American Convention on Human Rights.<sup>228</sup> Infact, the ACHR went further to state the relationship between duties and rights<sup>229</sup> but the African Charter on its part described more comprehensive rights and corresponding duties.<sup>230</sup> This can be said to be due to the fact that the African system defined personhood a bit different from the Western concept of ‘individualism in a large community’ and therefore duties and respect for the family and community are uniquely found in the African Charter.<sup>231</sup> It is obvious that the African system has made spirited efforts to respect the universality of human rights in many respects while it meets regional needs.<sup>232</sup>



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<sup>220</sup> Doebbler Curtis, ‘Introduction to International Human Rights Law’ (2006) 141-142.

<sup>221</sup> The European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted 26 November, 1987 and entered into force 1 February, 1989. (ETS. 126) See also Nigel Rodley and Matt Pollard, ‘Treatment of Prisoners under International Law’ (2009) 49; Karen De Costa, ‘The Extraterritorial Application of Selected Human Rights Treaties’ (2012) 276; Magdalena Forowicz, ‘The Reception of International Law in the European Court of Human Rights’ (2010) 192.

<sup>222</sup> ETS 24, 13 December, 1957. See Helen Duffy, ‘The War on Terror and the Framework of International Law’ (2005) 109; Marko Milanovic, ‘Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy’ (2011) 204.

<sup>223</sup> The Convention was adopted by the Council of Europe Committee of Ministers on 7 April, 2011. It opened for signature on 11 May, 2011 on the occasion of its 121<sup>st</sup> Session of the Committee in Istanbul, Turkey. As at April, 2014, the Convention has been signed by 33 States, followed by ratification of the minimum eight (8) Council of Europe states to wits Albania, Austria, Bosnia and Herzegovina, Italy, Montenegro, Portugal, Serbia and Turkey.

<sup>224</sup> It came into force on the 3<sup>rd</sup> of May, 2006 and it was ratified by the European Union on 23 December 2010. See Jeff Kenner, ‘European Union Legislation 2011-2012’ (2013) 625.

<sup>225</sup> *Ibid*, Article 4.1.

<sup>226</sup> This includes the right to peace, solidarity, a healthy environment and development. See The Report of the African Commissions Working Group of Experts on Indigenous Populations/Communities adopted by the African Commission in November, 2003. The report is available at [www.iwgia.org.sw163.asp](http://www.iwgia.org.sw163.asp) Accessed 1<sup>st</sup> August, 2016.

<sup>227</sup> *Ibid*, Article 8.

<sup>228</sup> *Ibid*, Article 5.

<sup>229</sup> *Ibid*, Article 32.

<sup>230</sup> Article 32(1) states ‘Every person has responsibilities to his family, his community and mankind.’

<sup>231</sup> It should be noted that the harmonious development of the family (Article 29[1]), national solidarity and independence (Article 29(4) (5)) and African value and unity (Article 29 (7) (8)) are highlighted.

<sup>232</sup> Although some are vaguely defined, duties of the States to promote and ensure the respect of rights and freedoms through education and publication as specified under Article 25, to guarantee the independence of the courts and to

The African Commission in *SERAC & Another v Nigeria*<sup>233</sup> interpreted the provisions of the Charter to include unenumerated rights. It held that there are rights which are not explicitly mentioned in the Charter but which should be regarded as being implicitly included. Such rights which were identified by the Commission in the case include the rights to housing or shelter deduced from the provisions on health, property and family in the Charter.<sup>234</sup> The right to food which was deduced from right to life, right to dignity, right to health and right to economic, social and cultural development.<sup>235</sup>

The Commission further stated that all rights listed under the Charter are enforceable through the Communication procedure no matter whether the rights are civil and political rights or economic, social and cultural rights.<sup>236</sup>

As colonialism, urbanisation and industrialisation shattered African societies, the bonds of immediacy and reciprocity grew weaker, people became alienated and isolated while new communities were formed.<sup>237</sup> Formalised state structures were established to organise social interaction on the basis of pre-determined expectations of roles, referred to as ‘rights’ and ‘duties’ while the idea of a community based on relationship gave way to a society made of rights.<sup>238</sup> With this, States set up a legal system to mediate on claims based on rights and with time, state power became increasingly intrusive, exemplified by the use of a criminal justice system to arrest, interrogate, search and seize, imprison and execute.

Although majoritarianism legalises legislation and the increasingly bureaucratized functioning of the executive, majorities sometimes get it wrong. They may have little regard for ‘numerical’

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establish national institutions (Article 26) are described. Another unique characteristic of the ACHPR is the prohibition of mass expulsion of non-nationals (Article 12), encroachment upon the right to property in the interest of public need or in the general interest of the community (Article 14), elimination of every discrimination against women and children (Article 17(3)). In addition, the African system expresses regional concerns such as special concerns for the rights and welfare of children. The African Charter on the Rights and Welfare of the Child calls for special mention of persons with disabilities and for special protection, participation and access for handicapped children.

<sup>233</sup> *Communication No. 155/96 Social and Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights (CESR) v Nigeria (2001)*; 15<sup>th</sup> Annual Activity Report: 2000-2002. See also, Michelo Hansungule, ‘African courts and the African Commission on Human and Peoples Rights’ in Bosl, A & Diescho J (eds) ‘Human Rights in Africa: Legal Perspectives on their Protection and Promotion’ (2009) 233.

<sup>234</sup> Articles 14, 16 and 18 of the African Charter. See also paragraph 60 of the case available at [www.achpr.org/search/?q=SERAC+V+Nigeria](http://www.achpr.org/search/?q=SERAC+V+Nigeria). Accessed on 3<sup>rd</sup> July 2014.

<sup>235</sup> Article 4, 5, 16 and 22 of the African Charter.

<sup>236</sup> Mashood Baderin & Manisuli Ssenyonjo (eds.), ‘International Human Rights Law: Six Decades after the UDHR and Beyond’ (2010) 238.

<sup>237</sup> Viljoen (2007) 5.

<sup>238</sup> Viljoen, ‘International Human Rights Law in Africa’ (2012) 4.

minorities such as sentenced criminals, linguistics or religious minorities, non-nationals, ‘indigenous Peoples’, and the socially stigmatised.<sup>239</sup> It therefore becomes necessary to guarantee the existence and rights of numerical minorities, of the vulnerable, and the powerless. This is done by agreeing on the rules governing society in the form of a constitutionally entrenched and justiciable Bill of Rights, containing the basic human rights of ‘everyone’. Through a bill of rights, human rights become integral to the legal system thereby becoming ‘human rights law’ which is superior to ordinary law and executive action.

With this, it shows that human rights law is closely linked to the emergence of the nation state and the implication of this state centeredness is that states are the primary duty bearers in respect of these rights.<sup>240</sup> Individuals depend on the states to guarantee their rights, but they also need to defend their rights against these very states as the principal violators of their rights.<sup>241</sup> In a particular state, ‘human rights laws’ serve as a yardstick against which the nature and extent of these obligations may be assessed, an ideal towards which to strive, and an inspiration for struggles to improve the current state of affairs.<sup>242</sup>

‘International human rights law’ differs from national law as to its source in the sense that its concretised content is found mainly in provisions of international human rights treaties. It is in this sense that the term ‘international human rights law’ is used in this thesis. The next sections will discuss some of the leading rights theories that have wrestled with the practice and justification of an overall system of rights in Africa.

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<sup>239</sup> Viljoen (2007) 5.

<sup>240</sup> It is accepted that the provisions of national and human rights instruments may be applied against states. It is more exceptional for these instruments to bind individuals, or non-state actors. The constitutional guarantees under both the South African 1996 Constitution (section 8 (2)) the Bill of Rights binds a natural person...) and Section 9 (4) (no person may unfairly discriminate), and Uganda 1995 Constitution (art. 137 (3) (the Constitutional Court may adjudicate an allegation that any act or omission by any person violated the Constitution)) provide for horizontal application. The Convention on the Elimination of All Forms of Discrimination against Women imposes the obligation on states to eliminate discrimination at the horizontal level (art.2 (e): states must take all appropriate measures to eliminate discrimination against women by any person...). See Viljoen (2007) 6.

<sup>241</sup> Douzinas C, ‘The End of Human Rights’ (2000) 100-107, 115-122.

<sup>242</sup> Christof Heyns, ‘A Struggle Approach to Human Rights’ in Heyns C & Stefiszyn (eds.), ‘Human Rights, Peace and Justice in Africa: A Reader’ (2006) 15-35.

## CHAPTER THREE

### NOTION OF JUSTICE IN AFRICA

#### 3.1 Introduction

The restoration of victims and their reintegration into the community is the essence of justice making in Africa. Resolving relationships and social harmony already damaged by conflict is also another significant goal of the African justice system. The success of the African justice system is due to the fact that all stakeholders have equal access and participation in the conflict resolution process. Every stakeholder is listened to, their opinion respected in the process and decisions are reached through a consensus. Justice-making further creates an opportunity for the learning and the re-examination of important values and the socio-economic conditions of the community. Important African communitarian principles of caring for one another and the spirit of mutual support are fostered in the process of justice-making and it is also appreciated that the survival of the community depends on the well-being of the individual in the community.

This chapter explores the concepts of justice and relates them to human rights from an African perspective. It will look at the process of justice making within the traditional African context. To accomplish this objective, an examination of African belief systems, values, culture, the economic system and the social and political structure of African societies is imperative. It must however be pointed out that Africa is not a homogenous cultural group. Although African cultures are diverse and, moreover, have been tempered by external influences and colonialism, there still remain certain tenets of African culture that have survived, to which we can refer to as 'African culture'. No culture is static, and African societies have had to borrow from others to enhance their viability and adaptability to technology and economic changes. The goal of justice as a practical matter in Africa is the restoration of relationships, peace and harmony within the community. It will demonstrate that human rights are the rationale for the quest for justice, peace, reconciliation and democracy in the society.

### 3.2 African Indigenous Justice: The System in Practice.

The quality and efficacy of African justice is measured through the well-being of victims, the community, offenders and the system's capacity in restoring social equilibrium following a conflict. Despite the fact that the post-colonial states are corrupt, oppressive and ineffective, pre-colonial African community themselves were characterised by low crime rates and relative peace.<sup>243</sup> Although generalisation about traditional Africa are always dangerous due to the distance of time and space involved, it cannot also be denied that there are many threads of continuity. The past and the present, the old social order and the new ones are linked by these threads.<sup>244</sup>

'Traditional Africa' is history now as what we have left is oral history but it does not mean it can be ignored. Africa cannot be spoken or written about as if it was a single, homogeneous society or even a series of isolated, ethnic groups, all basically similar or comparable but rather; it is and was socially and culturally fragmented.<sup>245</sup> There are very diverse physical environments wherein the various human groups have adapted themselves economically and socially in relative isolation.

Also, there has been no uniformity in this adaptation but rather a multiplicity of independent traditions and inventions even in the same or similar environment. The different traditions and systems, have however, been modified in different ways according to the impact of historic personalities and historic contact between ethnic groups. The result is the various political and social systems, languages, cultures and religion.<sup>246</sup>

Acting as a buffer between the predatory Africa, post-colonial states and the people are Africa's

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<sup>243</sup> Elechi, O. O., 'Human Rights and the African Indigenous Justice System' (2004)1. See also Okereafoezeke, N., 'Law and Justice in Post-British Nigeria: Conflicts and Interactions between Native and Foreign Systems of Social Control in Igbo' (2002) 9; Kalunta-Crumpton A& Agozino, B. (eds.) 'Pan-African Issues in crime and Justice' (2004) 159. They have all noted that one of the negative consequences of colonialism is its imposition of alien political, educational and judicial systems on African societies. One consequence of this is the emergence of two parallel systems of social control with the first one based on African indigenous justice values and the other based on Eurocentric values and the crisis of confidence and development it has engendered in the society.

<sup>244</sup> Alyward Shorter, 'Concepts of Social Justice in Traditional Africa' in *Pro Diago Bulletin* (1977) vol. 12 at 32-51

Available at [www.afrikaworld.net/afrel/atr-socjustice.htm](http://www.afrikaworld.net/afrel/atr-socjustice.htm) (Accessed on 21<sup>st</sup> July, 2014).

<sup>245</sup> Ambe NJ, 'Tradition, Culture and Development in Africa: Historical Lessons for Modern Development Planning' (2006) 51.

<sup>246</sup> Alyward Shorter (1977) 34.

traditional social institutions<sup>247</sup> which provide the necessary social support that prevents conflict and work toward the restoration of law and order when necessary. As a victim-centred justice system, the primary goal of the African indigenous justice system is the restoration of victims through empowering them and addressing their needs. Offenders are held accountable to the victim and the community. Efforts are also made to reintegrate the offenders back into the community while counselling efforts are geared toward the healing and transformation of the offender into a conforming citizen.<sup>248</sup> Though this is basically the responsibility of the offender's family and well-wishers, the tone of the tribunals do also encourage the healing and reintegration of the offender.

The African system of justice administration, as shown by traditional courts, is inclusive, democratic, open and welcoming to those who seek justice. In contrast to Western value-inspired courts, which are intimidating, alienating, complicated, retributive, incarcerating and expensive, traditional courts seek to foster harmony, reconciliation, compensation to the aggrieved, easy and inexpensive access to justice, and the rehabilitation of the offender.<sup>249</sup> It promotes a spirit of communalism, where the individual exists for the benefit of the greater community. Justice is fostered within the family, the clan, the neighbourhood and governance of the community, from the lowest level to the highest.<sup>250</sup>

Indigenous justice system in Africa employs restorative and transformative principles in conflict resolution. The system is process-oriented rather than rule based with emphasis on the process of achieving peaceful resolutions of disputes rather than on adherence to rules as the basis of determining disputes.<sup>251</sup> 'A fair and just Judgement must take into account a wider range of facts and interests, including that of the community, without necessarily compromising the facts of the matter in dispute and the rights of the litigants.'

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<sup>247</sup> The African traditional social institution here refers to the extended family system, the family, the economy, religion and political system.

<sup>248</sup> Elechi O. O., Sherill V.C & Edward J.S 'Restoring Justice: An African Perspective in International Criminal Justice Review' (2010) 20 at 73 Available at <http://icj.sagepub.com/content/20/1/73> (Accessed on 21<sup>st</sup> September, 2013).

<sup>249</sup> In Western philosophy and penology, there are three major purposes of punishment to wit: retribution, deterrence (specific and general) and rehabilitation. Courts in different common law countries emphasise these purposes. Restorative justice is also emphasized in some African countries, for example, South Africa in cases when an offender has been convicted of a relatively minor offence.

<sup>250</sup> Elechi (2000) 361.

<sup>251</sup> Armstrong, et al 'Uncovering Reality: Excavating Women's Rights in Africa Family Law' in 'Women and Law in Southern Africa' Working Paper No.7, WLSA Harare, Zimbabwe, 1993.

It must be noted that African customary legal processes focused mainly on the victim rather than on the offender and the goal of justice then was to vindicate the victim and protect his/her rights. The imposition of punishment on the offender was designed to bring about the healing of the victim rather than to punish the offender. In any conflict rather than punish the offender for punishment sake, the offender was made to compensate the victim.<sup>252</sup>

African Indigenous justice system supports offenders by persuading them to understand and accept responsibility for their actions. Accountability may result in some discomfort to such offenders but not so harsh as to degenerate into further ill feeling and hatred. Obligations must also be achievable hence justice processes recognise and respond to community bases of crime. Above all, efforts were made by the community to disapprove of wrongdoing, rather than the wrong-doer. As such, the collaboration and reintegration as a process of justice-making is encouraged, rather than coercion and isolation and underlying this assumption is a belief that all human beings are important and are not expendable. Healing must go deep to the centre of the problem, to the soul of the person.<sup>253</sup>

For example, the penalty for murder among the people of Kenya was compensatory in nature such as repayment to the family of the victim for the economic loss of a person. The family of the murderer usually engaged in peaceful negotiations with the family of the victim, most often involving a transfer of cattle or sheep as compensation.<sup>254</sup> Also, the Turkana people of Coast Province punished murder with the compensation of cattle as blood money. Crime of theft required the restoration of the stolen value while crimes of injury required payment for the victim's care and rehabilitation.<sup>255</sup>

The justice system then in Africa was negotiative and democratic; hence it empowered victims, offenders, their families and the entire community to participate in the identification, definition of harm and the search for restoration, healing, responsibility and prevention. Justice-making was seen as an opportunity for dialogue between the victim, the offender, their families and

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<sup>252</sup> Compensation here goes beyond restitution; it represents a form of apology and atonement by the offender to the victim and the community. See Nsereko N.; 'Victim of Crime and their Rights in Criminology in Africa,' Mwene Mushanga (ed.) (1992) Rome: United Nations Interregional Crime and Justice Research Institute (UNICRI).

<sup>253</sup> In addition to this, it is generally believed that human beings are naturally good and are capable of change when they make mistakes. See Oko Elechi, 'Human Rights and the African Indigenous Justice System'; a paper presented at the 18<sup>th</sup> International Conference of the International Society for the Reform of Criminal Law (2004) 3.

<sup>254</sup> Andrew Novak, 'Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya: An International Comparison' (2011) *Suffolk University Law Review* 54 at 285.

<sup>255</sup> Andrew Novak (2011) 285.

friends and the community.<sup>256</sup> It was believed that if participants are free to express their feelings in an environment devoid of power, there will be nothing left to embitter leading to a more enduring peace.

When people involved in a conflict participate and are part of the decision making process, they are more likely to accept and abide by the resolution. Furthermore, conflict provides opportunities for stakeholders to examine and bring about changes to the society's social, institutional and economic structure.<sup>257</sup>

Justice making here was also an opportunity for the re-socialisation of community members and learning of important African values and principles of restraint, respect and responsibility. Participants in the justice process were reminded about the danger of bearing grudges and the importance of reconciliation with one's adversaries, repentance, empathy, forgiveness and apology. This is in line with the goal of justice which is the restoration of relationships and social harmony. Family members of litigants were urged to see it as their responsibility to make sure that the lessons of conflict making are not lost on their loved ones.<sup>258</sup>

Africans then are litigious people and can bring up a case for hearing not because they are in the right but to simply to make a point. Additionally, tribunals are able to distinguish between legal and moral rights<sup>259</sup> African people believed that individuals and the community can be reformed through education and the teaching of morals. People with strong connection to their family and community are more likely to conform to societal norms and value their relationships, as opposed to those who are disconnected and feeling alienated and this can be compared to the Confucian concept.<sup>260</sup>

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<sup>256</sup> When the primary stake-holders to a conflict participate in the definition of harm and potential repair, all complaints and issues relating to the case are openly discussed. The thorough airing of complaints facilitates the gaining of insight into and the unlearning of bizarre behaviour which is socially disruptive. See Gibbs, Jr. & James L. 'Two Forms of Dispute Settlement among the Kpelle of West Africa' in Donald Black & Maureen Mileski (eds) 'The Social Organisation of Law' (1973) 368.

<sup>257</sup> Justice-making in the African indigenous justice system presented an opportunity for the re-evaluation of societal values and socio-economic conditions. The response of the Indigenous Justice system to conflict and law breaking partly accounted for the relatively low crime and incarceration rates in most African states then. See Oko O, Shril VC & Edward (2010) 74.

<sup>258</sup> Oko, Sherill & Edward (2010) 74.

<sup>259</sup> Elechi O.O.; 'Doing Justice without State: The Afikpo (Ehugbo) Nigeria Model of Conflict Resolution' (1996) 20 *International Journal of Comparative and Applied Criminal Justice* 337-355.

<sup>260</sup> As social beings, it is said that human beings desire to be part of the group and will make the necessary sacrifices to meet community expectations to belong. According to Worfel JK in Arthur Waley, 'Analects of Confucius' (2005) 27, Confucius believes that human beings are by nature good, but that the reason for the nations downturn

In discussing justice in indigenous Africa, a look at some of the causes of conflict will not be out of place. The various nature and sources of conflict in Indigenous Africa will also be discussed. The features of indigenous conflict resolution, traditional resolution of conflict institutions, the resolution of conflict principles and the prevention of conflict nature will all be discussed under this sub-heading as it is imperative to appreciate the background study of conflict in indigenous African societies.

### 3.3 Conflict in Indigenous African Society

Conflict played a major role in traditional African society and sometimes had its origin in many aspects of their cultural life. It is glaring that conflict was a natural occurrence in human society except that the way it is approached and managed by different indigenous African societies differs. The ways and manners of these conflicts also differ from one community to the other.

The understanding of conflicts in traditional African society and its exploitation was based on the problem between humans and the supernatural and except an ontological balance was upheld between the two parties, peace remained uncontainable. It is imperative to point out that conflict, from whatever angle it is viewed, is inevitable. The first party to the conflict, who are seen as imperfect beings, are the humans (Africans in this respect) while the other party are the deities and ancestors (perfect spirit) and supernatural supreme-being.

It can be established here that it is not just the inevitability and phenomenology of conflict, but also that highly placed, that is, the supernatural and the so lowly that is human beings, often had occasion for disagreement and disaffection.<sup>261</sup>

It is important to note that the results of conflict in traditional African societies was connected to the cultural activities of the people therefore, peace and conflict are signs of culture associated with governance and social engineering in indigenous African societies. Although

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was due to people either forgetting how to be good or not practicing being good. For the community to learn, or to remember, how to act with virtue requires active participation on the part of everybody. Emphasis was placed on political, social and familiar order of human life. Order comes from doing, or practicing what is right...

<sup>261</sup> Beyond the unexplainable sources of conflict also do lay the desirability of conflict from the generational point of view. Thus conflict derived from diverse sources in African traditional societies which include family, economic, chieftaincy, social and religion as well as breakdown of diplomatic relations and personal annoyance over behavioural pattern. It is important to point out here that there exist many sources of conflict in traditional/indigenous African societies and the knowledge about the various sources will help to decipher the difference between the written and unwritten sources of conflict. Unwritten sources were derived from oral data namely songs, pithy sayings, proverbs and maxims as well as from arbitral proceedings while written sources are textual/archival materials, journal article and books.

conflict has been seen as a basic unity of the culture of African political culture, it stems from the family level. Individuals in the family had the right of protest showing grievance over many things starting from inheritance, interpersonal relations to marital situation/matter.

From the economic point of view, it was discovered that in traditional African societies that conflict cannot be do away with. 'This, in a way justified Coser's<sup>262</sup> approach to the phenomenology of conflict.' 'Land encroachment, territorial dislocation, house sequestration, trade imbalance and non-payment of tributes or loans, even across cultural boundaries of the world, are identified as some of the reasons for conflict originating in traditional African societies.'<sup>263</sup>

The collapse of diplomatic relations among African societies can also lead to conflicts and this often led to communal conflict and violence between African communities. It is also evident that attack on territories had often occasioned war.<sup>264</sup>

It cannot be disputed that breach of sacred sanctions, 'insult to the supernatural, breaking of communal taboo, the defecation of shrines, sanctuaries or groves have been some of the reasons for religious conflict in traditional African societies.' As indicated earlier in this chapter, the breach of religious codes often occasioned conflict between Africans and their deities, the expression of such disaffection and hatred, had shifted the balance of relationship and power between the sacred and the profane.<sup>265</sup>

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<sup>262</sup> Coser L, 'The Functions of Social Conflict' (1956) 3.

<sup>263</sup> Various jurisprudences have been written by various distinguished jurists on African indigenous law showing numerous examples of forces of conflict. Chieftaincy imbroglios are also prevalent in African societies and they have had their origin from time immemorial, from the inevitability of competing forces to the royal throne especially when the norms and customs have been relegated to the background. The elements of chieftaincy conflict derived from tussle to the throne, misapplication of custom and tradition and impeachment/dethronement. Literature abounds on the nature and effects of Chieftaincy conflicts in African societies too. For example, see Akanmu Adebayo, Jesse Benjamin & Brandon Lundy (eds.), 'Indigenous Conflict Resolution Management Strategies' (2014)79. See also, John Mc Cracken, 'A History of Malawi: 1859-1966' (2012) 67.

<sup>264</sup> The Ashanti people occupied the present Ghana in the 18<sup>th</sup> and 19<sup>th</sup> centuries. Their expansion started around 1670 when King Osei Tutu defeated Denkyera and other nearby communities. His authority was symbolised by a golden stool (known as sika dwa) on which all subsequent kings were enthroned. Also, in the 17<sup>th</sup> century, the Kingdom of Dahomey gradually extended its domination around Abomey. Agaja, in the 18<sup>th</sup> century established a corps of women soldiers, gained control of the coast and became a major supplier of slaves to European traders. See Pre-Colonial African History Available at [www.berdo.net/page99/99en-afr-notes.html](http://www.berdo.net/page99/99en-afr-notes.html) (Accessed on 8<sup>th</sup> August, 2014).

<sup>265</sup> Olaoba BO et al; 'African Traditional method of conflict Resolution,' course guide developed by National Open University of Nigeria, 2010 Available at [www.nou.edu.ng/NOUN\\_OCL/pdf/SASS/PCR%20831.pdf](http://www.nou.edu.ng/NOUN_OCL/pdf/SASS/PCR%20831.pdf) (Accessed on 24<sup>th</sup> March, 2014).

Assault on personality of Africans has always led to conflict because they cherish their personality and ethos of respect and honour. In the same vein, it is discovered that the breakdown of covenant and the negligence of social responsibilities were clear grounds for causing conflict,<sup>266</sup> cultural norms which sometimes lead to social engineering, especially during the celebration of festival and other traditional ceremonies also generated conflict in traditional African societies.<sup>267</sup>

Conflict was in the mind of the indigenous Africans and its belief was often expressed to make everyone opened to its conditions of development. It was part of the life and an aspect of the activities of culture performed by traditional Africans that has often exhibited evidence of virility, responsibility and versatility. They were swift in understanding its nature, fundamentals and impact on social development.

Conflict resolution in indigenous Africa had great uncommon characteristics. The noble feature of this conflict resolution put Africans in the vantage position of demonstrating their culture and according it a radiant splendour and flame. This was why in pre-colonial African societies, peace and harmony somehow reigned supreme and often produced unique atmosphere for peace to thrive and development became dynamic.<sup>268</sup>

Conflict resolution in Indigenous African society's features included among other things, performance stance, resolving of conflict due to the accepted means/mechanisms, exhibition of the customs and norms and deification of the ethnical framework of the society. The drive for conflict resolution was prevalent throughout the society thereby creating conducive

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<sup>266</sup> Anthony E.E. & Emmanuel I., 'Traditional Methods for the Settlement of Conflicts: Appraising the Challenges for Justice in South –East' (2015) 1 (2) *International Journal of Multidisciplinary Research and Information* 124- 132.

<sup>267</sup> The knowledge of the sources of conflict is significant towards the understanding of the nature of conflict in the society because it will make us understand that conflict existed in traditional African societies, that it derived from various sources with particular nature and that it can either be positive or negative. This will also make us understand that conflict was inevitable in traditional African society and that they have their own ways of resolving such conflicts once the source of it has been discovered. It is also equally important to point out here that the sources of conflict often served useful purposes as they dictated the direction of understanding the nature of conflict in traditional African societies; it exposed the relationship between conflict and culture thereby revealing significant aspect of African cultural heritage; and induced the inevitability of developing incidental capacity for resolving conflicts.

<sup>268</sup> Birgit Brock-Utne, 'Indigenous Conflict Resolution in Africa'. Being a paper presented at the weekend Seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Education Research on 23-24 February, 2001. Available at

[www.africavenir.org/fileadmin/migrated/Content/uploads/BruckUtneTradConflictResolution\\_06.pdf](http://www.africavenir.org/fileadmin/migrated/Content/uploads/BruckUtneTradConflictResolution_06.pdf) (Accessed 13<sup>th</sup> August, 2016).

environment for the facilitation of peace and the enhancement of harmony.<sup>269</sup>

Conflict resolution model in traditional Africa was based on the dramatisation of the issues which led to the conflict. The level of performance of conflict resolution in African societies assisted participants in the ensuing drama to further appreciate the custom and norms bequeathed to them by their ancestors.<sup>270</sup>

During conflict resolution process in indigenous African societies, some rules were obeyed by all participants in the process of conflict resolution. These rules were designed for to ensure even distribution of justice and the maintenance of order. Accordingly an officer involved in the conflict resolution, a personality on the higher platform, was responsible for announcing to other *dramatis personae*, of the commencement of the action on stage. Such pronouncement signified to the participants of the atmosphere which is to be adhered to.

The mechanism of conflict resolution in the indigenous African societies was distinct as it was based on African cultural heritage and such distinctiveness, was as a result of the popularity of the custom and norms associated with conflict resolution. Every community member was satisfied with the ways and manner the hearing was handled as well as the dispatch with which the adjudicators handled the conflict issues. It is also important to understand the fact that the adjudicators were unwavering in their aspiration towards providing solutions to any dispute which may be tabled before them. They were also very rational when making their decisions by sticking to the custom and norms laid down by their ancestors.<sup>271</sup>

Aside providing solutions to the conflict, educating everyone present at the scene of the conflict resolution regarding the cultural heritage of the community through respect for personalities, astonishment of the supernatural, interpretation of the norms in order to appeal to the warring parties conflicting, examination and cross examining of evidences particularly on the volume of details given as regards the truth of the matter, is another important characteristic of

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<sup>269</sup> Birgit Brock-Utne, 'Indigenous Conflict Resolution in Africa'. Being a paper presented at the weekend Seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Education Research on 23-24 February, 2001. Available at [www.africavenir.org/fileadmin/migrated/Content/uploads/BruckUtneTradConflictResolution\\_06.pdf](http://www.africavenir.org/fileadmin/migrated/Content/uploads/BruckUtneTradConflictResolution_06.pdf) (Accessed 13<sup>th</sup> August, 2016).

<sup>270</sup> It is pertinent to point out here that proverbs and maxims were used in the drama of conflict resolution in traditional African societies. Among the Fante (Ghana), Yoruba (Nigeria), Lugbara (Uganda) and Barotse (Bechuanaland) for example, the lores were verbally dramatised to sharpen the memory of the audience thus educating them of the crucial aspects of their cultural heritage.

<sup>271</sup> Kaderi Bukari, 'Exploring Indigenous Approaches to Conflict Resolution: The Case of Bawku Conflict in Ghana' (2013) 4 (2) *Journal of Sociological Research* 89.

the conflict resolution mechanism of indigenous African societies.<sup>272</sup>

The adjudicators' attention was mostly on analysing evidence hence, truth, became *sine qua non* of resolution of conflict in indigenous African societies. The fact of honouring the invisible manifestation of the supernatural and evidence of demonstrating mastery of the art was proven by the recognition of truth. Except a person is well-taught and knowledgeable in the indigenous conflict resolution art, the size of the resolution could get out of control and war could arise. The lack of knowledge, understanding and dynamism of the whole process could lead to problem for the adjudicator.<sup>273</sup>

Several traditional institutions<sup>274</sup> set up for conflict resolution operated in indigenous African societies and they were responsible for the facilitation of peace and the ennoblement of harmony. Examples are the political,<sup>275</sup> economic,<sup>276</sup> social<sup>277</sup> and religious institutions.<sup>278</sup> These institutions came to life at different times and at different places in African societies and they had been purposeful towards enhancing the social engineering which nurtured healthy unity in diversity through cultural boundaries and it also showed a kind of association based on the cultural heritage in Africa.

Institutions for traditional conflict resolution allowed people in the society to comprehend and interpret the norms which gave rise to peace and harmony and the love for conducive atmosphere under which development and social orientation and mobilisation transpired in numerous African societies. The institutions, as demonstrated later in this chapter, also permitted a great sense of togetherness in the society and the social responsibility which a person owed to the society of his birth. In fact, a person was first born into a cultural society wherein the framework of the individual growth and development was acquired. Therefore, a person of African background and development grand up to join forces of development under the belief of peace and harmony. Such persons were also determined to learn under the several

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<sup>272</sup> Olaoba et al (2010) 42.

<sup>273</sup> Ajayi Adeyinka & Buhari Lateef, 'Methods of Conflict Resolution in African Traditional Society' (2014) Vol. 8(2) series No. 33, *African Research Review* 138-157 at 142.

<sup>274</sup> Institutions are set up or establishment or organisation for achieving some goals of development. They may refer to personalities or infrastructures upon which the developments of the society are anchored.

<sup>275</sup> Family and Palace. See Olaoba et al, 'African Traditional Method of Conflict Resolution' (2010) 69.

<sup>276</sup> Market See, Olaoba et al, 'African Traditional Method of Conflict Resolution' (2010) 95.

<sup>277</sup> Age-group and Professional Associations. See, Olaoba et al, 'African Traditional Method of Conflict Resolution' (2010) 95.

<sup>278</sup> Sanctuaries, deities and ancestors.

identified institutions, models of conflict resolution so that as he/she mature with it, they will become a master art for demonstration.

The cultural heritage of Africa is blessed with great indigenous institutions that govern the whole life of the people thereby improving common understanding and unity of purpose. Africans had long developed institutions set up for conflict resolution and governance of the society. The institutions were specifically designed in line with public will and associational trust particularly when they have been trained to be truthful in operation and pragmatic dynamism. Experience was however, associated with the explanation, clarity and the use of the institutions in order to realise peace and the enhancement of harmonial living in a peaceful environment.<sup>279</sup>

Traditional institutions like the family ensued in African society as a way of appreciating familial projection and unification of goals worthy of positive outcomes. Factored out from a lineage, the family system in Africa showed amazing unity so much at a closed range that mutuality was enhanced. Living in large compound with distinguishable reasonable responsibilities, the Africa family system represented the concept of keeping in touch to ascertain positive knowledge of welfare and interest for worthy wisdom associated with mutuality.

Therefore, the notion of being your brother's keeper was quite integral in the family system. Such a commonly exclusive trust at times boosted not only even distribution of justice but also unified responsibility, for a common destiny.<sup>280</sup>

Family units in Africa symbolised strong political institutions which was the basis of governance. The palace was the apex point of the political institution, a royal institution with legitimate authority and a mark of state formation. It signified the splendour of cultural heritage in pre-colonial African societies. The king had the supreme authority to put a hold

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<sup>279</sup> Kwame Badu & OkyereBonna, 'Traditional Institutions and Public Administration in Democratic Africa' (2009) 144.

<sup>280</sup> Conflicts of diverse nature especially civic ones, were resolved at the family level in the family compound. Such conflicts included petty quarrels between co-wives, among the polygamous children, between wives and husbands and the like. The conflicts were resolved based on the bond of unity and consanguinity and those saddled with the responsibilities of resolving the conflicts at the family level were the family heads. See Ajayi Adeyinka & Buhari Lateef (2014) 143. Among the Yoruba people of Nigeria, the smallest unit of the family called *idile* (Nuclear family) is headed by a *Bale*; the next unit is the *Ebi* (extended family) and is headed by *Mogaji* who is the most influential or usually the eldest person in the *Ebi*. The third tier comprises of several family compounds and is headed by a *Baale* (chief of ward/quarter). See Kenneth Onigu-Otite & Isaac Olawale Albert (eds.) 'Community Conflicts in Nigeria: Management, Resolution and Transformation' (1999) 13-31.

and seal on the issues of conflict. This was done along with the assistance of his chiefs, who met in the palace, to resolve conflicts particularly of criminal inclinations.<sup>281</sup>

Social institutions' importance to resolution of conflict in indigenous African societies has been an important aspect of cultural heritage. Social conflicts were at times resolved through the mechanism of social institutions like age-grade association; professional associations like the hunters guild and secret clubs or societies. The appropriate authority and social responsibilities of the recognised sections of the society relied on the acknowledgment given to them by members of the society. Infact, their prerogatives of position brought about the positive results which they normally boosted and arranged. They also had the knowledge and skill of tilting the extent of conflicts to practicable and manageable bounds and in their own sphere of influence, peace and harmony was the ultimate. As a corrective measure, punishment was, however, given out to offenders in order to discourage a ambitious act which might unsettle collective responsibility for positive results in the development process.<sup>282</sup>

Irrespective of the pains and paeans that comes with being a member of a particular age-grade association in indigenous societies, the way members were mobilised showed the competence to

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<sup>281</sup> Looking at things critically, it is discovered that the success of the state apparatus for development harped on the economic propensities of the society. The market institutions in African society had enabled proper legitimisation of sovereignty. This market institution, however, gave rise to some agents of peace and harmony within the market system. In other words, market administrators and leaders with diverse names across cultural boundaries facilitated peace and enabled equitable distribution of justice, the preservers of harmonious tradition in pre-colonial African societies. Selling and buying was not only done in the market, the mechanism for maintaining favourable atmosphere for bargaining was not in place. Hence, there were commodity associations helped by their executive overlords. Their roles were quite noticeable and appreciated not only by African kings but also by the populace. See Olaoba et al, 'African Traditional Methods of Conflict Resolution' (2010) 67.

<sup>282</sup> Age, sex and status have been social phenomena in African societies as they have been determinants of identity, social relevance and instruments of development. Africans have been cautious of their birth, status and the manner of identification with their societies. In this regard, age brackets have made it possible to make people get along with their group peers and companions. The degree of deference in the age-bracket depends largely on the nature of social stratification and this differs from community to community. Some authors and jurists have also pointed out that the age difference depends on local needs, periodic events or on economic or organisational necessities of the society concerned. See Onigu Otite & Ogionwo W, 'An Introduction to Sociological Studies' (1994). The age-grade association in African indigenous societies was not so much of identification with a particular group in the society but for the purposeful attention accorded them by members of the society, whose needs as the situation might have been, the association capably satisfied. A person was born into a society and within a context, growing up entails that he found relevance and substance within a group germane to his physical growth, where he could find succour and social significance. Although, a person's membership of age-group association changes from time to time depending on the number of years designed for the association, there was always the enthusiasm and interest to contribute to the associations activities and programmes irrespective of the numbers of years of membership. Each age-group association thus recognised active participation, sense of belongingness and social relevance towards development. See also Bascom WR, 'The Principle of Seniority in the Social Structure of the Yoruba' (1942) 44; Sangree, W.H, 'The Bantu Tiriki of Western Kenya' in Gibbs JL, Jr.(ed.) 'Peoples of Africa- Cultures of African South of the Sahara' (1977) 47.

introduce programmes of development and the attainment of wisdom to move ahead, aside being members of the association but also as members of the society was quite in focus. Graduation into levels of organisation therefore shows to one, numerous means of development and forms of challenges in African indigenous societies.

A huge role was played by traditional religion in conflict resolution throughout cultural boundaries in Africa. The religion, which introduced believes, apart from explaining the influence of supernatural, also showed religious refuges like shrines and groves. These venues later became venues for many extra-judicial activities. Traditional faith encouraged truth, equity and justice which were the basics of conflict resolution in indigenous African societies as the deities and ancestors were always on ground at the scene of conflict resolution.<sup>283</sup>

### 3.4 Principles of Conflict Resolution in indigenous African Society

This section will show that the forebearers at the start of the institutionalisation of political culture had a fortuitous approach concerning absorbing the morals of social justice. Ethical devices and models of conflict resolution, legitimacy of power and authority principled along the line of mutual understanding and public peace were inherent in political culture were. These principles were properly installed on a strong background in this situation. At the conceive of the African forebearers, they did well to leave the principles of conflict resolution, which they have actively practised, to their descendants who they themselves never stumbled in justifying not only the existence of the principles, but also lived the expectation of their forefathers by making their legacy hireable.

The ethics of conflict resolution in pre-colonial African cultures were perfectly modeled

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<sup>283</sup>Most of the indigenous institutions for conflict resolution have faded out as they no longer have bearing with modern day governance and the first problem one is faced with is how to recognise these institutions. Only the older people of this generation would know them. There are modern influences on the changing pattern of the institutions; foreign religion and western education have created new institutional frameworks for conflict resolution. For example, it is a notorious fact that social clubs and mosque/church societies have replaced age-grade association typical of indigenous African cultural heritage. The mode of conflict resolution in indigenous African societies had been well organised at the beginning of state formation thereby making the various institutions quite functional and adaptable to the development process. The institutions were not only relevant and functional but also produced such positive results for the administration of all members of the society. They were so popular and vital to problem solving for the purpose they were so designed. See Agbaje A.A.B, 'Traditional Channels of Political Communication in Africa' in Ayoade J. A. A.&Agbaje A. A. B. (eds.) 'African Traditional Political Thought and Institutions' (1989); Ayisi E.O., 'An Introduction to the Study of African Culture' (1979); Ayittey, G.B.N. 'Indigenous African Institutions' (1991).

towards good assimilation of African cultural heritage so that they become part of their customs and norms. The principles were also characterised by the attitude and personality of the Africans in a manner that their practice and adaptation were sufficiently appropriate to the environment and the spiritual power. The principles followed the line of fruition and functional press to exhibit the cultural heritage of the Africans; it therefore set in motion the desirability and readiness of the Africans to institute social order and control of their affairs, in such a way, that public morality and etiquette strengthen the chord of relationship and mutual trust.

The doctrines of conflict resolution in indigenous African societies exposed the thinking of the forebearers for the utmost future relevance and element of peace and harmony in the body polity of social organisation. Continuity of what was started by the African forebearers for their offsprings was in place. The enormity of the principles of conflict resolution in indigenous African societies was quite in place, the level of the application of the doctrines of conflict resolution to life expectations, nevertheless, rested mostly on the interest and eagerness as well as the knowledge acquired by the practitioners. This is why it is difficult at times to measure the level of wisdom of the congregations particularly when colonial culture had interfered into the unique African principle of conflict resolution.<sup>284</sup>

Putting the principles of conflict resolution in African society in adequate perspective and within the center of African cultural heritage is very essential and doing so requires that one acquire appropriate knowledge and proper assimilation of the peace process in Africa.

Essentially, parties to the conflict customarily give themselves in for cross-examination because they had glowing confidence in the conflict resolution doctrines which were to be applied to the conflict in vogue<sup>285</sup> and as a matter of fact, no one was seen as a secluded being in indigenous African society. This was why the principle of collective responsibility was in place. It will be discovered that the concern of the community was always focused to the parties in

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<sup>284</sup> Principles of conflict resolution in traditional African societies were anchored on the confidence of the parishioners, verification of truth, attainment of impartiality and the enhancement of transparency, reconciliation and the display of fairness and social justice as well as adherence to forgiveness and tolerance. This principle attested to the fact that Africans had long been principled in the ways of life and this had transformed their mode of existence to that of mutual exclusiveness. It is important to point out that supernatural force propelled the operation of the principles of conflict resolution in various traditional African societies and this permeated the essence of peace making and peace keeping incentives. Olaoba, O.B. in 'Yoruba Legal Culture' (2002) wrote extensively on this.

<sup>285</sup> Tsega Endalew, 'Inter-Ethnic Relations on a frontier: Matakka (Ethiopia) 1898-1991' (2006)153.

conflict borne out of pity and admiration to the ancestors who watched from far away and had the ability to reprimand the offenders or wrongdoers amongst the parties to the conflict. The wrongdoing when properly ascertained needed collective action to surmount, the reason why some jurists maintained that such a wrongdoing must be propitiated by all the members of the society in the area of contributing towards procuring ritual materials. This was also similar to the practice of being your brother's keeper in the time of crisis.<sup>286</sup>

Independence, impartiality and openness were the three ethics of conflict resolution in traditional African societies. They were embraced by the African forebearers to display the pressure connected with peace making and peace building. Infact, the practitioners of indigenous peace need the three principles to stand the test of time towards ensuring completeness and totality of verifying truth and asserting vibrant claims<sup>287</sup> African judges and adjudicators also sustained these values towards playing safe and restoring peace and order in the troubled societies.

Parties to the conflict in indigenous African communities had the motive of encouragement and compliance to equitable claims to justice. Therefore, they had the opportunity of letting off the steam of conflict, forgiving, loving and enduring one another for mutual alignment and adaptation and this was the basis of reconciliation and restoration of pleasant relationship. This principle had long been based on social engineering and characteristic on indigenous African societies.

Fairness, justice and equity were three-way code of conflict resolution in indigenous African society as parties to a conflict were generally given fair hearing and representation through a witness to the degree that no one had his case treated in his absence because doing so would result to misplace of justice and an attack on the enforcer of justice which is the supernatural.<sup>288</sup> Parties were always accorded reasonable time at the scene of conflict resolution to state the problem(s) in conflict. Refusal to appear at the venue by any of the

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<sup>286</sup> Driberg J.H., 'The African Conception of Law' (1934) supplement July, 34. Truth was associated with the positive conduct of life and was quite at home in place with conflict resolution mode in traditional African society. It has also been adjudged by African elders as the objective realisation of scientific trust and ethical modesty showcasing movement in development process. African forebearers embraced truth as a convenient logo and it was upheld as a salient principle of conflict resolution in indigenous African societies.

<sup>287</sup> Max Gluckman in 'The reasonable man in Barotse Law' (1956) *Journal of African Administration*, 8, No. 2 attested to this fact.

<sup>288</sup> Indigenous Africans believed that justice delayed was outright justice denied which was to spell doom for the community. See Ajayi A. & Buhari L. (2014) 142.

parties in dispute was viewed as contempt.<sup>289</sup>

Here (traditional African society), the end of justice justified the principles of justice in place. Parties were encouraged to give peace a chance by shifting the ground of conflict and moving towards peace and harmony in the spirit of ‘give a little, get a little.’<sup>290</sup>

The result of conflict resolution was based on reasonable acknowledgment and application of the philosophies engaged to achieve peace process in indigenous African societies. Listing was, however, an important art towards determining the prudent application of the principles of conflict resolution. The doctrines were never played with nor played down to achieve harmonious settlement and reinstatement of peace and harmony to a previously bad situation or atmosphere of crisis.

The principles of conflict resolution had been so universal in letters and approach to a point that it pleases all conflict circumstances when appropriately put into use and the non- application of the principles might be an insult to the forebearers who installed them. The conviction of the inaugurators of the principles was to the effect of sustaining the peaceful status quo of the society and to promote social bliss for equitable development. Therefore, once infuriated, the forebearers could cause all kinds of illnesses on the people until the ontological balance was maintained. Conflict in African society therefore was a means of measuring social balance between the people (Africans) and their supernatural that has the superpower of coercion and conformance.

### **3.5 Major players in the African Indigenous Judicial system**

#### **3.5.1 Victims in the African Judicial System**

The African Indigenous Judicial System (AIJS) is victim-centred. Victim care is more paramount because of the belief in the community that victims whose needs are not addressed are disgruntled and are potential offenders. In a communitarian society, when one individual suffers, the community suffers too and following the *Ubuntu* concept, ‘an injury to one is an injury to all.’<sup>291</sup> ‘It is also a teaching about respect and having compassion for others, especially those

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<sup>289</sup> Examples were found among the Tswana in South Africa and the Yoruba in Nigeria. See Schapera I, ‘Contempt of Court in Tswana Law’ (1974) *Journal of African Law* 21; Olaoba, O.B. ‘Yoruba Legal Culture’ (2002) 78.

<sup>290</sup> Ajayi Adeyinka & Buhari Lateef (2014) 142.

<sup>291</sup> Broodryk, J. ‘Ubuntu Management and Motivation’. Johannesburg: Gauteng Department of Welfare/Pretoria,

in need.’ Van der Merwe<sup>292</sup> noted that we affirm our own humanity by recognising the humanity of others. This principle is summed up by a Zulu saying: ‘*umuntungumuntungabantu*’ which literally translates to be ‘a human being is a human being through (otherness of) other human beings’. One’s individuality and humanity has meaning only when others acknowledge it and it is one’s relationship with others that enhances their humanity and self-worth. This principle encourages indigenous Africans to respect and treat others with compassion and also how to relate with others in a meaningful way.<sup>293</sup>

The empowerment and vindication of the victim is very central to the resolution of conflict. First, the victim feels vindicated by the acknowledgement by the offender and other relevant community members that he or she has suffered harm and loss. Victims feel empowered by being accorded the opportunity to bring their complaints to the community’s constituted justice centres which play very important roles in bringing offenders to justice in the definition of their harms and loss, and the search for solutions acceptable to them. Also as parties to the process of justice making, they are likely to abide by the decisions reached since they were party to the negotiation.

It is not all victims that are always willing to bring offenders to justice, for example, rape victims are always reluctant to bring up rape cases to the Africa indigenous justice system tribunals. However, when rape cases are brought before the tribunal, Africa indigenous justice system tribunals have standard ways of responding to such matters.<sup>294</sup>

Zion and Yazzie<sup>295</sup> in discussing Navajo justice showed that negotiated justice such as the AIJS is more beneficial and effective than adjudicated justice. According to them, the approach to adjudicated justice tends to be impersonal and rationalistic and restricted to facts relevant to a particular case. Moreover, unlike adjudicated justice, negotiated justice is not a winner take all justice. Resolutions can be reached where the offender, the community and the victim are each

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Ubuntu School of Philosophy, 1997 at pages 5, 7 and 9.

<sup>292</sup>Van der Merwe, W. C. ‘Philosophy and the Multi-Cultural Context of (post) Apartheid South Africa: Ethical perspectives’ (1996) 3 at 1-15.

<sup>293</sup> Nussbaum B ‘African Culture and Ubuntu: Reflections of a South African in America’ in ‘World Business Academy’ (2003) 17<sup>th</sup> edition, noted that African culture and principles of justice teach Africans to show companion (ship), reciprocity, dignity, harmony and humanity in the interest of building and maintaining community with justice and mutual caring.

<sup>294</sup> Amadi E. in ‘Ethics in Nigerian Culture’ (1982) and Elechi O.O. in ‘Doing Justice without the State: The Afikpo (Ehugbo) Nigerian model’ (2006) 207 extensively discussed this.

<sup>295</sup> Zion, J. W. & Yazzie R. ‘Navajo Peace making: Original Dispute Resolution and a way of Life’ in D. Sullivan & L. Tift (eds.), ‘Handbook of Restorative Justice: A global perspective’ (2006) 161-173.

partially wrong and it is important to also point out to the stakeholders to the conflict where each erred and each or every stakeholder may have to compromise. Also, one underlying assumption of negotiated justice is that all stakeholders have equal access and say and as such, no one individual has the final decision-making authority. Decisions are therefore reached through a consensus while it can be said that justice making present opportunities to teach values and social skills.<sup>296</sup>

Negotiated justice follows a relational process in which stakeholders are actively involved in the process of decision making. Negotiation promotes better communication and empathy as participants' statement shift from the 'I' statement to the 'we' statements<sup>297</sup> and as such, participants' feeling about the situation often prove more important than the facts of the conflict and this (negotiated justice) should not be confused with plea bargaining.

Unlike in the state justice system where plea bargaining takes place, participants to a conflict in a negotiated justice system tend to have equal power. Equality does not mean the same influence, prestige and status.<sup>298</sup> However, litigants appreciate the value and benefits of a peaceful community to the well-being and survival of all.<sup>299</sup>

In comparison to restorative justice-based justice system, such as the Navajo justice system whose principles and practices are similar to the Africa indigenous justice system, and retributive justice-centred justice systems, the major difference between western adjudication and indigenous dialogue is that Western thoughts tend to be rational and based on Aristotelian logic, using inductive or deductive reasoning. Indigenous thoughts tend to be based on facts or feelings, where feelings are often more important than 'finding facts', and both are expressed in languages that are more sophisticated than English.<sup>300</sup> That is, in countries where English is the official court language, translators are available to make sure that the parties follow the proceedings. This is one of the fundamental elements of the right to a fair trial. Of course, there are problems

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<sup>296</sup> Michael Allen, 'Globalisation, Negotiation and the Failure of Transformation in South Africa' (2006) 94.

<sup>297</sup> Zion J. and Yazzie R. (2006)163.

<sup>298</sup> Christie N. 'Crime Control as Industry: Towards Gulags, Western Style' (2000) 165.

<sup>299</sup> Christie N. in 'A suitable amount of crime' (2004) 75-76 pointed out that the questions of relevance are handled in a radically different way from what happens in the legal system. Relevance is seen as a concern, but in situations with horizontal justice as one without predefined solutions. Relevance is established through the process itself. Relevance is what the participants find relevant.

<sup>300</sup> Zion and Yazzie (2006) at 152. In the same vein, Block at page 47 has also observed that restoration comes from the choice to value possibility and relatedness over problems, self-interest and the rest of the stuck community agenda. It hinges on the accountability chosen by citizens and their willingness to connect with each other around promises they make to each other. He insists that we devalue associational life at our peril.

associated with this as well such as the lack of enough or competent translators.

Although victims always lead the quest for justice, they are hardly alone as they are always supported by their family members and other well-wishers throughout the process. Ample opportunities are given to victims in a respectful and secure setting to tell sympathetic listeners how the actions of the offenders affected them. This is also visible in criminal justice systems such as the one in South Africa where victims have a role to play as state witnesses and at sentencing and parole stages.<sup>301</sup> Furthermore, they are encouraged to openly vent their anger and frustration. Respectful and secure settings do not have to be emotionally sterile and controlled as is assumed in western court settings.<sup>302</sup>

### 3.5.2 Offenders in the African Indigenous Justice System

Offenders are also active participants in the African Indigenous Justice System. Their roles are not usurped by other professionals such as defence attorneys as it obtains in state adjudicated courts. As the offenders are actively involved in the definition of the harm and the search for solutions acceptable to all stakeholders, they are better placed to appreciate the harm their actions caused the victims and why other community members are concerned.

The opened airing of the facts and issues relevant to the case and its impact on the victim and the community encourages the offender to understand and appreciate the impact on the victim and the community encourages the offender(s) to understand and appreciate the impact of their actions. The potential for remorse and empathy by the offender is higher when they understand the harm their actions have caused the victim and how the community has been affected. This realisation is more likely when the emphasis is on the harm their actions have caused rather than the law broken, which may seem like an unfamiliar concept to some. This is in line with the goal<sup>303</sup> of the African Indigenous Justice System that is the restoration of relationships and social cohesion rather than the promotion of social control or other penal ideology. Retributive justice system seems to have elevated law and social control to values of their own, rather than a means

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<sup>301</sup> Bonny Ibhawoh, 'Imperial Justice: Africans in Empires Court' (2013) 68.

<sup>302</sup> Elechi O. O., 'The Igbo Indigenous Justice System' in Saleh-Hanna V. (ed) 'Colonial Systems of Control: Criminal Justice in Nigeria' (2008) 404.

<sup>303</sup> Kerry Clamp, 'Restorative Justice in Transition' (2013) 62. See also, Schoeman MI, 'A Philosophical View of Social Transformation through Restorative Justice Teaching: A case study of Traditional Leaders in Ixopo, South Africa' in 'Phronimon' An accredited journal of the South African Society of Greek Philosophy and the Humanities (2012) vol. 13 No.2 at 23. Available at [www.phronimon.co.za/index.php/phroni/article/view/79](http://www.phronimon.co.za/index.php/phroni/article/view/79) (Accessed on 19<sup>th</sup> October, 2016).

for the protection of people, their properties and their civil peace in the communities.<sup>304</sup> Behaviour also tends to be held in check only by not breaking the law. Doing what is right or 'duty', is little considered by citizens in a culture, which depends solely upon a retributive justice system.

As the main aim of justice in the African Indigenous Justice System is the restoration of the victims and their positions prior to their victimisations, offender accountability includes reparation to the victim and apology and atonement to both the victim and the community. Restitution to the victim as noted by authors is central to the resolution of the conflict.<sup>305</sup> Punishments are not meted out to offenders for punishment's sake or in rigid obedience of the law but as a means of restoring the victim's harm and loss. Where offenders are unable to compensate the victims for his or her loss, the offender's family is held responsible.<sup>306</sup> Human beings are not perfect and do make mistakes; and their actions whether intended or not, can cause harm to others. It is strongly believed in some parts of Africa that every wrong can be made right by the subsequent actions of the offender and other community members. For example, the Igbo people in Nigeria believe that no offense is so serious that it cannot be atoned for with a commensurate sacrifice and reparation, therefore punishments are finite and offenders had the option and opportunity to make amends and have their standing in the community restored.<sup>307</sup>

In line with the African humanitarian culture, human beings have both intrinsic and material value. Again, every individual is capable of contributing to the collective survival of the family and community; because the mainstay of traditional African economy is subsistence agriculture, every hand is highly valued. Agrarian economies are labour-intensive, reintegrating offenders into the community is important so that they can remain productive and contribute to the survival of the community.<sup>308</sup>

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<sup>304</sup> Mike Batley, 'Restorative Justice in the South African Context' in Traggymaepa (ed.), 'Beyond Retribution: Prospects for Restorative Justice in South Africa' (2005) Vol. 111 at 25.

<sup>305</sup> Such authors include but not limited to Nsereko N. in 'Victims of Crime and their Rights' in Mushanga T. M. (eds.) 'Criminology in Africa' (1992) 35; Elechi (2006 & 2008) 39.

<sup>306</sup> Restoring Justice at pg. 77 in some cases, even the community where the offender hails from can be held accountable for the action of one of their own. As the reasoning goes, in a communitarian setting, the family and community members also reap the rewards of the accomplishments of their own as such must bear the burden of their liability too.

<sup>307</sup> Oraegbunam, Ikenga, 'The principles and practice of justice in traditional Igbo jurisprudence' in 'OGIRISI: a New Journal of African Studies' (2009) vol. 6.1, 53-85 at 58.

<sup>308</sup> It should be noted that strictly violent criminal cases are not handled by the AIJS. Violent cases are referred to state courts that have the jurisdiction to deal with such matters.

It is important to note that there are two justice systems in operation in contemporary African societies. One is the state-administered justice system modelled on the Western judicial systems while the other is the African Indigenous justice system. Despite the relevance and popularity of the African Indigenous Justice System, the dominant authority of African State is not in question. It is also worth noting that litigants who are not satisfied with the Judgement of the African Indigenous Justice Systems can then take their cases to the state courts for further adjudication and litigants are free to choose which tribunal, either state or African Indigenous Justice System to take their cases to.<sup>309</sup> However, many African communities insist that litigants must first bring their cases to the African Indigenous Justice System tribunal for adjudication and the rationale behind this is to forestall the rich and politically connected from using the state criminal justice system as instruments for the intimidation and exploitation of community members.<sup>310</sup>

### 3.5.3 Community in the African Justice System

To the African indigenous justice system is the community which is central. It has also been argued that the concept of family in Africa includes the nuclear family and the extended family.<sup>311</sup> Family also encompasses people who do not share blood relationships or marriage.

Conflict in Africa is seen as the community's property and the state dominance in social control creates more problems than it solves.<sup>312</sup> The state's emphasis on punishment and the use of incarceration in response to law violation is destructive to the individuals who are confined as well as to the society at large.<sup>313</sup>

Also, the community's informal social control mechanism is undermined when the community is not empowered and involved and playing an active role in social control. Conflicts between community members must be adjudicated in the open with all community members participating both in the definition of harm and in the search for solutions acceptable to all stakeholders.

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<sup>309</sup> Elechi (2006) 208.

<sup>310</sup> Research has shown that state court interventions in conflicts have tended to polarise community members further. It is important to appreciate the fact that African communities are close-knit, thus conflict not quickly resolved to the satisfaction of litigants can undermine the peace and harmony of the community. State-based tribunal decisions often follow the winner takes all approach, which goes against the principles and values of the African Justice system.

<sup>311</sup> Louw, D. J. 'The African concept of Ubuntu and Restorative Justice' in D. Sullivan & L. Tiffit (eds.), 'Handbook of Restorative Justice: A global Perspective' (2006) 151-160.

<sup>312</sup> Louw (2006) 151.

<sup>313</sup> Elechi O. O. on Restoring Justice (2006). In pre-colonial Africa, persons caught in *fragrante delicto*, in the act of theft, for example, or in the act of adultery, might receive immediate punishment. See Shorter Alyward, 'Concepts of social justice in traditional Africa' (1977) 12 *Pro Dialogo Bulletin* 32-51.

African communities are close-knit and so conflicts not resolved quickly are capable of jeopardising community harmony and polarising the community.<sup>314</sup>

In the Africa Indigenous Justice System (some communities in West and East Africa today),<sup>315</sup> victims, their family members or their well-wishers are the ones who petition the tribunal to look into their cases while a messenger of the tribunal is then delegated to inform the defendants that there is a case against them and to report at a given time for the hearing of the matter. A typical sitting arrangement in a tribunal is circular in form; this is reflective of the egalitarian worldview of African people.<sup>316</sup>

In the tribunal, the victim is first invited to present his or her side of the story after which the offender is asked to respond to the complaint by the victim. The litigants are then asked to invite their witnesses, if any, to substantiate their stories. After all the testimonies have been given, the tribunal members or any community member present is then allowed to ask questions or provide commentary relevant to the resolution of the matter as decisions must be reached through a consensus. No individual has the authority to decide for the tribunal and decisions must be reached through a consensus for it to be enforceable.<sup>317</sup>

Considering the fact that traditionally there was no standing army or police in African communities, the enforcement of any tribunal decisions was through the cooperation and goodwill of the people. Communal decisions were always reached through dialogue.<sup>318</sup> Zehr<sup>319</sup>

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<sup>314</sup> Marital conflicts are an exception to this rule as they are settled internally first by the family head or the parents of the couples involved. See MunaNdulo, 'African Customary Law, Customs and Womens Rights' (2011) 18 *Indiana Journal of Global Legal Issues* 87. Some communities emphasise resolving marital disputes without involving the community as a whole, this is why elders are involved first before other members of the community get to know about the issues. Feminist have argued that this is one of the reasons why women are disadvantaged in some African communities as decisions that impact on them, sometimes negatively, are made by elders. See Kirsty Button, 'South Africa's System of Dispute Resolution Forums: The Role of the family and the State in Customary Marriage Dissolution' Centre for Social Science Research working paper No. 339, July 2014. Available at [www.cssr.uct.ac.za/sites/cssr.uct.ac.za/files/WP%20339.pdf](http://www.cssr.uct.ac.za/sites/cssr.uct.ac.za/files/WP%20339.pdf) (Accessed on 4<sup>th</sup> August, 2014). See also, Birgit Brock-Utne, 'Indigenous Conflict Resolution in Africa', presentation made at the Seminar on Solutions to conflicts held at the University of Oslo, Institute for Educational Research 23-24 February, 2001. Available at [www.africanvenir.org/uploads/media/BrockUtneTradConflictResolution\\_02.pdf](http://www.africanvenir.org/uploads/media/BrockUtneTradConflictResolution_02.pdf) (Accessed on 4<sup>th</sup> August, 2014).

<sup>315</sup> Simon Robins, 'Restorative Approaches to Criminal Justice in Africa: The Case of Uganda' in 'The Theory and Practice of Criminal Justice in Africa' (2009) 57-84. (A publication by the Institute of Security Studies).

<sup>316</sup> Zion and Yazzie observed that the horizontal process is plastic and flexible. A horizontal legal system has individuals who are at least nominally equal who negotiate norms and compliance with a consensual decision is voluntary. Norms may be stated in terms of right and wrong, or they may be unstated but expressed as feelings about a given situation.

<sup>317</sup> Elechi (2008) 404.

<sup>318</sup> See Louw (2006). He said dialogue enhances the reconciliation efforts between the victims and the offenders. Through dialogue, the offender's relationship with the community is restored. He notes that restorative justice

rightly observed that the dialogue may not succeed in reconciling the victim and the offender, but their relationship would challenge somewhat, as they begin to see one another as persons rather than monsters. According to him, 'yet the nature of their hostility had changed. No longer were they mad at an abstraction, at a stereotype of a victim or offender. They were now mad at a concrete person. Even that represents some improvements'.<sup>320</sup>

Looking at this perspective theoretically, the transformation of perspectives, structures and persons is the hallmark of restorative justice system. As earlier indicated, the African Indigenous Justice System uses restorative, transformative and communitarian principles in the resolution of conflicts.<sup>321</sup> Most of the so called trouble makers in most communities are often people who are socially, politically and economically marginalised. In support of this, Jenkins<sup>322</sup> in advancing the theory of restorative justice, made a case for justice making to begin with the emancipation of the community and individuals from the social conditions that precipitate conflict. According to him, 'emancipation means that all participants are aware of their responsibilities in relation to such concepts as unity and self-determination. The primary focus of restorative justice then is to move the participants from a 'survival' orientation to a 'liberation/empowerment' orientation.<sup>323</sup>

For the transformation of perspectives and structures to be effective, it must begin with the transformation of us, such as 'our own values, behaviour, mind set and character.'<sup>324</sup> They further posit that 'a hallmark of restorative justice must be on going transformation. It begins with transformation of ourselves, for we to have recompense to pay, reconciliation to seek, forgiveness to ask and healing to receive.'<sup>325</sup>

In African Indigenous Justice System that derives from egalitarian and communitarian principles, the defendant can become the judge tomorrow and vice versa. Mediators in conflict who are

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creates opportunities for the venting of harmful emotions and challenges any ill-feelings some of the stakeholders may harbour. Through dialogue, trust is engendered so that people feel more comfortable in exposing their vulnerable sides to others.

<sup>319</sup> Howard Zehr & Toews B, (eds.) 'Critical Issues in Restorative Justice' (2004).

<sup>320</sup> Van Ness D. W. & Strong K. H. 'Restoring Justice: An Introduction to Restorative Justice' (2006) 86.

<sup>321</sup> Van Ness & Strong (2006) 176 identified four elements in the transformation of perspectives through restorative justice processes, namely creativity, openness to learning, looking for familiar problems in new ways and considering new alternatives. They observed that the transformation of structures will entail the monitoring of justice structures with the goal of identifying economic and political impediments to community connection and harmony.

<sup>322</sup> Jenkins M, 'How do Culture, Class and Gender affect the Practice of Restorative Justice' in Howard Zehr & B. Toews (eds.), 'Critical issues in Restorative Justice' (2004) 311-324.

<sup>323</sup> Jenkins M (2004) 314.

<sup>324</sup> Van Ness & Strong (2006) 181.

<sup>325</sup> Van Ness and Strong (2004) 181.

therefore conscious of their vulnerable and changing roles tend to approach each case with sensitivity, patience and understanding.

### 3.6 Personalities Involved in Indigenous Conflict Resolution

Conflict resolution has been described to be a rather fulfilling exercise in traditional African communities as it consists of statement and a great number of initiators of peace and harmony, with the intention of encouraging development and the maintenance of law and order.<sup>326</sup> It is obvious individuals who ruled the different territories in Africa had the power and authority attached to the rule of law and the legitimacy idea thereof.

The traditional characters renowned for active involvement in conflict resolution in African societies are the chiefs, the kings, ancestors, elders, family heads, diviners and priests, members of age-association, commodity association and professional association<sup>327</sup> as well as members of secret societies.<sup>328</sup> Every single individual mentioned above, that participated in facilitation of peace and harmony in the community, had the capacity of keeping the society in order and maintaining social decorum.

Putting an end to disputes requires a lot of enthusiasm, bravery, extremely motivating passion and lasting sense of history. It is upon the peace facilitators to be strong minded to ward off disaster that conflicts may have ignited and an extensive understanding of norms and nuances of the art of conflict resolution at the grassroot level. This thesis will go further to show that all the above listed personalities involved in conflict resolution has all the features of responsibility based on the skill of conflict resolution.

#### 3.6.1 King and Chiefs

Indigenous African societies recognised the King as the overall head and father of the territory. They were at the top of the order of chiefs and statesmen; they were the revered representative of the ancestors on earth and embodiment of his domain. Kings were seen as the connection between the revered world and the physical world.<sup>329</sup> The indigenous African King played

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<sup>326</sup> Olaoba (2010) 69.

<sup>327</sup> Professional associations include the guilds of hunters and blacksmith among others.

<sup>328</sup> Olaoba (2010) 69.

<sup>329</sup> An example is the Akan community in Ghana where disputes which could not be resolved by the chiefs are referred to the king (Omanhene); also in the northern part of Nigeria, the Emir settles disputes which could not be resolved by its chiefs. See Morapedi G.W., 'Demise or Resilience? Customary Law and Chieftaincy in Twenty-First Century Botswana' (2010) 28(2) *Journal of Contemporary African Studies* 215-230.

diverse roles such as the guardian of culture, initiator of peace, advocate of harmony and controller of rituals for societal development.

The king played a leading role in the administration of his empire and to enable him perform this function, he was distinguished and empowered with explicitly different royal title representing the history of his kingdom.<sup>330</sup> The royal designations are unlimited but they are expressively symbolic of the suzerainty of the divine personality. In the indigenous African society, the nature of kingship was that of a human being in the mode of godliness, which gifted on the personality, the power to dish out power which cannot be questioned and here is the power of the African king concerning social control and instituting of law and order in the community. The word of the king was law which was never to be flouted by anyone in his kingdom.

With conflict resolution in pre-colonial Africa, African kings played very important roles and as a result, they were declared appropriate for providing forum, process, principles, pattern, pace, context, direction for the perfection and initiation of peace and harmony, the protection of growth and development in traditional African societies.<sup>331</sup> These royal principles endorse best royalty performance in the advancement and facilitation of cultural heritage, peace and harmony in their various kingdoms. The king's legality on the throne, the installation of royal power, their ritual cleansing capacity, their sense of history towards understanding the norms and rules bestowed onto them by their forebears, the respect and reverence bestowed on them by their subjects were privileges of giving so immensely to peace process and development in African communities. They were seen as active reconciliators, judges and adjudicators in their various domains.<sup>332</sup>

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<sup>330</sup> Some of the titles in African kingdom are the Ga Mantse kingship in the Ga kingdom of Ghana, the Ohene kingship in the Ashante kingdom of Ghana, the Oni kingship in the Ife Ile Kingdom of Nigeria (also referred to as the cradle of the Yoruba), the Alaafin kingship in the Oyo Kingdom of Nigeria, the Zibondo kingship in the Basoga kingdom of Uganda, the Kabaka kingship in the kingdom of Buganda in Uganda, the Moro naba kingship in the kingdom of Mossi, the Bur kingship in the Serer Kingdom in Senegal, the Mani Kongo kingship in the kingdom of Kongo, the Ngwenyama kingship in the Swazi Kingdom, the Shaka kingship in the Zulu kingdom in the South Eastern Africa, and the Nur kingship in the Saloun Kingdom of Senegal among others. See Olaoba et al, 'African Traditional Methods of Conflict Resolution' (2010) 71; Ayittey G, 'Indigenous African Institutions' (2006) 185.

<sup>331</sup> These provisions were in tune with the norms and customs of the Kingdoms which the kings inherited from their ancestors. To facilitate peace in his domain, the King was imbued with enduring sense of history of the norms and nuances of the kingdom, unwavering wisdom of distilling facts from falsehood in the treatment of issues of conflict, high level of epitomising moral order, peace process and classical demonstration of harmony; and broader legitimisation of the vital link between the universe and the supernatural order. See Asiwaju A. I., 'Western Yorubaland under European Rule 1889-1945: A Comparative Analysis of French and British Colonialism' (1976); Asiwaju A. I., 'Partitioned Africans: Ethnic Relations across Africa's International Boundaries 1884-1984' (1985).

<sup>332</sup> In pre-colonial times, some African kings were not physically seen or heard; rather they had an interpreter so referred to among the Akan speaking people of Ghana as a linguist. Such an interpretation was diplomatically couched as typical of the names of the *Ilari* (royal emissaries) in the Palace of the *Alaafin* of Oyo Kingdom. It was

Kingdoms in Africa were governed by kings in the form of monarchical government. Chiefs were second to the kings with chieftom as their area of jurisdiction. They had of lower status and power compared to the kings in African societies. They were leaders whereas the kings were rulers and their constitutional rights and duties was their commitment to governance and installation of peace and harmony in African societies.<sup>333</sup>

Judicial, executive and legislative duties were carried out in their various provinces in conjunction with the Kings and were mandated to provide solutions to conflicts regularly and enabled peace and harmony which boosted development in the society. In the conduct of conflict resolution meetings, the chiefs acted as safety verve to the Kings, who, for example, with a loss of memory would have missed certain procedure associated with the act of resolving conflict.<sup>334</sup>

It can be seen from the foregoing that chiefs in Africa were influential mediators of conflict resolution in traditional African societies as they occupy a transforming role especially with making sure that the kings don't over use their power in the dispensation of justice. They had the ability of conflict resolution in the society, as they learnt by heart and knowledge from their forebears who transferred the art to them. Some of them (the chiefs) were more practical and experienced than the kings who they installed; this is why it was not so easy for the kings to underestimate the acumen and intelligence of their chiefs. These chiefs were valued for their wealth of knowledge in reconciliation and enduring sense of history of the culture of the kingdom.<sup>335</sup>

The chiefs were the watchdog for the morality and proprietary of manners for the young and the aged in the African communities. Importantly, the source of unity, mutuality and common understanding was good behaviour and action directed towards social development in the society. A lot of the chiefs resided closely with the township people and observed their way of life; in fact chiefs had courts in their various residences where parties to conflicts

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not so much the idea of seeing the King that mattered but the process of resolution which the authority of the royal command through the interpreter to the degree that the end of justice was celebrated.

<sup>333</sup> Zartman, I (eds.) 'Traditional Cures for Modern Conflict: African Conflict' (2000) 283.

<sup>334</sup> African chiefs provided supporting force of action, enabling spirit and motivation, team spirit and interest, checks and balances, validity of verdict; and reconnection points for parties to the conflict. See African traditional Methods of Conflict Resolution at 73.

<sup>335</sup> Kaderi Noagah Bukari, 'Exploring Indigenous Approach to Conflict Resolution: The Case of the Bawku Conflict in Ghana' (2013) 4 *Journal of Sociological Research* 89.

frequently met for the resolution of their conflicts.

Where a chief could not handle a conflict in his ward/quarter, he will engineer the means of transmitting such case to a higher level, where kings with other chiefs will listen and resolve the matter.<sup>336</sup> African chiefs also had the power to issue warnings and institute specific ultimatum to Kings where there is no obedience with the norms and customs of the kingdom, shirking of chieftaincy and status symbols or refusal to perform sacrificial rites.<sup>337</sup> The chiefs (especially in West Africa) knew and mastered the act of installing their kings and dethroning them too therefore, from kingdom to kingdom, we had established rules which governed the relationship of the kings with their chiefs.<sup>338</sup>

For judicial, executive and legislative control of the society, Kings and chiefs were entirely depended upon but the situation is no longer the same today as there had been a lot of changes which have surpassed the indigenous roles of these traditional ruling elites.<sup>339</sup> They used to be involved in the development of governmental policies and the declaration of indigenous laws formed from traditional norms and customs. Colonial authorities came and took over such royal responsibilities and stood between the kings and chiefs, to the level that some of the kings had their power extended beyond the chiefs while on the other hand, some kings became figure head on the throne.<sup>340</sup>

Looking at the scenarios illustrated above one is left to wonder, whether, that in the structure of governance at the grassroot level, why it has been challenging to remove the kings and chiefs. The kings and chiefs, although still exists and continuously perform important role in governance and conflict resolution, they lack constitutional roles. This is the heart of the matter when sympathising with the inability of several indigenous institutions which still flourish in today within African societies.

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<sup>336</sup> Chiefs respected their Kings so well that they held them in great reverence, usually accorded them with utmost obeisance, regarded them as representatives of the gods and as such semi-supernatural; upheld their words and authority as sacrosanct, expected a reciprocal gestures from them. Thus, Chiefs never expected their kings to be so absolute in the expression of rights and privileges.

<sup>337</sup> Olaoba et al (2010) 74.

<sup>338</sup> Crowder, MO Ikime (eds.) 'West African Chiefs: Their Changing Status under Colonial rule and Independence' (1970).

<sup>339</sup> Such changes include the advent of colonial administrators, the missionary impact, establishment of colonial styled courts which practised colonial laws, the introduction of Alternative Dispute Resolution (ADR), foreign pattern of government and cultural traits and in respect of human rights cases, the introduction of human rights court for the continent of Africa.

<sup>340</sup> Taiwo B, 'Government and Politics in West Africa: A Critical Approach Part' (1982).

It is imperative to know that despite the denial of the kings and chiefs to be involved in administration within the context of the constitution, the knowledge of conflict resolution never diminished. They (kings and chiefs) still operated behind the scene roles and duties in today's conflicts resolution.<sup>341</sup> This is similar to the fact of the revolution of conflict resolution ideal through time, kingdom and space therefore; no need to say that people's culture can be virile and transformative.

Conventional customs and norms gradually engineered good societies through network of relationship and as it has been shown above, had been productive in the area of development. The motivators of these developments were the kings and the chiefs in Africa as their role was so pivotal and undeniable. The example demonstrated by the kings with their chiefs that made the colonialists recognise their ability and capacity to bring together people as well as maintaining law and order. In essence, the British Overseers and colonialist observed and authorised the kings, at a representative level, to good governance which at the end of the day produced economic prosperity.

### 3.6.2 Ancestors and the notion of Justice in Africa

The ancestors had been metaphysically and mystically conceived in the mind of Africans and such spiritualism directed the system of belief of the Africans that death will certainly not write off the motivation to live and desire of African people as long as there is such perception of the cosmos, where spiritual forces interact in the scheme of existence.

Ancestors were regarded as the living dead enjoying dual presence and the skill attained while still alive normally acknowledge the level of reflections of world happenings in the spiritual world. This experience was never written off since the blood connecting them constantly flows in their descendants, who although, does not have the necessary knowledge,

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<sup>341</sup> In some African countries, Kings are still recognised and are assigned roles to play. For example, in Lesotho, the King retained some political prerogatives part of which includes the right to name one-third of the members of the Senate. See Paul Nugent, 'Africa since Independence: A Comparative History' (2012) 441. Swaziland is another country where the King still partakes in the decision making of the country. Infact it is the last absolute monarchy in Africa. The King shares the titles of head of State and head of government and he is not restricted by the Constitution or law. Any legislation passed by the Parliament only becomes law when such legislation is passed by the King. See Mike Unwin, 'Swaziland' (2012) 62. Uganda is another country where the King still plays a role in the governance of the country. It has five monarchies within it and although these Kings have little political power on the national level, they possess some influence in local and regional administration. See Rebecca Steffoff, 'Monarchy' (2008) 106. In the northern part of Africa, Morocco is another example of where the King still plays a pivotal role in the administration of Justice in Africa. Nothing official happens in Morocco without the Kings explicit sanction. See Pat Seward & Orin Hargraves, 'Cultures of the World: Morocco' (2005) 31.

must be directed to attain the necessary life experience. Such an experience is that of motivation and coordination in the art of conflict resolution. The belief was that the living dead would provide on their ancestral and peaceful community, the art of enabling peace and harmony, which certainly, is echoed in modular display of peaceful growth.<sup>342</sup> The skill of resolution of conflict will not have been restricted to earthly living and sojourn but that it continued in the ancestral society. The ancestral community would have been stimulated with a number of well-arranged deeds contemplative of the physical world; consequently the ancestral community is the psychic world hence the next phase of human transformation into the spiritual world.

The transformation of human beings into the divine world is basically a complete one in a way that the norms, physical behaviour and customs were remembered as the next stage of sojourn. Just like a person travelling to another village and would, on his his way, impact and touch his next haven of call and also looking back to check what must have been happening with his village of exit. It is enlightening to be informed that life is a constant flow of unending activities which but changes form from one person to another and age to age.<sup>343</sup>

### 3.6.2.1 **The Ancestors in Partnership with the Living**

Some form of relationship has existed amid the ancestors and the living and this partnership had been very affectionate and common but conceptualised spiritually. This sustained association had been clearly described by Fortes as follows:

When a particular deceased and it is always a particular person- is thus reinstated as an ancestor, it is because he has living descendants of the right category. His reinstatement in this status established his continued relevance for his society, not as a ghost, but as a regulative focus for the social relations and activities and that persist as the deposit, so he speaks of his life and career.<sup>344</sup>

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<sup>342</sup> For example, in Botswana, traditional or spiritual leader may use herbs, animal sacrifices and water to perform rituals aimed at resolving a conflict between the living; and between the living and their ancestral. According to tradition, chiefs could consult traditional healers to seek their views on various conflicts in the community. See KwakuOsei-Hwedie&MorenaRankopo, 'Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana' (2012) 45.

<sup>343</sup> The essence of discussing about this is to propel clearer understanding of a total difficult concept of ancestral living and hope that at the end, I would have been able to situate ancestral living within the context of unending activities of man in space and time, identify the ancestors as key players in the art of conflict resolution in African society, assess the spectacular roles of the living-dead in the life of the living persons especially in the art of conflict resolution; and examine the implication of conflict resolution between the ancestors and the living persons. There is no doubt that there is a networking of relationships between the ancestors who have been transformed into spiritual universe and the living persons who are sojourning in the earthly universe.

<sup>344</sup> Fortes M. and G. Disesten (eds.), 'Some Reflection on Ancestor Worship in Africa' in 'African System of

The connection between the ancestors and the living persons are separately understood between the different indigenous groups in Africa but the fact still remains that the living and the dead have been in constant touch. The way the relationship between the living and the dead is interpreted differs. For example, in Nigeria it is amphibious amid the Irigwe's but treble among the Tirikis in Kenya. With the Sisala of Northern Ghana, the forebearers are conceptualised as an image of social associations. They control social relations within the Lojagaa of Uganda. The persistent relationship and partnership in the consistent control of the society as revealed by the ancestors and the living is characteristic of the Suku of South-western Congo, the Ngas and the Sukuma in Tanganyika.<sup>345</sup>

The constant manifestation of conflict within indigenous Africa is attributable to the strong impact of the supernatural in the dealings of the living.<sup>346</sup> The world is a supernatural place that brings to a close, the coming together of many forces and to overlook these forces or undue tapping of the forces would always lead to conflicts. To disregard these forebearers as part of life sequence can set off conflicts and afflictions within the society, family and lineage.<sup>347</sup> To prevent conflict in indigenous African societies, it was necessary for fear of mystical forces like the ancestors.<sup>348</sup> The responsibility of the ancestors was to make sure there is social evenness and justice. Infact, governance was adequately bestowed on them. Noticeable distinction between the governance of the ancestors and that of the living persons were identified by jurists and it was resolved that the governance of the forebearers is 'pervasive and absolute' whereas that of the living persons is 'partial and liable challenge.'<sup>349</sup> What this presumes is the fact that the living are submissive to the forebearers.

### 3.6.2.2 Ancestors in Peace-making Process

Ancestors are one of the major characters in dispute resolution in Africa and as pointed out

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Thought' (1965) 122. Available at [www.afrikaworld.net/afrel/fortes2.html](http://www.afrikaworld.net/afrel/fortes2.html) (Accessed on 30<sup>th</sup> March, 2015).

<sup>345</sup> See Calhoun, CJ, 'The Authority of Ancestors: A sociological Reconsideration of Fortes Tallensi in Response to Fortes critics' (1980)15 (2) Available at [www.lucy.ukc.ac.uk/era/ancestors/calhoun.html](http://www.lucy.ukc.ac.uk/era/ancestors/calhoun.html). (Accessed on 30<sup>th</sup> March, 2015).

<sup>346</sup> Olaoba et al, 'African Traditional Method of Conflict Resolution' (2010) 80.

<sup>347</sup> Among the Sukuma of Tanganyika, an offence against the ancestors attracts afflictions which can only be atoned for thorough propitiation.

<sup>348</sup> Adewoye O, 'The Judicial Systems in Southern Nigerian' (1977) 147-149; and Ojo J.D., 'The Place of supernatural powers in the individual law with Particular reference to Nigeria' (1973) 1 *Nigerian Behavioural Science Journal* 1, were of the view that the supernatural had overwhelming influence on the moral conduct of the society through the facilitation of peace and harmony.

<sup>349</sup> See Calhoun CJ, 'The Authority of ancestors: A sociological Reconsideration of Fortes Tallensi in Response to Fortes Critics' (1980) 15.

earlier in this chapter, the ancestors once lived the universe before they transformed into the spiritual universe from where they watched over the affairs and activities of the living persons. With the transformation, it was believed that the forebearers were gifted with knowledge and skill of resolution of conflict beyond the living. Indigenous Africans believed that their ancestors transferred the skill of resolution of conflict to the living persons while leaving the natural world and this explains the reasoning why they ensure that whatever they left in the earthly world was preserved and maintained for the steadiness.<sup>350</sup>

The forebearers have motivational power and determination towards aiding the mechanism resolution of conflict as they are very wise, all-knowing and also because they have the experience and authority. They are also peace-loving thereby making them facilitators of peace and enhancers. According to Kopytoff,<sup>351</sup> 'it has ever been the avowed responsibility and rights of the ancestors to occupy a prominent invisible and invincible position at the scene of conflict resolution in Africa. The living elders, who are physically seen, though standing above all parties to the conflict and the evidence, are merely present as lieutenants of the dead elders.'<sup>352</sup> The forebearers are mystically around at the venue of conflict resolution no matter the kind of dispute whether lineage, family, clan or town level and the power of the living elders over any conflict in range was endorsed by the dead elders (ancestors).

On the presence of the forebearers in the resolution of conflict process, Calhoun is positive. This is a method which appears largely within African societies. He states as follows:

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<sup>350</sup> Oyedolapo D.B, Olaoba O.B, Anifowose R. & Yesufu A., 'African Traditional Methods of Conflict Resolution' (2010) Course Code PCR831, National Open University of Nigeria handbook 19. Available at [www.nou.edu.ng/NOUN\\_OCL/pdf/SASS/PCR%20831.pdf](http://www.nou.edu.ng/NOUN_OCL/pdf/SASS/PCR%20831.pdf) (Accessed on 5<sup>th</sup> August, 2014). See also, Olaoba O.B., 'Yoruba Legal Culture' (2002) 18.

<sup>351</sup> Kopytoff I., 'Ancestors as Elders in Africa' (1971) 41 *Africa* 129-142.

<sup>352</sup> Olaoba et al, 'African Traditional Methods of Conflict Resolution' (2010) 78.

Alternately, the ancestors may be called upon to resolve a dispute, to put it another way, disputants may carry out their arguments in the language of ancestral authority. Specific ancestors hold primary authority over groups larger than households (that is, larger than those headed by living parents). They are also the prime referents in the definition and differentiation of these corporate groups. The primary means of bringing the ancestral voice into the affairs of the living, and thus rendering an authoritative decision through divination.<sup>353</sup>

The living elders have a sacred responsibility to sustain the doctrines of power and authority of the forebearers and they also view the responsibility as a privilege and not as a right that must not be abandoned or abused. Where the responsibility is misused, the forebearers could exert their power to discipline blundering living elders and what this means is that the ancestors enjoy retributory powers that the living elders cannot comprehend.

Peace making process in indigenous Africa was informed by the existence of the forebearers that monitored the process and exercise of resolution of conflict. They are also present during council's inauguration, tribunals and panels accountable for putting social orders in place, upkeep of spirit of togetherness (*esprit de corps*), they also give their blessing and support.<sup>354</sup>

Peace making and peace building, as earlier discussed, are the creation of founded establishments which are the kings, chiefs and priests, part of which claimed heavenly rights, and the living elders, who are blessed with ancestral investiture of power and authority to make rules and also to design enduring policies important to the growth of the community.

### 3.6.2.3 Conflict Generating Traits and Ancestors

Ancestors, like human beings, also have character traits although there is a bit of difference among them. Ancestors are invincible to the living but the living are not invincible to the ancestors and the space among them is hard to read and quantify. Though it is easy to predict the character of human beings, the reverse is the case for ancestors. It is, however, noticeable that the ancestors have huge powers to do and not to do; they can display strong sense of lenience, could be angered over the smallest blunders of their descendants, inflict affliction and such other epidemics at the smallest of incitement and can set off conflict when not happy with the way the events are being conducted.<sup>355</sup> The ancestors at all times desire that the

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<sup>353</sup> Calhoun, C. J., 'The Authority of ancestors: A Sociological Reconsideration of Fortes Critics' (1980) *Journal of the Royal Anthropological Institute* 304-19. The ancestors not only know the wherewithal of communicating in the language of peace and harmony, but also powerful forces to reckon with in conflict resolution.

<sup>354</sup> David Francis, 'Peace and Conflict in Africa' (2008) 18.

<sup>355</sup> Kopytoff I, 'Ancestors as Elders in Africa' (1971) 129-142.

society evolve to the highest level of success but they, nonetheless, does not like desertion, detestation between kith and kin, greed, pretext, self-aggrandisement, indolence, dishonesties, assassination of character, molestation and harassment among others.<sup>356</sup> When one of these is committed, the likelihood of not perpetually incurring the ire of the ancestors is in abundant appeasement.

However, the ancestors are not interested in causing wars, bringing about epidemics with disease. Fortes<sup>357</sup> captured this point clearly as follows:

In short, the persecuting ancestor is not a supernatural being capriciously punishing a wrongdoing or rewarding virtue. He is rather to be thought of as an ultimate judge and mentor whose vigilance is directed towards restoring order and discipline in compliance with the norms of right and duty, amity and piety, whenever regression threaten or occur. When misfortune occurs and is interpreted as punitive, or to be more exact, corrective intervention by the ancestors, they believed to have acted rightfully, not wantonly, moreover, they are subject to the moral constraint that emanates from faithful worship. Though one cannot be certain that one's offerings and attendance will gain benevolence, one can rest that they will bind the ancestors to act justly.

It is important to appreciate the fact that African ancestors have always directed their attention on dealings with their offspring in the human world. The notion of creating conflict, an act which the ancestors are known for, is not so much a great interest and intention but they could want their offspring to maintain an ontological balance with them for the purpose of constant reminder of what will ginger the living persons not only to action but also to the right direction. No matter the kind of punishment given to them, it is always purposeful and corrective therefore the living person cannot take the African ancestors for a ride as a result of their physical absence from the worldly universe.

The ancestors can be called upon in spirit to establish the invincible and spiritual presence at the scheme of conflict resolution in African societies. The reconciliators at the scheme could be moved and swayed by the concealed forces dictating the scene of conflict resolution. They would have been tremendously directed to emphasise the obvious, stress the significant points in the issues of conflict and strike the canal of the truth pertaining to the resolution of the

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<sup>356</sup> AfuaBonsuSarpong-Anane, 'Globalisation and Indigenous Conflict Management: Experience from Africa' in Akanmu G. A., Jesse J. B. & Brandon D. L. (eds), 'Indigenous Conflict Management Strategies: Global Perspectives' (2014) 78.

<sup>357</sup> Fortes M., 'Some Reflection on Ancestor Worship in Africa' Available at [www.afrikaworld.net/afrel/fortes2.html](http://www.afrikaworld.net/afrel/fortes2.html). (Accessed on 30<sup>th</sup> March, 2015).

conflict.<sup>358</sup>

The consideration of the fact of the conflict by the mediators, disagreeing parties, witnesses and the watching viewers could have been made possible by the peaceful atmosphere made possible by mystical principle of the ancestors, around the venue of conflict resolution. Atmosphere like this is charged with maximum attention, intention and commitment, all directed at eradicating falsehoods and misrepresentation but conversing and hammering on the truth and nothing but the truth.<sup>359</sup>

### 3.6.3 Elders and Family Heads

Elders and family heads, in indigenous African societies, played important roles in conflict resolution. Such roles include political, social and at times, religious. They also act as important characters when facilitating peace and harmony in their various jurisdictions. Family heads are seen as elders in their family compound and in the larger society; there were also elders in wards and quarter levels of the society.

The position of an elder in the indigenous Africa societies was determined with age, maturity, wisdom and knowledge posturing like in the Igbo community and the Yoruba community in Nigeria;<sup>360</sup> wealth and stature were not used as a determining factor. Maturity needs considerable level of development and extent of responsibility and wisdom, without these, a man cannot successfully participate in the act of resolution of conflict. They remained the focus of attention by the youth and the adolescents for joy and happiness, rewarding vocation and association as well as being regarded as repository of knowledge and wisdom and as shining examples of projecting a lasting sense of history of the society.<sup>361</sup>

It is significant to be informed that there is no interim periods in the life's stages in African societies, it is the era defined by the level of mind-set and the interest and passion of the youth<sup>362</sup> and the living elders.<sup>363</sup> Youth can be exuberant while at the same time, the

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<sup>358</sup> Tanner E. R.S., Ancestors Propitiation ceremony in Sukuma, Tangayika, (1958) *Africa* 1. See also Elders, Office holders and ancestors among the Sisala of Northern Ghana (1976) *Africa*.

<sup>359</sup> It is important to note here that truth is the language of the ancestors and the instrument of facilitating peace and harmony in African societies. To do otherwise will incur the wrath and anger of the ancestors; whereas it is not easy to annoy the ancestors. See, Ancestors as Elders in Africa (1971) 129 – 142.

<sup>360</sup> Uzoma Oyemaechi & Ann Arbor, 'Igbo Political Systems' Available at [www.umunna.org/politicalsystems.htm](http://www.umunna.org/politicalsystems.htm) (Accessed on 6<sup>th</sup> August, 2014).

<sup>361</sup> Age, sex and status have been adjudged prominent matrices of role play and modelling in African indigenous societies and these three have influenced seniority and maturity. They also determined experience and wisdom.

<sup>362</sup> They learn fast and acquire knowledge.

elders being unassuming in imparting knowledge; refusing to learn from the elders is not to appreciate the method of governance and resolution of conflict for the upcoming generation. Therefore, both elders and the youths are development partners in the maintenance of peace and harmony in Africa traditional societies<sup>364</sup>

### 3.6.3.1 Elders and Synergy for Effective Conflict Resolution

The elders in the indigenous African societies had the ability to initiate growths, provided anticipation into the future of the society and enabled peace and harmony the preserves of law and orderliness, which indicated social engineering. This explains the fact that the living elders have been instilled with the skill of resolution of conflict that is, the protection of truth and forecast of progress in African societies.<sup>365</sup>

With sterling attributes, the elders were able to interact perfectly with the members of their societies to the extent of notifying the people about the activities of development and thesis of companionship and social engineering.<sup>366</sup> They were so devoted to the growth of the community to the extent that the derivative skill of administration had its grip in both integrated and headless communities.<sup>367</sup> Among the centralised societies were the Swazi and Zulu of South Africa, the Mossi of Burkina Faso, the Fante of Ghana, the Yoruba of Southwest Nigeria and the Hausa of Northern Nigeria while for the acephalous societies were the Mbeere of Kenya, the Kokombo of Togoland, the Jie of Uganda and the Fulani of Northern Nigeria as well as the Igbo of South-eastern Nigeria.<sup>368</sup>

As mentioned earlier, status and age are not factors of defining social classificatory models in African communities; the elders thus had the privileges of maturity and experience through which they performed their primary functions, particularly the art of resolution of

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<sup>363</sup> They impart sufficient practical knowledge on the youth who will later take over the reign of affairs from them.

<sup>364</sup> The objective behind discussing about this is to bring forth, the wisdom of elders and family heads in the art of dispute resolution, to assess the peace making capacity of the elders and the family heads, identify the roles of the elders and family heads in conflict resolution and weigh the challenges before the elders and family heads in the process of conflict resolution in African societies. Through the discussion on this, I stand at the vantage position of appreciating the value of wisdom as applicable to the day to day life activities and how to cope with the challenges of the time and so do other people that will have the opportunity to go through my work later in life.

<sup>365</sup> The elders were attributed with sterling qualities which stood them out of the society and these qualities included forbearance, tolerance, patience, foresight, innovative spirit, self-control, forthrightness and commitment to development process.

<sup>366</sup> Olaoba O.B., 'Yoruba Elders and the Control of juristic thought' (2006) 1 *Peace Studies and Practice Journal of the society for Peace Studies and Practice* 1.

<sup>367</sup> Mendosa E. L., Elders, 'Office Holders and Ancestors among the Sisala of Northern Ghana' (1976) *Africa* 46.

<sup>368</sup> Olaoba et al (2010) 89.

conflict. The knowledge and understanding of conflict resolution is obtained from their forbears and elders were seen as ancestors in African societies.<sup>369</sup> What this means is simply the understanding and knowledge of elders were transferred to them by their ancestors who formerly had the primary understanding and wisdom of the worldly conflict resolution model. It is also important to conclude from the ancient transfer of knowledge on the living elders that African communities had in existence its own conflict resolution models before Western influence came. The living elders, thus, were the mechanisms of transition of knowledge and experience of conflict resolution in African societies.<sup>370</sup>

The attainment of knowledge and wisdom of resolution of conflict by the African elders empowered them to own, in excess, the lores (proverbs, maxim and folktales) through which they encourage parties to a conflict and the viewers at the venue of the conflict resolution.<sup>371</sup> It is however, not easy to obtain and perfect as well as relate the knowledge lores to matters of conflict.<sup>372</sup> To have been encouraged by the elders in a particular conflicting situation means the demonstration of the skill and scope of the sages in the art of conflict resolution. The elders had the wealth of power of influence and conviction obtainable from wisdom lores.<sup>373</sup>

The elders in the process of conflict resolution, either at the ward or family or quarter level, normally exhibit the belief in the omnipresent of the ancestral spirit, hope in the impartation of ancestral knowledge and control of the proceedings, application of the norms and customs of African society and the ability to end the feud in focus.<sup>374</sup>

The elders of the Tiriki from Western Kenya proved the example of the judicial role expected of them; thus Sangree analysed the roles of the Tiriki elders in a perfect way as follows:

The judicial elders who habitually gather at the community centre in the mornings may always be prevailed upon by any man in the community to arbitrate a dispute. Boys, girls, and women customarily have their grievances presented by an adult brother or father... The plaintiff pleads his own case or the case of the aggrieved woman or child he represents, and he may bring as many witnesses as he wants to substantiate his story and give supporting evidence. The defendant or his or her guardian then presents his own case and names witnesses whom

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<sup>369</sup> Kopytoff, 'The Ancestors as Elders in Africa' (1971) 129-142.

<sup>370</sup> Olaoba O. B., 'Yoruba Elders and the control of Juristic Thought' (2006) 1.

<sup>371</sup> Mendosa, E.L. 'Elders, Office Holders and Ancestors among the Sisala of Northern Ghana' (1976) 1.

<sup>372</sup> Lores were used at an impromptu manner, thereby suggesting the mental alertness and versatility of the living elders.

<sup>373</sup> Townsend N., 'Age, descent and Elders among the Pokomo Africa' (1977) 47.

<sup>374</sup> Olaoba et al, 'African Traditional Method of Conflict Resolution' (2010)

the judicial elders may then summon to give testimony on his behalf. During the entire proceedings, all adult men and elderly women may ask the judicial elders for permission to express their opinion on the case, or add further evidence, and the elders may themselves call on anyone; including women and children to present testimony. The matter on which the judicial elder finally pass Judgement is not necessarily that which the plaintiff first presented. Indeed, the original accusation may be judged irrelevant to some other question that arises during the trial and that is deemed of greater importance by the elders. The original defendant may even be acquitted and final Judgement made against someone else, even the plaintiff.<sup>375</sup>

The above activities amid the Tiriki of Kenya show the element of fair play and justice in the course of conflict resolution. The elders will not be able to do otherwise as their obligation was focused towards peace and harmony for the parties to the conflict and the society at large.

### 3.6.3.2 Family Systems and Conflict Resolution

The family is a social entity and the basis of relationships and development. It remain the entity for political culture in Africa and thereby the footing of conflict resolution. The art of conflict resolution encouraged peace and harmony for the African population and this presumes the fact that the family must first enjoy the joy of peaceful and cordial living before it spreads to the larger society.

At the level of the family, peace and harmony had been the basis of a constructive and comprehensive political culture and at this level, the coordinators of peace and harmony were the family heads, who in their own rights, were considered as elders. Infact, family heads are presumed to be the most aged.<sup>376</sup>

The head of the family had the ability and skill to resolve clashes within the family set up and as the eldest in the family and an ancestor in the making they exhibited the art of resolving conflicts as bestowed to them by the family ancestors. They had the ability to provide solutions to conflicts like marital brawl between co-wives in the family, between wives and husbands, between children and mothers as well as quarrels arising from property inheritance. Any clashes that the family head was incapable to determine were referred to the ward heads.<sup>377</sup> They were always cautious of the cord of unity among family members therefore they

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<sup>375</sup> Cited in Ajayi A. & Buhari L., 'Methods of Conflict Resolution in African Traditional Society' (2014) 8*African Research Review* 142.

<sup>376</sup> Bascom, W. R., 'The Principle of Seniority in the social structure of the Yoruba' (1942) *American Anthropologist* 44.

<sup>377</sup> Olaoba O. B. 'Yoruba Elders and the control of juristic thought' (2006) 1. See also Mendosa E. L., 'Elders, Office Holders and Ancestors among the Sisala of Northern Ghana' (1976) 1; Ayitsey G.B.N, 'Indigenous African Institutions' (1991) 26; Gluckman M, 'The Reasonable man in Barotse Law' in 'Order and Rebellion in Tribal Africa: Collected Essays with an Autobiographical Introduction' (2004) 178.

exercised caution, patience and level headedness when resolving conflicts and this was widespread in African indigenous societies.

### 3.6.3.3 Elders as Icons of Conflict Resolution

The African elders, as discussed earlier, were representatives of the spiritual forces and also symbolised the authority game in them. It is, nevertheless, important to interpret the hero of the heavenly beings which assisted the perfect implementation of power behind the conflict resolution in indigenous societies in Africa. They were seen as reformers with influence which symbolisation led to stronger hold and control in indigenous African societies and the fact that representational stance involve alot in delivery of service of spiritual guidance must be understood. The symbolisation of the ancestral power meant greater impartation of the social idea and justice.<sup>378</sup>

Elders as iconoclasts in Africa submits that the formulation of the ancestral power tremendously gave progressive or undesirable consequences based on the level playing ground for representation and symbolisation of power. They heroic in the growth process as product of legitimacy and symbolisation of control and authority.<sup>379</sup> As models; they were seen as elderly persons in the physical domain of the universe and younger persons in the divine arena and their influence in resolution of conflict was similar with the physical combined with spiritual voice resounded in order to institutionalise peace and organising harmony. They make sure of strong sense of justice and good principles equivalent to advanced projection of growth plan in indigenous African societies.<sup>380</sup>

### 3.6.4 Age-grade Association

As pointed out earlier, age, sex and status have been social phenomena in African societies. They have been determinants of identity, social relevance and instruments of development. Africans have always been cautious of their birth, status and the manner of identification with their societies and this still happens. Age bracket made it possible for people to get along with their

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<sup>378</sup> Such symbolisation of power conferred on the elders include investiture of authority, capacity for articulating norms and customs, ennoblement of personality, awareness of the wellbeing of the society, legitimacy of representation, linkage between abstract and sincerity of purpose, enablement to be divinely decisive and firsthand knowledge of ritual disposition for resolving conflicts in traditional African societies. See Akanmu Adebayo et al, *Indigenous Conflict Management Strategies: Global Perspectives* (2014) 93.

<sup>379</sup> Ernest Uwazie (ed.), 'Alternative Dispute Resolution and Peace-building in Africa' (2014) 88.

<sup>380</sup> Olaoba et al (2010) 89. See also Ann Skelton, 'Tapping indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of crime in South Africa' in Van der Spur, Parmentier S & Dissel A (eds.), 'Restorative Justice: Politics, Policies and Prospect' (2007) 228-246.

group peers and companions; it consists of people of roughly the same age while the degree of difference depended largely on the nature of social stratification but this differs from community to community.<sup>381</sup>

A person was born into a society and within a cultural context, growing up entails that he finds relevance and substance within a group germane to his physical growth, where he could find succour and social significance. Although, a person's membership of age-grade association changes from time to time, depending on the number of years designed for the association, there was always the enthusiasm and interest to contribute to the association's activities and programmes irrespective of the number of years of membership.<sup>382</sup> Each age-grade association recognised active participation, sense of belonging and social relevance towards development.

No matter the pain of belonging to a particular age-grade association might have been on indigenous African societies, the mode of mobilisation of the members showed the capacity to initiate programmes of development and the acquisition of wisdom to forge ahead, not only as members of the association but also as members of the society, was quite in focus.<sup>383</sup> Graduation into levels of organisation suggests the various channels of development and units of challenges in African indigenous societies.



#### **3.6.4.1 Age-Grade Association and Task Force Mandate**

Age-grade association can be ascribed to a task force which was given a special mandate in indigenous African societies. It was an organised labour unit working for the development of the society and charged with mandates of building and repairing the roads, tidying up the market square, drenching the streams and the rivers, felling of wild trees, clearing palaces and shrines and protecting lives and properties.<sup>384</sup> These mandates ensured the well-being and social welfare of the populace thereby making them peaceful and ready to shun chaos and violence. In fact, law and order was ascertained and sustained in indigenous African societies.<sup>385</sup>

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<sup>381</sup> Otite, O &Ogionwo W, 'An Introduction to Sociological Studies' (1994) 51. The age grade association in indigenous Africa society was not so much of identification with a particular group in the society but for the purposeful attention accorded them by members of the society, whose needs as the situation might have been, going through the stance of Otite and Ogionwo, the association capably satisfied.

<sup>382</sup> Otite, O &Ogionwo W (1994) 51.

<sup>383</sup> Fajana A., Age-group in Yoruba Traditional Society (1968) 98.

<sup>384</sup> Bona Udeze, Why Africa?: A Continent in a Dilemma of Unanswered Questions (2009) 72.

<sup>385</sup> Olaoba et al, 'African Traditional Methods of Conflict Resolution' (2010) 97.

To be a member of the task force was suggestive of the fact that maturity was in vogue and mental alertment was par with the taskforce mandate and it was always a thing of joy for a man to belong to the task force. Among the Bantu Tiriki of western Kenya, there was a special grade of warriors, also with the Swazis and the Zulus.<sup>386</sup> In many African societies the task force was recognised for its military strength and process as well as their intelligent projection and as observed that in battle there was conflict and chaos but in peace there was harmony and mutuality which signalled development.<sup>387</sup>

The social engineering in African indigenous societies was such that the integrative force in place projected and sustained law and order germane to the progress of the society. The task force which the age grade typified in African indigenous societies had been quite instrumental to the notion of proper organisation of ideas, duties and functions for which an individual as a member of an age grade association and as a member of the entire gamut of the society should play and actualise so credibly. Peace process was also anchored on task force mandate and this shall be discussed subsequently.

#### 3.6.4.2 Age-Grade Association and Conflict Resolution

Conflict resolution was tailored towards the restoration of peace and enhancement of harmony in African indigenous societies though it was not an easy task. It was desirous of knowledge, wisdom and experience, also aligned with social responsibilities of the age grade association. The association played significant roles in the process of conflict resolution as members had the capacity to ensure mutuality and harmony.

The age group association were forceful in action, dynamic by mindset, enthusiastic in manners, versatile in social engineering, intimidating in the struggle, spectacularly youthful and blunt in the pursuit of truth.<sup>388</sup> These qualities enabled the age grade association to be a power to reckon with in the reconciliatory process of restoring peace and harmony back to the

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<sup>386</sup> Sangree W. H., 'The Bantu Tiriki of Western Kenya' (1965) 49-52.

<sup>387</sup> The Swazi, Zulu and Tswana had well organised age-groups noted for their regimentation. Among the Ashanti, Bemba and Pondo age-grouping was of lesser degree. Age grade association had its age unit and period when their efficiency waned. Among the Turkana and Gusii, the strength of age grade association waned in old age; among the Yako of Cross Rivers the diminishing return sets in after the middle age, whereas among the southern Ibo and Ibibio groups and some parts of Yorubaland, the military functions of the age-grade association almost always terminated at the middle age. According to Udeze, (2009) 72, difference existed among the various ethnic groups concerned age-grade associations, which can be identified in the different types of activities and tasks performed by them. See Udeze (2009) 72.

<sup>388</sup> Townsend N., 'Age-descent and elders among the Pokomo' (1977) 4.

society. Their existence was one good innovation which proved quite successful in the sustainability of law and order in some traditional African societies.

The involvement of individuals with oratory talents and mediating skills in a given age grade association resonated with the fact that conflicts never remained unresolved in traditional African societies<sup>389</sup> and as observed by Glazier<sup>390</sup> among the Mberee:

Moots were not standing bodies in the sense that the same group of men had all the cases but were situational assemblies which disbanded when any case concluded. Because argumentation, persuasion and compromise determined the outcome of a dispute, the personal talent of moot members were emphasised and particular men from the pool of elders appeared as councillors in case after case. An individual's ability to serve on such a moot was not contingent on his membership in a particular class or set without exception informants stress ability rather than set or class as the major criterion in most participation and leadership.<sup>391</sup>

The age-grade associations were used to perform police duties since they were considered as having military prowess. Such duties included summoning offenders to the scene of conflict resolution, watching over the behaviour of parties to the conflict at the scene of reconciliation, ensuring adherence to and application of the norms and customs governing conflict resolution and especially protecting the lives of the crowd of spectators present at the scene of conflict resolution in African indigenous societies.<sup>392</sup> The age-group association, especially the youthful sets, played considerable roles in peace process and the actualisation of reconciliation and it was challenging for them to ascertain truthful disposition of the audience at the scene of conflict resolution. Perhaps more challenging was the fact of compromise among the tribunal or moot to reach reasonable conclusion of restoring peace and harmony back to the society.

### 3.6 Punishment in Traditional African Justice System

The African Indigenous Justice System is process-oriented with the main goal of restoring peace,

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<sup>389</sup> For example, the Mberee of Kenya had a significant moot proceeding which recognised the capacity of the individuals in conflict resolution.

<sup>390</sup> Glazier J., 'Generation Classes among the Mberee of Central Kenya' (1976) *Africa* 46 at 313-326.

<sup>391</sup> According to James I. Gibbs, 'The Kpelle Moot: A Therapeutic Model for the informal settlement of disputes' (1963) *African Magazine*, 33<sup>rd</sup> Edition, at 1-11, the moot among the Kpelle of Uganda was a therapeutic model of conflict resolution. Similarly, the moot among the Suku of South-Western Congo, recognised the talent of the advocate in pleading for a case. The Yoruba of south-western Nigeria had a different approach of the age-grade association towards conflict resolution although they recognised talent possession by an individual member of the association; it further required maturity, experience and wisdom. See also Kopytoff I, 'Family and Lineage among the Suku of South-western Congo' in Robert Gray & Gulliver PH, 'The Family Estate in Africa: Studies in the Role of Property in Family' (2013) 83.

<sup>392</sup> Otite O & Ogionwo W (1994) 51.

relationships and the social harmony which has been disrupted by conflict. Sanctions are applied as a last resort only after all other efforts have failed to realign the recalcitrant individual. Punishment for its sake is viewed as being contradictory to the prevailing principle that human beings are inherently good and capable of change in the society. Sanctions, when appropriate, are used to restore the victim's harm and losses and community equilibrium.<sup>393</sup>

Despite the restorative goals of the African Indigenous system, punishment was still imposed by the community for the maintenance of law and order in the traditional society. It was rationalised as a means to an end rather than an end itself and it was necessary in the case of repeat of offence by the offenders or those who posed serious threats to life or property. Punishments in that case are justified as an attempt to reinforce moral boundaries in punishing the evil-minded and in giving reassurance to those who conform to society's norm. For example, in traditional Tswana society, the punishments decreed varied widely. They ranged from admonishment, restitution, fines, corporal punishment, banishment and 'eating up', to capital punishment. 'Eating up' was a punishment where the offender's possessions were forfeited, his lands taken and his huts burned; and the offender was usually banished. Such severe punishment was rarely imposed, since chiefs relied upon the continuing support of their subjects to strengthen the polity.<sup>394</sup>

Punishments meted out on offenders were applied with utmost care since the offender still remained a member of the family, who is expected to contribute to the community's well-being in the future. Therefore, it must not be too debilitating or further alienate the offender and it is always fines.<sup>395</sup> Abominable acts and violent serious cases such as rape, in addition to fines, attracted the penalty of ridicule and ostracisation.<sup>396</sup> Reintegrating alienated individuals into the community was always the primary goal of the African justice system and this concept can be compared to the Confucian concept of Jen (virtue) and the feminist ethics of care as described by Li.<sup>397</sup> Jen and care societies are non-contractual, unlike Western societies that are based on the aggregation of rational individual with self-interests and defined rights. It is also not based on

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<sup>393</sup> Olaoba et al (2010) 51.

<sup>394</sup> Eileen McCarthy-Arnolds, David R. Penna & Debra Joy Cruz Sobrepena (eds.), 'Africa, Human Rights, and the Global System: The Political Economy of Human Rights in a Changing World' (1994) 213.

<sup>395</sup> The fines imposed as punishment were always commensurate with the offence committed and it is ensured to be what the offender can reasonably afford.

<sup>396</sup> The range of punishments used in the African Indigenous Justice System is extensively discussed by Elechi O. in 'Doing Justice without the State: The Afikpo (Ehugbo) Nigerian Model' (2006) 39.

<sup>397</sup> Li, C. 'The Confucian Concept of Jen and The Feminist Ethics of Care: A Comparative Study' (1994), vol. 9(1), 70-89. He argued that the Confucian Jen and care from the feminist perspective represent the highest ideals for society.

patriarchal values and male/masculine world. Relationships in Jen and care societies are like family relationships that are voluntary and non-contractual. Concepts like morality, fairness and justice, for this reason, are not narrowly defined as being limited to the individual's rights as enshrined in law.<sup>398</sup>

Looking at this concept, it can be picked out that it is similar to the concept of *Ubuntu* where the individual is defined in terms of his relations with others. An individual has meaning and significance only in relation with others as no individual is self-sufficient.<sup>399</sup>

Abuses were also evident in charges of witchcraft, which could be brought against any citizen whom others felt had succeeded through enhancement. Since the charge could be proven by questionable circumstantial evidence, sorcery was a difficult charge to defend against.<sup>400</sup> However, more enlightened chiefs discourage charges of sorcery.<sup>401</sup>

This continued with some exceptions. The colonial administration removed certain cases such as homicide, sorcery and treason from the traditional courts<sup>402</sup> as they were forbidden to impose capital punishment.

### 3.7 Women and the African Indigenous Justice System

To understand the African indigenous justice systems and processes, a review of African pre-colonial political organisation is important and this has been discussed in chapter two of this thesis. As stated earlier, the social history of Africa falls into three periods to wit: the pre-colonial, colonial and the post-colonial periods. The interest in African pre-colonial societies is

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<sup>398</sup> Gilligan as cited in Li (1994) 70-89 posits that the construction of moral understanding is not based on the primacy and universality of individual's rights but rather on a very strong sense of being responsible to the world.

<sup>399</sup> According to Shutte, 'Philosophy for Africa' (1993) 47, Ubuntu unites the self and the world in a particular web of reciprocal relations in which subject and object become indistinguishable, and in which I think, therefore I am, is substituted for I participate, therefore I am. He argued that this concept might be somewhat confusing for someone with Cartesian orientation whose understanding of individuality now has to move from solitary to solidarity, from independence to interdependence, from individuality vis-à-vis community to individuality a la community.

<sup>400</sup> Alec C. Campbell, 'The Rural Economy: A Sociological Perspective' (1971) 3 *Botswana Notes and Records* 193.

See also Eilen McCarthy et al, (1994) 213. In pre-colonial the Lango of Uganda imposed a mandatory death sentence on those caught in the act of witchcraft, incest and sexual aberrations. See Driberg J, 'The Lango: A Nilotic tribe of Uganda' (1923)9; Roscoe J, 'The Bagisu and other Tribes of the Uganda Protectorate' (1924) 39-40, 42, 102 & 118. Also in pre-colonial Sierra Leone the punishment of witchcraft and cannibalism was death. See the Report of the National Coordinator of Sierra Leone, Abdul Tejan-Cole, presented at the First International Conference on the Application of the Death Penalty in Commonwealth Africa in Entebbe, Uganda from 10 – 11 May, 2004.

<sup>401</sup> Eilen McCarthy et al, (1994) 213.

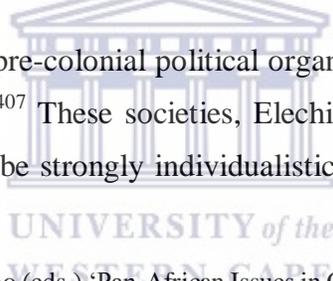
<sup>402</sup> Diana Wylie, 'A Little God: The Twilight of Patriarchy in a Southern African Chiefdom' (1990) 108-109.

because of the relevance of these institutions in African Peoples' life today<sup>403</sup> and the indigenous justice systems in Africa reign in the rural areas where majority of African resides.

According to Elias<sup>404</sup> and as already pointed out in chapter two of this thesis, African pre-colonial political organisation are categorised into two broad groups wherein the societies in the first group had a centralised political authority, 'administrative machinery' or 'judicial institution'. Societies in this group are generally heterogeneous but differ to one political superior, usually the 'paramount chief' or 'the King in Council.'<sup>405</sup>

Busia Jr. noted further that the King did not rule for life and that he remained in the office for as long as he enjoys the good will of his people. Any of his subjects has constitutional rights to institute impeachment proceedings against him and the case succeeds if the applicant is able to convince the majority of the councillors that the king has breached his oath of office and where such applicant fails with his case, he could pay with his life.<sup>406</sup>

The other category of the African pre-colonial political organisation is the African societies with a decentralised political authority.<sup>407</sup> These societies, Elechi said, were erroneously believed to possess no laws or leaders and to be strongly individualistic and societies in this group include



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<sup>403</sup> Anita Kalunta-Crumpton & Biko Agozino (eds.) 'Pan-African Issues in Crime and Justice' (2004) 164.

<sup>404</sup> Elias T. O. 'British Colonial law: A Comparative Study of the Interaction between English and Local Laws in British Dependency' (1962) 9.

<sup>405</sup> Societies in this group are the Zulus of South Africa, the Bembas of Zambia, and the Banyankole of Uganda among others. These African societies comprise several ethnic groups, which explain the necessity for the use of force to hold them together. There are class distinctions based on wealth, privilege and status and the incidence of organised force which is principal sanction in a society based upon cultural and economic heterogeneity. See Anita K & Biko A (eds.) (2004)164. Another example of a pre-colonial African society with a hierarchical political arrangement is the Ashanti of Ghana. Busia Jr., 'The Status of Human Rights in pre-colonial Africa: Implications for Contemporary Practices' in McCarthy-Arnolds et al. (eds.) 'Africa, Human Rights and the Global System' (1994) 213; observed that the social organisation of the Ashanti was and remains based on Kinship lineage networks. The political body was centred around the kinship system and the heads of the various lineages. They operated a federal system of government that comprised about twenty-two Chiefs (petty Kings), their political authority rested on the King, together with other paramount Chiefs who constituted the Ashanteman council. According to him, the Head of the council remained the king whose headquarter was in Kumasi. The Council, as the major authority, had power to maintain law and order and it also had the authority to declare war and also enter into treaties with other tribal groups. Each member of the Council had a different role. Next to the King who had executive powers was the Prime Minister while each of the councilors managed a portfolio like finance, public relations and so on. Two other offices worthy of note were the head of all women within the federal system known as the Queen-mother and the head of the youth whose office had no political significance. The office of the King was an elective one and eligibility was limited to members of the royal family. The Prime Minister acts in the event that the incumbent dies, abdicates his office or is deposed from power. The Queen-mother, as the head of the royal family, is constitutionally empowered to nominate a candidate for the office of the King.

<sup>406</sup> Busia Jr. (1994) 213. See also Elechi O.O., 'Women and African Indigenous Justice Systems' in KaluntarCrumpton & Agozino B (eds.), 'Pan African Issues in Crime and Justice' (2003) 165.

<sup>407</sup> Elechi O. 'Women and African Indigenous Justice Systems' (2003) 165.

the Logoli of Western Kenya, the Tallensi of Northern Ghana, the Nuer of Sudan and the Igbos of Southern Nigeria.<sup>408</sup> The participatory democracy and egalitarian outlook of the people were not affected by the hierarchical socio-political arrangement. It is noted, however, that certain levels of political discourse, women and children were not allowed full participation.<sup>409</sup>

This system had certain internal mechanism for the maintenance of law and order and also for the enforcement of political decisions and the Igbo people of Nigeria are said to be good example.<sup>410</sup> Everybody, including the villages, has equal rights and privileges; decisions reached at these general meetings were through consensus which was essential as sanctions against recalcitrant persons or groups were rarely enforced by force. All had a voice in these meetings, even though the elders, especially the ruling age grade, wielded a lot of influence.<sup>411</sup>

At the village level, what obtains can be said to be direct democracy; all adults, including men and women, are represented though talks are dominated by men.<sup>412</sup> Women are not allowed to talk except when they are directly involved, either as a witness, plaintiffs or defendants, and they can also initiate the proceedings as a group or make a representation as a group.<sup>413</sup>

According to Elias,<sup>414</sup> the role of the individual in a given society depends in the last resort upon his place in the society. How he fits into the society is majorly conditioned by the nature of the particular society and the reason why it is necessary to determine the exact position of an individual in the social structure is because it is only through the assessment that we can understand the extent of his rights and duties, the range of social activities in which he may or must participate and his opportunities for personal differentiation within his community.<sup>415</sup> The legal aspects of the individual's social relations which affect his/her acts or omissions with

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<sup>408</sup> Onitsha, Agbaja and the Aro-Chukwu according to Uchendu V.C. in 'The Igbo of Southeast Nigeria' (1965), are few of the Igbo societies that were not completely acephalous. He said however, that the villages in these communities remained autonomous and leadership was exercised through the Council of Elders.

<sup>409</sup> Elechi O., 'Women and African Indigenous Justice System' (2003) 165.

<sup>410</sup> The Igbos had no political arrangement that could be called a federation, a confederacy or state. Whenever there is a case or matter that affects the whole village groups, representatives of the villages will meet in a general assembly. Where a person is not available at a decision making meeting, such person cannot and will not be bound by the decision(s) taken from such meetings. See Elechi O.O., 'Doing Justice without the State: The Afikpo (Ehugbo) Nigerian Model' (2006) 69.

<sup>411</sup> Elechi O.O. (2006) 69.

<sup>412</sup> Elechi O. O., 'Women and African Indigenous Justice System' (2003) 166.

<sup>413</sup> Elechi (2006) 69. The setup is aptly summed up by Uchendu V.C., 'The Igbos of South-West Nigeria' (1965) 46 as follows: The picture of the Igbo political community which emerges from these settings is one that is territorially small enough to make direct democracy possible at the level; and in which there are leaders rather than rulers, and political cohesion is achieved by rules rather than by laws and by consensus rather than by dictation.

<sup>414</sup> Elias T.O., *The Status of African Customary Law* (1972) 76.

<sup>415</sup> Elias (1976) 76.

regard to all others within his/her world daily activity tend to create a concern.

Social control in society is achieved through formal and informal mechanisms.<sup>416</sup> To understand the status of African women under the community's traditional justice system, an examination of the institutions of marriage and family as well as the laws and customs of the people is important. Marriage systems and the African extended family system, aside from both reflecting the social and economic conditions of societies, they also have implications for the status of women. Customary laws also have been known to reproduce oppressive patriarchal values and practices.<sup>417</sup> Informing this viewpoint is the belief that modern state by its nature and agenda has a better view of the rights of women and other minority groups.<sup>418</sup>

Understanding the way women coped with the African indigenous justice system will lead to a review of the women's organisation and this is important and as mentioned earlier, pre-colonial Africa is categorised into two political structures which are centralised and decentralised. The Igbos people of Nigeria had a centralised, hierarchical political structure<sup>419</sup> and pre-colonial Igbo political culture has been described as 'dual sex.'<sup>420</sup> This is because women operate separate social and political organisations through which they exercise power over their membership. It has been argued that there is no generic or universal woman. Women under the African system operated a parallel social and political institution as that of the men.<sup>421</sup>

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<sup>416</sup> Formal social control methods are coercion-oriented, as in the functions of criminal justice officials while informal mechanisms of social control tend to be persuasion-oriented and relate to the controls exercised by the institutions of marriage, family and peer groups. See Elechi O.O. on 'Women and the African Indigenous justice system' (2006) 70.

<sup>417</sup> Recent experiences of Aboriginal women with customary laws confirm customary sanctioning of sexual offenders in particular has been ineffective in curbing sexual violence against women and children. Besides, certain customary cultural values of kindness, reconciliation and family cohesiveness may in fact prevent Aboriginal women from officially reporting violence in the home. See Richard Tewksbury & Matthew Lees, 'Perceptions of Punishment: How Registered Sex Offenders View Registries' (2007) 53 *Crime & Delinquency Journal* 380-407.

<sup>418</sup> The institutions of marriage, family, divorce and African feminist theories has being extensively dealt with by Elechi in his book 'Doing Justice without the State: The Afikpo (Ehugbo) Nigeria Model of Conflict Resolution' (2006) 164.

<sup>419</sup> An example is the Onitsha Igbos.

<sup>420</sup> See Rose Uchem, 'Overcoming Womens Subordination in the Igbo African Culture and in the Catholic Church: Envisioning an Inclusive Theology with Reference to Women' (2001) 46.

<sup>421</sup> According to Nzegwu, under this dual-symmetrical structure, women had their own Governing Councils- Ikporo-Onitsha, Ndinyom- to address their specific concerns and needs as women. The councils protected womens social and economic interests, and guided the communitys development. This dual-symmetrical structure accorded immense political profile to women both in communities with monarchies (on the western side and some parts of the eastern banks of the River Niger- Onitsha, Ogburu and Oguta), and in the non-centralised democracies of the eastern hinterland. See Nzegwu (1995) 445- 446.

### 3.8 Conclusion

The primary goal of African Indigenous Justice System is the restoration of victims, the community and also the offenders since it is justice centred. To resolve the conflict, it is important that the physical, emotional, psychological and financial losses suffered by the victim are restored. Conflicts cannot be considered fully restored until the peace, relationships and social harmony damaged by the conflict is restored also. Victim vindication is very important and also empowering to the victim, as all stakeholders including the offender and the community members acknowledge the suffering of the victim.

*Ubuntu* is the basis of African communal cultural life and it expresses Africa's principle of caring for one another and the spirit of mutual support. Offender accountability includes taking personal responsibility to repair the harm caused the victim and atoning to the community for disrupting their peace and violating societal norms.<sup>422</sup>

It is also a very important goal of the African Indigenous Justice System to reintegrate offenders into the community. The belief is that human beings are by nature good but are capable of making mistakes. Offenders' needs and competence must be looked into because of the understanding that people are capable of change and responsible behaviour under the right conditions. On the part of the community, it is its responsibility to provide mechanisms to address the harm caused and prevent future harm from occurring since justice making is a community responsibility. Community members, including the victim, offender, their family members and well-wishers and all persons with a stake in the well-being of the community are involved in the definition of the harm caused and the search for a resolution acceptable to all.

The community also shared in the responsibilities of the behaviour of one of their own. The trial of an offender is invariably a review of the role played by the individual's family and community in his life. Justice making presented opportunities for the examination and restoration of important values such as humanism, empathy and economic justice; it is also an opportunity to teach and reinforce important communitarian values of love, respect and connection with other community members.

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<sup>422</sup> A major lesson from the South African Truth and Reconciliation Commission based on the principle of Ubuntu is that we learn to forgive even our adversaries. The open airing of conflicts has a cathartic effect and educational value.

African Indigenous Justice System reflects the social, cultural and economic systems of traditional Africa. African economy is agrarian which is labour demanding and for the community's economy to survive every hand must be used in the planting and harvesting of crops. No one is considered a surplus labourer and therefore expendable since success in agrarian economy is determined by the number of hands involved to work. It is important to note also that one's well-being in Africa is tied to the individual's relationship with his or her family and significant other; this is different from what obtains in the Western societies where ones' relationship with banks and other social and economic institutions is often considered more important for the individual's wellbeing.<sup>423</sup>

African communities play a very dominant role in conflict resolution as justice in Africa is restorative and transformative, contextualised and negotiated. When communities rely on themselves to solve problems, both individual and collective accountability improve as a result. Effective informal social control and participatory justice making are keys to a stable social order.<sup>424</sup>

This chapter also examined the relationship between Women and the African Indigenous Justice System as it addressed the concerns often expressed regarding community based justice systems in a patriarchal society. Findings showed that individual and group rights are better protected and advanced within groups. Women conscious of their relative weaker economic and political position in the society, have employed their superior social organisation, group identification and solidarity capabilities to protect and promote their common interests. Bringing their marital problems to the public institutions of conflict resolution for adjudication was also encouraged since the belief of the community is that what affects the individual also affects the community.

The use of culturally and constitutionally enshrined sanctuary powers to counteract the oppressive policies and powers of men is done by women. Participation in the indigenous institutions of conflict resolution is voluntary as it is difficult to assume that the litigant's gender affected the outcome of a case in the African Indigenous Justice System. Litigants are supported

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<sup>423</sup> Lisa Suzuki & Joseph Ponterotto, 'Handbook of Multicultural Assessment: Clinical, Psychological and Educational Applications' (2008) 301.

<sup>424</sup> Confucius has observed: Lead the people with government and regulate them by law and punishment, and they will avoid wrongdoing but will have no sense of honour and shame. Lead them with virtue and regulate them by the rules of prosperity, and they will have a sense of shame, set themselves right (as cited in Jiang S. and Lambert E.G., Views of formal and informal crime Control and their Correlate in China (2009) 19 *International Criminal Justice Review* 5-24.

by their friends, relatives and well-wishers. All participants in the justice process are equal and they actively participate in principle thereby giving no reason to believe that women lack confidence in the African Indigenous Justice System.



## CHAPTER FOUR

### OAU AND THE AFRICAN CHARTER

#### 4.1 Historical Overview of Human Rights in Africa (OAU/AU)

Human rights institutions and organs that were created by the instruments were for many years on the periphery of the political institutions under which they fell. This is despite the fact that the manner in which they are formulated and structured requires them to rely on these political institutions for their funding, nominations and appointments to their own organs and in some cases, enforcement of their decisions.<sup>425</sup> Just as there has been a closer relationship between the European Convention on Human Rights (ECHR) and the European Union (EU), so the African political organisation, the Organisation of African Unity (OAU),<sup>426</sup> which has now been transformed into the African Union (AU), illustrates this closer attention to human rights as falling within its remit.<sup>427</sup> While a separate instrument was adopted under the auspices of the OAU in 1981 specifically to deal with human rights,<sup>428</sup> human rights remained largely on the periphery of the OAU's attention until recently. The OAU Charter does not appear to attach a particular significance to human rights in a more comprehensive way, with no particular way of focusing on making African governments accountable for the fundamental rights of their subjects.<sup>429</sup> This lack of significant protection was suggested not to be criticised because the other constitutional instruments of the other regional organisations and the United Nations also contain relatively few references to human rights.<sup>430</sup> It is also agreed that these other organisations take further steps in constructing a system for the promotion and protection of human rights, supported by legal binding instruments which was not the case for the OAU.<sup>431</sup> The Charter placed emphasis on the right of the people to self-determination and struggle against racial discrimination in response to the ravages of colonialism.<sup>432</sup>

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<sup>425</sup> Rachel Murray, 'Human Rights in Africa: From OAU to the African Union' (2004)2.

<sup>426</sup> The OAU came about on 25 May, 1963 as the first pan-African intergovernmental organization taking the form of a loose association (a United Africa of independent states). See Frans Viljoen, 'International Human Rights Law in Africa' 2012) 162.

<sup>427</sup> Rachel Murray (2004) 4.

<sup>428</sup> The African Charter on Human and Peoples Right.

<sup>429</sup> Vincent Orlu Nmehielle, 'The African Human Rights System: its Laws, Practice and Institutions' (2001)75.

<sup>430</sup> See BirameNdiaye, 'The Place of Human Rights in the Charter of the Organisation of African Unity in The International Dimensions of Human Rights'(1982)601. See also Viljoen (2012) 213.

<sup>431</sup> See BirameNdiaye (1982) 601.

<sup>432</sup> Birame Ndiaye (1982) 601.

The background to the creation of OAU can be traced back to a series of developments in various regions across the continent, with the various groupings among French-speaking countries,<sup>433</sup> East and Central Africa<sup>434</sup> and others pulling in slightly different directions.<sup>435</sup> A number of All-African Peoples' Conferences were held in the late 1950s and early 1960s with the aim of encouraging those who were not yet liberated to liberate themselves and to organise non-violent revolution in Africa. Even at this stage, the seed of human rights issues that would find their way into the OAU can be discerned with condemnation of racism in South Africa, the call for the need for universal vote and concern about religious separatism, among others.<sup>436</sup>

Human rights provide an external common standard of achievement for all nations and peoples, according to the Preamble of the UDHR. The road that Africa has travelled with regards to emphasising principles of international human rights has been a very slow one.<sup>437</sup> Despite the reiteration of the principles contained in the United Nations Charter and the reference to human rights in the OAU Charter,<sup>438</sup> the OAU's agenda for human rights implementation at the inception of the Organisation was very limited. The agenda gave priority to self-determination and the struggle against racism, both generally and particularly.<sup>439</sup> By self-determination, reference is being made to the struggle against colonialism and if looked at critically, the problem of colonialism could have been used by African leaders to emphasise the elaborate principles of human rights.<sup>440</sup>

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<sup>433</sup> Groupings included the Brazzaville powers of the twelve French-speaking African states which are Cameroon, Central African Republic (CAR), Chad, Congo, Dahomey, Gabon, Ivory Coast, Malagasy, Mauritania, Niger, Senegal, Upper Volta) meeting first in 1960.

<sup>434</sup> The Pan-African Movement of East and Central Africa (PAFMECA).

<sup>435</sup> In July 1959 the Sanniquellie Conference was held bringing together the governments of Liberia, Guinea and Ghana who pledged to work to set up a Community of Independent African States and decided to hold a conference in 1960. In August 1959 a Conference was held in Monrovia of nine independent states (Ethiopia, Ghana, Guinea, Liberia, Libya, Morocco, Sudan, Tunisia and United Arab Republic) to look specifically at the Algerian question- to stop the war there and assist the nationalists, many of these states having recognised the Algerian provisional government. The first Conference of Independent African states took place in Accra, Ghana, in 1958 and it had in attendance, Ethiopia, Ghana, Liberia, Libya, Morocco, Sudan, Tunisia and United Arab Republic. See Micheal Anda, 'International Relations in Contemporary Africa' (2000) 87.

<sup>436</sup> Resolutions of the first All African Peoples Conference held in Accra, 8-13 December, 1958. See Carol Johnson, 'International Organisation' (1962) vol.16 No.2, 426-429.

<sup>437</sup> Vincent Orlu Nmehielle, 'The African Human Rights System: Its Laws, Practice and Institutions' (2001) 67.

<sup>438</sup> Paragraph 8 of the OAU Charter.

<sup>439</sup> This is exemplified in the apartheid policy of the old South Africa. Some African scholars have attributed this lack of interest in international promotion and protection of human rights to the effect of colonialism. The fact that colonialism denied Africans the right to rule themselves and consequently the right to organise their economic, cultural, political and social affairs, coupled with inherent racism of colonialism, drove African governments to emphasise certain human rights as worthy of primary concern at the international level. Eze, 'Human Rights in Africa: Some selected problems' (1984)193 reiterated this point.

<sup>440</sup> Imbibing the notion/culture of human rights would not benefit the colonial powers but Africans who should enjoy

Before the coming into existence of the OAU, advocates of Pan Africanism, Nmehielle, had shown concern for human rights among the colonised peoples.<sup>441</sup> It was at the Fifth Pan African Congress held in Manchester in 1945 that the first conscious effort was made to establish a link between human rights and the fight against colonialism and human rights on one hand and between Pan Africanism and human rights on the other. They called for the abolition of all racial discrimination, freedom of expression, assembly and of the press, and free compulsory education up to age sixteen, the same rights that are still demanded today in all African States.<sup>442</sup> With the establishment of the OAU, two decades after the formation of the United Nations and the adoption of the UDHR, one would have thought that the ideals that drove Pan Africanism would have also concretised the promotion of human rights. This is so because those that founded OAU were persuaded that ‘the charter of the United Nations and the UDHR, the principles of which they affirm adherence to, provide a solid foundation for peace and positive cooperation among States.’<sup>443</sup>

Before the adoption of the OAU Charter, the Congress of African Jurists,<sup>444</sup> at a time when more African colonies had joined the ranks of independent States, adopted a resolution on human rights that was to lay down the basis for future efforts for the establishment of rules and mechanisms for African regional promotion and protection of human rights.<sup>445</sup>

The adoption of the African Charter by the Assembly of Heads of State and Government of the OAU<sup>446</sup> made human rights discourse in the continent to assume a new dimension. African

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every right denied during the colonial period in a dispensation of African self-rule. This situation has rather been the reverse. Africa has witnessed orchestrated human rights violations almost on the scale experienced during the colonial era but the only difference is that the perpetrators are Africans. See Eze (1984) 195.

<sup>441</sup> Vincent Orlu Nmehielle, ‘The African Human Rights System: Its Laws, Practice and Institutions’ (2001) 68.

<sup>442</sup> Eze (1984) 193.

<sup>443</sup> Paragraph 8, Preamble to the OAU Charter. Particularly the activities that preceded the formation of the OAU would have given one the reason to reach the above conclusion.

<sup>444</sup> The congress took place in Lagos, Nigeria between the 3<sup>rd</sup> and 7<sup>th</sup> of January, 1961. It was at this meeting that the famous Law of Lagos was drafted. The congress stated that in order to give full effect to the Universal Declaration of Human Rights, a suitable tribunal should be set up, to which all persons within the jurisdiction of Africa should have recourse. And that to this effect, an African Convention on Human Rights was needed, as only that would permit the realisation of the dual aspirations of independent Africa to wit: liberty and unity. See Fatsah Ouguergouz, ‘The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa’ (1993) 20.

<sup>445</sup> Eze (1984) 195.

<sup>446</sup> African Charter on Human and Peoples Rights adopted 27 June 1981 in Nairobi, Kenya, OAU. Doc. CAB/LEG/67/3, Rev. 5 reprinted in (1981) 21 I.L.M. 59. The charter entered into force on October 21, 1986. It was drafted pursuant to Decision 115 (XVI) Rev. 1 by which the Assembly of Heads of State and Government requested the Secretary-General of the OAU at its Sixteenth Ordinary Session held in Monrovia, Liberia, from July 12-20, 1979, to organise as soon as possible, in as African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an African Charter of Human and Peoples Rights.

States were convinced of the need to have home-grown regional human rights commitment in line with international standards put in place by the UDHR and other international human rights instruments including the experience of other regions. Also, African States which were always engrossed with struggles against colonial domination realised that with over two decades of the end of colonialism, there was the need to organise for the protection of the rights of Africans against violations by their home governments.<sup>447</sup> The coming into force of the Charter, according to commentators, is seen as impressive and distinct in its rich provisions, and as breaking new grounds in the area of ‘Peoples’ rights’, and the incorporation of economic, social and cultural rights and other impressive provisions.<sup>448</sup> The Charter did not explicitly include human rights as part of the mandate of the OAU, member states were only required to have ‘due regard’ for human rights set out in the Universal Declaration.<sup>449</sup>

With the adoption of the OAU Charter, the place given to human right became limited to African unity, decolonisation and the elimination of racism, all of which have been referred to as the spirit of Addis Ababa.<sup>450</sup> Article II (1) of the Charter enumerates the purpose of the organisation as:

- (a) To promote the unity and solidarity of the African States,
- (b) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa.
- (c) To defend their sovereignty, their territorial integrity and independence,
- (d) To eradicate all forms of colonialism from Africa; and
- (e) To promote international cooperation, having due regard to the United Nations and the Universal Declaration of Human Rights.

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<sup>447</sup> See Vincent O. Orlu Nmehielle, ‘Towards an African Court of Human Rights: Structuring and Empowering the Court’ (2000) *27 Annual Survey of International & Comparative Law* 33.

<sup>448</sup> Ramcharan B.G., ‘The *Travaux Préparatoires* of the African Commission on Human Rights’ (1992) *13 Human Rights Journal* 307. It must be pointed out that the state of human rights in many African countries before the adoption of the Charter was unremarkable. There was the air of totalitarianism, either in the form of military governments or one-party dominated autocracy, which attracted much of regional and international outcry and the need for action.

<sup>449</sup> OAU Charter, Article 2(1)(e); the preamble of the OAU Charter also recognises the Universal Declaration of Human Rights and the UN Charter as the foundation of peaceful and positive cooperation between states. See Viljoen, ‘International Human Rights Law in Africa’ (2012) 162.

<sup>450</sup> Cervenka, ‘The Organisation of African Unity and its Charter’, note 169, at 13, referring to the speech of the then president of Algeria, Ahmed Ben Bella, against colonial rule at the Addis Ababa Summit Conference of Heads of State and Government of Independent African States in May, 1968. See also T.O. Elias, ‘African and Development of International Law’ (1988) 121-127.

Taking a deep and critical look at the Charter revealed that the mechanism created under it lacked adequate authority to effectively realise the mandates enshrined in it. Also, the lack of provision for a judicial organ under it (a court) compounds the ability of the African human rights mechanism to effectively achieve its mandate under the charter.

Article III makes provision for principles that would govern Member States in achieving the purposes stated in Article II, one of which is the non-intervention in the internal affairs of Member States.<sup>451</sup> It has been opined that this provision was drafted into the Charter to appease the basic concern of the founders of the OAU to the effect that no outside body should deal with matters within the domestic jurisdiction of Member States.<sup>452</sup> Issues that have to do with human rights were regarded as the internal affairs of Member States, and therefore, must not be interfered with, as has been stressed by African States over the years.

The international law principles of national sovereignty and territorial integrity, as affirmed by the Charter of the United Nations, does not permit redress for human rights violations except through the State. But it must be observed that the realities of post-colonial Africa necessarily required that attention should be given to the use of human rights in a more elaborate fashion before it became too late. Colonialism was not going to last forever, neither was apartheid as happenings have shown.<sup>453</sup> Bolstered by this principle of ‘non-interference’, the OAU in subsequent years after the adoption of the Charter turned a blind eye to allegations of human rights violations in member states. In a commentator’s view, the OAU could be regarded as ‘a club of presidents, engaged in a tacit policy of not inquiring into each other’s practices’.<sup>454</sup> This gap was not only substantive but also institutional. None of the specialist commissions provided for under article 20 of the Charter or those established later, was devoted to human rights.<sup>455</sup>

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<sup>451</sup> Article III (2) of the Charter.

<sup>452</sup> Eze at 199.

<sup>453</sup> The OAU could not, for example, afford to ignore African refugee problems. That is why the assistance and protection of refugees is seen as one of the positive activities of the OAU at the regional level in the field of human rights. Efforts in that direction culminated in the adoption of the OAU Convention on Refugees by Heads of State and Governments in September, 1969.

<sup>454</sup> Welch C. E., ‘Protecting Human Rights in Africa: Strategies and Roles of Non-governmental Organisations’ (1995) 151 and 288 wherein the OAU’s policy was criticised.

<sup>455</sup> The Charter established five specialised Commissions, (i) Economic and Social; (ii) Educational and Cultural; (iii) Health, Sanitation and Nutrition; (iv) Defence; (v) Scientific, Technical and Research Commission. At the first Ordinary Session of the OAU in 1964, a Commission on Transport and Communications, and one on Jurists, were added. The last one was designed as an instrument for legal research but was disbanded after only one year. See Mbaye and B Ndiaye, ‘The Organisation of Africa Unity’ in Vasak K and Alston P (eds), ‘The International

The Charter<sup>456</sup> is a fundamental instrument in the African regional system created under the auspices of the OAU.<sup>457</sup> It established the African Commission on Human and Peoples' Rights (the Commission),<sup>458</sup> an independent body of eleven experts nominated and with its headquarters in the Gambia. Very little was known of the Commission's work in the early years when it was established, only in 1994 did it start to make public its decisions on communications brought before it.<sup>459</sup> Chapter four of this thesis is dedicated to the Commission and issues such as the composition, seat, functioning and its protective mandate among others will be discussed.

Other instruments making up the regional system are the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969,<sup>460</sup> the African Charter on the Rights and Welfare of the Child,<sup>461</sup> the Protocol to the African Charter on the Rights of Women in Africa,<sup>462</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the

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Dimension of Human Rights' (1982)583; AE EL-Obaid&Appiagyei-AtuaA., 'Human Rights in Africa: A New Perspective on Linking the Past to the Present' (1996) 42 *McGill LJ* 819-27.

<sup>456</sup> The African Charter was enacted pursuant to the Charter of the Organisation of African Unity which stipulates that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African Peoples. The African Charter came into force on October 21, 1986 upon ratification by a simple majority of Member States of the OAU (OAU was replaced with the African Union (AU) on July 10, 2002).

<sup>457</sup> Now known as the 'African Union.'

<sup>458</sup> The African Commission on Human and Peoples Rights is the implementing arm of the charter which was established in 1987. It did not have a permanent secretariat after its inauguration and only became fully functional in June 1989.

<sup>459</sup> Obiora Chinedu Okafor, 'The African Human Rights System, Activist Forces and International Institutions' (2007) 85. See also Faustin Ntoubandi, 'Amnesty for Crimes against Humanity under International Law' (2007) 130.

<sup>460</sup> The Convention was adopted by the Assembly of Heads of State and Governments of the OAU at its sixth Ordinary session held in Addis Ababa on 10<sup>th</sup> September, 1969. It entered into force on 20<sup>th</sup> June, 1974 in accordance with Article XI.

<sup>461</sup> OAU Doc. CAB/LEG/24.9/49 (1990). It entered into force on the 29<sup>th</sup> November, 1999. I will like to point out here that Africa is the only region that has a region-specific instrument for child rights.

<sup>462</sup> OAU Doc. CAB/LEG/24.9/49 was adopted on the 11<sup>th</sup> of July, 2003 during the Second Ordinary Session of the AU held in Maputo, Mozambique and it entered into force on 25<sup>th</sup> November, 2005. The adoption of the Protocol was pushed by the widespread sentiments that African women continued to suffer human rights violations simply because they were women and the existing guarantees for the protection of their rights were felt to be inadequate. The adoption of the Protocol was therefore a landmark step in enhancing the promotion and protection of women's human rights on the continent through providing a comprehensive legal framework for holding African governments accountable for their violations. See Anthony Kuria Njoroge, 'The Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples Rights.' A paper presented at Thematic Session II during the Sub-Regional Conference on Female Genital Mutilation (FGM) held in Djibouti from the 2<sup>nd</sup> -3<sup>rd</sup> February, 2005. Available at [www.emmabonino.it/campagne/stopfgm/djibouti/njoroge.pdf](http://www.emmabonino.it/campagne/stopfgm/djibouti/njoroge.pdf) (Accessed on 28<sup>th</sup> March, 2014). See also, Martin SemaluluNsibirwa, 'A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40; Jamil DdamuliraMujuzi, 'The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations' in *Law, Democracy and Development* (2008)2, 41-61; Viljoen, 'An Introduction to the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa' (2009-2010) 16 *Wash. & Lee J. Civil Rts. & Soc. Just.* 11; Julia Sloth-Nielsen, 'Childrens Rights in Africa' in ManisuliSsenyonjo (ed.)

Establishment of an African Court on Human and Peoples' Rights<sup>463</sup> (the African Human Rights Court Protocol) which created the regional Human Rights Court.

Regarding other areas of human rights as stated earlier, there was a necessity for regional African human rights mechanism after an attempt of African jurists in 1961 failed in Lagos, Nigeria. This call was made at several seminars on human rights organised by the United Nations<sup>464</sup> and some other African institutions such as the colloquium organised by the International Commission of Jurists (ICJ) and the Senegalese Bar Association. The colloquium recommended the establishment of a Human Rights Commission as one of the means of tackling the fundamental and urgent problems of human rights in Africa.<sup>465</sup>

States have the international legal obligation to provide for the protection of human rights under their own national constitutions, legal systems and other official measures<sup>466</sup> as it is concerned with the relationship between citizens of a State and their political authority. It raises questions as to the responsibility of a political authority with respect to the protection of an individual and the scope of claims that such an individual can make from its sovereign. According to Lauren,<sup>467</sup> the issue of human rights addresses age-old and universal questions about the relationship between individuals and their larger society, and thus is one that has been raised across time and across culture.

The African continent provides a clear reminder that human rights is a dynamic concept and that

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'The African Regional Human Rights System: 30 years after the African Charter on Human and Peoples' Rights' (2012) 155.

<sup>463</sup> The Protocol was adopted in June, 1998 in Ouagadougou, Burkina Faso and it entered into force on the 25<sup>th</sup> of January, 2005. See Viljeon, 'International Human Rights Law' (2007) 419; see also Fatsah Ougurgouz, 'The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa' (2003) 688; Murray, 'Human Rights in Africa: From OAU to the African Union' (2004) 68 and [www.africa-court.org/index.php/2-home/2-institutional-background](http://www.africa-court.org/index.php/2-home/2-institutional-background) (Accessed on 28<sup>th</sup> March, 2012).

<sup>464</sup> For example, the seminar on Human Rights in Developing Countries held in Dakar, Senegal in February, 1966; the Cairo Conference of 1969, which was devoted to the establishment of regional human rights commissions with special reference to Africa based on a proposal to UN Human Rights Commission for the establishment of regional commissions on human rights in those part of the world where they did not exist; the Economic Commission for Africa Conference on Legal Process and the Individual held at Addis Ababa in 1971; the Seminar on the Study of New Ways and Means for promoting Human Rights with Special reference to the Problems and Needs of Africa, held in Dar-es Salaam, Tanzania from October 23 to November 5, 1973; and the UN Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, held in Monrovia, Liberia from September 10 to 21, 1979. See History of the African Charter available at [www.achpr.org/instruments/achpr/history/](http://www.achpr.org/instruments/achpr/history/) (Accessed on 12<sup>th</sup> July, 2014).

<sup>465</sup> Eze at 203.

<sup>466</sup> Abdullahi Ahmed An-Na'im, 'Expanding Legal Protection of Human Rights in African Context' in 'Human Rights under African Constitutions: Realising the Promise for Ourselves' (2003) 29.

<sup>467</sup> Paul Gordon Lauren, 'The Evolution of International Human Rights: Visions Seen' (2003) 13.

it cannot be seen in isolation from the context and environment in which it operates.<sup>468</sup> The protection of human rights, according to Okere<sup>469</sup> consists in the attribution of certain rights to, and imposition of certain duties on, the individual to enable him to lead a full and meaningful existence in, and to contribute as a useful member of, society is not strange to Africa.

Rights can either be negative or positive. The belief is that the active and meaningful participation in the affairs of the community is only achieved when the individual is not constrained by hunger, poverty, illiteracy, diseases and fear.

The Charter highlights the cultural dimension of human rights; it is a regional initiative for the promotion of human right that is relevant to Africa, it is developed as a regional initiative for the promotion of human rights which is relevant to Africa's need. It reflects the region's world-outlook, legal philosophy, collective development needs and peculiar circumstances and autonomy. It laid more emphasis on the protection of national rights than individual rights<sup>470</sup> and reason(s) for this has been highlighted by numerous scholars in the field on human rights in the continent.

#### 4.2 The African Charter on Human and Peoples' Rights and its features

The purpose here is to identify the general characteristics of the Charter through an examination of its content. The Charter is a multilateral convention elaborated and adopted in the framework of the OAU.<sup>471</sup> The Charter consists of a Preamble of ten paragraphs and a text of sixty-eight articles and a close examination of the preamble to the Charter will reveal the broad principles of the Charter. Focus will be on the operative part of the Charter and in particular, on the norms and the system of safeguards to which it devotes attention.<sup>472</sup> The Preamble deals majorly with the

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<sup>468</sup> Heyns & Stefiszyn (eds.), 'Human Rights, peace and justice in Africa: A reader' (2006) 1.

<sup>469</sup> Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples Rights: A Comparative Analysis with European and American Systems' (1984) 6 *Human Rights Quarterly* 141.

<sup>470</sup> Rights listed for protection by the Charter include the rights to self-determination, liberation, and equality of all peoples; the right to international peace and security; the right to use one's resources; the right to development; the right to a satisfactory environment and the right of national minorities. Reasons have been adduced by scholars as regards the reasons for the choice of national to individual rights and to development. According to Robertson R. E., in 'Measuring State Compliance with the Obligation to Devote Maximum Available Resources to Realising Economic, Social and Cultural Rights' (1994) 16 *Human Rights Quarterly* 694, the economic development of underdeveloped countries is necessary for their social well-being and political stability, without which they cannot ensure effectively, the civil, political, economic, social and cultural rights announced in the major international texts and that therefore the right to development is a human right.

<sup>471</sup> Article 63 (1) African Charter.

<sup>472</sup> Part I of the Article deals with rights and duties and it is covered by Articles 1 to 29. Part II dealt with measures of safeguard and it is covered by Articles 30 to 33 while part III of the Charter deals with the General Provisions.

conception of human rights enshrined by the African Charter. The indivisibility of rights, the concept of 'Peoples' rights, individual duties and the lack of a derogation clause are some of the features of the Charter that will be looked into here.

The African Charter by adding all rights from the three generations of rights in one document<sup>473</sup> undid the division of rights into first generation, second generation and third generation. These rights are also provided for in the UDHR except the third generation of rights.<sup>474</sup> Notwithstanding the slightly different formulation of the rights and the lack of total similarity in the African Charter and the UDHR, it can be said that there is a remarkable resemblance between the two documents. What they have in common is greater than their difference.

One of the consequences of having the three generations of rights together in one document as done by the African Charter is that socio-economic rights are unambiguously actionable just like any other rights in the Charter.<sup>475</sup> The justiciability stands as a reaction to the prevalent condition of severe scarcity and manipulation by kleptocratic elites.<sup>476</sup> A close look at the

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Articles 64 to 68 took care of this. It should be noted that Article 63 which dealt with Signature and Ratification and which is found under Part II, would normally belong to Part III. See Ouguergouz, 'The African Charter on Human and Peoples Rights: A comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa' (2003) 55.

<sup>473</sup> The Preamble proclaims that civil and political rights cannot be dissociated from Economic, Social and Cultural Rights. This situation can be distinguished from the dichotomy at the global level between civil and political rights in the ICCPR and socio-economic rights in the ICESCR and at the regional level (in the European Convention of Human Rights and Fundamental Freedoms and the European Social Charter, as well as the American Convention on Human Rights (American Convention) and the Protocol of San Salvador). First generation rights in the African Charter are for example, the right to equality before the law (Art. 3), the right to have ones case heard (Art. 7), and the right to freely associate (Art. 10). Socio-economic rights or Second Generation rights include the right to work under adequate and satisfactory conditions (Art. 15). This provision does not grant a right to work rather it deals with conditions of work and introduces the principle of equal pay for equal work, the right to enjoy the best attainable state of physical and mental health (Art.16 (1) A) and the rights to education (Art. 17(1)). The right to a generally satisfactory environment (Art.24) and the right to international peace and security (Art. 23(1) included in the Charter as peoples' rights have been characterised as Third Generation Rights. See Umzurike U. Oji, 'The African Charter on Human and Peoples Rights' (1997) 51; Vasak K, 'The Third Generation of Human Rights: The Rights of Solidarity,' Inaugural lecture at the 10<sup>th</sup> Study Session of the International Institute of Human Rights, Strasbourg, July 1979.

<sup>474</sup> Right to life is provided for under Article 3 of the UDHR; rights to respect for human dignity and the prohibition of cruel, inhuman or degrading treatment or punishment are provided for under Article 4 and 5 of the UDHR, right to liberty and security is provided for under Article 9 of UDHR, the right to fair hearing and the principles of non-retroactivity of criminal legislation is under Article 8, 10 and 11 UDHR, the freedom of conscience and religion (Article 18 UDHR), the right to information and freedom of expression (Article 19 UDHR), freedom of association (Article 20 UDHR), freedom of movement and residence (Article 13 UDHR), the right to seek asylum (Article 14 UDHR), freedom to take part in the government of his country and of equal access to public service (Article 21 UDHR), the right to property (Article 17 UDHR), and the traditional principles of the entitlement to the rights set out in these instruments, including the right to non-discrimination (Article 2 UDHR) and the right to equality of all before the law (Article 7 UDHR). See Ouguergouz (2003) 55-56.

<sup>475</sup> Viljoen F., 'International Human Rights Law in Africa' (2012) 237.

<sup>476</sup> The justiciability of socio-economic rights was not only an exhortation for things to be different but also an

African Charter reveal that civil and political rights are indissociable from economic, social and cultural rights, in both conception and universality, and that the satisfaction of the economic, social and cultural rights guarantees enjoyment of civil and political rights.<sup>477</sup> This is a clarification of Article 28 of the UDHR which states that everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration may be fully realised.<sup>478</sup> This provision of the UDHR can be said to contain ‘right to development’,<sup>479</sup> which the African Charter attach much importance to.<sup>480</sup> It is in this regard that the African Charter sets itself apart from the universal standard and the collective nature of these rights and of some others makes the African Charter so original.

The African Charter has remained silent on some of the most pressing socio-economic needs of Africa’s majorly rural communities such as safe and accessible drinking water, adequate housing and sustained food supplies as most of the communications submitted to the African Commission dealt with the right to fair trial.<sup>481</sup> Some touched on issues like ousting of courts’ jurisdiction by military decrees<sup>482</sup> access to legal counsel,<sup>483</sup> the presumption of innocence<sup>484</sup> and the right to a trial within a reasonable time.<sup>485</sup> Findings on the rights to personal liberty and security and the prohibition against torture and cruel, inhuman, degrading treatment or punishment also featured regularly.<sup>486</sup> The Commission has found some States to

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acknowledgement that accountability through the law was part of the solution. This position was contained in the initial draft of the African Charter. See Viljoen F., ‘International Human Rights Law in Africa’ (2012) 215.

<sup>477</sup> Par. 7, Preamble to the African Charter.

<sup>478</sup> Ouguergouz (2003) 57.

<sup>479</sup> Article 22 of the UDHR states: Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

<sup>480</sup> Par. 7 of the Preamble to the African Charter states thus: Convinced that it is henceforth essential to pay particular attention to the right to development [...]. See Article 22 of the African Charter which is more explicit in this respect. See also Fatsah Ouguergouz, ‘The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Rights and Sustainable Democracy in Africa’ (2003) 297.

<sup>481</sup> Christof Heyns, ‘Civil and political Rights in African Charter’ in Evans MD and Murray R (eds.), ‘The African Charter on Human and Peoples Rights: The System in Practice, 1986-2000’ (2002) 137.

<sup>482</sup> See Communications 105/93, 128/94, 152/95, 150/96 (joined), *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) 12<sup>th</sup> Annual Activity Report Paragraphs 63 and 78-82.

<sup>483</sup> See Communication 87/93, *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995) 8<sup>th</sup> Annual Activity Report Paragraph 13.

<sup>484</sup> Communications 37/94, 139/94, 154/96, 161/97 (joined), *International PEN and others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) 12<sup>th</sup> Annual Activity Report (Saro-Wiwas case) Paragraph 96.

<sup>485</sup> See Communication 103/93, *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR) 10<sup>th</sup> Annual Activity Report, paragraphs 11 & 12. See also Communication 225/98, *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000)

14<sup>th</sup> Annual Activity Report paragraphs 45 & 46.

<sup>486</sup> Violations of Article 6 which deals with personal liberty and security were found in 24 of 42 cases finalised up till 2002. See Killander, ‘Communications before the African Commission on Human and Peoples Rights 1988-

be in violation of these rights despite not being specifically mentioned in the Charter.

On the concept of Peoples' rights, the Charter recognises not only individual rights but also those of Peoples'.<sup>487</sup> According to the Charter, peoples have the right to existence, to self-determination, to freely dispose of their natural resources, to development, to international peace and security and to a generally satisfactory environment.<sup>488</sup> Though the concept of Peoples' right was omitted from the initial proposal, it was mentioned in the resolution of the OAU Assembly calling for the elaboration on the Charter<sup>489</sup> as Guinea and Madagascar pressed for the inclusion of the term 'Peoples' rights' alongside 'human rights',<sup>490</sup> and it is through this (their insistence) that the continent's human rights instrument was able to achieve one of its distinctive characteristics.<sup>491</sup>

The African Charter incorporates the new generation of rights as mentioned earlier. With these rights, the people are the principal beneficiary. The Charter devoted six Articles<sup>492</sup> to these rights in general which reflect a very special conception of human rights according to which the reality and respect of Peoples' rights should necessarily guarantee human rights.<sup>493</sup>

Another outstanding feature of the African Charter is 'individual duties'.<sup>494</sup> An individual has

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2002' (2006) 10(1) *Law, Democracy and Development* 103.

<sup>487</sup> Kiwanuka R.N., 'The Meaning of People in the African Charter on Human and Peoples Rights' (1988) 82 *AJIL* 80.

<sup>488</sup> Article 19-24 African Charter.

<sup>489</sup> MBaye K, '*Les Droits de l'Homme en Afrique*' (1992) *Pedone* 150.

<sup>490</sup> MBaye K, (1992) 150; also Viljeon (2007) 242.

<sup>491</sup> During his address to the Senegal meeting, Sengor added a cultural justification to the ideological one, explaining the reference to peoples' rights as follows: We simply meant... to show our attachment to economic, social and cultural rights, to collective rights in general, rights which have a particular importance in our situation in a developing country. He added that, in Africa, the individual and his rights are wrapped in the protection of the family and other communities. See address delivered by Leopard Sedar Senghor, President of the Republic of Senegal at the opening of the Meeting of Africa Experts preparing the Draft African Charter in Dakar, Senegal from 28<sup>th</sup> November to 8<sup>th</sup> December, 1979. A copy of the speech can be found in, Christof Heyns (ed.), '*Human rights Law in Africa*' (1999) 49.

<sup>492</sup> Articles 19 to 24. Out of these six Articles, only three are devoted to the third generation of rights and these are Article 22 which deals with Right to development, Article 23 which deals with Right to Peace and Article 24 which deals with right to satisfactory environment.

<sup>493</sup> Paragraph 5, Preamble to the African Charter; human rights never the less remain attributes inherent to human nature, as the same paragraph acknowledges that fundamental human rights stem from the attributes of human beings. This wording should be likened to that of the two United Nations Covenants of 1966 which directly stem from the UDHR and which state, in their Preamble (para.2) recognising that these rights derive from the inherent dignity of the human person.

<sup>494</sup> The primary duty under the Charter is the duty of state parties to recognise the rights therein and to adopt legislative or other measures to give effect to them. Except for the mention in Article 10, individual duties are not mentioned in the European Convention, and are barely mentioned in the American Convention, making the African Charter the first to elaborate the duties of individuals. See Umozurike U.O., '*The African Charter on Human and Peoples Rights*' (1997) 64; Mutua M, '*The Banjul Charter and the African Cultural Fingerprint: An Evaluation of*

duties towards other individuals, his or her family, towards the community, towards the state whose national he or she happens to be and to her African and international community.<sup>495</sup> The Committee of experts that drafted the African Charter were motivated by the speech delivered by the then Republic of Senegal's president at the opening of the meeting of African Expert held in Senegal<sup>496</sup> who called for the inclusion of 'individual duties' contrary to what has been done in other regions of the world as at that time.<sup>497</sup> He stressed the interrelated nature of traditional African society where the individual and his rights are bound in the protection of the family and other communities. This is in contrast with the European tradition which allows human rights to be used as a 'weapon' with which the individual can defend himself against the group or entity representing it.<sup>498</sup>

The African Commission so far has not dealt with this either in its communications or in its state reporting procedures. What this means is that no case involving individual duties had been submitted to the Commission.<sup>499</sup> According to Umozurike, these duties require states to 'instil them in their subjects.'<sup>500</sup> It is important to note that duties themselves cannot confer upon State Parties jurisdiction over individuals while complaints about individuals cannot be brought before the Commission for the simple reason that the Charter is open for ratification only to states. The inclusion of duties should not serve as a pretext for the curtailment of individual rights by repressive governments.<sup>501</sup>

The concept of duties was able to find its way into domestic constitutions, something the concept of individual was not able to do and this inclusion in domestic constitutions underscores the reciprocity of rights and duties.<sup>502</sup> This is an aspect that is hailed as part of the African understanding of rights. There is no provision for individual duties in the European Convention and the American Convention on its part barely mentioned it where it says: 'Every person has

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the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339-354.

<sup>495</sup> Articles 27-29 African Charter.

<sup>496</sup> Heyns C, 'Human Rights Law in Africa' (1999) 65-77.

<sup>497</sup> Viljeon (2007) 248.

<sup>498</sup> Senghoro's speech (Note 237) 79.

<sup>499</sup> The Guidelines for National Periodic Reports shed some light on the content of these duties by indicating that states should provide particulars about legislative measures, administrative regulations and court decisions establishing the atmosphere for enforcement and effectuation of these duties. See Paragraph IV.7 of the Guidelines, Second Activity Report, Annex XII. See also Paragraph IV.8 of the Guidelines noting the need to establish programmes because some of these valuable traditional duties might have been treated lightly... because of the overwhelming Western influence in the past colonial days.

<sup>500</sup> Umozurike U. O., 'The African Charter on Human and Peoples Rights' (1997) 65.

<sup>501</sup> Article 24 (4) African Charter which require the individual to preserve and strengthen national security.

<sup>502</sup> Christof Heyns, 'Where is the Voice in our Constitution?' Centre for Human Rights, Pretoria, Occasional Paper 8 [www.chr.up.ac.za/test/images/files/about/archive/occasional\\_paper\\_8.pdf](http://www.chr.up.ac.za/test/images/files/about/archive/occasional_paper_8.pdf) (Accessed on 1<sup>st</sup> April, 2014).

responsibilities to his community and mankind.<sup>503</sup> Individual duties were included in the UDHR<sup>504</sup> and also in the fifth paragraph of the Preamble to the Covenants of Human Rights.<sup>505</sup>

The African Charter, unlike other international treaties, does not make provision for derogation of rights.<sup>506</sup> This omission has been said to put the Charter at odds with the domestic constitutional law of sub-Saharan African states<sup>507</sup> as well as with some other international law obligations. Under the ICCPR,<sup>508</sup> derogations are allowed but states are required to inform the UN Secretary-General immediately of the provisions from which they have derogated. They must also state the reason for the derogation and when it is expected to end. Whenever the derogation ends, the same kind of communication that was made when the derogation was to start must be made.

It must be pointed out here that rights like the right to life, the prohibition of torture, slavery, forced labour, and on retroactive penal laws as well as freedom of conscience and religion, may under no circumstances be suspended or derogated from.<sup>509</sup> This should be seen as one of the shortcomings of the Charter.

Another shortcoming of the Charter is the lack of qualification of the restrictions on the rights. The exercise of many rights is limited by these 'claw-back' clauses such as 'within the law',<sup>510</sup> 'provided that the individual abides by the law',<sup>511</sup> 'in accordance with the law of those countries and international conventions',<sup>512</sup> 'in accordance with the provisions of the law.'<sup>513</sup> With these,

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<sup>503</sup> Article 32(1) American Convention.

<sup>504</sup> Article 29 of the UDHR states that Everyone has duties to the community in which alone the free and full development of his personality is possible.

<sup>505</sup> Paragraph 5 of the Declaration state thus: whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standard of life in larger freedom. See Universal Declaration of Human Rights.

<sup>506</sup> The Charter does not contain a derogation clause in terms of which certain selected rights may be suspended temporarily during times of national emergency. See Viljoen (2007) 251.

<sup>507</sup> Some African Constitutions allow for derogation under circumscribed circumstances. For example, the 1973 Constitution of Angola, Article 52; 1966 Constitution of Botswana, Article 16; 1994 Constitution of Ethiopia, Article 93; 1992 Constitution of Ghana, Article 31; 1990 Constitution of Mozambique, Article 828 to mention a few. In the Constitution of Northern African states, there are no such clauses observed. See Frans Viljoen (2012) 333. See also, Abdi Jibril Ali, 'Derogation from Constitutional Rights and its Implication under the African Charter on Human and Peoples Rights' (2013) 17 *Law, Democracy and Development* 78.

<sup>508</sup> Article 4(3) International Covenant on Civil and Political Rights.

<sup>509</sup> Article 4(2) International Covenant on Civil and Political Rights.

<sup>510</sup> Article 9 of the African Charter dealing with freedom of expression.

<sup>511</sup> Article 10 of the African Charter dealing with freedom of Association and Article 12 African Charter dealing with freedom of movement.

<sup>512</sup> Article 12(3) African Charter dealing with right of Asylum.

<sup>513</sup> Article 13 African Charter dealing with right to participate in government.

the legislative authority of each State party to the African Charter has broad powers which should have been precisely defined or limited, for example, by making the requirement of legality subject to the requirement that such restriction should be expedient.<sup>514</sup> Article 9(2) of the African Charter states that ‘every individual shall have the right to express and disseminate his opinions within the law.’ The term ‘within the law’ has been interpreted by many experts to mean that no domestic legal provision limiting the right in question could be challenged under the African Charter. This, the Commission has rectified in one of its Communications when it found that the term ‘within the law’ was to be interpreted to refer to international law and not domestic law.<sup>515</sup>

To allow national law to take precedence over the international law of the Charter will defeat the purpose of the rights and freedoms which are enshrined in the Charter. International human rights standards must always prevail over contradictory national law and any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.<sup>516</sup>

#### 4.3 Culture and African Values

It will be wrong to argue that culture has no place in the human rights discourse. Africa’s struggle for liberation was a struggle for its identity and cultural heritage as well as respect for human rights. This is because the goal of colonialism in Africa, among others, was to undermine African cultures and the rights of the African people.<sup>517</sup> To ensure the protection of these cultures in Africa, the OAU adopted the African Cultural Charter.<sup>518</sup> Today, the continent is again faced with having to defend its cultural heritage against the impacts of globalisation and Western lifestyles on traditional modes of living and social values.

For cultures to stand the test of time they must interact with other cultures and change and also maintain their own unique characteristics. In 2006, the AU adopted the Charter for the Cultural

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<sup>514</sup> For example, ‘provided it is for the protection of national security, law and order, public health or morality or is enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.’ The Second UN Convention (Article 22(2)), the European Convention (Article 9 for example) and the American Convention (Article 16(2)) only permit restrictions on rights if they are established by law and are necessary in a democratic society, in the interest of national security, public safety or order, or to protect public health or morality or the rights and freedom of others.

<sup>515</sup> See *Civil Liberties Organisation (in respect of Nigerian Bar Association) V Nigeria*; Communication 101/93.

<sup>516</sup> See *Media Rights Agenda and Constitutional Rights Project V Nigeria* Communication 105/93-128/94-130/94-152/96.

<sup>517</sup> Anton Bosl & Joseph Diescho (eds.), ‘Human Rights in Africa: Legal Perspectives on their Protection and Promotion’ (2009)141.

<sup>518</sup> CAB/LEG/67/3/Rev 5. Also called Banjul Charter, the African Charter was adopted in Nairobi, Kenya on 28 June, 1981 and entered into force on 21 October, 1986.

renaissance of Africa<sup>519</sup> recognising that the birth of the AU brought in a new African consciousness captured in the African Renaissance which is intended to inform, inspire and allow Africans to search for and discover their true African identity. The AU also adopted various instruments on culture such as the Nairobi<sup>520</sup> and the Algiers<sup>521</sup> Declarations with the Algiers Declaration reiterating that culture represents a set of ways and means through which the people of Africa, individually and collectively, affirm their identity, and protect and transmit such identity from generation to generation.<sup>522</sup>

Culture has also been understood to be the foundation of society and development, integrating the values, customs and characteristics of a people. It also promotes interaction and dialogue among people therefore it should serve the cause of holding the African people together and strengthening their unity in diversity whether within families, public life, communities or organisations.<sup>523</sup> It should help the region to make sense of itself in order to assert its root, reflect on its troubled past and forge a better, safer and prosperous way forward through a shared African vision.<sup>524</sup>

The Charter places emphasis on Peoples' rights because African culture is firmly grounded in the age-long traditions of the supremacy of collectivism, sense of belonging to a community, humanism and Ubuntu.<sup>525</sup> Its languages, history and traditions remain fundamental to the

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<sup>519</sup> The Charter of the African Cultural Renaissance was formally adopted at the ordinary session of the Assembly held in Khartoum, Sudan on the 24<sup>th</sup> January, 2006. The Charter is a cultural tool which will empower Member States to promote Pan-Africanism, cultural renewal and identity as well as strengthen their national policies and other cultural instruments which will in turn contribute to the achievement of the continent socio-economic and cultural integration, build sustainable peace and winning the fight against poverty. See Africa Cultural Renaissance Campaign 2010-2012 Strategy for Implementation: Promoting Together the African Renaissance. Available at [www.africa-union.org/root/ua/Conferences/2010/mai/SA/23-25mai/AFRICAN\\_CULTURAL\\_RENAISSANCE\\_CAMPAIGN-2010-2012finaldraft2.doc](http://www.africa-union.org/root/ua/Conferences/2010/mai/SA/23-25mai/AFRICAN_CULTURAL_RENAISSANCE_CAMPAIGN-2010-2012finaldraft2.doc) (Accessed on 4<sup>th</sup> April, 2014).

<sup>520</sup> Adopted at the AU Conference of Ministers of Culture in 2005 and endorsed by the AU Executive Council and the Assembly.

<sup>521</sup> Adopted at the AU Conference of Ministers of Culture in 2008 and endorsed by the AU Executive Council and the Assembly.

<sup>522</sup> Bience Gawanas, 'The African Union: Concepts and Implementation Mechanisms relating to Human Rights' in 'Human Rights in Africa' (2009) 143. The declaration reaffirmed the role of culture for sustainable development, continental integration and the realisation of the African Union Renaissance with a view to building a united, peaceful and prosperous Africa.

<sup>523</sup> Agbakwa S.C., 'Reclaiming Humanity: Social, Economic and Cultural Rights as the Cornerstone of African Human Rights' in Heyns, C & Steffysun K. (eds), 'Human Rights, Peace and Justice in Africa: A Reader' (2006) 70.

<sup>524</sup> Gawanas B., 'The African Union: Concepts and Implementation Mechanisms relating to Human Rights' in Bosl & Diescho, 'Human Rights in Africa' (2009) 142.

<sup>525</sup> Gawans B., 'The African Union: Concepts and Implementation Mechanisms relating to Human Rights' in Bosl & Diescho, 'Human Rights in Africa' (2009) 143. This means that we exist as people only in relationships with others.

coexistence of its people.

#### 4.4 Human Rights within OAU

The provisions of the OAU Charter made little express mention of human rights but rather, it reflects the dominating concerns of Africa during that period,<sup>526</sup> it centred on issues such as the non-interference in internal affairs,<sup>527</sup> sovereign equality of states,<sup>528</sup> the fight against neo-colonialism,<sup>529</sup> self-determination in the state context<sup>530</sup> and peaceful settlement of disputes.<sup>531</sup> The OAU's focus was on protection of the state, not the individual,<sup>532</sup> and any concept of human rights within the OAU went little beyond the notion of self-determination in the context of decolonisation and apartheid in South Africa.<sup>533</sup>

There are other aspects of human rights mentioned in the Charter which are broad and general and related to the relationship among states<sup>534</sup> and ethnic divide: 'inspired by a common determination to promote understanding among our people... in a larger unity transcending

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<sup>526</sup> The concern of Africa during this period was to ensure the independence of those African people who were still colonised, condemnation of apartheid regime in southern Africa, and protecting the newly acquired statehood. Furthermore, it has been suggested that the OAU was not initially willing to consider human rights, labelling them one of the main elements in the ideological armoury of imperialism. See Rachel Murray, 'Human Rights in Africa: From OAU to AU' (2004) 7. See also, Shivji Issa, 'The concept of Human Rights in Africa' (1989) 43; Naldi, G.J. 'Documents of the Organisation of African Unity' (1992) 3.

<sup>527</sup> Article 3(1) (2) Elias, as one of the drafters of the Charter, notes that the desire to be left alone, to be allowed to choose its particular political, economic and social systems and to order the life of its community in its own way, is a legitimate one for large and small states alike, Elias, *The Charter*, at 248. See also Akinyemi A. B., 'The Organisation of African Unity and the concept of Non-Interference in Internal Affairs of Member States' (1972 – 1973) 46 *BYIL*393-400 at 393-5.

<sup>528</sup> Article 3 (1).

<sup>529</sup> Preamble, Article 2(1) (d), Article 3(6).

<sup>530</sup> Preamble, Article 3(3).

<sup>531</sup> Article 3(4).

<sup>532</sup> For example, assassination is condemned in respect of subverting the state, unreserved condemnation...of political assassination as well as of subversive activities, Article 3(5). See also El-Ayouty Y. (ed.), 'The Organisation of African Unity after Thirty Years' (1994) 15-26, at 17.

<sup>533</sup> Murray (2004) 8. Mathews in *The organization of African Unity* (1989) 79 noted that the OAU Charter, for instance, does not contain any provision for the protection of the right of the African masses... evidently the emphasis in 1963 was on the state rather than the people. As President Nyerere of Tanzania, one of the founding fathers of OAU has pointed out, the OAU Charter spoke for the African peoples still under colonialism or racial domination, but once the countries emerged to nationhood, the Charter stood for the protection of their heads of state and served as a trade union which protected them. In other words, the OAU appears to be an institution of the African heads of state, by the heads of state and for the heads of state. See also Akindele R.A. & Akinterinwa B. A., 'Reform of the United Nation: Towards Greater Effectiveness, Enhanced Legitimacy Profile and Equitable Regionally Balanced membership in an Enlarged United Nations Security Council' in Obiozor G. A. & Ajala A. (eds.), 'Africa and the United Nations System: The First Fifty Years' (1998) 200-31 at 206.

<sup>534</sup> For example, in the preamble, it notes that states are conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples. Also, persuaded that the Charter of the UN and the UDHR, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive co-operation among states; to promote international co-operation, having due regard to the African Charter and the Universal Declaration of Human Rights; Article 2(1)(e).

ethnic and national differences', this is stressed in respect of African unity as a whole, rather than from the perspective of the impact upon the individual.<sup>535</sup> Any threat to human rights appeared to be reflected in the OAU Charter as coming from outside the continent, a thing which African unity may help to prevent.<sup>536</sup> These influences during the 1960s were to define the OAU's approach to human rights issues for many years and from the point of view of human rights, it was the two issues of self-determination and apartheid in South Africa that were central to the OAU at its formation and which appear to have guided its approach to human rights throughout its later years.<sup>537</sup>

#### 4.5 Transformation of OAU to AU

The Assembly of Heads of State and Government at their Fourth Extraordinary Summit<sup>538</sup> adopted the Sirte Declaration proposing an Inter-African Union.<sup>539</sup> Legal experts and parliamentarians met in Ethiopia in April and in Tripoli at the end of May 2000. Their report was considered by the first OAU Ministerial Meeting on the Implementation of the Sirte Declaration<sup>540</sup> and in July, 2000, in Lomé, Togo, the Constitutive Act<sup>541</sup> of the Union was

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<sup>535</sup> Murray (2004) 8.

<sup>536</sup> Desirous that all African states should henceforth unite so that the welfare and well-being of their people can be assured... [and] to co-operate and intensify their co-operation and efforts to achieve a better life for the people of Africa, Article 2(1) (b). With this in mind states should thus coordinate their efforts, according to Article 2(2), specifically in the political, diplomatic, economic, educational and cultural, health, science and defence and security fields.

<sup>537</sup> Rachel Murray (2004) 8.

<sup>538</sup> This was held in Libya on the 9<sup>th</sup> of September, 1999.

<sup>539</sup> It was by acclamation that the Assembly of Heads of State and Governments in July 1999 in Algiers accepted an invitation from Colonel Muammar al- Gaddafi to the 4th Extraordinary Summit in September in Sirte. The purpose of the Extraordinary Summit was to amend the OAU Charter to increase the efficiency and effectiveness of the OAU. The theme of the Sirte Summit was *Strengthening OAU capacity to enable it to meet the challenges of the new millennium*. This Summit concluded on 9 September 1999 with the *Sirte Declaration* aimed at effectively addressing the new social, political and economic realities in Africa and the world; fulfilling the peoples aspirations for greater unity in conforming with the objectives of the OAU Charter and the Treaty Establishing the African Economic Community; revitalising the Continental Organisation to play a more active role in addressing the needs of the people; eliminating the scourge of conflicts; meeting global challenges; and harnessing the human and natural resources of the continent to improve living conditions. To achieve these aims, the Summit, inter alia, decided to establish an African Union in conformity with the ultimate objectives of the Charter of our Continental Organisation and the provisions of the Treaty establishing the African Economic Community. Accelerate the process of implementing the Treaty establishing the African Economic Community, in particular shorten the implementation periods of the *Abuja Treaty*, ensure the speedy establishment of all the institutions provided for in the *Abuja Treaty*; such as the African Central Bank, the African Monetary Union, the African Court of Justice and in particular, the Pan-African Parliament, strengthening and consolidating the Regional Economic Communities as the pillars for achieving the objectives of the African Economic Communities (RECs) and realising the envisaged Union, convene an African Ministerial Conference on Security, Stability, Development and Cooperation in the continent as soon as possible. See [www.au2002.gov.za/docs/background/oau\\_to\\_au.htm](http://www.au2002.gov.za/docs/background/oau_to_au.htm). (Accessed on 18<sup>th</sup> August, 2014).

<sup>540</sup> The report of the Ministerial Conference on the Establishment of the African Union and Pan-African Parliament,

adopted.

Since the entry into force of the *Abuja Treaty*<sup>542</sup> establishing the African Economic Community (AEC), the OAU has been operating on the basis of two legal instruments. The *Abuja Treaty* came into force after the requisite number of ratification in May 1994. It provided for the African Economic Community to be set up through a gradual process, which would be achieved by coordination, harmonisation and progressive integration of the activities of existing and future regional economy.

With the AEC, the AU is taking a wider political and economic view than the European Union (EU) now encompasses, in fact, the AU was modelled on the EU. People have argued that the EU was not the only regional influence and models from the Association of South East Asian Nations (ASEAN) were also of use.<sup>543</sup> A look at the treaty leaves no doubt that the architect of the Abuja treaty hoped to replicate the EU's structure, policies and success, but on an African Landscape.<sup>544</sup>

Libya played a major role in the establishment of the AU and this generated a lot of concerns and criticisms<sup>545</sup> because of the way the country treated black Africans. It is important to stress that though Libya was in the forefront of the transformation, even though it was not the only State that played a key role, the transformation is a result of a long process of OAU/AEC initiatives.<sup>546</sup>

The provisions of the resulting Constitutive Act suggest that human rights will indeed play a greater role in the work of the Union than they did in the OAU. Thus, the Preamble to the

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CM/2162 (LXXII).

<sup>541</sup> The Act provides for transitional arrangements whereby the OAU Charter remains operative for one year for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto. See Article 13 of the Constitutive Act.

<sup>542</sup> The Abuja Treaty is an International Agreement signed on June 3, 1991 in Abuja, Nigeria which created the African Economic Community. The treaty called for an African Central Bank to follow by 2028. The current plan is to establish an African Economic Community with a single currency by 2023.

<sup>543</sup> See Inter-Africa Group/Justice Africa, *The Architecture and Capacity of the African Union. Africa Development Forum (ADF III) Economic Commission for Africa*, Issue Paper for the African Union Symposium, at 3.

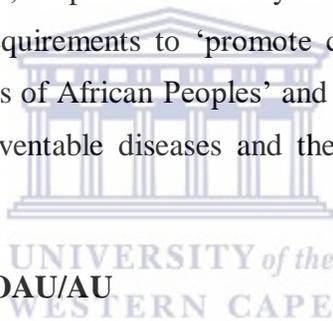
<sup>544</sup> Babarinde O.A., 'Analysing the Proposed African Economic Community: Lessons from the Experience of the European Union,' paper for the Third ECSA-World Conference on The European Union in a Changing World, sponsored by the European Commission, D-G X, Brussels, 19-20 September, 1996. The author went ahead to argue that there are limits to the parallels that can be drawn between the EU and the proposed AEC... the stated goals may be too ambitious, albeit not impossible, to achieve, given the recent socio-political and economic trends which predominate in Africa.

<sup>545</sup> For example, allegation of racist attacks against sub-Sahara Africans, see Libya, *Amnesty International, Annual Report 2001*, AI Index: POL 10/0001/2001.

<sup>546</sup> Ali Abdullatif Ahmida, 'The Making of Modern Libya: State formation, Colonisation and Resistance' (2009) 163.

Constitutive Act recalls ‘the heroic struggles waged by our people and our countries for economic independence, human dignity and economic emancipation.’ Human rights are mentioned specifically with states being ‘determined to promote and protect human and Peoples’ rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law.’<sup>547</sup>

It is also recognised that there is a need to ‘encourage international co-operation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights’ and ‘promote and protect human and Peoples’ rights in accordance with the Africa Charter on Human and Peoples’ Rights and other relevant human rights instruments.’<sup>548</sup> States must respect the need for ‘peaceful coexistence of member states and their rights to live in peace and security,’<sup>549</sup> promote gender equality, have ‘respect for democratic principles, human rights, the rule of law and good governance’, respect the sanctity of life and condemn unconstitutional changes of government.<sup>550</sup> The requirements to ‘promote co-operation in all fields of human activity to raise the living standards of African Peoples’ and to ‘work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent are also relevant.’<sup>551</sup>



#### **4.6 STRUCTURE OF THE OAU/AU**

The OAU Charter provided for four (4) principal institutions, the Assembly of Heads of State and Government (AHS), the Council of Ministers, the General Secretariat and the Commission on Mediation, Conciliation and Arbitration.<sup>552</sup> The Constitutive Act of the AU on its parts listed the organs of the Union to be the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialised Technical Committee, the Economic, Social and Cultural Council and the Financial Institutions.<sup>553</sup> Of all these above listed organs, the Assembly of the Union, the Executive Council, the Commission and the Specialised Technical Committees are equivalent to the

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<sup>547</sup> Rachel Murray (2004) at 32. The central objectives, in Article 3, and Principles, in Article 4, of the Union noted that the Unions aims include not only achieving greater unity and solidarity between the African countries and the peoples of Africa and accelerating development but also the need to promote peace, security and stability on the continent. See Article 3(f).

<sup>548</sup> Article 3(e)(h).

<sup>549</sup> Article 4(i).

<sup>550</sup> Article 4(l),(o) and (p).

<sup>551</sup> Article 3(k) and (n).

<sup>552</sup> Article 7.

<sup>553</sup> Article 5 of the Constitutive Act.

Assembly of Heads of State and Governments, the Council of Ministers, General Secretariat and Specialised Commissions in the OAU institutional structure.

#### 4.6.1 The Assembly of Heads of State and Governments/the Assembly

The Assembly of Heads of State and Government is a composition of the Heads of State and Governments of member states of the African Union or their representatives<sup>554</sup> which meets at least once in a year.<sup>555</sup> The Assembly being the supreme organ of the Organisation, determines the common policies of the Union, monitors their implementation, establishes any organ of the Union, and receives, considers and takes decisions on reports and recommendations of other organs of the Union. What this means is that it has final decision making powers.<sup>556</sup>

#### 4.6.2 The Court of Justice of the African Union

The Court of Justice of the African Union was established by the Constitutive Act of the African Union<sup>557</sup> with jurisdiction mainly on the interpretation of the Constitutive Act of the AU and other treaties.<sup>558</sup> AU organs and Member States are eligible to file cases before the court<sup>559</sup> and as at February 2019, eighteen Member States<sup>560</sup> has ratified the Protocol as against the required fifteen ratification needed for it to come into effect.<sup>561</sup> The African Court on Human and Peoples' Rights with the African Court of Justice were to be established as two separate institutions, as a treaty body and as an organ of the AU respectively but in July, 2004, the Assembly decided to 'integrate' the African Court and the Court of Justice of the African Union into one Court.<sup>562</sup> The merger protocol was adopted in 2008. The African Court was set up to

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<sup>554</sup> Article 9.

<sup>555</sup> Article 9. It infact rarely met more than twice though there are provisions in Article 9 for extra-ordinary sessions to be held. See Philippe Sands & Pierre Klein, 'Bowett's Laws of International Institutions' (2001) 246.

<sup>556</sup> Article 8.

<sup>557</sup> Article 5 Constitutive Act.

<sup>558</sup> Article 19 of the Court of Justice Protocol.

<sup>559</sup> Article 18 of the Court of Justice Protocol.

<sup>560</sup> [www.au.int/sites/default/files/treaties/7784-sl-protocol\\_of\\_the\\_court\\_of\\_justice\\_of\\_the\\_african\\_union\\_1.pdf](http://www.au.int/sites/default/files/treaties/7784-sl-protocol_of_the_court_of_justice_of_the_african_union_1.pdf) (Accessed 18 March, 2017).

<sup>561</sup> See [www.au.int/en/treaties/status](http://www.au.int/en/treaties/status) (Accessed on 7<sup>th</sup> March, 2014).

<sup>562</sup> During the discussion on the recommendation of the Executive Council to postpone the election of Judges of the African Court due to insufficient candidates, the then chairperson of the Assembly, President Olusegun Obasanjo, expressed concern about the proliferation of organs of AU, and the danger of not having enough funds to support them. In his comment, he said why shouldn't the Court of Justice take along with it the Court on Human and Peoples Rights so that we can have a Court of Justice which will have a division, if you like, for border issues, a division for human rights issues, a division for cross-border criminal issues or whatever. See 'Report on the Decision of the Assembly of the Union to Merge the African Court on Human and Peoples Rights and the Court of Justice of the African Union', Executive Council, Sixth Ordinary Session, 24-28 January, 2005, Abuja, Nigeria, Ex.CL/162, pp.1 & 2. See also Evans & Murray (eds), 'African Charter on Human and Peoples Rights: The System in Practice, 1986-2006' (2008) 406.

deal with allegations of human rights abuses against AU Member States while the Court of Justice was expected to deal mainly with contentious matters of a political and economic nature.<sup>563</sup> The mandate of the Court of Justice related to disputes about the common policies of the AU<sup>564</sup> and arising issues from accelerated political and economic integration.<sup>565</sup> The merger will be extensively discussed in chapter six of this thesis.

#### 4.6.3 The Commission

The Commission is another organ of the AU which operates as the functional heart of the AU and it operates as the secretariat of the Union.<sup>566</sup> It is saddled with the day to day operations of the AU. It is headed by a Chairperson who is elected by the Assembly and assisted by eight Commissioners who are appointed by the Assembly, with each in charge of a Department while regional and gender representation are ensured during the appointment of these Commissioners.<sup>567</sup> This led to the appointment of five female Commissioners thereby making it the first AU organ to achieve gender equality.<sup>568</sup> The Commission is equivalent to the General Secretariat in the OAU Charter and the Abuja Treaty.

#### 4.6.3 The Permanent Representative Committee

The Permanent Representatives' Committee (PRC) can be said to be the most active of the AU organs and it is made up of ambassadors or the representatives of Member States to the AU. It has been described as the 'hands-on' body engaged continuously in negotiations on a variety of issues.<sup>569</sup> It is where the political deals were decided which turned technical drafting into official policy<sup>570</sup> and this was demonstrated during the drafting of the Protocol merging the African Human Rights Court and the African Court of Justice.<sup>571</sup> Its sub-committee on Refugees, Returnees and Internally Displaced Persons has also taken a leading role in the elaboration of a 'legal framework for the protection and assistance of internally displaced

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<sup>563</sup> Viljoen, *International Human Rights Law in Africa* (2007) 225.

<sup>564</sup> Article 9(1)(a) Constitutive Act.

<sup>565</sup> Article 3 Constitutive Act.

<sup>566</sup> Article 20(1) Constitutive Act.

<sup>567</sup> Article 6(2) (3) Statutes of the AU Commission.

<sup>568</sup> Stefiszyn K, 'The African Union: Challenges and Opportunities for Women' (2005) 5 *AHRLJ* 358, 365.

<sup>569</sup> Viljoen (2007) 183.

<sup>570</sup> See, 'African Network on Debt and Development, Open Society Initiative for Southern Africa'. See also, Oxfam GB, 'Towards a People-Driven African Union: Current Obstacles and New Opportunities' Available at [www.soros.org/resources/articels\\_publications/publications/people\\_20070124/a-people-20071101-english.pdf](http://www.soros.org/resources/articels_publications/publications/people_20070124/a-people-20071101-english.pdf).

(Accessed on 7<sup>th</sup> March, 2014).

<sup>571</sup> AU Doc. EX. CL.237 (VIII) Decision on the merger of the African Court on Human and Peoples Rights and the Court of Justice of the African Union.

persons in the continent.<sup>572</sup> This was evidenced in its advocacy for the ratification, domestication and implementation of the Kampala Convention by States. The humanitarian mission conducted by the PRC to countries affected by displacement provides unique opportunities to promote the Kampala Convention with relevant authorities.<sup>573</sup>

#### 4.6.4 The Economic, Social and Cultural Council

The Economic, Social and Cultural Council is an advisory body of the AU aimed at giving civil society organisations a voice among AU institutions.<sup>574</sup> It is composed of different social and professional groups of Member States<sup>575</sup> as its composition and functioning was left to be determined by the Assembly.<sup>576</sup> It was the last of the organs of AU to be established, this is reinforcing the belief that the AU gives low priority to the inclusion of ordinary African people in its structure and no provision was made for it in the OAU Charter. The Abuja Treaty provided for an organ named the Economic and Social Commission.<sup>577</sup> It aimed at fostering a partnership between the AU and civil societies, it is not treated as a ‘legislative’ organ because the outcomes of the partnership will only take the form of ‘advice’ to the organs with decision-making powers and there is no stated intention that the AU will ever change this position. It provides civil societies in Africa with the opportunity to participate in dialogues and debates about AU policies and programmes since they were excluded from participating meaningfully in the formation of the AU. The ECOSOCC statute is silent on how the outcome of debates may be brought to the attention of other AU organs. It is also silent on the relationship between ECOSOCC and other AU organs. This is because of its limited advisory powers and the possibility of state elites controlling its membership, the danger is that ECOSOCC may not constitute a vibrant ‘fourth branch’ where participation of African citizens will be secured.

The Constitutive Act of the AU gives an important place to human rights and an indication that they will play a significant role in the AU. However, there have been serious concerns that the

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<sup>572</sup> AU Doc. Ex.CL/Dec.284 (IX) para.9.

<sup>573</sup> See the Report of the Workshop organized by the Norwegian Refugee Council in conjunction with Internal Displacement Monitoring Centre and the African Union titled ‘The Natural Responsibility to Protect Internally Displaced People: The Kampala Convention’ held at Addis Ababa, Ethiopia from 8-10 December, 2014 at 7.

<sup>574</sup> Article 3(1) ECOSOCC Statutes.

<sup>575</sup> It is composed of one hundred and fifty (150) civil society organisations including those representing women, children, elderly, disabled, professional groups, NGOs, workers, employers, traditional leaders, academics, religious and cultural organisations. There are two civil society organisations from each member state, ten with sub-regional and eight with regional (continent- wide) focus; twenty representing the Diaspora; and another six nominated by the AU Commission. See Article 4, Statute of ECOSOCC.

<sup>576</sup> Article 22 Constitutive Act.

<sup>577</sup> Heyns (eds.) (2006) 102.

Commission and the Court do not feature in the Act as they were not previously mentioned. While it is feared that these two bodies were being sidelined or forgotten under these new structures,<sup>578</sup> it perhaps indicates the lack of coherence in the Act as a whole when other organs, such as the Central Organ, were also omitted. For example, the Council of Ministers asked the Secretary to take measure to assure the place of the African Population Commission and the OAU Labour and Social Affairs Commission in the AU.<sup>579</sup> Despite being mentioned in the substantive provisions of the Act, in relation to the mandates of the various institutions, within the Union, it is disturbing that human rights are not listed under any of them expressly. The Assembly, as the supreme body of the Union, seems to reflect the AHSG under the OAU.<sup>580</sup> The relationship between the ACJ and the Court will be examined in greater detail in chapter six of this thesis.

#### 4.7 Conclusion

A clear understanding of the background to the human rights regime in Africa is a requirement for a full appreciation of how the African human rights regime came into existence and this is what this chapter has tried to do. The chapter has traced the historical development of human rights in Africa thereby laying a foundation for the exploration of the relationship between human rights and culture in Africa as it sets the tone of the study generally.

The concepts dealt with in this chapter are merely introductory as it is dedicated to inquiring whether law existed in pre-colonial Africa/traditional African society and this was done via two

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<sup>578</sup> See Rachel Murray, 'Human Rights in Africa: From the OAU to the African Union' (2004) 33. The Sirte Declaration went further with the AHSG noting the violations of human and peoples rights that continued on the continent and specifically stated: We also recommit ourselves to ensure the early establishment of the African Court on Human and Peoples Rights, Draft Sirte Declaration, Fourth Extraordinary Summit of the Assembly of Heads of State and Government, 8-9 September 1999, Sirte, Libya, EAHG/Draft/DECL. (IV) Rev.1, para. 14.

<sup>579</sup> Decision on the place of the African Population Commission (APC) in the African Union, AHG/Dec.176 (XXXVIII); Decision on the place of the OAU Labour and Social Affairs Commission in the African Union, AHG/Dec.177 (XXXVIII). The OAU/AU organs have continually stressed that it is for the Commission first to consider its place within the Union and to inform the AU organs accordingly.

<sup>580</sup> The functions of the Executive Council in Article 13 provide that 'it should coordinate and take decisions on policies in areas of common interest and list environmental protection, humanitarian action and disaster response and relief, education, culture, health, nationality, residency and immigration, social security... child care policies as well as policies relating to the disabled and handicapped.' See Article 13 (e), (h), (j), (k) of the Constitutive Act respectively. Similarly, the Act establishes a number of Specialised Technical Committee such as the Rural Economy and Agricultural Matters; Monetary and Financial Affairs; Trade, Customs and Immigration; Industry, Science and Technology, Energy, Natural Resources and Environment; Transport, Communications and Tourism; Health, Labour and Social Affairs; Education, Culture and Human Resources. See Article 14. It is possible that the committee on Health, Labour and Social Affairs, and on Education, Culture and Human Resources, may cover human rights.

inquiries. First, the chapter looked into the existence of human rights in pre-colonial or traditional African society then followed it up with human rights debates. The historical development of the African Charter was also examined by critically analysing its content, application, enforcement and implementation.

The point remains that colonialism relegated African tradition and values; it arrested and destroyed the internal dynamics of the evolution of Africa societies and there is no doubt that by abolishing certain objectionable traditional practices that were prevalent in pre-colonial Africa which were carried over to colonial Africa, the colonialist did contribute to selective progressive development of human rights. It was not only founded on racism and naked exploitation, it also denied and prevented fundamental human rights, and was essentially against the promotion and protection of human rights in Africa.

The consequences of colonialism can still be seen in the high handedness and authoritarian nature of many African regimes, which have adopted the oppressive mechanisms of the colonial masters against their own people.

The next chapter will seek to explore the concepts of justice and relate them to human rights from an African perspective. It will demonstrate that human rights are the rationale for the quest for justice, peace, reconciliation and democracy in the society.

## CHAPTER 5

### THE AFRICAN COMMISSION

#### 5.1 Introduction

The African Charter<sup>581</sup> provides for the establishment of the African Commission on Human and Peoples' Rights (the Commission) within the OAU (now AU). The Commission has the mandate to promote and protect human and Peoples' rights in Africa.<sup>582</sup> The African Charter is regarded as one of the comprehensive human rights treaties presently in existence.<sup>583</sup> The Commission was the sole supervisory body of the African Charter before the establishment of the African Court on Human and Peoples' Rights which came into existence with the adoption of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights.<sup>584</sup> This positioned the Commission at the very core of the African human rights system.<sup>585</sup>

The Commission is made up of 11 members<sup>586</sup> that are elected by secret ballot by the Assembly of Heads of State and Government of the OAU/AU<sup>587</sup> for a period of six renewable years.<sup>588</sup> The candidates are drawn from a list by the States Parties to the African Charter and chosen from among African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in human and Peoples' rights.<sup>589</sup> The candidate must also have the nationality of one of the State Parties to the Charter.<sup>590</sup>

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<sup>581</sup> Adopted by the Assembly of Heads of States and Government of the Organisation of African Unity on 28 June, 1981. It entered into force on 21 October, 1986. See OAU Doc. CAB/LEG/67/3, Rev. 5.

<sup>582</sup> Article 30 of the African Charter on Human and Peoples Rights.

<sup>583</sup> Udombana N.J., 'Between Promise and Performance: Revisiting States Obligations under the African Charter' (2004) 40 at 105.

<sup>584</sup> Adopted by the Assembly of Heads of States and Government of the OAU on 9<sup>th</sup> of June, 1998 and it entered into force on 25<sup>th</sup> January, 2004. See OAU/LEG/AFCHPR/PROT (III).

<sup>585</sup> Malcolm Evans & Rachel Murray (eds.), 'African Charter on Human and Peoples Rights: The System in Practice 1986-2006' (2008) 317.

<sup>586</sup> Article 31 (1).

<sup>587</sup> Article 33 of the African Charter.

<sup>588</sup> Article 36.

<sup>589</sup> Article 31. The AU Assembly in May, 2013 elected Lawrence Mute as Commissioner for a term of six years. Commissioner Mute has previously served as a Commissioner of the Kenya National Commission on Human Rights and he replaced former Chairperson of the Commission, Dupe Atoki from Nigeria, who did not stand for re-election. Yeung Kam John Yeung Sik Yuen from Mauritius (elected 2007), Soyata Maiga from Mali (elected 2007) and Lucy Asuagbor from Cameroon (elected 2010) were re-elected for six year terms. See Assembly/AU/Dec. 483. (XXI). Other Commissioners are Faith Pansy Tlakula (elected 2005) from South Africa, Dr. Solomon Ayele Dersso (elected 2015) from Ethiopia, Jamesina Essie L. King (elected 2015) from Sierra Leone, Madam Reine Alapini-Gansou (elected 2005) from Benin, Maya Sahli Fadel Ms (elected 2011) from Algeria, Med. S.K. Kaggwa (elected 2011) from Uganda and Mrs. Zainab Sylvie Kayitesi (elected 2007) from Rwanda. See [www.achpr.org/about/](http://www.achpr.org/about/) (Accessed 15<sup>th</sup> August, 2016).

<sup>590</sup> Article 34. It should be noted that the initial version of this Article did not lay down this condition, whose effect is

In order for the Commission to execute its mandate, it is essential that its members meet. To achieve this, provision has been made for members to meet at least twice a year during the ordinary session.<sup>591</sup> The ordinary session of the Commission normally lasts for a period of two (2) weeks<sup>592</sup> and it is divided into public and private sessions.<sup>593</sup>

The Executive Council in its decisions on the Commission's Activity Reports, has repeatedly called on the AU Commission to 'expedite recruitment for the Secretariat in order to enable the ACHPR to effectively deliver on the mandate entrusted to it.'<sup>594</sup> A staffing structure was approved by the AU for the Secretariat in 2009 but the Commission has not expedited action for the recruitment of staff.<sup>595</sup>

On the financial allocation to the Commission, the Commission's budget in the AU has increased significantly. The total budget for the Commission for 2019 is about \$681.5 million,<sup>596</sup> in 2008 the Commission presented and successfully defended a budget of \$6million<sup>597</sup> while in 2007 the Commission was allocated a budget of \$1.2million<sup>598</sup> but the Commission has expressed concern

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to limit the choice of States in this field. The American Convention, for example in Article 36 simply requires that candidates should be nationals of a Member State of OAS. The European Convention also in its previous Article 36 required members of the Commission to have the nationality of a country party or the nationality of a Member State of the Council of Europe. The same rule applies to members of the European Court in which a judge of Swiss nationality proposed by Liechtenstein and a judge of Italian nationality proposed by San Marino currently sit. See also Fatsar Ouguergouz, 'The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa' (2003) 486.

<sup>591</sup> See Rules 1 and 2 of the Rules of Procedure of the African Commission on Human and Peoples Rights. The Commission may also hold Extraordinary Sessions where necessary. See Rule 3 of the Rules of Procedure of the African Commission. The Commission held two ordinary sessions in 2014 and 2015, the Commission held one ordinary session between the 28<sup>th</sup> of April (55<sup>th</sup> Ordinary Session) and 12<sup>th</sup> of May in Angola and a joint session between the 16<sup>th</sup> and 19<sup>th</sup> of July, 2014. But due to the backlog of complaints and state reports, the Commission has held three Extraordinary Sessions; the 15<sup>th</sup> Extraordinary Session from 7<sup>th</sup> - 14<sup>th</sup> March, 2014 in The Gambia, the 16<sup>th</sup> Extraordinary Session from 20<sup>th</sup> - 29<sup>th</sup> July 2014 in Rwanda and the 17<sup>th</sup> Extraordinary Session between the 19<sup>th</sup> and 28<sup>th</sup> February, 2015 in The Gambia. See [www.achpr.org/sessions](http://www.achpr.org/sessions) (Accessed 4<sup>th</sup> April, 2015).

<sup>592</sup> Rule 2 of the Rules of Procedure of the African Commission.

<sup>593</sup> The Commission during its public session reports on its promotional activities and receives reports from government representatives, national human rights institutions, international organisations, inter-governmental organisations and non-governmental organisations about human rights situations in Africa. Matters relating to the protective mandate of the Commission as well as the administrative and financial situation of its secretariat are handled during the private sessions. Members of the Commission also discuss and adopt decisions and resolutions or make recommendations aimed at improving the situation of human rights on the continent during private sessions. See Evans & Murray (eds.) (2008) 317.

<sup>594</sup> See Decision on the 34<sup>th</sup> Activity Report of the African Commission on Human and Peoples Rights Doc Ex.CL/796 (XXIII) para 24 of 2013.

<sup>595</sup> 35<sup>th</sup> Activity Report of the African Commission at para 30.

<sup>596</sup> [www.au.int/en/pressrelease/20180706/financial-reforms-african-union-lead-massive-cuts-union's-budget](http://www.au.int/en/pressrelease/20180706/financial-reforms-african-union-lead-massive-cuts-union's-budget) (Accessed 8 March, 2019)

<sup>597</sup> See Par. 38, 23<sup>rd</sup> & 24<sup>th</sup> Activity Report.

<sup>598</sup> See Par. 113, 23<sup>rd</sup> Activity Report.

that no funds for programme activities as allocated in the AU budget were released to the Commission.<sup>599</sup>

Article 45 of the Charter provides the various functions of the African Commission and the relevant provisions are to promote human and Peoples'rights, protect humanrights as laid down in the Charter, interpret the provisions of the Charter, and carry out other functions assigned to it by the Assembly of Heads of State.<sup>600</sup> In carrying out its functions, the Commission shall not only co-operate with other human rights organisations, but have regard for the international law of human rights and other treaties in its interpretation of the Charter, especially those of which African states are parties.<sup>601</sup>

The African Commission was established as a quasi-judicial supervisory body under the African Charter whose findings are not legally binding as such.<sup>602</sup> The Commission issues 'recommendations' to state parties, rather than 'orders.' In fulfilling its protective mandate, the African Commission has developed a well-established practice of receiving and considering individual complaints alleging violations by state parties of the African Charter.<sup>603</sup> When it has found such a violation, the Commission has further developed a practice not only of listing the articles violated by the state party concerned, but also of recommending remedial measures to be adopted by that state.<sup>604</sup>

In contrast to the individual complaints procedure, what follows once the Commission has made

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<sup>599</sup>35<sup>th</sup> Activity Report of the African Commission para. 31. The budget for 2014 was also reduced to \$4 million as an operational budget from member States and \$1, 5 million as programme budget from partners. See Killander M & Nkrumah B, 'Human Rights Developments in the African Union during 2012 and 2013' (2014) 14 *African Human Rights Law Journal* 275-296.

<sup>600</sup> Article 45, African Charter.

<sup>601</sup> Article 60 and 61, African Charter.

<sup>602</sup> See the introductory comments to Mbaye draft which formed the basis of the Charters *travaux préparatoires*, highlighting this omission of judicial institution but explaining that it was thought premature to [establish one] at this stage. Introduction to Mbaye Draft, 4<sup>th</sup> par.; OAU Doc. CAB/LEG/67/1 (1979). See also Christof Heyns (ed.) 'Human Rights Law in Africa' (2002) 65. See also, Yemi Akinseye-George, 'New Trends in African Human Rights Laws: Prospect of an African Court on Human Rights' (2002) 10 *University of Miami International & Comparative Law Review* 162-3.

<sup>603</sup> Frans Viljoen & Lilette Louw, 'State Compliance with the Recommendation of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1.

<sup>604</sup> The Commission's practice in this regard is well documented. See Malcolm Evans & Rachel Murray, 'The African Charter on Human and Peoples' Rights: The system in Practice 1986-2000', Evelyn Ankumah, 'The African Commission on Human and Peoples Rights: Practice and Procedure' (1996); Rachel Murray, 'The African Commission on Human and Peoples Rights and International Law' (2000); Inger Osterdahl, 'Implementing Human Rights in Africa: The African Commission on Human and Peoples Rights and Individual Communications' (2000), Nasila Rembe, 'The System of Protection of Human Rights under the African Charter on Human and Peoples Rights' (1997).

its findings is not well recorded as little is known about the status of state compliance with the Commission's recommendations.<sup>605</sup> Both the African Charter and the Rules of Procedure of the African Commission did not make provision for what happens to communications once a finding has been made.<sup>606</sup> There are also no follow-up mechanisms or policy put in place by the Commission to monitor state compliance with its recommendations.<sup>607</sup> Although some attempts were made in the past by the Commission to monitor compliance of its recommendation by states, these efforts were few and far apart.<sup>608</sup>

According to Viljoen and Louw, commentators on the African regional human rights system have often cited its absence of 'teeth' when it comes to the enforcement mechanisms provided for in the African Charter.<sup>609</sup> The African Commission, in reflecting on its activities, has indicated that the lack of state compliance with its recommendations was 'one of the major factors of the erosion of the Commission's credibility.'<sup>610</sup> However, in the absence of

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<sup>605</sup> This is not a phenomenon peculiar to the Africa system. Paulson in analysing compliance with final Judgements of International Court of Justice (ICJ) quoted Judge Robert Y. Jennings of the ICJ who stated that it is ironic that the Courts business up to the delivery of Judgement is published in lavish details, but it is not at all easy to find out what happened afterwards. See Colter Paulson, 'Compliance with Final Judgements of the International Court of Justice since 1987' (2004) 98 *AJIL* 434.

<sup>606</sup> Frans Viljoen & Lirette Louw (2007) 2.

<sup>607</sup> According to Robert Eno, Unlike other regional and global human rights bodies, the Commission has not developed any follow up mechanism to ensure implementation of its recommendation...This has been very frustrating especially for the victims who have to pursue the execution of the decisions on their own. Because there is no pressure from the Commission, states have tended to turn a blind eye to the recommendations and a deaf ear to the victims pleas for compliance. See Robert Eno, 'The Place of the African Commission in the New Dispensation (2002)11 *African Security Review* 63, 67. See also Rachel Murray, 'The African Commission on Human and Peoples Right and International Law' (2002)21; Dankwa E.V.O., 'The African System for the Protection of Human Rights: The Task Ahead' (1998) 4. Document prepared for the National Human Rights Commission of Nigeria, African Human Rights day celebration by the Nigerian Institute of International Affairs, Lagos, Nigeria.

<sup>608</sup> Viljoen & Louw (2007) 2.

<sup>609</sup> They cited the work of Claude E. Welch, *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organisations* (1995) 151-153 as an example in their article titled *State Compliance with the Recommendations of the African Commission on Human and Peoples Rights 1994-2004* (2007) *American Journal of International Law* 3.

<sup>610</sup> See the discussion document entitled *Non-Compliance of State Parties to Adopt Recommendations of the African Commission: A Legal Approach*, DOC/OS/50b (XXIV) Para.2 (1998) [hereinafter *Non-Compliance: A Legal Approach*]. This document has been reprinted in *Documents of the African Commission on Human and Peoples Rights* (Rachel Murray & Evans Malcolm eds. 2001). In this document, the secretariat highlighted the absence of compliance, save for a case, *Pagnouille (on behalf of Mazou) v. Cameroon, Communication* [Comm.] No. 39/90, 2000 *African Human Rights Law Report* 55. The first time that the Commission noted that State parties were not complying with its recommendations had been at its twenty-second Ordinary session in November, 1997 where the Secretariat also raised the issue. In the Eleventh Annual Activity Report, covering the November 1997 session, the Commission observed not only that non-compliance affected its credibility but also that it could probably be to blame for the reduction of Communications to it. See section VIII, Protective Activities, 11<sup>th</sup> Activity Report, 1997-1998 (see [www.achpr.org](http://www.achpr.org)). Later in September, 2003 at a retreat organized by the office of the UN High Commissioner for Human Rights in Addis Ababa to evaluate the functioning of the African Commission, problems of non-compliance by State parties were highlighted once more. The retreat also identified the lack of a follow-up system to ensure that decisions and recommendations of the Commission are complied with as one of the challenges

accumulated data and any policy on follow-up, the commissioners' critical observations about a lack of compliance with their findings remain speculative.<sup>611</sup> In order to provide a solution to this problem, the Commission, at its 50<sup>th</sup> Ordinary Session established the Working Group on Communications<sup>612</sup> with the mandate to consider Communications at the level of seizure and inform the Commission; to consider the Communications on Admissibility and formulate recommendations to the Commission and where necessary, consider Communications on merit among others.<sup>613</sup>

This chapter will analyse and appraise the African Commission as an organ for the enforcement of human rights in Africa. This will necessitate a scrutiny of its structure, mandate, and rules of procedure. It will also determine whether the Commission reflects the African system of justice.

## 5.2 The Secretariat of the African Commission

The African Commission is a permanent organ of the OAU/AU which is assisted in its work by the Secretariat.<sup>614</sup> The Secretariat is headed by a Secretary who is appointed by the Secretary-General<sup>615</sup> of the OAU<sup>616</sup> and the Secretary is responsible for the day to day activities of the Commission under the supervision of the Chairman.<sup>617</sup> The Secretariat's main function is to assist members of the Commission and the Commission in the exercise of their functions while it also serves as the intermediary for all the correspondence concerning the Commission. The Secretary is also placed in charge of the archives of the

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facing the Commission. The report of the Retreat of Members of the African Commission on Human and Peoples' Rights (ACHPR) at 4 (September 24-26, 2003) Available at [www.nhri.net](http://www.nhri.net).

<sup>611</sup> During the twenty-second Session of the Commission, the Chairman stated that none of the decisions on individual communications taken by the Commission and adopted by the Assembly had ever been implemented Rachel Murray, *Report on the 1997 Session of the African Commission on Human and Peoples Rights, 21<sup>st</sup> and 22<sup>nd</sup> Session: 15<sup>th</sup> -25<sup>th</sup> April and 2<sup>nd</sup> – 11<sup>th</sup> November, 1997*; 19, (1998) *Human Rights Law Journal* 169-170.

<sup>612</sup> Resolution 194 adopted at the 50<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples Rights held in Banjul, Gambia from the 24<sup>th</sup> October to the 5<sup>th</sup> November, 2011. Available at [www.achpr.org/sessions/50th/resolutions/194](http://www.achpr.org/sessions/50th/resolutions/194). (Accessed 5<sup>th</sup> April, 2015).

<sup>613</sup> Resolution 212 adopted at the 11<sup>th</sup> Extraordinary Session of the African Commission on Human and Peoples Rights held in Banjul, The Gambia from the 21<sup>st</sup> February to 1<sup>st</sup> March, 2012. Available at [www.achpr.org/sessions/11th-ao/resolutions/212](http://www.achpr.org/sessions/11th-ao/resolutions/212). (Accessed 5<sup>th</sup> April, 2015).

<sup>614</sup> Malcolm & Murray (2008)13.

<sup>615</sup> The Secretary-General of the OAU is now the Secretary under the AU.

<sup>616</sup> Article 41 of the African Charter. The Secretary-General also provides the necessary staff and funds for the operation of the Secretariat. This appointment is made in consultation with the Chairperson of the African Commission. See Rule 22(2) of the Rules of Procedure of the African Commission.

<sup>617</sup> Rule 23, Rules of Procedure of the African Commission.

Commission.<sup>618</sup>

Furthermore, the Secretary drafts summary minutes of the public and private sessions of the Commission and its subsidiary bodies and distributes them immediately to members of the Commission and other participants in the session.<sup>619</sup> The Secretary along with the other members of the Secretariat provides all the technical assistance,<sup>620</sup> financial assistance<sup>621</sup> and administrative assistance.<sup>622</sup> Aside these functions, the Secretary is also responsible for keeping 'a special record with a reference number and initialled' wherein dates of registration of each petition and communications and that of the procedures relating to them before the Commission are entered.<sup>623</sup> The Secretary also records and keeps tape recordings of the various sessions of the Commission and where the Commission so decides, of its subsidiary bodies.<sup>624</sup>

Explaining the function of the Secretariat of the Commission, the African Charter did not explicitly say what the functions of the Secretariat should be but Article 41 states that it shall assist the African Commission in discharging its duties, while the Rules of Procedure which ought to have defined the task of the Secretariat of the African Commission are also unclear. The lack of description on the role of the Secretariat always creates confusion within the African Commission as it relates to what the Secretariat is expected to do in relation to the mandate of the African Commission.<sup>625</sup>

An action plan was developed by the Secretariat of the African Union for the period 2003-2006 wherein it attempted to define its role.<sup>626</sup> The action plan stated that the Secretariat should provide administrative, technical and logistical support to the members of the Commission and it

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<sup>618</sup> Rule 23 (c) Rules of Procedure of the African Commission.

<sup>619</sup> Rule 39 Rules of Procedure of the African Commission.

<sup>620</sup> This include processing communications, preparation for missions, undertaking missions and writing up reports thereto, preparing periodic reports of States, preparing the applications for affiliated status of National Human Rights Institutions and applications for observer status of NGOs.

<sup>621</sup> This include mobilisation of the necessary funds for their activities.

<sup>622</sup> Arranging their work, organising trips and any other administrative activities.

<sup>623</sup> Rule 27 Rules of Procedure of the African Commission.

<sup>624</sup> Rule 38 Rules of Procedure of the African Commission. The Secretary, for some years now, has had the human and material resources required for actually making sound recordings and also for making summary records of sessions. See Fatsah Ouguergouz (2003)493.

<sup>625</sup> Evans & Murray (2008) 318 provided instances where members of the African Commission have taken decisions on matters and issues which are purely administrative and which fall within the scope of the Secretariat.

<sup>626</sup> This was developed by the African Commission on Human and Peoples Rights in order to effectively execute its mandate. The strategic plan aimed at meeting the specific challenges of the time and ensuring the effective protection of human rights. The current strategic plan covers the period 2008 -2012. See 'Concept Notes on the Working Method Workshop of the African Commission on Human and Peoples Rights' held at Ouagadougou, Burkina Faso between the 26<sup>th</sup> and 27<sup>th</sup> of September, 2008.

went further to break down the support provided by the Secretariat to the Commission into three which are:

1. Support to the Commission as an institution
2. Support to the Bureau of the Commission<sup>627</sup>
3. Support to the individual Commissioners in order to facilitate them in performing the various tasks assigned to them.<sup>628</sup>

The task of carrying out all the above enumerated functions is conferred on the Secretariat. It brings to fore, the important role the Secretariat plays in making sure the Commission discharges its mandates as spelt out in the Charter.<sup>629</sup> The legal section of the Secretariat is relied upon by the Commission to provide it with the necessary technical assistance needed by it to discharge its mandate of promoting and protecting human and Peoples' rights.<sup>630</sup>

With the provision of technical support for the monitoring and advisory functions of the Commission, reports of human rights violations and situations in State Parties are sent to the Commission through the Secretariat by NGOs and other sources. The Secretariat keeps the Commission up-to-date with the situation of human rights on the continent.<sup>631</sup> Undertaking missions to monitor the human rights situations in State Parties and adherence by State Parties to international human rights standards is a way of acting on the reports received by the Secretariat.<sup>632</sup> Although the Commission may adopt resolutions or issue recommendations to the State Parties concerned, through its communication or complaint procedures,<sup>633</sup> issuance of urgent appeals or request for provisional measures,<sup>634</sup> the Commission is able to advise State

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<sup>627</sup> This composed of the Chairperson of the African Commission, its Vice-Chairperson and the Secretary to the Commission who is an ex-officio member.

<sup>628</sup> This is achieved by (1) providing technical support for the monitoring and advisory functions of the African Commission and any other necessary assistance in the fulfilment of its mandate; (2) disseminating the work of the Commission and facilitating the promotion of the African Charter; (3) networking with other human rights organisations, and facilitating networking activities among them; and (4) procuring the necessary resources for the fulfilment of the African Commissions mandate. See Strategic Plan of the African Commission on Human and Peoples Rights 2003-2006.

<sup>629</sup> See the Strategy Plan of the African Commission on Human and Peoples Rights 2003-2006, p.3.

<sup>630</sup> Nsongurua Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples Rights' (2003)97 *American Journal of International Law* 1. The bulk of the work and activities of the members of the Commission is carried out with the assistance of legal officers who are responsible for carrying out research, drafting decisions on communications, reports and other legal documents, as well as undertaking any other tasks that would facilitate the members of the Commission in carrying out their duties.

<sup>631</sup> These reports are what legal officers studied and analysed, carry out research to verify the veracity of the complaint and thereupon make recommendation to the Members of the Commission as to the step to be taken.

<sup>632</sup> Under Articles 45(3) and 45(4) of the African Charter, the Commission is also mandated to interpret the provisions of the African Charter and perform any other tasks entrusted to it by the OAU/AU.

<sup>633</sup> Articles 47-54 of the African Charter which relate to inter-state communications.

<sup>634</sup> Rule 111, Rules of Procedure of the African Commission. It is important to note that in order to ensure effective

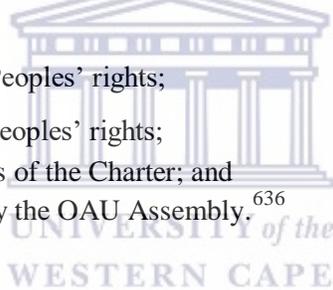
Parties on how they can make sure rights enshrined in the Charter are enjoyed by all.

Furthermore, by the provision of Article 62, the Commission is mandated to receive reports from States Parties outlining the legislative or other measures taken in order to give effect to the rights guaranteed under the Charter. The State reports are examined by the Commission while concluding observations which contain recommendations to the reporting State Party are also adopted by it too.<sup>635</sup>

### 5.3 Mandate of the African Commission

In the light of Article 30 of the African Charter which provides for the establishment of the Commission, the Commission has two principal functions for which it was established: to promote and to protect human and Peoples' rights within the region of Africa. Article 45 of the Charter enumerates the functions of the Commission to be:

- i. the promotion of human and Peoples' rights;
- ii. the protection of human and Peoples' rights;
- iii. interpretation of the provisions of the Charter; and
- iv. any other task assigned to it by the OAU Assembly.<sup>636</sup>



#### 5.3.1 Promotional Mandate of the Commission

Article 45 details the functions of the Commission. It sets out the framework for the promotion of human rights that would in the long run, if properly applied, have the effects of forestalling violations. This framework includes the dissemination of information, research and formulation of normative standards and cooperation with national and international institutions for purposes of promoting respect for human rights.<sup>637</sup>

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monitoring of human rights in Africa, the Commission assigned a specific number of State Parties to each Commissioner and a legal officer is also assigned to assist one or two members of the Commission to carry out their task. What this means is that each of the legal officers is responsible for monitoring human rights in at least six States Parties and in some cases even more. See Fiona Adolu, 'A View from the Inside: The Role of the Secretariat in African Charter on Human and Peoples Rights,' Evans & Murray (eds.) (2008) 316-343.

<sup>635</sup> Fiona Adolu (2008) 320.

<sup>636</sup> OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force 21 October, 1986. Available at [www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) (Accessed 6<sup>th</sup> April, 2015).

<sup>637</sup> In theory, the Commission has demonstrated a perfect understanding of this mandate in stating that within the framework of its promotional role, it has, *inter alia*, an information and education function, a quasi-legislative function, an institutional cooperation function and an examination of state reports functions. See

In carrying out its promotional mandate, the Commission carries out activities like organising seminars and workshops on various human rights topics in conjunction with different organisations. Its Commissioners conduct promotional missions to states depending on the availability of funds during which they engage stakeholders in dialogue on appropriate ways of enhancing the promotion and protection of human and Peoples' rights in the specific state.<sup>638</sup> They also partake in conferences, seminars and expert meetings on various issues related to human rights in Africa. These activities are what the Commission usually includes in its activity reports under the heading 'promotional activities.'<sup>639</sup> These activities are carried out in a piecemeal basis instead of a well-coordinated continental effort which the Commission is well placed to create. It is also unlikely that participation of Commissioners in high level conferences, workshops and seminars on human rights would have a direct impact on the knowledge of the ordinary public about the human and peoples' rights protected by the Charter.

Like in other human right systems, it is clear that under the African human rights system an interest in protection mechanisms overshadows efforts of promoting human rights, but it has been discovered that the protection of human rights through 'blaming and shaming' governments or states does not yield much fruit.<sup>640</sup> What this means is that the promotion of human rights should be given more attention.<sup>641</sup> Promotion of human rights is more effective than deterrence strategies which involve sanction by human rights instruments,<sup>642</sup> extensive promotion of human rights has special importance for African states where violations of

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[www.achpr.org/english/info/mandate\\_en.htm](http://www.achpr.org/english/info/mandate_en.htm). (Accessed 6<sup>th</sup> April, 2015).

<sup>638</sup> There have been instances where Commissioners were unable to conduct scheduled promotional missions due to lack of funding. See Twentieth Annual Activity Report of the African Commission on Human and Peoples Rights, 9<sup>th</sup> Ordinary Session of the Executive Council, 25<sup>th</sup> -29<sup>th</sup> June, 2006 held in Banjul, The Gambia Ex.CL/279/(IX) para 22.

<sup>639</sup> The promotional role of the Commission would be enhanced by the fact that it meets in different African states and is thus able to open dialogue and cooperation with a variety of African governments on a face-to-face basis. See Doebbler CFJ, A 'Complex Ambiguity: The Relationship between the African Commission on Human and Peoples' Rights and other African Union Initiatives Affecting Respect for Human Rights' (2003) 13 *Transitional Law and Contemporary Problems* 7 at 15.

<sup>640</sup> Rosemann N, 'Human Rights Education: Towards the end of the UN Decade' (2003) 4 *Nordic Journal of Human Rights* 4. Available at [www.hrea.org/erc/Library/rosemann03.pdf](http://www.hrea.org/erc/Library/rosemann03.pdf) (Accessed 6<sup>th</sup> of April, 2015).

<sup>641</sup> For example, promoting human rights through education targeted at state officials, professionals, students and the public at large, the violation of human rights can be curbed while officials and professionals would be required to work in accordance with accepted norms of human rights, as informed citizens would put them under pressure to respect the same. See Sisay Alemahu, 'Utilising the Promotional Mandate of the African Commission on Human and Peoples Rights to Promote Human Rights Education in Africa (2007) 7 *African Human Rights Law Journal* 191-205.

<sup>642</sup> Barnhizer D, 'Human Rights Strategies for Investigation and shaming, Resisting Globalisation Rhetoric and Education' in Barnhizer D (ed.), 'Effective Strategies for Protecting Human Rights: Prevention and Intervention, Trade and Education' (2001) 1.

human rights have been prevalent and where many people do not have functional knowledge of human rights.<sup>643</sup>

People need to be enlightened through radio and television programmes about the activities of the Commission; they should also be able to read about the Commission in the newspapers, magazines and other publications in their states about what the Commission does and about its relevance to their lives. Students and pupils need to be taught about the usefulness of the Commission to their careers and life generally. The Charter should be integrated into the curriculum of schools in Africa at all levels of education while journalists, lawyers and other professionals should enlighten people more about their rights and duties.

In the indigenous African Justice System, information about the existence of a law, duties or rights of the people are easily disseminated to the people by going around the community with a bell to attract attention before delivering the message. In order to be able to pay particular attention to specific human rights issues, special mechanisms were set up by the Commission with mandates and activities on all member States to the African Charter.<sup>644</sup>

Although there is no specific Article in the Charter which provides for the establishment of these special mechanisms under the Commission, it can be said that the legal basis for the establishment of the special mechanisms is located in Article 45 of the Charter. Article 45(1) of the Charter which provides for the promotional mandate of the Commission further elaborate this mandate to include:

- (a) to collect documents, undertake studies and research on African problems in the field of human and Peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and Peoples' rights and give its views or make recommendations to governments;
- (b) to formulate and lay down principles and rules aimed at solving legal problems relating to human rights and fundamental freedoms upon which African governments may base their legislations;
- (c) co-operate with other African and international institutions concerned with the promotion and

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<sup>643</sup> Addo M.K. 'Implementation by African States of the Plan of Action for the United Nations Decade for Human Rights' (2000) 44 *Journal of African Law* 96 at 104.

<sup>644</sup> Michelo Hansungule, 'The African Court and the African Commission on Human and Peoples Rights' in Antol Bosl & Joseph Diescho (eds.) 'Human Rights in Africa: Legal Perspectives on their promotion and Protection' (2009) 233.

protection of human and Peoples' rights.<sup>645</sup>

This provision can be said to be in line with the terms of reference, mandate and working methods of most of the special mechanisms under the Commission, therefore it will be reasonable to say that Article 45(1) is the foundation upon which the setting up of these special mechanisms of the Commission are based. Furthermore, looking at the Rules of Procedure of the Commission,<sup>646</sup> Rule 23 can also be said to be another basis for the creation of these special mechanisms. It provides that:

1. The Commission may create subsidiary mechanisms such as special rapporteurs, committees and working groups.<sup>647</sup>
2. The creation and membership of such subsidiary mechanisms may be determined by consensus, failing which, the decision shall be taken by voting.<sup>648</sup>
3. The Commission shall determine the mandate and terms of reference of each subsidiary mechanism. Such subsidiary mechanism shall present a report on its work to the Commission at each ordinary session.<sup>649</sup>

Working groups such as the Working group on Communications have been set up by the Commission pursuant to Rule 97, Rules of Procedure which provides as follows:

1. The Commission shall appoint a rapporteur for each Communication from its members.
2. The Commission may also establish one or more working groups to consider questions of seizure, admissibility and the merits of any Communication(s) and to make Recommendations to the Commission.
3. The Commission shall consider the recommendations of the Rapporteur and or the working group and make a decision.<sup>650</sup>

In line with the provisions of Rules 23 and 97 of the Rules of procedures and Article 45(1) African Charter, the Special Rapporteurs established by the Commission are Special Rapporteurs

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<sup>645</sup> See Article 45 (1) (a) (b) (c) African Charter.

<sup>646</sup> The Rules of Procedure were adopted by the African Commission on Human and Peoples Rights during the second Ordinary Session held in Dakar, Senegal from 2<sup>nd</sup> to 13<sup>th</sup> February, 1988. They were revised during the 18<sup>th</sup> Ordinary Session held in Praia, Cape-Verde from 2<sup>nd</sup> to 11 October, 1995. With the coming into existence of the African Court on Human and Peoples Rights the African Commission developed new Rules of Procedure which were approved by the African Commission on Human and Peoples Rights during its 47<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 12-26 May, 2010. The rules entered into force on 18 August, 2010.

<sup>647</sup> Rule 23 (1) Rules of Procedure of the African Commission.

<sup>648</sup> Rule 23 (2) Rules of Procedure of the African Commission.

<sup>649</sup> Rule 23 (3) Rules of Procedure of the African Commission.

<sup>650</sup> Rule 97 Rules of Procedure of the African Commission.

on Prison and Conditions of Detention,<sup>651</sup> Special Rapporteur on the Rights of Women,<sup>652</sup> Special Rapporteur on Freedom of Expression and Access to Information,<sup>653</sup> Special Rapporteur on Human Rights Defenders,<sup>654</sup> and Special Rapporteur on Refugees, asylum Seekers, Migrants and Internally Displaced Persons.<sup>655</sup> The Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions<sup>656</sup> was created in April, 1994 and was the first special mechanism to be established within the Commission. Aside these Special Rapporteurs there are also working groups and follow up committees on the implementation of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Punishment and Treatment in Africa,<sup>657</sup> Advisory Committee on Budgetary and Staff Matters, and Committee on the Protection of the Rights of People living with HIV and those at risk, vulnerable to and affected by HIV (only few of these will be discussed in details as they relate to the African notion of justice).

The working groups are the Working Group of Experts on Indigenous Populations/Communities in Africa;<sup>658</sup> the Working Group on Economic, Social and Cultural Rights in Africa;<sup>659</sup> the Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights,<sup>660</sup> the Working Group on the Question of the Death Penalty,<sup>661</sup> Working Group on the Rights of Older Persons and people with Disabilities, Working Group on

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<sup>651</sup> This was established in October, 1996. See Final Communique of the Twentieth Ordinary Session of the African Commission, 21-31 October, Grand Bay, Mauritius, Par. 18.

<sup>652</sup> This was established in April, 1998. See Final Communique of the Twenty-third Ordinary Session of the African Commission, 20-29 April, Banjul, The Gambia at Par. 11.

<sup>653</sup> Established in December, 2004. See Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa, ACHPR/Res. 71 (XXXVI) 04.

<sup>654</sup> Established in June 2004. See Resolution on the Protection of Human Rights Defenders in Africa, ACHPR/Res.69 (XXXV) 04.

<sup>655</sup> This was established in December, 2004. See Resolution on the mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa, ACHPR/Res.72 (XXXVI) 04.

<sup>656</sup> See the Final Communique of the Fifteenth Ordinary Session of the African Commission, 18-27 April, 1994 Banjul, The Gambia at paragraph 20.

<sup>657</sup> See the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, ACHPR/Res.61 (XXXII) 02 at Par. 2. The follow up committee was established in 2002 and its members were nominated at the African Commissions Thirty-fifth Ordinary Session held between the 21<sup>st</sup> May and 4<sup>th</sup> June, 2004 in Banjul, The Gambia. See Seventeenth Activity Report 2003-2004 particularly paragraph 35.

<sup>658</sup> Established in November 2003, see the Resolution on the Adoption of the Report of the African Commissions Working Group on Indigenous Populations/Communities, ACHPR/Res.65 (XXXIV) 03.

<sup>659</sup> Established in December 2004, see Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res. 73 (XXXVI) 04.

<sup>660</sup> Established in May 2005, see the Resolution on the Creation of a Working Group on Specific Issues relevant to the Work of the African Commission on Human and Peoples Rights, ACHPR/Res.77 (XXXVII) 05.

<sup>661</sup> Established in December 2005, see the Resolution on the Composition and the Operationalisation of the Working Group on the Death Penalty as adopted at the 38<sup>th</sup> Session, December 2005.

Extractive Industries and Human rights Violations and the Working Group on Communications.<sup>662</sup> Members of these working groups and the follow up committees are members of the African Commission and experts from outside the African Commission membership.<sup>663</sup> The Secretariat is expected to provide support and assistance to these special mechanisms established by the Commission in fulfilling its mandate.<sup>664</sup>

### 5.3.1.1 Special Rapporteurs of the African Commission

The African Commission has six Special Rapporteurs<sup>665</sup> on thematic issues which are: Special Rapporteur on Freedom of Expression and Access to Information in Africa, the Special Rapporteur on Prisons and Conditions of Detention in Africa, the Special Rapporteur on Refugees, Internally Displaced Persons and Migrants in Africa, the Special Rapporteur on Human Rights Defenders in Africa, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings and the last one is the Special Rapporteur on the Rights of Women.<sup>666</sup> The practice of appointing Special Rapporteurs to explore the human rights situations in States has become a feature of the UN human rights machinery.<sup>667</sup> It has been described as the most innovative achievement of the United Nations on human rights.<sup>668</sup>

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<sup>662</sup> Established in November, 2011. See Resolution 194 on the Establishment of a Working Group on Communications available at [www.achpr.org/sessions/50th/resolutions/194](http://www.achpr.org/sessions/50th/resolutions/194). (Accessed on 7<sup>th</sup> April, 2015).

<sup>663</sup> The legal basis for the establishment of the working groups derives from the Rules of Procedure of the African Commission which was adopted under Article 42(2) of the African Charter. Nowhere is the term working group used in the African Charter but the concept can be justified under Article 46 of the African Charter which gives the African Commission broad latitude in the application of appropriate method of investigation in the discharge of its work. See Bahame Tom Mukirya Nyanduga, 'Working Groups of the African Commission and their Role in the Development of the African Charter on Human and Peoples' Rights' in Evans & Murray (eds.) 'The African Charter on Human and Peoples Rights: The System in Practice, 1986-2006' (2008) 379. Rule 28 (1) of the 1995 Rules of procedure of the African Commission provides that subsidiary bodies may be authorized to hold their sessions after the Commission has had consultations with the Secretary-General (now the Chairperson of the African Union Commission), this replaced the 1988 Rules of Procedure which required committees and working groups to be established in consultation with the Secretary-General of the OAU, whose prior consent was needed to hold sessions.

<sup>664</sup> Fiona Adolu (2008)322.

<sup>665</sup> In 1994 the African Commission established a number of Special Rapporteurs to provide focal points for the Commission on issues arising from the African Charter. See Harrington J, 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001)1 *African Human Rights Law Journal* 247, Frans Viljoen, 'State Reporting under the African Charter on Human and Peoples' Rights: A Boost from the South' (2000) 44, *J. AFR. L.* 110; Dinah Shelton, 'Regional Protection of Human Rights' (2008) Vol. 1.

<sup>666</sup> See [www.achpr.org/mechanisms](http://www.achpr.org/mechanisms). (Accessed on 16<sup>th</sup> August, 2016).

<sup>667</sup> The UN human rights system has special rapporteurs on adequate housing; the sale of children; child prostitution and pornography; the right to education; food; the promotion and protection of the right to freedom of opinion and expression; freedom of religion or belief among others. Regional human rights organisations including the African regional human organisations have also adopted this method of human rights protection. See Tomasevski K., 'The Right to Education: The Work of the Special Rapporteur, 1998-2001' (2000) 13 *Interights Bulletin* 81-82.

<sup>668</sup> Rachel Murray, 'The Special Rapporteurs in the African System' in 'The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006' (2008) 344.

In African regional human rights system, Special Rapporteurs can be said to be tied to the special procedures available to the African Commission and they are tasked with investigating important human rights issues.<sup>669</sup> According to Viljoen, the inadequate achievement of the state reporting procedure in the region can be tied to the establishment of special rapporteurs by the African Commission.<sup>670</sup> He added though state reporting is nearly solely reliant on the enterprise of states to submit reports; the status of Special Rapporteur permits the Commission to take the enthusiasm and to be more pro-active.<sup>671</sup>

The decision of the Commission to establish Special Rapporteurs came as a result of lobbying by Non-Governmental Organisations, the impact of particular sets of circumstances and the African Commission's desire to be seen as working rather than as the product of any well-thought-out programme. A distinguishing factor of the Special Rapporteur mechanism of the African Commission is the fact that all mandate holders are serving members of the African Commission.<sup>672</sup>

#### 5.3.1.1.1 Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in Africa

The Commission, at its 15<sup>th</sup> Ordinary Session,<sup>673</sup> agreed to appoint a Special Rapporteur on Extrajudicial, Summary and Arbitrary Execution because of the genocide in Rwanda<sup>674</sup> as at that time. In 1993, Amnesty International proposed the creation of this Special Rapporteur but the Commission deferred making a decision to its next session but rather instructed its members to engage in discussions with the UN Special Rapporteur on Extrajudicial Executions.<sup>675</sup> Before the next Ordinary Session of the Commission could be held, the genocide in Rwanda had started thereby giving the Commission another reason besides the pressure from the international organisations, to take action.<sup>676</sup>

Looking at the background to the setting up of this Special Rapporteur, the legal basis for its

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<sup>669</sup> See Special Rapporteurs Available at [www.ishr.ch/african-commission/special-rapporteurs](http://www.ishr.ch/african-commission/special-rapporteurs) (Accessed on 16<sup>th</sup> August, 2016).

<sup>670</sup> Viljoen (2007) 392.

<sup>671</sup> Viljoen (2007) 392.

<sup>672</sup> Murray (2008) 345.

<sup>673</sup> The Ordinary Session was held from 15-18 April, 1994 in Banjul, The Gambia.

<sup>674</sup> This was based on Resolution 8 adopted at the 15<sup>th</sup> Ordinary session and Resolution 12 adopted at the 16<sup>th</sup> Ordinary Session of the African Commission. See [www.achpr.org/mechanisms/extrajudicial-summary-or-arbitrary-execution](http://www.achpr.org/mechanisms/extrajudicial-summary-or-arbitrary-execution) (Accessed on 16<sup>th</sup> May, 2012).

<sup>675</sup> Harrington (2001) 251.

<sup>676</sup> Harrington (2001) 151.

creation can be found in Chapter VI of the Rules of Procedure of the African Commission. Rule 28 gives power to the Commission to set up ‘committees or working groups composed of members of the Commission and send them any agenda or item for consideration and report.’<sup>677</sup> The rule provides further that the Commission ‘may establish sub-commissions of experts and determine the functions and composition of each sub-Commission unless the Assembly of Heads of States and Government of the OAU decide otherwise.’<sup>678</sup> This legal background together with a belief that there is nothing more irremediable and more irrevocable than the taking, outside the law, of the human life, a right clearly defined under the African Charter,<sup>679</sup> the Commission nominated Commissioner Hatem Ben Salem as the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.<sup>680</sup>

The mandate<sup>681</sup> of the Special Rapporteur was to,

1. propose the implementation of a reporting system on cases of extrajudicial, summary or arbitrary executions in the continent, specifically by keeping a register containing all information as to the identity of the victims;
2. to follow up, in collaboration with government officials, or failing that, with international, national or African NGOs, all enquiries which could lead to discovering the identity and extent of responsibility of authors and initiators of extrajudicial, summary or arbitrary executions;
3. to suggest the ways and means of informing the Commission in good time of the possibility of extrajudicial, summary or arbitrary executions with the goal of intervening before the OAU summit;
4. to intervene with states for trial and punishment of perpetrators of extrajudicial, summary or arbitrary executions and rehabilitation of the victims of these execution; and

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<sup>677</sup> Rule 28, Rules of Procedure of the African Commission adopted 13<sup>th</sup> February, 1988.

<sup>678</sup> Rule 29, Rules of Procedure of the African Commission adopted 13<sup>th</sup> February, 1988.

<sup>679</sup> Article 4 of the African Charter.

<sup>680</sup> This was at the 16<sup>th</sup> Ordinary Session of the Commission which was held from 25 October – 03 November, 1994 in Banjul, The Gambia. The mandate for determining the missions of this special Rapporteur was only approved at the 18<sup>th</sup> Ordinary Session of the Commission held in Praia, Cape Verde in October 1995. The delay was due to the yearning of the Commission to base the function on solid grounds, both in terms of giving it specific role and adequate resources in order for it to play an effective role in the promotion and protection of human rights in the continent. See Background Information on the mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions of the African Commission on Human and Peoples Rights. Available at [www.achpr.org/mechanisms/extra-judicial-summary-or-arbitrary-execution/about](http://www.achpr.org/mechanisms/extra-judicial-summary-or-arbitrary-execution/about)

<sup>681</sup> The mandate of the first Special Rapporteur was located in Article 4 of the African Charter which talks about Right to life. Procedurally, the expansion of the Commission’s mandate could also be based on Articles 45(1) (a), 46 and 66 of the African Charter. The mandate of subsequent rapporteur has been located in Article 45 suggesting a preference for a legal basis not constrained by the confidentiality requirements of protective measures applicable to Article 46 investigations. See Frans Viljoen (2007) 392.

5. to examine the modalities of the creation of a mechanism of compensation for the families of victims of extrajudicial, summary or arbitrary executions, which might be done through national legal procedures, through an African compensation fund.<sup>682</sup>

The Special Rapporteur was able to produce a report which was submitted to the Commission at its 20<sup>th</sup> Ordinary Session in October, 1996<sup>683</sup>. This was supplemented by general comments which were made at subsequent sessions of the Commission.<sup>684</sup> The Special Rapporteur was not given a guideline as regards what he was expected to do or how to go about carrying out his task but the Special Rapporteur did set up ideas concerning his mandate and this was what was approved by the Commission at its 17<sup>th</sup> Ordinary Session.<sup>685</sup>

One of the problems of the Special Rapporteur is the lack of clarity as regards the work. This became glaring with the content of the Report<sup>686</sup> submitted to the Commission on Extrajudicial, Summary or Arbitrary Executions with reference to Burundi and Rwanda.<sup>687</sup> Another defect is noticed in the working methods of the Special Rapporteur and also in the work of the Commission.<sup>688</sup> The Special Rapporteur, during his tenure, was not able to conduct any state visit even though he planned to visit Chad.

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<sup>682</sup> See [www.achpr.org/mechanisms/extra-judicial-summary-or-arbitrary-execution/about](http://www.achpr.org/mechanisms/extra-judicial-summary-or-arbitrary-execution/about). The Special Rapporteur's priority then was to produce a report on extrajudicial, summary or arbitrary execution of women, children, demonstrators and human rights activists/political opponents. (Accessed on 16<sup>th</sup> August, 2016).

<sup>683</sup> The 20<sup>th</sup> Ordinary Session was held from 21-31 October, 1996 in Mauritius. Available at [www.achpr.org/sessions/20th/intersession-activity-reports/extra-judicial-summary-or-arbitrary-execution](http://www.achpr.org/sessions/20th/intersession-activity-reports/extra-judicial-summary-or-arbitrary-execution) (Accessed on 16<sup>th</sup> August, 2016). The report also considered the nature of information that was to be collected in the course of the fulfilment of the mandate especially in terms of the credibility of the sources of information.

<sup>684</sup> Murray (2008) 347.

<sup>685</sup> See the Report of the Special Rapporteur on Extrajudicial Executions in Africa, Eight Annual Activity Reports 1994-1995. Available at [http://www.achpr.org/files/activity-reports/8/achpr16and17\\_actrep8\\_1994\\_eng2.pdf](http://www.achpr.org/files/activity-reports/8/achpr16and17_actrep8_1994_eng2.pdf) (Accessed 15<sup>th</sup> August, 2016). Emphasis is laid on paragraphs 17-19 of the report. The Commission also tried to avoid duplicating the work of the UN thereby agreed to concentrate on two particular aspects which are (a) compensations to the families of victims of such executions; and (b) the responsibility of instigators and authors of such executions. See paragraph 18 of the Activity Report.

<sup>686</sup> Progress Report on Extrajudicial, Summary or Arbitrary Execution.

<sup>687</sup> See the Progress Report on Extrajudicial, Summary or Arbitrary Executions, Tenth Activity Report covering October 1996 till April, 1997, Annex VI. Available at [http://www.achpr.org/files/activity-reports/10/achpr20and21\\_actrep10\\_19961997\\_eng.pdf](http://www.achpr.org/files/activity-reports/10/achpr20and21_actrep10_19961997_eng.pdf) (Accessed on 16<sup>th</sup> August, 2016). Looking at section III, A of the report, it states that 'If in the first place the case of Rwanda and Burundi will be a priority for the collection of information and creation of the computer database, as a matter of course all available information on extrajudicial executions in other African countries will be registered, especially for Liberia. To do so, and collect more testimony, the reports submitted by the organs of the UN as well as the OAU will be taken in to consideration'. What this means is that there was no consistency in the work of the Special Rapporteur as at these times in his report it would appear he was focusing on certain groups such as women and children but the lists are not consistent throughout the report. Also in relation to the countries that merit particular attention, the report went beyond Rwanda and Burundi; it included Zaire, Nigeria, Liberia and Sudan. This was against the initial motivation for establishing the mandate of the Special Rapporteur.

<sup>688</sup> Rachel Murray (2008) 351.

Although the intention of the Commission when it set up the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions was to show its resolve to forget about its failure to react to the genocide in Rwanda, the delay in the appointment of the Special Rapporteur and the Special Rapporteur's failure to produce result means the Commission failed. The lack of co-operation and support from states too did not help the Special Rapporteur in achieving its mandate and this led to the resignation of the Special Rapporteur. The mandate received little attention and was poorly implemented thereby making it unattractive for Commissioners to take up. This can be said to be a waste of opportunity by the Commission and it will be right to say that this is the reason for the drawback which has prevented the Commission from utilising the Special Rapporteur system.

#### 5.3.1.1.2 Special Rapporteur on Prisons and Conditions of Detention in Africa

Among the Special Rapporteurs created by the Commission is the Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP).<sup>689</sup> This can be said to be in response to the request by the Penal Reform International<sup>690</sup> and some other NGOs.<sup>691</sup>

The setting up of the office of the SRP was not that easy as there was difficulty in deciding whether the Commission should appoint an expert who was not already a member of the Commission to work under a Commissioner but this was eventually rejected.<sup>692</sup> This was

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<sup>689</sup> At its 19<sup>th</sup> Ordinary Session of the African Commission held from the 26<sup>th</sup> of March to the 4<sup>th</sup> of April, 1996 at Ouagadougou, Burkina Faso, the Commission agreed in principle to appoint a Special Rapporteur on Prison Conditions in Africa. See Ninth Activity report of the Commission which covered the period October 1995 till April 1996 particularly paragraph 18. Available at [http://www.achpr.org/files/activity-reports/9/achpr1819eo2\\_actrep9\\_19951996\\_eng.pdf](http://www.achpr.org/files/activity-reports/9/achpr1819eo2_actrep9_19951996_eng.pdf). (Accessed on 15<sup>th</sup> August, 2016.) See also, Frans Viljoen, *The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities* (2005) 27 *Human Rights Quarterly* 125-171.

<sup>690</sup> An International NGO with its headquarters in Paris. The approach PRI used was to organise the Pan-African Seminar on Prison Conditions in Africa in conjunction with the Commission and some other NGOs thereby firmly positioning the hitherto neglected issue of prisoners' rights on the agenda of the Commission and NGOs in the continent. The fight for the establishment of the Special Rapporteur was further pushed by the NGO in the Kampala Declaration on Prison Conditions in Africa. This was adopted at the end of the conference. See Viljoen Frans, 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities' (2003) 27 *HRQ* 125.

<sup>691</sup> For example, at the 18<sup>th</sup> Session of the Commission, a draft resolution was presented which had been adopted at the International Court of Justices 9<sup>th</sup> Workshop for NGOs. The workshop was held prior to the session concerning the appointment of Special Rapporteurs on both prisons and women's rights. See Final Communique of the 18<sup>th</sup> Ordinary Session held in Praia, Cape Verde from 2-11 October, 1995, ACHPR/FIN/COMM/XVIII at 457, particularly paragraphs 22-23.

<sup>692</sup> 9<sup>th</sup> Activity Report of the Commission, 1995-1996, paragraph 18.

eventually resolved with the appointment of Commissioner Dankwa<sup>693</sup> at the 20<sup>th</sup> Ordinary Session.<sup>694</sup> His mandate was initially to run for a period of two years but this was eventually extended for another period of one year<sup>695</sup> at the 25<sup>th</sup> ordinary Session of the Commission held in Burundi in 1995.

Dankwa's tenure as a Special Rapporteur is said to be the golden period in the life of Special Rapporteurs due to his level of commitment to undertake activities agreed to. Despite the challenges of having to always travel and his constant writing as a professor he still ensured that detailed reports of the prisons visited, officials met and the legal background was published regularly. His reports also contained recommendations to governments as well. Copies of these reports were made available at sessions of the Commission both in French and English.<sup>696</sup> His tenure expired on the 31<sup>st</sup> October, 2000 and Commissioner Chirwa<sup>697</sup> was appointed to take over<sup>698</sup> and presently Med S.K. Kagwa is the Special Rapporteur.<sup>699</sup>

From the start, Penal Reform International (PRI) assisted the SRP by providing administrative

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<sup>693</sup> Before he was appointed the Special Rapporteur he served as the Deputy Chairperson of the Commission.

<sup>694</sup> The 20<sup>th</sup> Ordinary Session was held in Mauritius from 21-31 October, 1996. Following the practice of the UN Commission on Human Rights and due to the fact that they hold full-time employment outside while they participate at the Commission on part-time basis, the argument was strongly in support of an expert outside the Commission. But due to the point raised that the Commission would not be able to control an outsider and the impression that the Commission was inadequate, the Commission had to do away with the idea of looking outside for expert to appoint as a SRP. See Frans Viljoen (2007) 394.

<sup>695</sup> See Resolution on the Extension of the Mandate of the Special Rapporteur on Prisons and conditions of Detention in Africa, 12<sup>th</sup> Activity Report, October 1998 - May, 1999, Annex IV (AHG/215 (XXXV)) Available at [http://www.achpr.org/files/activity-reports/12/achpr24and25\\_actrep12\\_19981999\\_eng.pdf](http://www.achpr.org/files/activity-reports/12/achpr24and25_actrep12_19981999_eng.pdf). (Accessed 16<sup>th</sup> August, 2016).

<sup>696</sup> Among the prisons he visited are Zimbabwe, Mali (both in August, 1997), Mozambique in December, 1997, Madagascar in February, 1998, Mali again in December, 1998, The Gambia I June, 1999, Benin in August, 1999 and Central African Republic in June, 2000. His reports on these entire mission aside the one on Madagascar, are available in English, French and Portuguese. See Julia Harrington, 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 2 *AHRLJ* 247-267.

<sup>697</sup> Commissioner Chirwa brought to use her personal experience as a political prisoner under the Banda government. This is reflected in *Achutan and Another (on behalf of Banda and others) v Malawi* (2000) *AHRLR* 144 (ACHPR 1995) 18<sup>th</sup> Annual Activity Report.

<sup>698</sup> At the 28<sup>th</sup> Ordinary Session of the Commission held at the Republic of Benin from 23<sup>rd</sup> October to 6<sup>th</sup> November, 2000, Commissioner Chirwa was appointed the Special Rapporteur on Prisons and Conditions of Detention in Africa. See the Final Communique of the Twenty-eighth Ordinary Session, Cotonou, Benin Republic, ACHPR, FIN.COMM/XXVIII, Rev. 2. Commissioner Chirwa held the post till July, 2005 when she was not re-elected to the Commission. The post was subsequently awarded to Commissioner Mumba Malila. See 19<sup>th</sup> Activity Report of the African Commission 2005 at paragraph 8. Available at [http://www.achpr.org/files/activity-reports/19/achpr38\\_actrep19\\_2005\\_eng.pdf](http://www.achpr.org/files/activity-reports/19/achpr38_actrep19_2005_eng.pdf). (Accessed on 16<sup>th</sup> May, 2012).

<sup>699</sup> He was reappointed at the 57<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 4 – 18 November, 2015. See [www.achpr.org/mechanisms/prisons-and-conditions-of-detention/](http://www.achpr.org/mechanisms/prisons-and-conditions-of-detention/) (Accessed 16<sup>th</sup> August, 2016).

and secretarial assistance to the Secretariat of the African Commission, and the individual SRP. PRI also achieved financial support from the Norwegian Agency for Development (NORAD) to assist the sustained functioning of the SRP.<sup>700</sup>

Deliberations were embarked on in 1996 to determine the SRP's mandate. The Commission's Secretariat developed a document with a proposed mandate which was used as a preparatory framework. This was refined by a working group meeting in Banjul, in January 1997. The following mandate was eventually submitted to the Commission's 21<sup>st</sup> session, and was adopted:

The Special Rapporteur is empowered to examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights.<sup>701</sup>

The Special Rapporteur was expected, when setting out its task, to examine the state of prisons and conditions of detention in Africa and make recommendations with a view to improving them and advocate adherence to the Charter and international human rights norms and standards concerning the rights and conditions of persons deprived of their liberty, examine the relevant national law and regulations in the respective States Parties as well as their implementation and make appropriate recommendations on their conformity with the Charter and with international law and standards among others.<sup>702</sup> Under the African Indigenous Justice system, the chiefs' courts aimed at holding wrongdoers answerable for their action by emphasising on the human impact of crime. They gave wrongdoers the chance to be accountable for their actions by facing their victims and reconciling, encouraging active victim-community

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<sup>700</sup> About the Special Rapporteur on Prisons and Conditions of Detention in Africa Available at <http://www.achpr.org/mechanisms/prisons-and-conditions-of-detention/about/>. (Accessed 16<sup>th</sup> May, 2012).

<sup>701</sup> The 21<sup>st</sup> Ordinary Session of the Commission was held in Mauritania from 15-24 April, 1997. The mandate was set out as an appendix to the Report of the Special Rapporteur on Prisons. The text of the Special Rapporteurs report states that these were based on an earlier draft, and were revised at the request of the Commission at its 20<sup>th</sup> Session in October, 1996. This would appear to refer to the outcome of a consultation that was held in The Gambia in January 1996 and which was circulated at the 20<sup>th</sup> Ordinary Session later in the year. A copy of the report is available at <http://www.achpr.org/sessions/21st/intersession-activity-reports/prisons-and-conditions-of-detention/>. (Accessed on 16<sup>th</sup> August, 2016).

<sup>702</sup> Murray (2008) 355. See also <http://www.achpr.org/mechanisms/prisons-and-conditions-of-detention/about/> (Accessed on 16<sup>th</sup> August, 2016). To be able to carry out these tasks, the Special Rapporteur is empowered to seek and receive information from States Parties to the Charter and from individuals and other bodies on cases or situations falling within the scope of its mandate. See paragraph 7 of the Report of the Special Rapporteur on Prisons submitted at the 21<sup>st</sup> Ordinary Session held in 1997. Furthermore, the Special Rapporteur is expected to be given all the necessary assistance and cooperation needed to be able to carry out visits and receive information from detained persons, their families or representatives, governmental or non-governmental organisations and others. See Paragraph 8 of the Report of Special Rapporteur on Prisons submitted at the 21<sup>st</sup> Ordinary Session held in 1997.

participation in the justice process and improving the quality of justice by which the victims and offenders are reunited and the offenders reintegrated back into the society.<sup>703</sup> In the reintegrating and rehabilitating of these offenders back into the society, the underlying principles was that firstly, the offender takes liability for the crime, face the repercussion of their deed and see the victim as a person with feelings and needs, with the intention to make it possible for the community to resolve and reconcile the parties.<sup>704</sup>

Secondly, the attention was on resolving inequality which came up because of the commission of the offence. The chiefs' courts insist on restoration of the relationship among the parties and their various communities.<sup>705</sup> And thirdly, the Chief's court will decide on an appropriate and concrete solution acceptable by all parties.<sup>706</sup>

The Special Rapporteur is expected to publish and submit an annual report to the Commission which should be published and widely disseminated in accordance with the relevant provisions of the Charter.<sup>707</sup> The Special Rapporteur carried out some country visits since establishment even though the countries visited varied from the ones listed to be visited in its work plan submitted to the Commission.<sup>708</sup> The SRP nonetheless visited Zimbabwe (23 February to 3 March, 1997),<sup>709</sup> Mali (20 -30 August 1997),<sup>710</sup> Mozambique (4-24 December, 1997),<sup>711</sup> Madagascar (10-20 February, 1998), Mali (27 November to 8 December 1998),<sup>712</sup> The Gambia

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<sup>703</sup> Umbreit M, 'Victim meets Offender: The Impact of Restorative Justice and Mediation' (1994) 5.

<sup>704</sup> Umbreit (1994) 5.

<sup>705</sup> Umbreit (1994) 5.

<sup>706</sup> Amanda Dissel, 'Restoring Harmony: Piloting Victim-Offender Conferencing in South Africa' A paper presented at De Monfort University, Leicester (20 – 21 March, 2002) 5. See also, Kayitare Frank, 'Respect of the Right to a Fair Trial in Indigenous African Criminal Justice Systems: The Case of Rwanda and South Africa,' (unpublished LLM thesis submitted to the Faculty of Law, University of Pretoria) (2004) 28.

<sup>707</sup> Paragraph 5 of the Report of Special Rapporteur on Prisons, 1999.

<sup>708</sup> Report of the Special Rapporteur to the 21<sup>st</sup> Session of the African Commission, 1997 part 1, Document of the African Commission at page 518. The countries listed by the Special Rapporteur to visit are Senegal or Mali between May and October 1997; Uganda or Mauritius between November 1997 and March 1998; Mozambique or Sao Tome between May and October 1998; Tunisia and South Africa between November 1998 and January, 1999.

<sup>709</sup> Chirwa EVO, 'Prisons in Zimbabwe: Report on a Visit, 23 February-3 March, 1997', Series IV No. 01 Available at [www.achpr.org/files/sessions/23rd/mission-reports/prisons-1997/misrep\\_specmec\\_priso\\_zimbabwe\\_1997\\_eng.pdf](http://www.achpr.org/files/sessions/23rd/mission-reports/prisons-1997/misrep_specmec_priso_zimbabwe_1997_eng.pdf)

(Accessed on 16<sup>th</sup> August, 2016).

<sup>710</sup> Dankwa EVO, Prisons in Mali: Report of the Special Rapporteur on Prisons and Conditions of Detention, Report on a Visit 20-30 August 1997, Series IV, No.2, Document of the African Commission, page 625. Available at [www.achpr.org/files/sessions/22nd/mission-reports/mali/achpr22\\_misrep\\_specmec\\_priso\\_mali\\_1997\\_eng.pdf](http://www.achpr.org/files/sessions/22nd/mission-reports/mali/achpr22_misrep_specmec_priso_mali_1997_eng.pdf),

(Accessed on 16<sup>th</sup> August, 2016).

<sup>711</sup> See Dankwa EVO, 'Prisons in Mozambique: Report of the Special Rapporteur on Prisons and Conditions of Detention', Report on a Visit, 14-24 December 1997, Series IV, No. 3, Documents of the African Commission at page 645. Available at [www.achpr.org/files/sessions/23rd/mission-reports/mozambique/achpr23\\_misrep\\_specmec\\_priso\\_mozambique\\_1997\\_eng.pdf](http://www.achpr.org/files/sessions/23rd/mission-reports/mozambique/achpr23_misrep_specmec_priso_mozambique_1997_eng.pdf),

(Accessed on 16<sup>th</sup> August, 2016).

<sup>712</sup> Dankwa EVO, 'Mali Prisons Revisited: Report of the Special Rapporteur on Prisons and Conditions of Detention in

(21-2 June, 1999),<sup>713</sup> Benin (23-31 August, 1999),<sup>714</sup> Central African Republic (19-29 June, 2000),<sup>715</sup> Mozambique (4-14 April 2001),<sup>716</sup> Malawi (17-28 June, 2001), Namibia (17-28 September, 2001),<sup>717</sup> Uganda (11-22 March 2001),<sup>718</sup> Cameroon (1-14 September, 2002),<sup>719</sup> Benin (23 January – 5 February, 2003), Ethiopia (15-29 March 2004)<sup>720</sup> and South Africa (14-30 June, 2004).<sup>721</sup> Between the 6<sup>th</sup> and 10<sup>th</sup> of October, 2008, Special Rapporteur went on a promotional mission to the United Republic of Tanzania.<sup>722</sup> He also carried out a sample visit to prisons in Swaziland in May, 2008 where he visited three prisons<sup>723</sup> even though it was not a

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Africa', Report on a Visit 27 November to 8 December, 1998, Series IV, No. 4. Available at [www.achpr.org/files/sessions/25th/mission-reports/mali/achpr25\\_misrep\\_specmec\\_priso\\_mali\\_1998\\_eng.pdf](http://www.achpr.org/files/sessions/25th/mission-reports/mali/achpr25_misrep_specmec_priso_mali_1998_eng.pdf), (Accessed on 16<sup>th</sup> August, 2016).

<sup>713</sup> Dankwa EVO, 'Prisons in The Gambia: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa', Report on a Visit 21- 26 June, 1999 Series IV, No. 5. Available at [www.achpr.org/files/sessions/26th/mission-reports/gambia/achpr26\\_misrep\\_specmec\\_priso\\_gambia\\_1999\\_eng.pdf](http://www.achpr.org/files/sessions/26th/mission-reports/gambia/achpr26_misrep_specmec_priso_gambia_1999_eng.pdf), (Accessed on 16<sup>th</sup> May, 2012).

<sup>714</sup> Dankwa EVO, 'Prisons in Benin; Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa', Report on a Visit 23-31 1999, Series IV, No. 6. Available at [www.achpr.org/files/sessions/26th/mission-reports/benin/achpr26\\_misrep\\_specmec\\_priso\\_benin\\_1999\\_eng.pdf](http://www.achpr.org/files/sessions/26th/mission-reports/benin/achpr26_misrep_specmec_priso_benin_1999_eng.pdf), (Accessed 16<sup>th</sup> August, 2016).

<sup>715</sup> Dankwa EVO, 'prisons in the Central African Republic: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa', 19-29 June 2000, Series IV, No. 7. Available at [www.achpr.org/files/sessions/28th/mission-reports/centralafricanrepublic/achpr28\\_misrep\\_specmec\\_priso\\_car\\_2000\\_fra.pdf](http://www.achpr.org/files/sessions/28th/mission-reports/centralafricanrepublic/achpr28_misrep_specmec_priso_car_2000_fra.pdf), (Accessed on 16<sup>th</sup> August, 2016). I will like to point out here that this report is only available in French.

<sup>716</sup> Chirwa V.M., 'Prisons in Mozambique: Report on a Second Visit,' April 4-14, 2001, Series IV, No.08. Available at [www.achpr.org/files/sessions/30th/mission-reports/mozambique/achpr30\\_misrep\\_specmec\\_priso\\_mozambique\\_2001\\_eng.pdf](http://www.achpr.org/files/sessions/30th/mission-reports/mozambique/achpr30_misrep_specmec_priso_mozambique_2001_eng.pdf), (Accessed on 16<sup>th</sup> August, 2016).

<sup>717</sup> DOC/OS (XXXIII) 324c/I, Prisons in Namibia Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa on a Visit 17-28 September, 2001. Available at [www.achpr.org/files/sessions/33rd/mission-reports/namibia/achpr33\\_misrep\\_specmec\\_priso\\_namibia\\_2001\\_eng.pdf](http://www.achpr.org/files/sessions/33rd/mission-reports/namibia/achpr33_misrep_specmec_priso_namibia_2001_eng.pdf), (Accessed 16<sup>th</sup> May, 2016).

<sup>718</sup> Chirwa V.M., 'Report on the Mission of the Special Rapporteur on Prisons and Conditions of Detention in Africa' (Item 10) Visit 11-22 March 2001, DOC/OS(XXXIII)324c/II. Available at [www.achpr.org/files/sessions/33rd/mission-reports/uganda/achpr33\\_misrep\\_specmec\\_priso\\_uganda\\_2001\\_eng.pdf](http://www.achpr.org/files/sessions/33rd/mission-reports/uganda/achpr33_misrep_specmec_priso_uganda_2001_eng.pdf), (Accessed 16<sup>th</sup> May, 2012).

<sup>719</sup> Chirwa V.M., 'Prisons in Cameroon: The Report of the Special Rapporteur on Prisons and Condition of Detention in Africa,' Visit 2-15 September, 2002, ACHPR/37/OS/11/437. Available at [www.achpr.org/files/sessions/37th/mission-reports/cameroon-prisons/misrep\\_specmec\\_priso\\_cameroon\\_2002\\_eng.pdf](http://www.achpr.org/files/sessions/37th/mission-reports/cameroon-prisons/misrep_specmec_priso_cameroon_2002_eng.pdf), (Accessed on 16<sup>th</sup> May, 2016).

<sup>720</sup> Chirwa V.M., 'Report of the Mission of the Special Rapporteur on Prisons and Condition of Detention in Africa to the Federal Democratic Republic of Ethiopia,' Visit 15-29 March, 2004. Available at [www.achpr.org/files/sessions/37th/mission-reports/ethiopia/misrep\\_specmec\\_priso\\_ethiopia\\_2004\\_eng.pdf](http://www.achpr.org/files/sessions/37th/mission-reports/ethiopia/misrep_specmec_priso_ethiopia_2004_eng.pdf)

(Accessed on 16<sup>th</sup> May, 2016).

<sup>721</sup> Chirwa V.M., 'Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa Mission to the Republic of South Africa,' Visit 14-30 June, 2004. Available at [http://www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep\\_specmec\\_priso\\_southafrica\\_2004\\_eng.pdf](http://www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf) (Accessed on 16<sup>th</sup> May, 2016).

<sup>722</sup> See, Report of Promotional Activities by Commissioner Mumba Malila on Promotional Activities during the Intersection period May to November, 2008 particularly at paragraph 5. Available at [www.achpr.org/files/sessions/44th/inter-act-reps/mumba-malila/achpr44\\_comrep\\_2008\\_malila\\_eng.pdf](http://www.achpr.org/files/sessions/44th/inter-act-reps/mumba-malila/achpr44_comrep_2008_malila_eng.pdf) (Accessed 16th August, 2016).

<sup>723</sup> During the 43<sup>rd</sup> Session held in May 2008 in Ezulwini, Swaziland, an arrangement was made for the members of the African Commission to visit and see some prisons in Swaziland. The prisons visited were Mawelawela Female

scheduled activity for the Special Rapporteur. According to the Activity Report of the Commission, between 2005 and 2009 the Special Rapporteur was only able to carry out one country mission to Liberia in 2008 and this was carried out jointly with the Follow-up Committee on the Robben Island Guidelines.<sup>724</sup> It should be noted that between 2010 and now, several seminars, workshops and trainings have been organised by the SRP especially during the tenure of Commissioner Dupe Atoki and Med Kaggwa. These were organised for law enforcement officers comprising prison officials with other stakeholders on prison reforms with the objective of reviewing the prison and criminal justice with intention of urging State to work together more closely in order to make minimal use of imprisonment.<sup>725</sup> Till date, more than 25 visits to 23 countries have been conducted by the Special Rapporteur on Prisons at the rate of two per year wherein meetings with Government authorities are held. Press conferences are also held prior to visits to police holding cells, prisons and reform schools for approximately 10 days.<sup>726</sup>

After every visit, the Special Rapporteur is expected to come up with a report which must contain the number of prisons visited and their population. The report must also contain background information of the country involved. There is no particular format to be followed in writing this report but it must demonstrate a particular interest in and awareness of, issues concerning overcrowding, whether females are housed with males, and children with adults, the number of remand prisoners, discipline and disappearances as well as the judicial process.<sup>727</sup> These reports used to be published with the assistance of PRI and the financial assistance of the Norwegian Agency for Development Corporation (NORAD)<sup>728</sup> but this has since stopped. Reports are now being presented by the Special Rapporteurs with increased financial support from Member States.<sup>729</sup>

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Prison, a Juvenile male prison and adult male prison. See Report of the Activities by Commissioner Mumba Malila on Promotional Activities during the Inter Session Period May to November, 2008. Available at [www.achpr.org/files/sessions/44th/inter-act-reps/mumba-malila/achpr44\\_comrep\\_2008\\_malila\\_eng.pdf](http://www.achpr.org/files/sessions/44th/inter-act-reps/mumba-malila/achpr44_comrep_2008_malila_eng.pdf) (Accessed on 7<sup>th</sup> April, 2015).

<sup>724</sup> Long D & Muntingh L, 'The Special Rapporteur on Prisons and Conditions of Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for synergy or Inertia?'(2010) 13 *International Journal on Human Rights* 99.

<sup>725</sup> See Report presented by Hon. Commissioner Med Kaggwa at the 52<sup>nd</sup> Ordinary Session of the African Commission on Human and Peoples Rights held in Yamoussoukro, Cote d'Ivoire, from 9 – 22 October, 2012.

<sup>726</sup> See Report of Hon. Commissioner Med Kaggwa delivered at the 52<sup>nd</sup> Ordinary Session of the African Commission on Human and Peoples Rights held in Yamoussoukro, Cote d'Ivoire, 9 – 22 October, 2012.

<sup>727</sup> Murray (2008) 357.

<sup>728</sup> Viljoen (2007) 396.

<sup>729</sup> Viljoen, 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities'

The success of the Special Rapporteur on Prisons and Conditions of Detention in Africa can be attributed to the support given by Member States and the efforts of the Special Rapporteurs too but the full realisation of the potentials of the SRP was also hindered by the states too. SRP need the consent of the state to be able to carry out visits. These states are also required to grant unrestricted access to all detention facilities in the country but states where allegations of maltreatment of detainees regularly fall outside the jurisdiction of the SRP.<sup>730</sup>

#### 5.3.1.1.3 Special Rapporteur on the Rights of Women in Africa

The Resolution on the appointment of a Special Rapporteur on the Rights of Women in Africa was adopted at the 25<sup>th</sup> Ordinary Session of the African Commission.<sup>731</sup> The early motivation for the appointment of this Special Rapporteur came from a Seminar on the Rights of Women in Africa and the African Charter on Human and Peoples' Rights.<sup>732</sup> Recommendations from the Seminar suggested that whoever is to be appointed as a Special Rapporteur on the Rights of Women will be responsible for the protection of women's rights.<sup>733</sup>

The mandate of the Special Rapporteur was directed more at general studies and collaboration with non-governmental organisations with less emphasis on visits<sup>734</sup> compared to the mandates of the other earlier Special Rapporteurs of the Commission already discussed in this thesis. It demanded for the expansion of guidelines to help States in developing their report on the

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(2005) *Human Rights Quarterly* vol. 27 No. 1 at 125-171.

<sup>730</sup> States like Egypt, Algeria, Libya and Tunisia.

<sup>731</sup> The 25<sup>th</sup> Ordinary Session of the Commission was held at Bujumbura, Burundi for 26 April to 5 May, 1999. See ACHPR/res.38 (XXV) 99. The Resolution appointed the Special Rapporteur retroactively as from October 1998. See Mandate and Biographical Note, Available at [www.achpr.org/mechanisms/rights-of-women/about/](http://www.achpr.org/mechanisms/rights-of-women/about/) (Accessed 16<sup>th</sup> August, 2016).

<sup>732</sup> The Seminar was organized by the African Commission in conjunction with the Women in Law and Development in Africa (WILDA). See the Final Communique of the 17<sup>th</sup> Ordinary Session of the African Commission held in Togo from 13 to 22 MARCH, 1995.

<sup>733</sup> See Paragraph 28 (3) of the Communique to the 17<sup>th</sup> Ordinary Session of the African Commission. Though the Commission did not initially take a decision as regards this recommendation not until the 19<sup>th</sup> Ordinary Session where the creation of the mandate of the Special Rapporteur was approved. See 9<sup>th</sup> Activity Report of the African Commission (1995-1996), particularly at paragraph 19.

<sup>734</sup> The Special Rapporteur embarked on some mission visits to States Parties like Djibouti from 14 to 17 September, 2002 and Sudan from 30 March to 4 April 2003. These visits were termed promotional visits. See 19<sup>th</sup> Annual Activity Report 2005, paragraph 19(c). The Special Rapporteur also went to Angola from 27 September to 2 October 2002 (See Activity Report by Commissioner Anela Melo, Special Rapporteur on the Right of Women in Africa to the 33<sup>rd</sup> Ordinary Session of the African Commission 15-19 May 2003 at paragraph 6-8), to Democratic Republic of Congo (see 20<sup>th</sup> Activity Report January – June 2006 at paragraph 14 (b)) and to Cape Verde (See 21<sup>st</sup> Activity Report May-December 2006 at paragraph 65 (c)).

situation of women and for the finalisation of the protocol on the rights of women.<sup>735</sup>

This mandate was expected to terminate after 4 years with the Special Rapporteur expected to submit an interim report addressing the substance of the subject-matter of the mandate within two years and a proposal for the future.<sup>736</sup> Furthermore, the Special Rapporteur was required to submit progress reports to the Commission at every Ordinary Session and also present an annual report to the Assembly as an Annexure to the report of the Commission.<sup>737</sup> This mandate has been renewed on 4 occasions with the adoption of Resolution 63 at the 34<sup>th</sup> Ordinary Session, Resolution 78 of the 38<sup>th</sup> Ordinary Session, Resolution 112 at the 42<sup>nd</sup> Ordinary Session and 154 at the 46<sup>th</sup> Ordinary Session of the African Commission.<sup>738</sup>

The adoption of the Protocol to the African Charter on the Rights of Women in Africa was termed as the major achievement of the Special Rapporteur.<sup>739</sup> After the adoption of this treaty, the focus of the Special Rapporteur shifted to the ratification and domestication of it by State parties.<sup>740</sup> The Special Rapporteur Angela Melo<sup>741</sup> was able to persuade Mozambique to ratify the Protocol.<sup>742</sup> The Special Rapporteur, during the examination of state reports, raised questions pertinent to the position of women and the status of ratification of and reservations to the Women's Protocol.<sup>743</sup> 'Urgent Appeals' were also issued by the Special Rapporteur in response to specific situations affecting women. At the 40<sup>th</sup> Ordinary Session of the Commission, the Commission adopted a resolution asking DRC to guarantee the right to security of young women in the country that were suffering from sexual abuse. The resolution urged the state to ratify and domesticate the African Women's Protocol and effectively

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<sup>735</sup> A copy of the mandate of the Special Rapporteur on the Rights of Women is available at [www.achpr.org/mechanisms/rights-of-women/about/](http://www.achpr.org/mechanisms/rights-of-women/about/) under the caption About: Mandate and Biographical Notes.

(Accessed on 19<sup>th</sup> May, 2015).

<sup>736</sup> Draft Terms of Reference, Section 1, Paragraph 1. See also Murray (2008) 362.

<sup>737</sup> Section I paragraph 4 of the Draft Terms of Reference.

<sup>738</sup> See [www.achpr.org/mechanisms/rights-of-women/](http://www.achpr.org/mechanisms/rights-of-women/) (Accessed 16<sup>th</sup> August, 2016).

<sup>739</sup> Murray (2008) 364. See also Viljoen (2007) 398.

<sup>740</sup> See 20<sup>th</sup> Activity Report at paragraph 30. In 2005, the Special Rapporteur sent a Communication to the Chairperson of the Pan-African Parliament persuading her to set in motion a process of domesticating the Womens Protocol in National laws.

<sup>741</sup> Appointed at the 34<sup>th</sup> Ordinary Session and reappointed at the 38<sup>th</sup> Ordinary Session of the African Commission. Her tenure expired at the 42<sup>nd</sup> Ordinary Session which was held in November, 2007.

<sup>742</sup> Letters to the relevant government officials of Mozambique were sent by the Special Rapporteur in July 2003 and by December, 2005 Mozambique ratified the Womens Protocol. See 17<sup>th</sup> Annual Activity Report, para.30 Available at [www.achpr.org/files/activity-reports/17/achpr34and35\\_20032004\\_eng.pdf](http://www.achpr.org/files/activity-reports/17/achpr34and35_20032004_eng.pdf) (Accessed on 7<sup>th</sup> April, 2015).

<sup>743</sup> Viljoen (2012) 375.

implement a new law on sexual violence.<sup>744</sup> This was as a result of the inaction of the Government to whom an appeal was earlier directed.

The Special rapporteur had some challenges along the way as the ‘preliminary’ report presented six months after her appointment and the ‘activity report’ at the 25<sup>th</sup> session did not find their way into the activity report of the African Commission. By the 26<sup>th</sup> session the Special Rapporteur reported receiving a printer and a computer from the International Centre for Human Rights and Democratic Development situated in Canada. She also embarked on an ‘information and awareness’ mission to Liberia, a trip which was funded by Women in Law and Development in Africa<sup>745</sup> despite not receiving any budget from the Commission.<sup>746</sup> Although the Special Rapporteur presented her activity report at the 26<sup>th</sup> ordinary session of the Commission; the report did not make its way into the 13<sup>th</sup> Annual Activity report of the Commission thereby making it a restricted document.

#### 5.3.1.1.4 Special Rapporteur on Freedom of Expression and Access to Information in Africa



This Special Rapporteur was initially referred to as the Special Rapporteur on Freedom of Expression and was established by the Commission at its 36<sup>th</sup> Ordinary Session held in Dakar, Senegal.<sup>747</sup> It represents an institutional continuation of the working Group on Freedom of Expression and was established to monitor state compliance with the Declaration of Principles on Freedom of Expression in the continent.<sup>748</sup>

The initial mandates of the Special rapporteur are:

- i. analyse national media legislation, policies and practice within Member States;
- ii. monitor their compliance with freedom of expression standards and advise Member States accordingly;
- iii. undertake investigative missions to Member States where reports of massive violations of the right to freedom of expression are made and make appropriate recommendations to the

<sup>744</sup> See AU Doc. ACHPR/Res. 103 (XXXX) 06, Resolution on the Situation of Women in the Democratic Republic of Congo, adopted on 29 November, 2006.

<sup>745</sup> See Report of Activities of the Special Rapporteur on the Rights of Women in Africa 26<sup>th</sup> Ordinary Session, DOC/OS/(XXVI)/124.

<sup>746</sup> Julia Harrington, ‘Special Rapporteur of the African Commission on Human and Peoples Rights’ (2001) vol. 1 No. 2 *AHRLJ* 247-267.

<sup>747</sup> Resolution 71 adopted at the 36<sup>th</sup> Ordinary Session of the Commission.

<sup>748</sup> Viljoen (2007) 399.

- African Commission;
- iv. undertake country missions and any other promotional activity that would strengthen the full enjoyment of the right to freedom of expression in Africa;
  - v. make public interventions where violations of the right of freedom of expression have been brought to his/her attention; keep a proper record of violations of the right of freedom of expression and publish this in his/her reports submitted to the African Commission; and
  - vi. submit reports at each ordinary session of the African Commission on the status of the enjoyment of the right to freedom of expression in Africa.<sup>749</sup>

These mandates were renewed at the 42<sup>nd</sup> Ordinary Session<sup>750</sup> of the Commission by amending the title with the addition of ‘Access to Information in Africa’. The Special Rapporteur was allowed to proceed further with the mandate to:

- i. analyse national media legislation, policies and practice within Member States, monitor their compliance with freedom of expression and access to information standards in general and the Declaration of Principles on Freedom of Expression in Africa in particular, and advise Member States accordingly;
- ii. undertake fact-finding missions to Member States from where reports of systemic violations of the right to freedom of expression and denial of access to information have reached the attention of the Special Rapporteur and make appropriate recommendations to the African Commission;
- iii. undertake promotional country Missions and any other activities that would strengthen the full enjoyment of the right to freedom of expression and the promotion of access to information in Africa;
- iv. make public interventions where violations of the right to freedom of expression and access to information have been brought to his/her attention, including by issuing public statements, press releases, and sending appeals to Member States asking for clarifications;
- v. keep a proper record of violations of the right to freedom of expression and denial of access to information and publish this in his/her reports submitted to the African Commission; and
- vi. submit reports at each Ordinary Session of the African Commission on the status of the enjoyment of the right to freedom of expression and access to information in Africa.<sup>751</sup>

Commissioner Faith Pansy Tlakula is the Special Rapporteur as she has just been re-appointed.<sup>752</sup> Whenever a report of massive violation of the rights to freedom of expression is received by the Special Rapporteur, it undertakes an investigative mission to the state in question and when any other relevant complaint is forwarded or received by the Special Rapporteur, it makes intervention publicly through press releases and ‘urgent appeals.’<sup>753</sup> The Special

<sup>749</sup> See <http://www.achpr.org/mechanisms/freedom-of-expression/> (Accessed on 20<sup>th</sup> May, 2015).

<sup>750</sup> The 42<sup>nd</sup> session of the African Commission was held in Brazzaville, Republic of Congo in November 2007.

<sup>751</sup> See [www.achpr.org/mechanisms/freedom-of-expression/](http://www.achpr.org/mechanisms/freedom-of-expression/) (Accessed on 20<sup>th</sup> May, 2015).

<sup>752</sup> She is a Commissioner from South Africa and was re-appointed as the Special Rapporteur at the 57<sup>th</sup> Ordinary Session of the Commission held in Banjul, The Gambia from 4 – 18 November, 2015.

<sup>753</sup> Viljoen (2007) 399. Promotional activities such as country missions can also be undertaken by the special rapporteur.

Rapporteur embarked on a promotional mission to the Kingdom of Swaziland in 2006.<sup>754</sup> At the 48<sup>th</sup> Ordinary Session of the Commission<sup>755</sup> by Resolution 167, the Commission decided to begin the process of drafting a model access to information legislation for Africa and the Special Rapporteur was mandated to lead the process. This process was coordinated by the Centre for Human Rights, University of Pretoria under the auspices of Special Rapporteur and several experts meetings were held. The first of these meetings resulted in the establishment of a ten-member working group of access to information experts who were tasked with developing an initial draft model law.<sup>756</sup>

The first draft was presented to the Commission at its 49<sup>th</sup> Ordinary Session held in Banjul, The Gambia on 29<sup>th</sup> April 2011<sup>757</sup> and between June 2011 and June 2012, four sub-regional consultations were held in Mozambique, Kenya, Senegal and Tunisia and additional call for comments from the public was also made by the Commission. The feedback from these consultations and the public call made were considered by the working group and informed the final text of the Model law.

The aim of the Model law is to ensure that legislative drafters and policy makers address all issues relevant to the African context in their adoption and review of access to information legislation. The Model law is framed as an 'Act' in order to serve as a 'ready-made' example which could constitute the basis of national legislation.<sup>758</sup>

#### 5.3.1.1.5 Special Rapporteur on Human Rights Defenders in Africa

The Special Rapporteur on Human Rights Defenders<sup>759</sup> was established by the African Commission on Human and Peoples' Rights with the adoption of Resolution 69 at the 35<sup>th</sup>

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<sup>754</sup> The promotional mission took place between 21<sup>st</sup> and 25<sup>th</sup> of August, 2006 and the recommendations of the Special Rapporteur are available at [www.achpr.org/states/swaziland/missions/promo-2006/](http://www.achpr.org/states/swaziland/missions/promo-2006/) (Accessed on 7<sup>th</sup> April, 2015).

<sup>755</sup> The 48<sup>th</sup> Ordinary Session was held between the 10<sup>th</sup> and 24<sup>th</sup> of November, 2010 in Banjul, The Gambia.

<sup>756</sup> See Model Law on Access to Information for Africa prepared by the African Commission on Human and Peoples' Rights. Available at [www.achpr.org/files/news/2013/04/d84/model\\_law.pdf](http://www.achpr.org/files/news/2013/04/d84/model_law.pdf) (Accessed 8<sup>th</sup> April, 2015).

<sup>757</sup> The aim of this consultation was to introduce the Draft Model Law, developed in accordance to Resolution 167 (XLVIII) 2010 of the Commission.

<sup>758</sup> See, Model Law on Access to Information for Africa. Available at [www.achpr.org/files/news/2013/04/d84/model\\_law.pdf](http://www.achpr.org/files/news/2013/04/d84/model_law.pdf) (Accessed 7<sup>th</sup> April, 2015).

<sup>759</sup> The current Special Rapporteur is Reine Alapini-Gansou from Cotonou, Benin and was appointed at the 50<sup>th</sup> Ordinary session of the Commission held in Banjul, The Gambia from the 24<sup>th</sup> October-7<sup>th</sup> November, 2011.

Ordinary Session held in Banjul, The Gambia<sup>760</sup> and it functions on the substantive basis of the UN Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Freedoms. The mandate of the Special Rapporteur is to seek, receive, examine and act upon information on the situation of human rights defenders in Africa.<sup>761</sup>

Aside its promotional mandates, the Special Rapporteur also receives, examines and acts upon information about human rights defenders and engages government in dialogues.<sup>762</sup> In responding to information, the Special Rapporteur will either send urgent appeals<sup>763</sup> to heads of state or might decide to issue an allegation letter.<sup>764</sup> The visibility of the work of the Special Rapporteur's intervention has not always been possible because of their sensitivity and confidential nature.

Looking at all the Special Rapporteurs as discussed above, it is clear that they are all members of the Commission at one point or the other. This can be said to be one of the reasons why the Commission has not been able to achieve much progress with the Special Rapporteurs. I believe the Commission will achieve more where people to be appointed Special Rapporteurs are not members of the Commission. The lack of state consent for visit, lack of resources and insufficient publicity assigned to the activities of these Special Rapporteurs

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<sup>760</sup> The Ordinary Session was held from 4<sup>th</sup> of May to 4<sup>th</sup> of June, 2004 in Banjul, The Gambia. The call for the appointment of a Special Rapporteur on Human Rights Defenders was as a result of the adoption of the Declaration on Human Rights by the UN in 1998. See the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedom, UN General Assembly Resolution A/Res/53/144 of 8<sup>th</sup> March, 1999. The NGOs that participated in the African Commission session urged the Commission to adopt something similar. After the appointment of the Special Representative under the UN system ( Resolution E/CN.4/RES/2000/61 of 26 April 2000 on Special Representative of the UN Secretary General on Human Rights Defenders) and the raising of high cases like the death of human rights activist in Burkina Faso the Commission took a step towards the actualisation of the call by the NGOs with its inclusion on its agenda and the eventual decision to appoint a focal point on Human Rights Defenders in Africa in November 2003 for a period of two years.

<sup>761</sup> See Special Rapporteur on Human Rights Defenders at <http://www.achpr.org/mechanisms/human-rights-defenders/> (Accessed on 20<sup>th</sup> May, 2016). This mandate has however being renewed through Resolutions adopted at the 38<sup>th</sup> Ordinary session in 2005, 42<sup>nd</sup> Ordinary Session in 2007, 46<sup>th</sup> Ordinary Session in 2009 and 49<sup>th</sup> Ordinary Session in 2011.

<sup>762</sup> Resolution on the Protection of Human Rights Defenders in Africa adopted at the 35<sup>th</sup> Ordinary Session of the African Commission, 21 May-4 June, 2004.

<sup>763</sup> This procedure is reserved for cases where there are sufficient and reliable allegations that a human rights defenders right might be violated and time is of the essence as loss of life might occur, life threatening situation is imminent or on-going.

<sup>764</sup> An example is the Appeal sent by Commissioner John Jainaba to the presidents of Sudan and Zimbabwe. This is reported in the 18<sup>th</sup> Annual Activity Report of the African Commission. (AU Doc EX/CL.199 (VII) at paragraph 27.

has also constrained the effectiveness of the mechanisms.

### 5.3.1.2 Working Groups

Working groups, established by Rule 28,<sup>765</sup> differ from Special Rapporteurs. Working Groups are more investigative and research-directed,<sup>766</sup> focusing on evolving issues or matters core to the Commission's functions. A number of these Working Groups were established by the African Commission in order to enable it address important issues under its mandate since there are inadequate human and material resources at the African Commission's disposal.<sup>767</sup> As pointed out earlier in this chapter, members of the working groups consist of NGOs and individual experts as against members of Special Rapporteurs. The seven Working Groups established by the Commission have been mentioned earlier in the above sub-paragraph but few of them will now be discussed in order to understand the reason(s) behind their establishment, composition, the way they work, their achievements and their failures in relation to the objectives of enhancing the Commission's mandate of promotion and protection of human and Peoples' rights. A link will also be established between these working groups and the indigenous justice system.

#### 5.3.1.2.1 Working Group of Experts on Indigenous Populations/Communities in Africa

This was the first Working Group to be established by the African Commission.<sup>768</sup> This was a follow-up on the Commission's deliberation on the human rights issues of indigenous peoples and minorities at the 26<sup>th</sup> Ordinary Session held in Rwanda where the Commission appointed three Commissioners to form a committee to extra deliberate the issue of indigenous peoples in Africa and advise accordingly.<sup>769</sup> This Working Group consists of two Commissioners and four experts in the field of human rights or indigenous issues and with a mandate to examine the concept of indigenous people and communities in Africa; study the implication of the African Charter on Human and Peoples' Rights on the wellbeing of

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<sup>765</sup> Rules of Procedure of the African Commission on human and Peoples' Rights.

<sup>766</sup> Viljoen (2007) 400.

<sup>767</sup> Mukundi Wachira & Kealeboga N Bojosi, 'Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights' (2006) 6 *AHRLJ* 382.

<sup>768</sup> This was established during the Commissions 28<sup>th</sup> Ordinary session which was held between the 23<sup>rd</sup> October and 6<sup>th</sup> November, 2000 in The Republic of Benin. See 14<sup>th</sup> Annual Activity Report, Annex IV October 2000 – May, 2001.

<sup>769</sup> Bahame Tom Mukirya Nyanduga (2008) 390.

indigenous communities especially with regards to the right to equality,<sup>770</sup> the right to dignity,<sup>771</sup> protection against domination,<sup>772</sup> on self-determination,<sup>773</sup> and the promotion of cultural development and identity;<sup>774</sup> and consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities.<sup>775</sup> The Working Group is expected to report back to the African Commission with its findings.

This Working Group was established to fill a major gap in the protection of the human rights of indigenous populations and minorities in Africa<sup>776</sup> and it, like the other Special Mechanisms of the African Commission, derived its presence and mandate from Article 45 of the African Charter, which expounds on the promotion and protection mandates of the Commission. Nonetheless, the Working Group owe its existence and mandate to several of the African Charter such as Article 2,<sup>777</sup> 3,<sup>778</sup> 5,<sup>779</sup> 19,<sup>780</sup> 20<sup>781</sup> and 22<sup>782</sup> unlike most special mechanisms of the African Commission.<sup>783</sup>

The first task of the Working Group was to produce the report on indigenous peoples in



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<sup>770</sup> Article 2 and 3 of the African Charter.

<sup>771</sup> Article 5 of the African Charter.

<sup>772</sup> Article 19 of the African Charter.

<sup>773</sup> Article 20 of the African Charter.

<sup>774</sup> Article 22 of the African Charter.

<sup>775</sup> Resolution on the Rights of Indigenous Peoples' Communities in Africa, 2000, ACHPR/Res.51(XXXVIII)00.

The group was finally constituted during the 29<sup>th</sup> Ordinary Session which was held in Tripoli, Libya between 23<sup>rd</sup> April and 7<sup>th</sup> May, 2001. Three Commissioners and four experts were named as members of the Working Group, three of whom were members of indigenous and marginalized communities from Kenya, Niger and Rwanda and the fourth was an independent expert with long-standing experience on indigenous and minority population issue. See the Final Communique of the 29<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples Rights, Paragraph 9. The members of the Working Group then were Commissioner Nyameko Barney Pityana, Convenor; Commissioner Kamel Rezag-Bara; Commissioner Andrew Chigovera; Ms Marianne Jensen; independent expert (International Work Group for Indigenous Affairs [IWGIA]); Naomi Kapuri; indigenous expert; Mr Muhammed Khattali, indigenous expert; and Mr Zephyrin Kalimba, indigenous expert. See Report of the African Commissions Working Group of Experts on Indigenous Populations/Communities, ACHPR/IWGIA 2005 at page 11.

<sup>776</sup> Bahame Tom Mukirya Nyanduga (2008) 392.

<sup>777</sup> Enjoyment of rights and freedoms recognised and guaranteed under the Charter without distinction to race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

<sup>778</sup> Equality before the law and the right to equal protection of the law.

<sup>779</sup> Right to the respect of human dignity and the recognition of man's social status.

<sup>780</sup> Equality before the law as nothing shall justify the domination of a people by another.

<sup>781</sup> Right to existence and self-determination.

<sup>782</sup> Right to Economic, Social and Cultural Rights.

<sup>783</sup> Soyata Maiga, 'Historical Development, Mandate, Activities and Future Perspectives of the Working Group on Indigenous Populations/Communities in Africa,' a paper presented at a Regional Sensitisation Seminar on the Rights of Indigenous Populations/Communities in Central and East Africa held from 22 to 25 August, 2011 in Brazzaville, The Republic of Congo.

Africa.<sup>784</sup> This involved extensive consultations with African human rights experts and indigenous peoples' own organisations.<sup>785</sup> The final report was submitted to the African Commission and same was adopted by the Commission in 2003.<sup>786</sup> The report, among other things, provides an analysis of the human rights situation of indigenous peoples in Africa seen in the light of the provisions of the African Charter on Human and Peoples' Rights and includes solid recommendations to the African Commission. The report was published by the African Commission and IWGIA in 2005 in a book form and it is considered as a major accomplishment of the Working Group.<sup>787</sup> The report has afforded the indigenous peoples in Africa with arguments and a strong advocacy tool to demand their governments to recognise their rights particularly in relation to their economic and social development, their environment and land rights.<sup>788</sup>

In furtherance of the discharge of its mandate, the Working Group has visited 14 African countries and in its reports on these country visits, the Working Group pointed out, among other challenges, the socio-economic environment and land related challenges that are being faced by indigenous peoples in these countries.<sup>789</sup>

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<sup>784</sup> ACHPR Working Group on Indigenous Populations/Communities, Article published by International Work Group for Indigenous Affairs, Available at [www.iwgia.org/human-rights/regional-bodies-and-mechanisms/african-commission-on-human-and-peoples-rights-working-group-on-indigenous-populationscommunities](http://www.iwgia.org/human-rights/regional-bodies-and-mechanisms/african-commission-on-human-and-peoples-rights-working-group-on-indigenous-populationscommunities) (Accessed on 2<sup>nd</sup> May, 2015).

<sup>785</sup> The Working Group first met prior to the 30<sup>th</sup> Session in October 2001 in Banjul, The Gambia. It then convened aroundtable meeting prior to the 31<sup>st</sup> Session in April 2002 in Pretoria, South Africa, and then a consultative meeting in January, 2003 in Nairobi, Kenya. See Resolution 65 on the Adoption of the Report of the African Commissions Working Group on Indigenous Populations/Communities Available at [www.achpr.org/sessions/34th/resolutions/65/](http://www.achpr.org/sessions/34th/resolutions/65/) (Accessed on 6<sup>th</sup> June, 2016).

<sup>786</sup> The Report of the Working Group was adopted in November, 2003 by the African Commission at the Commissions 34<sup>th</sup> Session held in Banjul, The Gambia. See 17<sup>th</sup> Annual Activity Report, paragraph 41. Adopting the Report of the Working Group, the Commission reaffirmed the need to promote and protect more effectively the human rights of indigenous populations and communities in Africa, taking into account the absence of a mechanism within the African Commission that has a specific mandate to monitor, promote and protect the respect and enjoyment of human rights of these marginalised or minority indigenous groups and communities. See Resolution on the Adoption of the Report of the African Commissions Working Group on Indigenous Populations/Communities, ACHPR/Res.65 (XXXIV) 03.

<sup>787</sup> See [www.iwgia.org/publications/search-pubs?\\_id=116](http://www.iwgia.org/publications/search-pubs?_id=116) (Accessed on 17<sup>th</sup> August, 2016).

<sup>788</sup> An example of this can be traced to Kenya where the indigenous civil society has actively used the report to advocate for legal and policy indigenous reforms such as the new Constitution and the new Land Policy. See Maurice Odhiambo Makoloo, 'Kenya: Minority, Indigenous People and Ethnic Diversity,' a report published by Minority Rights Group International in February, 2005.

<sup>789</sup> The countries visited by the Working Group are Burundi in April, 2005; Botswana in June, 2005; Namibia between July and August, 2005; Congo Brazzaville in September, 2005 and March 2010; Niger in February, 2006; Uganda in July, 2006 and Central African Republic in January, 2007. Others are Gabon which was visited in September 2007, Rwanda in December, 2008, Democratic Republic of Congo in August 2009 and Kenya in March 2010. In its report on these visits, the Working Group recommended ways of improving the lives and wellbeing of the indigenous population. See 'About' Available at [www.achpr.org/mechanisms/indigenous-populations/about/](http://www.achpr.org/mechanisms/indigenous-populations/about/) (Accessed 17<sup>th</sup> August, 2016). In October, 2010 the Working Group launched a report on the Constitutional and

The specific acknowledgment by the African charter, of Peoples' rights has also eased the work of the African Commission in the establishment of this Working Group hence; all the mandates lined out in the resolution creating the Working Group speak to and are linked to the earlier cited provisions of the Charter.<sup>790</sup> The resolution providing for the adoption of the report on indigenous peoples in Africa also provided for the continuation of the Working group with a renewed and extended mandate as the Working Group was not disbanded after the submission of its report.<sup>791</sup>

The Working Group has recorded some achievements so far and also faced with challenges. The major challenge the Working Group is faced with is the absence of cooperation and response from State Parties. The Working Group has conducted various promotional missions, sensitisation conferences and seminars with the consent of states<sup>792</sup> but normally when request are sent to the state parties by the Working Group they always fail to give any response and at times when they decide to give response, it is always a negative one.<sup>793</sup>

Also is the absence of networking and co-operation with various stakeholders such as non-governmental organisations, national human rights institutions and international actors such as the UN Special Rapporteur.<sup>794</sup> Due to this, exercise of the Working Group has been duplicated thereby compromising its effectiveness. Another challenge being faced by the

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legislative protection of indigenous people in 24 African countries in conjunction with the International Labour Organisation and the University of Pretoria. In the report, socio-economic conditions, land and natural resources, environmental, cultural, linguistic and educational rights of indigenous peoples were extensively covered and assessed. The report also made recommendations to African States, concerned organs of the United Nations, AU and other international organisations. Civil society and the media were also included. See Soyata Maiga (2011) 5.

<sup>790</sup> Soyata Maiga (2011) 4.

<sup>791</sup> The Working Group was tasked to raise funds for further promotion and protection work, co-operate with other regional and international mechanisms, gather information, and engage various stakeholders, including governments and indigenous communities. It was also required to undertake country missions to study the human rights situation of the indigenous populations/communities and submit recommendations and measures to prevent and remedy situations. The Working Group was also required to report to every Ordinary Session of the African Commission. See ACHPR/Res.65 (XXXIV) 03 Resolution on the Adoption of the Report of the African Commissions Working Group on Indigenous Population/Communities.

<sup>792</sup> An example is the Regional Sensitisation Seminar conducted on the Rights of Indigenous Populations/Communities in Central Africa. The Seminar was held in Yaoundé, Cameroon from 13-16 September, 2006. Available at

[www.achpr.org/english/Special%20Mechanisms/Indigenous/Rpt\\_seminers/seminer\\_cameroon.pdf](http://www.achpr.org/english/Special%20Mechanisms/Indigenous/Rpt_seminers/seminer_cameroon.pdf) (Accessed on 17<sup>th</sup> August, 2017) See also Kipuri Naomi, 'The Working Group of the African Commission on Human and Peoples Rights on the Situation of Indigenous Populations and Communities in Africa,' paper presented at the IFAD Governing Council meeting held on 15 -16 February, 2005. The author is one of the founding members of the African Working Group.

<sup>793</sup> Soyata Maiga (2011) 6.

<sup>794</sup> Felix Mukwiza Ndahinda, 'Indigenesness in Africa: A Contested Legal Framework for Empowerment of Marginalised Communities' (2011) 205.

Working Group is that of finance<sup>795</sup> therefore NGOs have been instrumental in the Working Group mechanism, in the initiation of thematic issues to be pursued by the Commission and in their activities.<sup>796</sup> Absence of finance has stopped the Working Group from carrying out as many promotional and fact finding missions, seminars and conferences as possible to sensitise and discuss with stakeholders.<sup>797</sup>

The establishment of the Working Group represented an important moment in the African Commission and the African human rights system. It signified a break from a past where the concentration on nation building prevented any serious discourse on the rights of ethnic groups in post-colonial Africa. The problem with the Working Group is that it was essentially the product of the African indigenous Peoples' movement;<sup>798</sup> the movement itself was not a product of a broad-based conscious self-identification by certain ethnic groups in Africa as indigenous peoples rooted on the widely-held belief that they shared similar experiences with the people of the international indigenous movement. Rather, the movement was a long enduring external mission to apply the concept of indigenous Peoples' to certain predetermined peoples in Africa.

#### 5.3.1.2.2 Working Group on Death Penalty

Article 4 of the African Charter guarantees the right to life. At its 26<sup>th</sup> Ordinary Session,<sup>799</sup> the Commission adopted a resolution calling for a moratorium on the death penalty<sup>800</sup> wherein it urged States Parties to the African Charter which still retain the death penalty to

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<sup>795</sup> For a discussion of the Working Groups of the African Charter, see Nyandunga B.T.M., 'Working Groups of the African Commission and their Role in the Development of the Africa Charter on Human and Peoples Rights in Context' in Evans M & Murray R, 'The African Charter on Human and Peoples Rights: The System in Practice,' 1986-2000 (2002) 379.

<sup>796</sup> Mbelle N, 'The Role of non-governmental Organisations and National Human Rights Institutions at the African Commission' in Evans & Murray (2002) 289-292. The Working Group has been relying on funding made available by the Danish International Development agency (DANIDA) through the International Working Group on Indigenous Affairs (IWGIA) and this has made the continuity and sustainability of its activities and project very uncertain. See Soyata Maiga (2011) 8.

<sup>797</sup> Kealeboga Bojosi, 'Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights' (2006) 2 *AHRLJ* 382-406.

<sup>798</sup> Kealeboga Bojosi, 'The African Commission Working Group of Experts on the Rights of Indigenous Communities/Populations: Some Reflections on its Work so Far' in Solomon Dersso (ed.) 'Perspectives on the Rights of Minorities and Indigenous Peoples in Africa' (2010) 95-137.

<sup>799</sup> The Session was held in Kigali, Rwanda from the 1-15<sup>th</sup> November, 1999 and was presided over by Commissioner Isaac Nguema.

<sup>800</sup> See the Final Communique of the 26<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples Rights held in Kigali, Rwanda.

comply with their obligations under the treaty.<sup>801</sup> It further urged them to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter.<sup>802</sup> The preamble to the resolution notes that Article 4 of the African Charter ‘affirms the rights of everyone to life’. The preamble also made reference to resolutions of the United Nations Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human rights calling for a moratorium on the death penalty.<sup>803</sup>

Furthermore, it also pointed out that some African States have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights while some States have abolished the death penalty either *de facto* or *de jure*.<sup>804</sup>

The African Commission had not paid much attention to the death penalty or addressed the issue of death penalty in any of its resolutions by 1999. However, the situation changed in November when the Commission passed the ‘Resolution Urging the State to Envisage a Moratorium on Death Penalty.’<sup>805</sup> The resolution was adopted because non-governmental organisations had expressed concern about recent death sentences carried out in the continent. In view of this and international development towards the abolition of death penalty, Ben Salem<sup>806</sup> proposed that the African Commission should make a statement on the subject and call for a moratorium. He agreed with a request from the Chair to prepare the draft text and during debate, representatives from Sudan and Rwanda opposed the resolution thereby adopting positions similar to the one they took in the United Nations Commission on Human Rights.<sup>807</sup>

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<sup>801</sup> Resolution Urging States to Envisage a Moratorium on the Death Penalty, 13<sup>th</sup> Activity Report of the African Commission on Human and Peoples Rights, OAU Doc. AHG/Dec.153 (XXXVI), Annex IV.

<sup>802</sup> The resolution further called upon State Parties to the African Charter to limit the imposition of the death penalty only to the most serious crimes, consider establishing a moratorium on execution of the death penalty and reflect on the possibility of abolishing the death penalty. See Resolution ACHPR/Res.42 (XXVI) 99 adopted in Kigali, Rwanda and available at <http://www.achpr.org/sessions/26th/resolutions/42/> (Accessed on 6<sup>th</sup> June, 2012).

<sup>803</sup> See UN Commission on Human Rights Resolution 2005/59 (Question of the death penalty) Available at [www.legislationline.org/documents/action/popup/id/4184](http://www.legislationline.org/documents/action/popup/id/4184) (Accessed on 8<sup>th</sup> April, 2015).

<sup>804</sup> See OAU Doc. AHG/Dec.153 (XXXVI) Annex IV.

<sup>805</sup> Jon Yorke (ed.), ‘Against the Death Penalty: International Initiatives and Implications’ (2008) 80.

<sup>806</sup> Ben Salem was appointed a Special Rapporteur on Summary, Arbitrary and Extra judicial Execution in 1994 and he resigned from his position in 2001.

<sup>807</sup> See William Schabas (2002) 358. A year after the debate Rwanda was targeted by a resolution of the African Commission with respect to its proposed execution of twenty-three persons convicted of genocide. The scheduled executions coincided with the 23<sup>rd</sup> Ordinary Session of the African Commission being held at Banjul, The Gambia in April 1998. The Commission issued an urgent appeal to the government of Rwanda for postponement of the executions, stating that it would violate the provisions of Article 4 of the African Charter which guarantee the right to life. The Commission called for a proper investigation of the allegations against the accused and a new trial with adequate legal assistance. But these people were later executed; they were the only formal executions carried out in

At the 35<sup>th</sup> Ordinary Session of the African Commission<sup>808</sup> Vera Chirwa<sup>809</sup> introduced an item on the agenda of the Commission on the question of the death penalty in Africa. The paper also pointed out a trend within some African countries where the question on death penalty was being carried out especially in the context of constitutional review processes.<sup>810</sup> The draft paper was debated at a public session of the African Commission during its 36<sup>th</sup> Ordinary Session held in Dakar, Senegal in November, 2004 wherein the opinions of human rights actors and other participants including national Human rights Commissions, States and non-Governmental Organisations on the issue of death penalty were requested for to improve the document the more.

During the 37<sup>th</sup> Ordinary Session,<sup>811</sup> the Commission, after a lengthy debate, decided to set up a Working Group on the Death Penalty.<sup>812</sup> It appointed two Commissioners to work with the Special Rapporteur on Prisons and Conditions of Detention in Africa, to expand on the question of the death penalty in Africa and propose ways of tackling this question.<sup>813</sup>

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connection with Genocide trials. See Amnesty International, Africa Update October 1998, AI Index: AFR 01/05/98 at 2. Although some other people were sentenced to death for Genocide too, their sentences were commuted when Rwanda abolished the death penalty in 2007.

<sup>808</sup> The 35<sup>th</sup> Ordinary Session of the African Commission was held from 21<sup>st</sup> of May to 4<sup>th</sup> of June, 2004 in Banjul, The Gambia.

<sup>809</sup> Vera Chirwa was then the Special Rapporteur on Prisons and Conditions of Detention in Africa. She had before, commissioned the Secretariat to prepare a concept paper on the question of the death penalty in Africa which looked at State practice in Africa and human rights issues. It looked at the practice in some African States and discovered that there was no uniformity of State practice on the continent as regards the death penalty. The paper identified the States that had abolished the death penalty and those that had not carried out any execution in the last 10 years before the presentation of the paper, these she referred to as the abolitionists. Those that continued to execute the death sentence were referred to as the retentionists. As at 2014, Gambia, Ghana, Guinea, Liberia, Nigeria, Sierra Leone and Chad in West Africa; Congo DR, Equatorial Guinea in Central Africa; Burundi, Kenya, Tanzania, Uganda in East Africa; Lesotho, Swaziland, Zambia and Zimbabwe in Southern Africa and Algeria, Djibouti, Egypt, Eritrea, Ethiopia, Libya, Sudan, Somalia and Tunisia Sahrawi Arab Democratic Republic are countries that have retained the death penalty. Benin Republic, Burkina Faso, Mali, Mauritania, Niger, Togo, Central African Republic, Congo-Brazzaville and Morocco have moratorium on execution while Angola, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Rwanda, Gabon, Sao Tome et Principe, Cape Verde, Cote d'Ivoire, Guinea-Bissau, and Senegal have all abolished the death penalty. See [www.se2009.eu/polopoly\\_fs/1.17106!menu/s](http://www.se2009.eu/polopoly_fs/1.17106!menu/s) (Accessed 9<sup>th</sup> May, 2014). It is worthy to note here that Liberia, after abolishing death penalty later reintroduced it and by 2009, courts in the country started pronouncing death sentence again. See, Jamil Mujuzi, 'High Crime Rates Forces Liberia to Reintroduce Death Penalty and put International Treaty Aside: What the Critics Missed?' (2009) 17 *African Journal of International and Comparative Law* 343-344.

<sup>810</sup> Evans & Murray (2008) 398.

<sup>811</sup> The 37<sup>th</sup> Ordinary Session of the Commission was held from 27<sup>th</sup> April - 11<sup>th</sup> May, 2005 at Banjul, The Gambia.

<sup>812</sup> Japhet Biegon & Magnus Killander, 'Human Rights Developments in the African Union during' 2009 (2010) 1 *Africa Human Rights Law Journal* 212-232.

<sup>813</sup> See [www.achpr.org/mechanisms/death-penalty](http://www.achpr.org/mechanisms/death-penalty) (Accessed on 10<sup>th</sup> May, 2014). See also Catherine Dupe Atoki (2009) 7, Evans & Murray (2008) 398.

The Working Group was composed of two members of the African Commission<sup>814</sup> and five experts chosen from the different legal systems and the different regions in Africa.<sup>815</sup> At the first meeting of the group,<sup>816</sup> it analysed a draft position paper on the death penalty and decided on the need to include the public in debating the issue as it appeared there was much work left to be done. The Working Group recommended to the Commission that the composition be increased and at the 38<sup>th</sup> Ordinary Session of the Commission, the Commission adopted a resolution to expand the composition of the Working group.<sup>817</sup>

Resolution 79 adopted by the Commission at the 38<sup>th</sup> Ordinary Session put into use, the mandate of the Working Group on the Death Penalty. The mandate requested the Working Group to further expand a Concept Paper on the Death Penalty in Africa; design a Strategic plan comprising of a practical and legal framework on the abolition of the Death Penalty, gather information and continue to monitor the situation of the application of the Death Penalty in African States develop a funding proposal; and submit a progress report at every ordinary session of the Commission.<sup>818</sup>

Furthermore, it further encouraged the Working Group to cooperate with other partners comprising international, national government and non-governmental institutions for an

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<sup>814</sup> These Commissioners were Commissioner Yasser El Hassan who was the Chair and Commissioner Tom Nyanduga. See Jon Yorke, 'Against the Death Penalty: International Initiatives and Implications' (2008) 80. Commissioner Kayitesi Zainabo Sylvie, in 2007 was appointed the new Chair of the Working Group. See 'Resolution on the Renewal of the Mandate and Appointment of the Chairperson of the Working Group on the Death Penalty,' adopted at the 42<sup>nd</sup> Ordinary Session of the African Commission held in Brazzaville, Republic of Congo from 15-28, November, 2007. ACHPR/Res.113 (XXXXII)07.

<sup>815</sup> Jon Yorke (2008) 80.

<sup>816</sup> The first meeting of the group was held on 20<sup>th</sup> November, 2012 in Banjul, The Gambia and it was financed by Federation *Internationale des Droits de L Homme* and it was held prior to the 38<sup>th</sup> Ordinary Session of the African Commission. See Lilian Chenwi, 'Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective' (2007) 8.

<sup>817</sup> The 38<sup>th</sup> Ordinary Session took place in Banjul, The Gambia between 21 November and 5 December 2004. It adopted the Resolution on the Composition and Operationalisation of the Working Group on the Death Penalty. See ACHPR/Res. 79 (XXXVII) 05. The nomination of the independent experts was solicited from the public and at the 40<sup>th</sup> Ordinary Session of the Commission it appointed the independent experts thereby completing the composition of the Working Group. See Bahame Tom Mukirya Nyanduga (2008) 398. The experts were drawn from African personalities with expertise in human rights in general and the death penalty in particular and were appointed for a renewable term of two years. They represented the different legal, religious, gender and geographical makeup of the continent. See Dupe Atoki (2009) 7. The composition of the Working Group was also expanded and the following experts were named as Members of the Working Group: Ms Alya Cherif Chammari (Tunisia), Ms Alice Mogwe (Botswana), Mr Mactar Diallo (Senegal), Philip Francis Iya (Uganda), Carlson E. Anyagwe (Cameroon) and Mohammed S. El-Awa (Egypt). See Resolution on the Extension and Appointment of Members of the Working Group on the Death Penalty, ACHPR/Res. 101 (XXXX) 06, 15-29 November, 2005, Banjul, The Gambia. The Commission extended the number of experts to six in order to cater for gender balance.

<sup>818</sup> [www.achpr.org/mechanisms/death-penalty/](http://www.achpr.org/mechanisms/death-penalty/) (Accessed on 11<sup>th</sup> May, 2014).

effective implementation of its mandate.

In the African traditional justice system, the acceptance of the death penalty depended on three principal factors, the first is insignificant value attached to human life, the second being the individual and tribal vengeance which was seen as just and necessary; and the third, the sovereign was both the only source of justice and the guardian of peace or public security, with the right to inflict death in the name of the organised society which the sovereign incarnated.<sup>819</sup>

In Africa, the death penalty can be said to have been in use in the Colonial period in some African societies. The penalty for offences like sorcery or witchcraft, wilful murder, treason and certain types of political offences was death by shooting, spearing, hanging, drowning or impalement of the convicted person(s).<sup>820</sup> The offences were seen in pre-colonial African societies as threatening the security of the community and beyond redress by the payment of compensation to the victim.<sup>821</sup>

The Working Group organised two regional conferences on the death penalty; the first was in Kigali from the 23<sup>rd</sup> to the 25<sup>th</sup> September, 2009 for Central and Southern African States and the second was held in Cotonou, Benin from the 12-15 April, 2010 for West and North African States.<sup>822</sup> These conferences helped with the drafting of the Kigali<sup>823</sup> and Cotonou<sup>824</sup>

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<sup>819</sup> Ancel A, 'The Problem of the Death Penalty' in Sellin Thorsten (ed.) 'Capital Punishment' (1967) 4-5.

<sup>820</sup> Elias Teslim, 'The Nature of African Customary Law' (1956) 260.

<sup>821</sup> For example, in pre-colonial Uganda, the Lango imposed a mandatory death sentence on those caught in the act of witchcraft, incest and sexual aberrations. These offences fell under criminal offences, which were considered offences against the society generally and not compoundable. Homicide whether accidental, deliberate, immediate or protracted, was classified under civil offences, which are offences against individuals and not the society and therefore compoundable by a compensatory payment. See Driberg Jack Herbert, 'The Lango: A Nilotic Tribe of Uganda' (1923) 209. The Baganda imposed death penalty for murder and adultery, the Bagisu on their part imposed the death penalty on whoever murdered or caused the fatal sickness of another; the Basoga imposed death penalty on a confirmed thief and the Bakyiga for murder. Compensation was also an option with regard to the above offences. Among the Basoga, the thief was put to death by being speared while with the Bakyiga, a murderer was either strangled to death or buried alive in the grave and beneath the body of his victim. See Roscoe John, 'The Bagesu and other Tribes of Uganda Protectorate: The Third part of the Mackie Ethnological Expedition of Central Africa' (1924) 39-40, 42, 102 & 108. See also Elias Teslim (1956) 135-136. In Nigeria, among the Yoruba of the Southern part of the country, death was the penalty for adultery with Chiefs' wives and also for murder in the Western part of the country. Also, under the Sotho traditional law, notorious stock thieves were sometimes put to death. See Lilian Chenwi, 'Towards the Abolition of Death Penalty in Africa: A Human Rights Perspective' (2007) 18.

<sup>822</sup> See What Strategies towards the Abolition of the Death Penalty in West Africa? Report of the Symposium held in Dakar, Senegal from 12-14 November, 2012.

<sup>823</sup> The framework is available at [www.achpr.org/files/special-mechanisms/death-penalty/kigali\\_framework.pdf](http://www.achpr.org/files/special-mechanisms/death-penalty/kigali_framework.pdf) (Accessed on 8<sup>th</sup> April, 2015). The framework was adopted by the First Sub-Regional Conference for Central, Eastern and southern Africa on the Question of the Death Penalty in Africa on the 25<sup>th</sup> of September, 2009.

<sup>824</sup> The Framework is available at [www.achpr.org/files/special-mechanisms/death-penalty/cotonou\\_framework\\_pdf](http://www.achpr.org/files/special-mechanisms/death-penalty/cotonou_framework_pdf) (Accessed on 8<sup>th</sup> April, 2015). The framework was adopted by the Second Regional Conference for North and West

framework documents which provide detailed recommendations on the issue of the abolition of the death penalty, the strategies put in place and the need to adopt a protocol to the African Charter on Human and Peoples' Rights on the abolition of the death penalty in Africa. This Protocol is to address the shortcomings of the African Charter regarding the inviolability of the right to life.<sup>825</sup>

The Working Group, in addition to the strategies already adopted and put into practice by the Commission, proposed some strategies which can further strengthen the suggestions already suggested at the conferences held in Kigali and Cotonou.<sup>826</sup> Among the suggestions that were made was the abolition of the death penalty by either constitutional route or ratification of a treaty, unremitting efforts by the Commission to demonstrate the need for abolition, continued dialogue and consultation, organisation of public debate on the need for the abolition of the death penalty, encouragement for states to ratify the Second Optional Protocol, close co-operation with strategic partners and lastly, drafting of an Additional Optional Protocol on Abolition of death penalty.<sup>827</sup>

#### 5.3.1.2.3 Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights

This Working Group was established by Resolution 77<sup>828</sup> which was adopted at the 37<sup>th</sup> Ordinary Session of the African Commission.<sup>829</sup> It was established to meet the specific needs of the Commission like the need to expressly finalise a number of issues that the Commission had been considering over a long period of time.<sup>830</sup>

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Africa on the Question of the Death Penalty in Africa on the 15<sup>th</sup> of April, 2010.

<sup>825</sup> Religion, culture and public opinion emerged during these conferences as obstacles to any progress in the abolition of the death penalty in some countries.

<sup>826</sup> See Report of the African Commission on Human and Peoples Rights Working Group on Death Penalty in Africa presented by Commissioner Kayitesi Zainabo Sylvie at the 52<sup>nd</sup> Ordinary Session of the African Commission held on the 22<sup>nd</sup> of October, 2012 at Yamoussoukoro, Cote D'Ivoire. Available at [www.achpr.org/sessions/52nd/intersession-activity--reports/death-penalty](http://www.achpr.org/sessions/52nd/intersession-activity--reports/death-penalty) (Accessed On 17th August, 2016).

<sup>827</sup> See, What Strategies towards the Abolition of the Death Penalty in West Africa. A report of the symposium in Dakar, Senegal held from 12-14 November, 2012.

<sup>828</sup> See Resolution ACHPR/Res. 77 (XXXVII) 05 adopted at the 37<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples Rights available at [www1.umn.edu/humanrts/africa/resolutions/rec82.html](http://www1.umn.edu/humanrts/africa/resolutions/rec82.html) (Accessed 14<sup>th</sup> May, 2012).

<sup>829</sup> The 37<sup>th</sup> Ordinary Session of the African commission was held between 27 April and 11 May, 2004 in Banjul, The Gambia.

<sup>830</sup> [www.achpr.org/mechanisms/specific-issues](http://www.achpr.org/mechanisms/specific-issues) (Accessed on 14<sup>th</sup> May, 2012).

The Working Group was constituted to deal with the following questions:

1. review the Rules of Procedure of the Commission<sup>831</sup>
2. deal with the mechanism and procedure on follow-up decisions and recommendation of the African Commission;
3. deal with the structure of different reports of the African Commission;
4. deal with the modalities for the establishment of a Voluntary Fund for Human Rights in Africa; and
5. deal with the follow-up on the implementation of the recommendation of the Retreat of the African Commission in Addis Ababa of September 2003, the evaluation report on the work of the African Commission and the UPPSALA consultation of June 2004.

The Preamble to Resolution 77 of the Commission raised three issues of concern which the Working Group is expected to tackle. The first issue is the need to deal with the relationship between the Commission and the various organs and institutions established by the AU. The second being the Commission's relationship with the African Court following the entry into force of the Protocol to the African Charter establishing the African Court on Human Peoples' Rights and the third issue was on the delay in the finalisations of a number of issues like the follow-up mechanisms for it is the Commission's recommendations and decisions.<sup>832</sup>

The Working Group was initially composed of three Commissioners and three experts from NGOs with observer status with the Commission. The NGOs were the Institute for Human Rights and Development in Africa, Interights (which no longer exists as a legal entity) and Open Society Justice Initiative.<sup>833</sup> The Commission, in 2013, at an Extra-Ordinary Session held in Banjul, The Gambia, passed a Resolution on the Reconstitution of the Working Group on Specific Issues Related to the Work of the African Commission<sup>834</sup> wherein four Commissions

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<sup>831</sup> The working Group review the Rules of Procedure by ensuring the inclusion of items concerning the relationship between the Bureau and the Secretariat, the relationship between the African Commission and its various partners, the relationship between the African Commission and the various organs and institutions of the African Union, and other relevant issues. See ACHPR/Res.77 (XXXVII) 05 at Paragraph 08.

<sup>832</sup> The Summit of the AU had severally called on the Commission to complete the exercise of rationalising its relationship with its organs and institutions. See Assembly /AU/Dec.56 (IV) particularly at paragraph 3 which dealt with the adoption of the 17<sup>th</sup> Activity Report. This was also repeated in Assembly/AU/Dec.77 (V) at paragraph 4 on the adoption of the 18<sup>th</sup> Activity Report of the Commission. Also Assembly/AU/Dec.101 (V) in paragraphs 8 and 9 on the adoption of the 19<sup>th</sup> Activity Report specifically requested the Commission to submit appropriate recommendations on its relationship with the African Court and to take part in its operationalisation.

<sup>833</sup> See Resolution on the Appointment and Composition of the Working Group on Specific Issues Relevant to the work of the Commission ACHPR/Res.150 (XLVI) 09 adopted at the 46<sup>th</sup> Ordinary Session of the African Commission held from 27<sup>th</sup> April to 11<sup>th</sup> May, 2005 in Banjul, The Gambia. Available at [www.old.achpr.org/English/resolutions/resolution150\\_en.htm](http://www.old.achpr.org/English/resolutions/resolution150_en.htm) (Accessed on 14<sup>th</sup> May, 2014).

<sup>834</sup> See Res. 233 (EXT. OS/XIII) 2013. Available at [www.achpr.org/mechanisms/specific-issues/](http://www.achpr.org/mechanisms/specific-issues/) (Accessed 17<sup>th</sup> August, 2016).

were appointed as the members of the Working Group.<sup>835</sup> The mandate of the Working Group has been renewed on three different occasions through Resolutions 80 adopted at the 30<sup>th</sup> Ordinary Session of the Commission,<sup>836</sup> Resolution 127 adopted at the 42<sup>nd</sup> Ordinary Session<sup>837</sup> and Resolution 150 adopted at the 46<sup>th</sup> Ordinary Session.<sup>838</sup>

With regards to the mandate of reviewing the Rules of Procedure of the Commission, the Working Group submitted a draft of the rules which contained rules on the composition, membership and incompatibility of members of the Commission.<sup>839</sup> This was eventually approved by the Commission at its 47<sup>th</sup> Ordinary Session and it is what the Commission is using today.<sup>840</sup> I will not delve into the details of the content of the rules of procedure as it is outside the scope of this thesis.

#### 5.3.1.2.4 Working Group on Economic, Social and Cultural Rights

This Working Group was established by the Commission with the adoption of Resolution 73<sup>841</sup> which was adopted at the 36<sup>th</sup> Ordinary Session.<sup>842</sup> The Working Group is made up of members of the Commission and NGOs and was given the mandate to develop and propose to

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<sup>835</sup> The Commissioners are Commissioner Faith Pansy Tlakula, Commissioner Med Kaggwa, Commissioner Soyata Maiga and Commissioner Lucy Asuagbor. The Resolution further appointed Commissioner Faith Pansy Tlakula as the Chairperson of the Working Group.

<sup>836</sup> The Ordinary Session was held from 21 November -5 December, 2005 at Banjul, The Gambia. See ACHPR/Res.80 (XXXVIII) 05. Available at [www.achpr.org/sessions.38th/resolutions/80](http://www.achpr.org/sessions.38th/resolutions/80) (Accessed on 14<sup>th</sup> May, 2014). The Working Group was initially given six month within which to work but this was later extended at the Ordinary Session. See Bahame Nyanduga (2008) 401.

<sup>837</sup> The 42<sup>nd</sup> Ordinary Session was held from 15-28 November, 2007 in Brazzaville, Republic of Congo. See [www.achpr.org/sessions/42nd/resolutions/127](http://www.achpr.org/sessions/42nd/resolutions/127) (Accessed on 14<sup>th</sup> May, 2012).

<sup>838</sup> The Ordinary Session was held from 11-25 November, 2009 in Banjul, The Gambia. See [www.achpr.org/sessions/46th/resolutions/150](http://www.achpr.org/sessions/46th/resolutions/150) (Accessed on 14<sup>th</sup> May, 012).

<sup>839</sup> With the advent of the African Court on Human and Peoples Rights, the Commission, through the working Group on Specific Issues Relevant to the Work of the African Commission developed new Rules of Procedure.

These rules were approved by the Commission at its 47<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 12-26 May, 2010 and it entered into force on 18<sup>th</sup> August, 2010. See [www.achpr.org/instruments/rules-of-procedure-2010](http://www.achpr.org/instruments/rules-of-procedure-2010) for the rules of procedure of the African Commission. (Accessed on 14<sup>th</sup> May, 2012).

<sup>840</sup> See Rules of Procedure of the African Commission on Human and Peoples Rights revised by the African Commission on Human and Peoples Rights during its 47<sup>th</sup> Ordinary Session held in Banjul, The Gambia. Copy is available at [www.chr.up.ac.za/images/files/documents/ahrdd/theme02/african\\_commission\\_rules\\_procedure\\_2010\\_new.pdf](http://www.chr.up.ac.za/images/files/documents/ahrdd/theme02/african_commission_rules_procedure_2010_new.pdf) (Accessed on 15<sup>th</sup> May, 2012).

<sup>841</sup> ACHPR/Res.73 (XXXVI) 04.

<sup>842</sup> The session was held from the 23<sup>rd</sup> November – 7<sup>th</sup> December, 2004 in Dakar, Senegal.

the African Commission, draft Principles and Guidelines on Economic, Social and Cultural Rights; to elaborate a draft revised guidelines for State reporting; undertake studies and research on specific economic, social and cultural rights; and make a progress report to the African Commission at each Ordinary Session.<sup>843</sup>

A compilation of Principles and Guidelines on Economic, Social and Cultural Rights in Africa<sup>844</sup> and a compilation of Reporting Guidelines on Economic, Social and Cultural Rights in Africa were developed by the Working Group and were subsequently adopted by the Commission with amendments in 2010.<sup>845</sup> These Guidelines consolidate the jurisprudence of the Commission on Economic, Social and Cultural Rights and are expected to guide States in complying with their reporting obligations on the Economic Social and Cultural Rights under the Charter.<sup>846</sup> The Working Group undertook promotional missions to Angola, The Democratic Republic of Congo, Central African Republic and Sahrawi Arab Democratic Republic. During these visits, the Working Group implored States to vigorously consider the details of the Nairobi Principles while developing their economic, social and cultural policies and programmes; and to also look into the Tunis Guidelines while putting together their reports under Article 62 of the Charter.<sup>847</sup>

Despite its achievements, the Working Group has been faced with challenges among which, is the problem of meeting among the Group. Members of the Group are based across Africa thereby making it difficult for them to meet to discuss themes as they relate to the Group. This has greatly affected the effectiveness and functioning of the Group.<sup>848</sup> Another obstacle which the Working Group has faced so far is the lack of human and financial resources. This has handicapped the Working Group as the budget assigned to it prevent it from fully conducting

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<sup>843</sup> [www.achpr.org/mechanisms/escr/](http://www.achpr.org/mechanisms/escr/) (Accessed on 8<sup>th</sup> April, 2015).

<sup>844</sup> The aim of drafting these principles was to define in clear and precise terms the nature of the obligations of States Parties regarding the promotion and protection of the economic, social and cultural rights enshrined in the African Charter and the content of these rights. See Report of the Working Group on Economic, Social and Cultural Rights since its Establishment by Mr. Mohamed Bechir Khalfallah, Commissioner, Chairperson of the Working Group and presented at the 52<sup>nd</sup> Ordinary Session and 25<sup>th</sup> Anniversary of the African Commission on Human and Peoples Rights held at Yamoussoukro, Cote d'Ivoire from the 9<sup>th</sup> -22<sup>nd</sup> October, 2012.

Available at [www.achpr.org/files/sessions/52nd/inter-act-reps/181/activity\\_report\\_ecosoc\\_eng.pdf](http://www.achpr.org/files/sessions/52nd/inter-act-reps/181/activity_report_ecosoc_eng.pdf) (Accessed 10<sup>th</sup> April, 2015).

<sup>845</sup> Report of the 48<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples Rights, 10<sup>th</sup> -24<sup>th</sup> November, 2010, Banjul, The Gambia at para. 244.

<sup>846</sup> Manisuli Ssenyonjo, Economic, Social and Cultural Rights in the African Charter in Manisuli Ssenyonjo (ed.), The African Regional Human Rights System: 30 years After the African Charter on Human and Peoples Rights (2011) 80.

<sup>847</sup> See Report of the Working Group on Economic, Social and Cultural Rights since its Establishment (2012) 5.

<sup>848</sup> See Report of the Working Group on Economic, Social and Cultural Rights since its Establishment (2012) 8.

its activities.<sup>849</sup> Since the launch of the Guidelines and principles on Economic, Social and Cultural Rights, it has been difficult organising any other activity to promote them because of lack of finance. These documents are to be made available to the populace through dissemination strategies like making it available in English, French, Portuguese languages and also to be translated into African languages in addition to disseminating them via the several avenues of communication. These have not been able to be achieved due to the lack of finance.<sup>850</sup>

The lack of human resources has also hampered the proper functioning of the Working Group as there is no permanent staff at the Secretariat of the Commission working for the Working Group since the Senior Legal Officer, that was designated to the Group left.

The culture of Traditional African society made them distinct from other human societies in the family of humanities. These cultures along with their value system and belief of traditional African societies are close although they vary from one another; it embraces the totality of the African way of life in all its ramifications.

#### 5.3.1.2.5 Working Group on Rights of Older Persons and People with disabilities

This Working Group started as a Focal Point which was created by the adoption of Resolution 118 by the Commission.<sup>851</sup> The Focal Point was with the view to initially consider developing a Protocol to the African Charter to deal with the rights of older persons in Africa.<sup>852</sup>

A consultative meeting held in Mauritius in 2008 by the Focal Point on the rights of older persons led to the foundation for a co-ordinated approach towards the promotion and protection of the rights of older persons. The conclusion reached at this consultative meeting was that the principle of non-discrimination and equality before the law requires that States adopt special measures to protect older persons and persons with disabilities.<sup>853</sup>

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<sup>849</sup> See Intersession Report delivered by Honourable Commissioner Mohamed BechirKhalfallah, Chairperson of the African Commission Working Group on Economic, Social and Cultural Rights in Africa at the 56<sup>th</sup> Ordinary Session of the Africa Commission on Human and Peoples Rights held in Banjul, The Gambia from 21 April to 7<sup>th</sup> May, 2015. See also, Intersession Report delivered by Honourable Commissioner Jamesina Essie. King, Chairperson of the Working Group on Economic, Social and Cultural Rights In Africa at the 58<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples Rights held in Banjul, The Gambia from 6 to 20 April, 2016.

<sup>850</sup> Inter-Session Report of the Working Group on Economic, Social and Cultural Rights (2016) 7.

<sup>851</sup> The Resolution was adopted at the 42<sup>nd</sup> Ordinary Session of the Commission held from 15-28 November, 2007 at Brazzaville, Republic of Congo. See Resolution ACHPR/Res.118 (XXXII) 07.

<sup>852</sup> Yeung Kam John Yeung Sik Yuen, 'The Rights of Older Persons and Persons with Disabilities in Africa' in Manisuli Ssenyonjo (ed.) 'The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples Rights' (2011) 228.

<sup>853</sup> See Report on the Activities of the Commissioner Yeung Sik Yuen of the Working Group on the Rights of Older

By 2009, at the meeting of experts which was held in Accra, Ghana,<sup>854</sup> the first Draft Protocol on the Rights of People with Disabilities in Africa was produced by including standards in the 1983-1992 UN Decade for people with disabilities, the 1993 Standard Rules on Equalisation of Opportunities for Persons with Disabilities<sup>855</sup> and the Kigali Declaration.<sup>856</sup> The Focal Point, at the 45<sup>th</sup> Ordinary Session of the Commission,<sup>857</sup> was transformed into a Working Group on the Rights of Older Persons and People with Disabilities<sup>858</sup> with an extended mandate to hold comprehensive brainstorming sessions to articulate the rights of older persons and peoples with disabilities.<sup>859</sup>

The 'Accra Draft' has been criticised for having been formulated without the participation of persons with disabilities and it also presented a diluted version of international standards, most notably the Convention for Rights of People with Disabilities, without adequately introducing an 'African-specific' perspectives.<sup>860</sup> This led to the suspension of the Accra draft and it has been proposed that the existing potential of the African human right system to realise the rights of people with disabilities should be explored more fully. This may entail the adoption by the African Commission thematic resolutions that could act as guidelines to the interpretation of the African Charter.<sup>861</sup>

Traditional African society was closely attached with deep-rooted cultural facts. Elders and older persons played a major role in problem solving in these African societies; they also created

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Persons and People with Disabilities, November 2009. Available at [www.achpr.org/files/sessions/46th/inter-act-reps/129/achpr46\\_specmec\\_older\\_actrep\\_2009\\_eng.pdf](http://www.achpr.org/files/sessions/46th/inter-act-reps/129/achpr46_specmec_older_actrep_2009_eng.pdf) (Accessed 10<sup>th</sup> April, 2015).

<sup>854</sup> Expert Seminar on the Rights of Older Persons and People with Disabilities, held in Accra, Ghana from 26-28 August, 2009.

<sup>855</sup> Article 18(4) African Charter.

<sup>856</sup> Yeung Sik Yuen (2011) 229.

<sup>857</sup> The Ordinary Session was held in Banjul, The Gambia from 13-27 May, 2009.

<sup>858</sup> The Resolution was as a result of the recognition by the Commission that people with disabilities are entitled to the rights guaranteed for all in the African Charter and that mainstreaming disability in the development agenda of States Parties is an appropriate strategy for achieving equality for people with disabilities and older people. See Draft Report of Commissioner Y.K.J. Yeung Sik Yuen, Chairperson of the Working Group on the Rights of Older Persons and People with Disabilities in Africa Inter-Session period, May 2009-November 2009. Available at

[www.achpr.org/files/sessions/46th/inter-act-reps/129/achpr46\\_specmec\\_older\\_actrep\\_2009\\_eng.pdf](http://www.achpr.org/files/sessions/46th/inter-act-reps/129/achpr46_specmec_older_actrep_2009_eng.pdf) (Accessed 10<sup>th</sup> April, 2015).

<sup>859</sup> See [www.achpr.org/mechanisms/older-disabled/](http://www.achpr.org/mechanisms/older-disabled/) for the mandate of the Working Group. (Accessed 10<sup>th</sup> April, 2015).

<sup>860</sup> Kamga S A, 'A Call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 21 *African Journal of International and Comparative Law* 219-237.

<sup>861</sup> Secretariat of the African Decade on Persons with Disabilities The Architecture for an African Disability Rights Mechanism (2011)32-35. See also Helen Combrinck, 'Disability Rights in the African Regional Human Rights System During 2011 and 2012' (2013)1 *African Disability Rights Yearbook* 361-368.

strategies and shaped local visions based on skills and wisdoms. In achieving these, they used their experience which they acquired over time and their knowledge which transmit from generation to generation. These knowledge are indigenous knowledge acquired from their local community and applied to development planning as well as social problems in the community.<sup>862</sup>

Conflict resolutions in the African Traditional societies through indigenous institutions perform a healing function. It provides opportunity for examination of alternative positive decision to resolve differences and as a result elders in the community are major players because they have wisdom and knowledge. They are also respected as trustworthy mediators;<sup>863</sup> they are associated with the cultural norms and beliefs of the peoples. They gain their legitimacy from the community values instead of state. What this means is that traditional dispute resolution mechanisms function on the basis of local customary practices or cultural norms based on indigenous knowledge embedded in the elders.<sup>864</sup>

The African Traditional Justice system is inclusive, democratic, open and welcoming to the people who seek it. The traditional courts tried to promote harmony, reconciliation, compensation to the aggrieved, easy and inexpensive access to justice and the restoration of the wrongdoer. It also promoted the spirit of communalism where an individual exist for the benefit of the greater community. Establishment of the Special mechanisms by the Commission can be said to be a reflection of what indigenous Africans perceived as Justice. They seek to foster harmony, reconciliation and an easy access to justice for the aggrieved.

### 5.3.2 Protective Mandate of the African Commission

Another mandate conferred on the Commission is to ensure the protection of human and Peoples' rights as laid down by the African Charter.<sup>865</sup> Article 45(2) specifically provide for the protective mandate of the Commission as 'ensuring the protection of Peoples' right under conditions laid down by the present Charter'. This power can be assessed based on the nature of the rights being violated, the place of their violation and the status of their subjects, whether active or passive. Unlike the promotional mandate, the protective mandate of the Commission covers the whole Charter in terms of specific rights, duties and obligations as laid down by the

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<sup>862</sup> Tasew Tafese, 'Conflict Management through African Indigenous Institutions: A Study of the Anyuua Community (2016) vol. 3 No. 1 *World Journal of Social Science* 22.

<sup>863</sup> Tasew Tafese (2016) 22.

<sup>864</sup> Tasew Tafese (2016) 22.

<sup>865</sup> Article 45(2) African Charter.

Charter.

To be able to carry out this protective mandate effectively, the Commission identified two major areas which are the examination of State Reports and the examination of complaints or communications. The examination of Communications was further divided into State Communications and non-State communications. The protective mandate enables the Commission to take measures which will ensure the enjoyment of individual's rights as spelt out in the Charter and this includes making sure that Member States do not violate individual's rights as contained in the Charter and where a violation occurs, the right of the victim(s) are reinstated.<sup>866</sup>

The objectives of State Reporting as a protective mandate of the Commission, as summarised by the Committee on Economic, Social and Cultural Rights, can be said to be to ensure that a complete review of national legislation, administrative rules, procedures and practices is undertaken in order to ensure a strict adherence of the provision to the African Charter.<sup>867</sup> Other objectives of State reporting as a protective mandate of the Commission includes, among others, to ensure that States Parties measure the actual situation of each and every rights on a regular basis thereby being aware of the level at which each and every rights are, whether the rights are being enjoyed or not by individuals within their jurisdiction.<sup>868</sup>

Other objectives of State Reporting is to enable a government to demonstrate that principled policy making has infact been undertaken; also to facilitate public scrutiny of government policies with respect to the right in question and to encourage the involvement of the relevant sectors of the society in the formulation, implementation and review of the relevant policies. Another objective is to provide a basis on which the State Party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realisation of the obligations contained in the Covenant. It is also to enable the State Party to develop a better understanding of the problem and shortcomings encountered in an effort to realise progressively the full range of economic, social and cultural rights.<sup>869</sup>

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<sup>866</sup> See African Commission on Human and Peoples Rights, Establishment Information Sheet No.1 at page 13.

<sup>867</sup> Takele Soboka Bulto, 'Africa's Engagement with the Universal Periodic Review: Commitment or Capitulation' in Hilary Charlesworth & Ema Larking (eds.) 'Human Rights and the Universal Periodic Review: Ritual and Ritualism' (2015) 239.

<sup>868</sup> Morris Mbondenyei, 'Human Rights in Africa' (2011) 431.

<sup>869</sup> Kofi Quashigah, 'The African Charter on Human and Peoples Rights: Towards a more Effective Reporting Mechanism' (2002) 2 *AHRLJ* 261-300.

Despite all the above listed objectives of state reporting, States have shown a lack of appreciation of the importance of putting together their reports and submitting as at when due<sup>870</sup> and as a result of the frustration being experienced by the Commission delay in the submission of these reports, the Commission, in its 5<sup>th</sup> Activity Report, made a recommendation to the Assembly of Heads of State and Government of OAU asking it to adopt a resolution on overdue reports that was drafted by the Commission.<sup>871</sup> The Assembly, at its 29<sup>th</sup> Ordinary Session held in Cairo, Egypt, adopted a resolution urging States Parties to the African Charter that are yet to submit their reports to do so as soon as possible.<sup>872</sup>

Limited legal framework providing for reporting, lack of political will and irregular submission of reports, lack of seriousness on the part of the Commission and States Parties during reporting process and budgetary constraint among others, can be identified as the constraint of state reporting.<sup>873</sup> The onus to make the state reporting procedure effective is not on the Commission alone, State Parties too do have an obligation to make it effective likewise NGOs. They provide 'shadow' reports to the reporting system and the benefit of this shadow report is that they provide the requisite information that will enable the Commission to engage in constructive dialogue with State representatives when periodic reports are considered.<sup>874</sup>

### 5.3.2.1 Inter-State Communications before the African Commission

Articles 47 to 54 of the African Charter make provision for Inter-State Communications and chapter III Section 2 of the Rules of Procedure of the African Commission. Inter-States Communications enables a State to petition the African Commission where there is a violation of the Charter. Where a State Party feels that there is a breach of the Charter by another State Party such State can call the attention of the Commission to such a breach by sending a comprehensive statement of facts as well as the provisions of the Charter alleged to have been violated to the

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<sup>870</sup> The first report was submitted by Libya in 1990. See Paragraph 23 of the 3<sup>rd</sup> Activity Report of the African Commission on Human and Peoples Rights 1990. Only nine States have submitted their reports to date, 16 States are late by either one or two reports; 22 State are late by three or more reports while seven States have never submitted any reports. See State Reports and Concluding Observations. Available at [www.achpr.org/states/reports-and-concluding-observations/](http://www.achpr.org/states/reports-and-concluding-observations/) (Accessed on 18<sup>th</sup> August, 2016).

<sup>871</sup> 5<sup>th</sup> Activity Report of the African Commission on Human and Peoples Rights, 1991-1992. Available at [www.achpr.org/files/activity-reports/5/achpr10and11\\_actrep5\\_1991992\\_eng.pdf](http://www.achpr.org/files/activity-reports/5/achpr10and11_actrep5_1991992_eng.pdf) (Accessed on 18<sup>th</sup> August, 2016).

<sup>872</sup> AHG/Res.(XXVIII).

<sup>873</sup> Crawford J, 'The UN Human Rights treaty System: A System in Crisis' in Alston P & Crawford J (eds) 'The Future of UN Human Rights Treaty Monitoring' (2000) 1-7.

<sup>874</sup> Anette Faye Jacobson, 'Human Rights Monitoring: A Field Mission Manual' (2008) 25.

Chairperson of the Commission.<sup>875</sup>

The Procedure for Inter-State Communications under the Charter, unlike the American System, is not optional. Under the American system, the Inter-American Commission may only deal with inter-state complaints where the parties, that is, the complaining states and the state being accused have both made a declaration accepting the inter-state jurisdiction of the Inter-American Commission. Aside this, they must have ratified the American Convention on Human Rights.<sup>876</sup> This is also the case under the African Charter although all African countries are State Parties.

Looking at the procedures of bringing communications from the states to the Commission, Article 47 of the Charter states that where a State noticed a violation of the African Charter, such State can write to the infringing state bringing the attention of the state to the infringement. A copy of the communication will also be sent to the Commission and the Secretary of the AU. On receipt of the communication, the infringing State has three months to give a written reply and this must be supported with documents on relevant rules and legislation and the available redress and actions taken.<sup>877</sup> Also, disputes that may arise between State Parties as a result of the violation of the Charter can also be resolved amicably by parties without making recourse to the African Commission.<sup>878</sup> The amicable settlement of disputes is in line with international norms and African tradition where clashes are determined in order to get the truth and attaining harmony. In the African Tradition Justice System, there are no winners and losers.<sup>879</sup>

Furthermore, Article 49 gives a State party the right to approach the Commission with a communication against a State Party where it feels there has been a breach of the provision of the African Charter without making recourse to the infringing State as specified under Articles 47

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<sup>875</sup> Rule 86 (2) Rules of Procedure of the African Commission, 2010.

<sup>876</sup> See Article 45 of the American Convention on Human Rights.

<sup>877</sup> Article 47 states that if a State Party to the Present Charter has good reasons to believe that another State Party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary-General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the state to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws of procedure applied and applicable, and the redress already given or course of action available.

<sup>878</sup> Article 48 states that: If within three months from the date on which the original communication is received by the state to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by another peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman who will notify the other State involved.

<sup>879</sup> Kennedy Maranga, 'Indigenous People and the Roles of Culture, Law and Globalisation: Comparing the Americas, Asia-Pacific and Africa' (2013) 74.

and 48.<sup>880</sup>

In filing a complaint against a state, there is a Guideline which must be strictly adhered to.<sup>881</sup> The Commission can only look into a communication where it is satisfied that all legal remedies have been exhausted. The only exception to this is that unless the Commission feels that the procedure of achieving these remedies would be unduly prolonged.<sup>882</sup> Where the Commission finds the need for additional information, it can ask the States concerned for more relevant information and where possible, it may even invite States for oral presentation.<sup>883</sup> Where an amicable settlement cannot be reached between parties to an inter-State dispute, the Commission will therefore present a report to the Assembly of Heads of State and Government and will attach to the report, its recommendations.<sup>884</sup>

The inter-State communication procedure is seldom used and neither the Charter nor the Rules of Procedure of the Commission tells us the kind of dispute or violations that are envisaged under Article 47 and 49. The Commission has only received one complaint that can actually be classified as an inter-State complaint under the Charter. The complaint was received from the Democratic Republic of Congo against Burundi, Rwanda and Uganda<sup>885</sup> where it claimed

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<sup>880</sup> Article 49 states as follows: Notwithstanding the provisions of Article 47, if a State Party to the present Charter considers that another State Party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary-General of the Organisation of African Unity and the State concerned. It is important to note here that there is no time limit for the exchange of information here as compared to the other procedures under the Inter-American and European Commission wherein a period of three months is required for exchange of information. But practically, the Commission always gives a period of three months as time limits to ensure that the states involved would still have sought resolution of their disputes diplomatically. See Rules 91, 92 and 97, Rules of Procedure of the African Commission.

<sup>881</sup> See The African Commission on Human and Peoples Rights, Guidelines on the submission of Communications: Information Sheet 2, 14. Under the Guidelines, the complaining State must state in writing, its name, official language and the year in which it ratified the Charter; it must state the name of the accused State, its official language and year it ratified the Charter; it must state the facts constituting the violation. This must be explained in as much factual detail as possible in terms of what occurred, specifying place, time and dates of the violation if possible. It must also indicate measures that have been taken to resolve the matter amicably; why the measures if any, failed or why no measure was used at all. Along this line, the state must also indicate measures taken to exhaust local remedies. All relevant documents in this regard must be attached. The State must also point out the domestic legal remedies that have not been pursued yet, giving reasons why this has not yet been done; it must also state whether the case has also been referred to other international avenues, such as referral to other international settlement bodies like the UN or within the OAU/AU system and finally, it must show complaints submitted to the Secretary-General of the OAU and to the accused State, accompanied by any response from the accused State and the Secretary-General of the OAU/AU.

<sup>882</sup> See the African Commission on Human and Peoples Rights Communication Procedure: Information Sheet 3, 18 (1998), also Rule 97, Rules of Procedure of the African Commission.

<sup>883</sup> See Information Sheet No. 3 at 18. See Rule 100, Rule of Procedure of the African Charter.

<sup>884</sup> See Rule 101(5) Rules of Procedure of the African Charter.

<sup>885</sup> Communication 227/99, *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*. The Communication was admitted on merit by the Commission wherein the Respondent States were found to be in violation of Articles 2, 4, 5, 12(1) & (2), 14, 16, 17, 18(1) & (3), 19, 20, 21, 22 and 23 of the African Charter. It urged them to abide by their obligations under the Charters of United Nations, OAU, African Charter, UN Declaration on Principles of

violation of human rights as a result of their unlawful invasion of the Congolese territory.<sup>886</sup> The reluctance of States to condemn violations by other states simply mean they also are not far from committing the same violation thereby putting them at risk of being condemned in return.<sup>887</sup>

### 5.3.2.2 Non-State or Individual Complaints (Other communications)

The Charter also gives power to the Commission to receive other communications aside inter-state communications. 'Other communications' is not a specifically defined phrase by the Charter but the only link to it is in the provision of Article 55.<sup>888</sup> Looking at the provision of Article 55 what it means is that a person, a group of persons or even an NGO can file a complaint before the Commission against a State party to the Charter where such State Party has violated the Charter. This is close to what obtains in the Inter-American Commission<sup>889</sup> where access by individuals to the Inter-American Commission is mandatory rather than optional. The African Charter is more generous when it comes to allowing individual access to the Commission unlike other regional human rights regimes as there is no prerequisite for organisations in the African system.<sup>890</sup>

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International Law Concerning Friendly Relations and Co-operation among States and other applicable international principles of law and withdraw its troops immediately from the complainant's territory. Available at [www.hrlibrary.umn.edu/africa/comcases/227-99.html](http://www.hrlibrary.umn.edu/africa/comcases/227-99.html) (Accessed 19 August, 2016).

<sup>886</sup> The Communication filed by Sudan against Ethiopia alleging violation by the Ethiopian troops during the invasion of Kunnuk and Gissan in Sudan on January 12, 1997 will not pass as an inter-State Communication. The matter was referred to the OAU Secretariat by the Commission while it also advised Sudan to file a complaint to the OAU Secretariat because Ethiopia was not a State Party to the Charter which makes it not to be bound by the decision of the Commission. Libya also in 1987 filed a complaint against the United States after the Administration of Reagan bombed Libya. The complaint was declared unreceivable because the United State is not a party to the African Charter. See The African Commission on Human and Peoples Rights, Tenth Anniversary Celebration, 2<sup>nd</sup> November, 1987 - 2<sup>nd</sup> November, 1997: One Decade of Challenge (1998) 3 *ACHPR* 19.

<sup>887</sup> Citing examples from the European system, it took two years after the election of members of the European Commission on Human Rights before it received an inter-state complaint. See Application No. 176/56, *Kingdom of Greece v. United Kingdom of Great Britain and Northern Ireland*, dated 7 May 1956, in connection with the violation of the European Convention by the Administration of Cyprus (1958-1959) 2 *yearbook of the European Convention on Human Rights* 182-186.

<sup>888</sup> Article 55 states that before a session, the secretary shall make a list of the communications other than those of State Parties to the present Charter and transmit them to the members of the Commission who shall indicate and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission Sub-paragraph two of Article 55 state further that a communication shall be considered by the Commission if a simple majority of its members so decides.

<sup>889</sup> Article 44 of the American Convention on Human Rights.

<sup>890</sup> Vincent Orlu Nmehielle (2001) 204. The African Charter does not contain any primary requirements that petitioners must be the actual victims of the Charter violations. The Charter does not also require that the complainants or petitioners must be within the jurisdiction of the respondent State. This provision is the same with the American Convention on Human Rights but different from the provision of the First Optional Protocol to the International Covenant on Civil and Political Rights and also the European Convention on Human Rights. See Article 1 and 2 of the First Optional Protocol to the International Covenant on Civil and Political Rights and Article 34 of the Old European Convention on Human Rights.

Looking at Article 55 (2), the Commission can also consider a communication where a simple majority of its members agree to do so. What this means is that where a simple majority of its members decide, the Commission can decline the receipt of a Complaint. In declining jurisdiction in line with this provision of the Charter, there is no place either in the Charter or the Rules of Procedure of the African Commission where the conditions that must be met before refusal of a complaint are written.

Before an individual communication is considered by the Commission on merit, there are some conditions which must be met and they are as follows:<sup>891</sup>

1. the complaint must indicate the author(s) even if the author request anonymity;<sup>892</sup>
2. the complaint must be compatible with the African charter;<sup>893</sup>
3. it must not be written in disparaging or insulting language against the State concerned and its institutions or the OAU/AU;<sup>894</sup>
4. the complaint must not be based exclusively on news disseminated through the mass media;<sup>895</sup>
5. the complaint must be submitted to the African Commission only when local remedies have already been exhausted unless it is obvious that the procedure is unduly prolonged;<sup>896</sup>

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<sup>891</sup> Article 56 of the African Charter highlight the conditions under which Communications received by the Commission will be considered.

<sup>892</sup> Where the complainant wishes to remain anonymous he should indicate so and the Communication will be given a letter alphabet like A, B or C and thereafter be addressed by the State party concerned. The author does not need to give reason(s) why he wants to remain anonymous. Where the author of a communication is an NGO, the names of its representatives would be required likewise their contact addresses as it makes correspondence between the Commission and the author easier. Where this information is left out in a communication, such communication will not be considered by the Commission.

<sup>893</sup> The communication should invoke the provisions of the Charter alleged to have been violated and the principles enshrined in it. Where a communication does not illustrate a *prima facie* violation of the Banjul Charter or some basic principles of the OAU Charter like freedom, equality, justice and dignity, it will not be examined. See, Communication 57/91, *Tanko Bariga v Nigeria*, Seventh Activity Report, 1993-1994, Annex IX and Communication 1/88, *Frederick Korvah V Liberia* Seventh Activity Report 1993-1994 Annex IX where failure to prove a *prima facie* violation rendered the communication inadmissible, an allegation in a general manner is not enough. See also Communication 63/92 *Congress for the Second Republic of Malawi v Malawi*, Seventh Activity Report, 1993-1994, Annex IX.

<sup>894</sup> The author should state the facts of his case without insulting anyone. Political rhetoric and vulgar language is not necessary as insulting language will render a communication inadmissible irrespective of the seriousness of the complaint. See Communication 65/92, *Ligue Camerounaise des droits de l'homme v Cameroon* Tenth Activity Report 1996-1997, Annex X, where the communication was declared inadmissible for using words such as regime of torture and a government of barbarism.

<sup>895</sup> In Communications 147/95 and 149/96 (joined), *Sir Dawda KJawara v The Gambia* (2000) *African Human Rights Law Report* 107, the government alleged that the communication should be declared inadmissible because it was based exclusively on news disseminated through mass media. The Commission however declared it admissible.

<sup>896</sup> The author must have taken the matter to all the available domestic local remedies. What this means is that he must have taken the case to the highest court of the land. Where such remedies are not available or they are available but the procedure is unduly prolonged, the complainant is allowed to submit his complaint to the Commission. See Communications 43/90, *Union des Scolaires Nigeriens, Union Generale des Etudiants Nigeriens au Benin v Niger*, Seventh Activity Report 1993-1994, Annex IX and 45/90, *Civil Liberties Organisation v Nigeria*, Seventh Activity Report 1993-1994, Annex IX where a non-exhaustion of local remedies rendered communication inadmissible. See

6. the complaint must be submitted within a reasonable period from the time local remedies are exhausted or from the date the commission is seized with the matter; and
7. the complaint does not deal with cases which have already been settled by the States involved in accordance with the principles of the Charter of the UN<sup>897</sup> or the African Charter.<sup>898</sup>

A non-state complaint, which has to be written and which has passed through the above listed requirements is sent to the Secretary of the Commission who in turn, transfers it to the Commission where it will be looked into to see if it will be declared admissible or not.<sup>899</sup> Where a complaint is declared to be admissible, the Commission is entitled to bring the complaint to the notice of the State concerned.<sup>900</sup> Such State has three months within which to file a response.<sup>901</sup> Where a communication is declared inadmissible from the beginning, it will be declared closed. The Commission has the power to revive a communication already declared inadmissible where the complainant can provide more information to the point that the ground on which the Commission stood on in declaring the complaint inadmissible, can no longer withstand the

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also Communication 59/91, *Emgba Mekongo Louis v Cameroon*, Eight Activity Report, 1994-1995 Annex VI, where the communication was declared admissible because an appeal was pending before the local court for 12 years. This was considered to be unduly prolonged. Some communications can also be declared admissible without the exhaustion of local remedies where the remedy is at the discretion of the executive or if the jurisdiction of the ordinary courts has been ousted due to a decree or through the establishment of a special tribunal. See Communications 60/91, *Constitutional Rights Projects (in respect of Akanmu and others) v Nigeria* (2000) *African Human Rights Law Report* 180; 64/92 and 78/92 (joined), *Achutan & Another (on behalf of Banda and others) v Malawi* (2000) *African Human Rights Law Report* 144.

<sup>897</sup> The communication must not be one which has already been settled through another international body like the UN Human Rights Committee or even some of OAU organs. See Communication 15/88, *Mpaka-Nsusu Andre Alphonse v Zaire*, Seventh Activity Report, 1993-1994, Annex IX, where the UN Human Rights Committee had decided the case in favour of the victim and he submitted the same communication to the Commission. The communication was declared inadmissible. However, the submission of a complaint to an NGO or an Inter-Governmental Organisation like the European Economy Community does not render a communication inadmissible. See Communication 59/91, *Emgba Mekongo Louis v Cameroon*, Eighth Activity Report, (2000) *African Human Rights Law Report* 56. However, a communication already being examined under Rule 1503 of the UN (which deals with procedures of dealing with communications relating to violations of human rights and fundamental freedoms) will be rendered inadmissible see Communication 69/92 *Amnesty International v Tunisia*, Seventh Activity Report, 1993-1994, Annex IX. The whole purpose of this is to avoid usurpation of the jurisdiction of the bodies that may provide a solution or relevant information.

<sup>898</sup> See Information Sheet 2, Guidelines on the Submission of Communications at page 10; Information Sheet 3, Guidelines on the Submission of Communications at page 7-10; Rule 116, Rules of Procedure of the African Commission. See also Article 56 of the African Charter.

<sup>899</sup> Article 56 of the African Charter.

<sup>900</sup> Article 57 of the African Charter, see also Article 47 of the African Charter; Rule 112, Rules of Procedure of the African Commission.

<sup>901</sup> See Rules 117 (4) Rules of Procedure of the African Commission. It is pertinent to note that despite the fact that the Commission gives 3 months to States within which to file their response, the States Parties always have more time to respond to communications. See Hamidu Mariam, *The Open-door Approach to locus standi by the African Commission on Human and Peoples Rights in Respect of its non-state Complaints Procedure: In need of Reform?* (2006) LLM dissertation, Centre for Human Rights, University of Pretoria. . See for example, Nos. 25/89, 47/90, 56/91, 100/94 (joined), *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire* (2000) *AHRLR* 74.

strength of the new facts being supplied by the complainant.<sup>902</sup> The author of a communication can also withdraw it at any stage. The Commission in such a case will discontinue proceedings on it without taking any written decision.<sup>903</sup>

When the Commission become seized of a communication, decision as to the admissibility of such communication will have to be taken. Article 56 of the Charter sets out seven conditions to be met for a communication received pursuant to article 55 to be considered. The seven conditions are already listed above in this chapter.

After studying the arguments presented by both parties, and bearing in mind the principles of international human rights law, which are basically aimed at protecting the individuals from State's infringement, the Commission may then make a decision. When a decision on admissibility is taken on a communication, this is transmitted to both the complainant and the State concerned. In principle, a decision on admissibility is final. If a communication is declared inadmissible, the reasons for inadmissibility will be stated and this will automatically bring the consideration of the communication to an end. However, a communication declared inadmissible could be reviewed at a later date where the complainant is able to provide information to the effect that the grounds for inadmissibility no longer exist.<sup>904</sup>

However, the Commission does not have a laid down procedure to supervise the implementation of its recommendations. What it does is that the Secretariat will send letters of reminders to States that have been found to have violated provisions of the Charter calling upon them to honour their obligations under Article 1 of the Charter which reads ‘... to recognise the rights, duties and freedoms enshrined in this Charter and (...) adopt legislative and other measures to give effect to them.’ The first letters are sent immediately after the adoption of the Commission's Annual Activity Report by the OAU Assembly of Heads of State and Government and

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<sup>902</sup> Rule 118 Rules of Procedure of the African Commission.

<sup>903</sup> See Communications Procedure African Commission on Human and Peoples Rights. Available at [www.achpr.org/communications/procedure/](http://www.achpr.org/communications/procedure/) (Accessed 30<sup>th</sup> May, 2016).

<sup>904</sup> After a careful deliberation of the facts and arguments submitted by the parties, that is, the complainant and the respondent State Party, the Commission makes a decision on whether or not it finds a violation of the Charter. Where the Commission observes that a violation has occurred it will issue recommendation to the State Party concerned. The Commission's decisions are recommendations which are not legally binding on the States concerned. By including the recommendations in its Annual Activity Report which it submits to the Assembly of Heads of State and Government of the AU, the Commission tends to add some binding power to its recommendations. See Rule 120 (1) Rules of Procedure of the African Commission. The adoption of the Report by the Assembly is believed to make the decisions binding on the State Parties but the question that has continued to be asked is how recommendations can be made binding. The implementation of recommendations ordinarily is subjective because the State party to which the recommendation is made can either choose to implement them or not.

subsequent letters are sent as often as necessary.<sup>905</sup>

The Commission, on many occasions, has used its ability to take interim provisions to protect a victim in line with the provision of Rule 111 of its Rules of Procedure.<sup>906</sup> It has also called on State Parties to make sure victims of violations are adequately remedied.<sup>907</sup> The main aim of putting in place interim or provisional measures is basically to prevent irreparable damage to victims during the period their complaint is being considered. This measure is appreciated more in places where there are serious violations of human rights. The Inter-American Commission has laid a very strong foundation on the interim measures unlike the European system.<sup>908</sup> These provisional measures also play a great role in the African human rights system as a result of the character of most of the human rights claims which are brought before the Commission and the realities of human rights violation in the continent.<sup>909</sup>

The power to request for provisional measures vested in the Commission as a body or in the Chairperson of the Commission where the Commission is not in session and in emergency cases,<sup>910</sup> may be made before the commission makes its recommendation.<sup>911</sup> With this, the

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<sup>905</sup> Communication Procedure, The African Commission on Human and Peoples Rights. Available at [www.achpr.org/communications/procedure/#sdfootnote6sym](http://www.achpr.org/communications/procedure/#sdfootnote6sym) (Accessed 31<sup>st</sup> May, 2016). See also DOC/OS/50b (XXIV) 1, *Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach*.

<sup>906</sup> Rule 111 provides that before making its final views known to the Assembly on the Communication, the Commission may inform the State party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation. In so doing, the Commission shall inform the State Party that the expression on its views on the adoption of those provisional measures does not imply a decision on the substance of the communication. In Communication Nos. 83/92, 88/93 and 91/93, *Jean Y. Degli (on behalf of N. Bikagni), Union Inter africaine des Droits de l'Homme, Commission Internationale de Juristes v. Togo*, the Commission brought into play, these measures towards ensuring the security of Corporal Bikangi in order to avoid any irreparable prejudice inflicted on the victim of the alleged violations. The Commission also sent letters to Nigeria requesting it not to execute individuals until the Commission had the opportunity to consider the case which was pending before it. See Letter dated 1 November, 1995 in 'Human Rights Report on the Situation in Nigeria,' ACHPR/COMMU/A044 (6).

<sup>907</sup> Rachel Murray, 'African Commission on Human and Peoples Rights & International Law' (2000) 20.

<sup>908</sup> Jo Marie Pasqualucci, 'Practice and Procedure of the Inter-American Court of Human Rights' (2013) 268.

<sup>909</sup> The preventive function of provisional measures, when lives and physical security of persons concerned is more valuable than the compensatory function of a final decision. See Jo Marie Pasqualucci (2013) 268.

<sup>910</sup> Rule 111(3) of the Rules of Procedure of the African Commission. This is similar to the power vested in the Commission in Article 58 of the African Charter which deals with cases of serious and massive violations of human rights under which the Commission or the Chairman of the Commission, when the Commission is not in session, would draw the attention of the Assembly of Heads of State and Government, or its Chairman to those cases. The difference between the power in these two provisions is that while under the Rules of Procedure the Commission can request for interim or provisional measures, its power to deal with special cases of serious and massive violations of human rights depend on the AHSG or its Chairman requesting the Commission to undertake an in-depth study of the cases. See Rachel Murray, 'Serious or Massive Violations under the African Charter on Human and Peoples Rights: A Comparison with the Inter-American and European Mechanisms' (1999) 3 *Netherlands Human Rights Quarterly* 118-119.

question that readily comes to mind is that at what point can the Commission make this request for provisional measures? This was put to test when the Commission issued provisional measures against Libya in the armed conflict in its territory.<sup>912</sup> The absent of AU's political will and effective follow-up procedures made these orders remain without much force.<sup>913</sup>

### 5.3.3 Interpretation of the Charter as a mandate of the African Commission

The task of interpreting the provisions of the African Charter was bestowed on the Commission by the Charter itself.<sup>914</sup> As stated in the Charter, the Commission can interpret the Charter at the request of State Parties, the OAU or NGOs.<sup>915</sup> The interpretative power of the Commission is similar to an advisory opinion jurisdiction and looking at the provisions of Articles 60 and 61 of the African Charter, it takes into account other international and African laws and customs. With this it gives the Charter a touch of Africa and is rare in its addition of non-binding concepts and the jurisprudence of other bodies.<sup>916</sup> A number of recommendations and resolutions have been adopted by the Commission and these have interpreted so many rights in the Charter.<sup>917</sup>

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<sup>911</sup> Rule 111 Rules of Procedure of the African Commission.

<sup>912</sup> In *Re African Commission on Human and Peoples Rights v Great Socialist Peoples Libya Arab Jamahiriya*, Application No. 004/2011, Order for Provisional Measure 23 African Court on Human and Peoples Rights, March 25, 2011. Available at [www.en.africa-court.org/images/Cases/Decision/DECISION\\_Application\\_004-2011\\_AfricanCommission\\_v\\_Libya\\_Struck\\_outEngl.pdf](http://www.en.africa-court.org/images/Cases/Decision/DECISION_Application_004-2011_AfricanCommission_v_Libya_Struck_outEngl.pdf) (Accessed 19<sup>th</sup> August, 2016).

<sup>913</sup> Dan Juma, 'Provisional Measures under the African Human Rights System: The African Courts Order Against Libya' (2012) *Wisconsin International Law Journal* 344.

<sup>914</sup> Article 45(3) of the African Charter ... Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognized by the OAU. This power of interpretation did not exist in the draft of the African Charter but was added by an amendment aimed at reformulating Article 45 with the view to including a separate Article on the Commissions mandate regarding the interpretation of the Charter. See OAU DOC Amendment No. 6.

<sup>915</sup> Although the Commission is not expressly included on the list of parties which can request the interpretation of the Charter, it can on its own make such interpretation on the initiative of any of the parties listed under Article 45(3) of the Charter. It can also do so when considering a communication and it has on many occasions made generous use of this power of interpretation both as it relates to the rights enshrined in the Charter and the procedure. In its decision relating to Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertes v. Chad* where it gave a broad interpretation of the general obligation undertaken by the States parties under Article 1 of the Charter of the notions of violation of a guaranteed right, of derogation or of the content of the economic, social and cultural rights guaranteed by the Charter, it indicated that since Article 1 specifies that the States Parties shall not only recognise the rights, duties and freedoms adopted by the Charter, but that they should also undertake measures to give effect to them. (19<sup>th</sup> Annual Report of the African Commission, 1995/1996) See Fatsah Ouguergouz (2003) 563.

<sup>916</sup> Frans Viljoen, 'International Human Rights Law in Africa' (2012) 325. See also, Rachel Murray, 'The African Commission on Human and Peoples Rights and International Law' (2000) 25; Chaloka Beyani, 'Protection of the Rights to Seek and Obtain Asylum under the African Human Rights System' (2013) 28; Dinah Shelton, 'Advanced Introduction to International Human Rights Law' (2014) 107.

<sup>917</sup> See Resolution on the Right to Recourse Procedure and Fair Trial and Resolution on the Freedom of Association, in: *The Participation of Non-Governmental Organisations (NGOs) in the Work of the African Commission on Human and Peoples Rights, A Compilation of Basic Documents by the International Commission of Jurists* October 1991-April 1994) 40-42.

Among these rights is the right to fair trial and freedom of association.<sup>918</sup> Documents like the Additional Protocol on Rights of Women<sup>919</sup> and Guidelines for National Periodic Reports<sup>920</sup> among others further developed the African Charter. In the case of the Guideline for National Periodic Reports, it is clear that the better part of the advancement as regard Articles 15 to 18 of the Charter is a straight reference to provisions of the International Covenant on Economic, Social and Cultural Rights and also that of the Universal Declaration of Human Rights.<sup>921</sup> The purpose of the various resolutions is to shed light on the unclear and confusing provisions of the Charter in a way to give it its maximum effect.<sup>922</sup>

Taking a look at the provision of Article 45 (3), the Charter does not state categorically (define) an 'African Organisation' recognised by the OAU, this leaves us to wonder if NGOs fit into this class as their presence in the region has been recognised by the fact that they have observer status before the Commission.<sup>923</sup> It is also not clear if what the provision is trying to say is that it is only inter-governmental organisations or national organisations which have in one way or the other been endorsed by the OAU that can apply for the interpretation of the provisions of the Charter. The fact is that neither the OAU nor a State Party has approached the Commission for an interpretation of any of the provisions of the Charter instead; NGOs have succeeded through draft resolutions, in obtaining the interpretation of some of the provisions of the Charter. This is directed at giving clarity to the confusing provisions.<sup>924</sup>

Comparing this interpretative mandate of the African Commission to what obtains in the other

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<sup>918</sup> Resolution on the Rights to Freedom of Association, 5<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples Rights (1991/1992), ACHPR/RPT/5<sup>th</sup> Annex VII. See also Resolution on the Right to Recourse Procedure and Fair Trial, 5<sup>th</sup> Annual Activity Report of the African Commission, ACHPR/RPT/5<sup>th</sup> Annex XI; Resolution on the Integration of the Provisions of the Charter into national Laws of States, 2<sup>nd</sup> Annual Activity Report of the African Commission (1988/1989) ACHPR/RPT/2<sup>nd</sup> Annex XI; Resolution on Electoral Process and Participatory Governance, Ninth Annual Activity Report of the African Commission on Human and Peoples Rights (1995/1996) ACHPR/RPT/9<sup>th</sup> Annex VII.

<sup>919</sup> See DOC/OS/34c (XXIII) produced by the Working Group on the Additional Protocol to the African Charter on Women's Rights. This document has eventually been amended by the Dakar Draft Protocol on Womens Rights, June 1999.

<sup>920</sup> Guidelines for National Periodic Reports, 2<sup>nd</sup> Annual Activity Reports of the African Commission on Human and Peoples' Rights (1988/1989) ACHPR/RPT/2<sup>nd</sup> Annex XII.

<sup>921</sup> Paragraph 10 to 16 of the Guidelines for National Periodic Reports (2<sup>nd</sup> Annual Activity Report of the African Commission) clearly repeat Article 8 of the ICESCR. Furthermore, the order in which the rights are dealt with in the Guidelines follows the sequence of the Arts in the Covenant.

<sup>922</sup> Evelyn Ankumah (1996) 26.

<sup>923</sup> Vincent Orlu Nmehielle (2011) 181.

<sup>924</sup> Information Sheet 1, African Commission on Human and Peoples Rights, Establishment at page 16.

human rights regions, the Inter-American Commission may only provide advisory opinions to Member States of the OAS<sup>925</sup> whereas in the European system, prior to its reformation by Protocol No. 11, only the Court was entitled to provide advisory opinions at the request of the Council of Europe's Committee of Ministers and on very strictly limited questions.<sup>926</sup> What this means is that the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights<sup>927</sup> gives the Court very wide autonomy in relation to advisory opinions where these may relate to any other relevant human rights instrument including the African Charter.<sup>928</sup>

#### 5.3.4 'Other Task' as a mandate of the African Commission

Article 45 (4) of the African Charter gave the Commission the mandate to perform any other task as may be referred to it by the Assembly of Heads of State and Governments. This mandate is yet to be utilised as no other task outside the ones specified in the African Charter has been entrusted to the Commission by the Assembly.<sup>929</sup> Because of its broad mandate, this makes it needless for it to seek approval from the Assembly for important initiatives; it appeared that many of the issues of human rights within Africa fall under the Commission thus giving hope that the Commission might still, in the nearest future, be called upon to take up some roles which presently are not assigned to it.<sup>930</sup>

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<sup>925</sup> Article 41 (e) of the American Convention and Article 18 (e) of the Status of the Inter-American Commission, as approved by Resolution 447 of the General Assembly of the OAS at its 9<sup>th</sup> Ordinary Session, held at La Paz (Bolivia) in October 1979; Article 64 of this Convention also authorises the Inter-American Court to provide advisory opinions regarding that Convention and at the request of any Member state of the OAS or of one of the organs listed in Chapter X of the OAS Charter, which include the Inter-American Commission.

<sup>926</sup> Article 1 (2) of Protocol No. 2 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions, adopted in Strasbourg on 6 May, 1963. See also the subsequent Articles 47, 48 and 49 of Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established by it, signed on 11 May, 1994 and entered into force on 1 November, 1998. See Fatsah Ouguerouz (2003) 566.

<sup>927</sup> Adopted in 1998.

<sup>928</sup> Article 1 of the Protocol provides that At the request of a Member State of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU, the court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

<sup>929</sup> See Information Sheet 1 at page 17.

<sup>930</sup> Cees Flinterman & Evelyn Ankumah, 'The African Commission on Human and Peoples' Rights' in Hurst Hannum (ed), 'Guide to International Human Rights Practice' (1992) 165.

## Chapter 6

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

#### 6.1 Introduction

The coming into existence of the African Court on Human and Peoples' Rights as a result of the adoption and ratification of the Protocol to the African Charter on the Establishment of the African Court marked a landmark development in the field of international human rights law.<sup>931</sup> The adoption of the Protocol has been said to have placed the continent's human rights system on the same level with the European and the Inter-American human rights systems when it comes to providing judicial guarantees at the regional level for the protection of human and Peoples' rights in the continent.<sup>932</sup>

The Protocol can be termed as an end result of the collective effort of the civil society at the national, regional and international levels; this was in order to ensure that there is more effective human rights protection in Africa. The breakthrough can be attributed to the result of four years of hard work, intense negotiations and compromise to reach a common position<sup>933</sup> and the fact that the continent is in serious need of a court to handle human rights violations cannot be denied.

Uncountable human rights violations have taken place in the continent in the past, with minorities and indigenous peoples particularly affected.<sup>934</sup> As some of the underprivileged and most vulnerable communities on the continent, minority and indigenous people experience multiple human rights violations on a daily basis. Yet, due to their marginalised position, states are often unmoved by their predicament. A strong legal mechanism is therefore essential if the rights of Africa's minorities and marginalised peoples are to be realised.

A lot of progress has been made since the adoption of the Protocol by Member States; some important steps towards the actualisation of the dream of the continent having a human rights

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<sup>931</sup> The Protocol was adopted at the summit organised by the Organisation of African Unity which was held in Ouagadougou, Burkina Faso in June, 1998.

<sup>932</sup> Udombana N.J, 'Towards the African Court on Human and Peoples Rights: Better Late Than Never' (2000) 3 *Yale Hum. Rts& Dev. L.J.* 45 at 46.

<sup>933</sup> George Mukundi, 'African Court on Human and people's Rights: Ten Years on and Still No Justice' a report published by the Minority Rights Group International, 2008.

<sup>934</sup> George Mukundi (2008).

court of its own have been taken, such as, the appointment of judges of the Court, development of the Rules of procedure for the Court and above all, the Court itself is located in Arusha, Tanzania where the Government of Tanzania has provided a building to house it. But looking at the Court's achievements so far, there has been more work on logistics than on the real issues therefore the goal of a functioning, effective Court is threatened to be derailed by bureaucracy. This chapter being the heart of this thesis will therefore introduce the Protocol to the African Charter on Human and Peoples' Right on the Establishment of an African Court on Human and Peoples' Rights. It will critically analyse its provisions with particular focus on the constitution, jurisdiction and enforcement of the entity.

Furthermore, the chapter will attempt to examine the relationship between the Court and the Commission and also look at situations where cases already reviewed by the Commission can be sent back to the Court for review. The retention or abolishment of the Commission will at this point be debated.

## 6.2 The 'Birth' of the Protocol

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights established the African Court on Human and Peoples' Rights (The African Human Rights Courts or the Court).<sup>935</sup> The establishment of the Court brings in an era whereby Judgements delivered are made binding on states, as opposed to the mere recommendations of the African Commission.<sup>936</sup> The binding legal force behind these Judgements might be the missing impetus to secure compliance, although this aspect alone will, in all likelihood, not guarantee improved compliance.<sup>937</sup>

The African Charter provided room for the establishment of special protocols or agreement where they are deemed necessary to supplement the provisions of the Charter.<sup>938</sup> This provision of the African Charter was what was activated by State Parties in 1998

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<sup>935</sup> The Protocol was adopted on the 10<sup>th</sup> of June, 1998 and it entered in to force on the 25<sup>th</sup> of January, 2004. A lot of literature has been written and published as a result of the adoption of this Protocol.

<sup>936</sup> Tarisai Mutangi, 'An examination of Compliance by States with Judgments of the African Court on Human and People's Rights: Prospects and Challenges'. An unpublished LLD Thesis submitted at the Centre for Human Rights, Faculty of Law, University of Pretoria, September, 2010.

<sup>937</sup> Tarisai Mutangi (2007) 2.

<sup>938</sup> Article 66 of the African Charter.

and which led to the establishment of the African Court by virtue of a Protocol.<sup>939</sup> The conference on the Rule of Law which was organised by the International Commission of Jurists<sup>940</sup> is said to be the place where the idea for the creation of the African Human Rights Court was first debated.<sup>941</sup> It was proposed by participants at the conference that a Court should be created to handle human rights matters in the continent with the possibility of individuals making individual appeals.<sup>942</sup> At the end of the conference a resolution urging African Governments to ‘study the possibility of adopting an African Convention on Human Rights’ and ‘the creation of a court of appropriate jurisdiction’ was adopted by the delegates but this effort of the African jurists brought out nothing as the OAU Charter was adopted without either a framework for human rights or any human rights mechanism.<sup>943</sup>

The idea of establishing a Court for the continent never received the much needed support despite the fact that it was revived on several occasions;<sup>944</sup> this can be attributed to the attachment of African leaders to the principle of sovereign equality and also to the principle of non-interference in the internal affairs of States especially States where human rights violations are reported.<sup>945</sup> The OAU, being an inter-State organisation with the principal objectives of co-ordination and harmonisation of the general policies of its members, would not perform well with the existence of a judicial body because it would mean that the organisation would be giving out its power of sovereignty. The

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<sup>939</sup> State Parties to the African Charter created the African Court, a judicial body with the intention of reinforcing the African Commission in 1981. The establishment and effective operation of the Court is expected to complete the metamorphosis of the system for the protection of human and Peoples’ rights in the continent which was created in 1981. See Fatsah Ougurgouz (2003)687.

<sup>940</sup> The International Commission of Jurists is a non-governmental organization based in Geneva, Switzerland.

<sup>941</sup> The Conference was held in Lagos, Nigeria in 1961 and it was attended by African Jurists. See Law of Lagos paragraph 4, text in African Conference on the Rule of Law, Lagos (Nigeria) 3-7 January, 1961-Report of the Conference, Geneva International Commission of jurists (1961) 9. See also Fatsah Ougurgouz (2003) 688, Viljoen (2007) 420, Vincent Orlu Nmehielle (2001)249.

<sup>942</sup> International Commission of Jurists, African Conference on the Rule of Law (1961) 11.

<sup>943</sup> Frans Viljoen (2007) 421.

<sup>944</sup> The proposal for a similar system to that of the European Convention on Human Rights which was made during the Seminar organised by the United Nations in Dakar, Senegal in 1966 on Human Rights in Developing Countries gave some degree of support to the idea of the creation of the Court in Africa. See UN DOC ST/TAO/HR 25 at 53. *Seminar on Human Rights in Developing Countries*, Dakar, Senegal, 8-10 February, 1966, United Nations, New York, 1966. More significant is the amendment proposed at the second Ministerial Conference in Banjul calling for (a) the creation of a Court whose task would be to rule on crimes against mankind and safeguard the protection of human rights.

<sup>945</sup> According to Borella on the issue of equality between States, at a deeper level, it reveals the fragility of African States, whose artificiality has to be camouflaged by the constant assertion that they exist and that they have exclusive jurisdiction over their population and territory see Borella F, *Le systeme juridique de IO.U.A* (1971) *Annuaire Française de Droit International* 233-254 particularly at 236.

organisation's lack of any supranational dimension is exposed by looking at Article II, paragraph 1(b) and 2 and Article VIII of the Constituent Charter.<sup>946</sup> The Commission of Jurists of the OAU<sup>947</sup> also suffered the same fate as the Commission of Mediation, Conciliation and Arbitration despite the fact that they were both set up at the same time. The Commission of Jurists of the OAU was raised to the rank of a specialised Commission of the OAU. This Commission, even though harmless, was given the power among others, to study the legal problems of common interest and any other problems referred to it by any Member State or the OAU and to make recommendations that will be useful to them.<sup>948</sup> The composition of this Commission is of great interest as each Member State has to be represented by a delegation headed by the competent minister, another minister or a plenipotentiary which is assisted by experts.<sup>949</sup> This can be said to be a reproduction of Article XXI of the OAU Charter which gave political powers to the Commissions.

It is interesting to note that the Commission of Jurists only existed for a year as a specialised Commission of the OAU as it was abolished. The reasons given then for its abolition were financial, practical as well as political reasons.<sup>950</sup> With this, it only showed the unwillingness of African leaders then not to assign the resolution of their conflict to a third body which is not a judicial body.

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<sup>946</sup> See also Rule 3 of the Rules of Procedure of the Assembly of Heads of State and Government. The experience of the Commission of Mediation, Conciliation and Arbitration which was created by protocol on July 21, 1964 at the First Ordinary Summit of the Assembly of Heads of States and Government held in Cairo, Egypt from 17-21 July 1964 is revealing in this connection. See AHG/Res. 22 (I). This Commission, although did not escape the control of African States, did not function at all. Looking at Article 4 of the Protocol which established the Commission, it states that Members of the Commission shall not be removed from office except by the decision of the Heads of State and Government, by a two-third majority of the total membership, on the grounds of inability to perform the functions of their office or of proved misconduct. This provision which appears to protect the members of the Commission by limiting their removability is another example of the suspicion of the African leaders as regards any wholly independent institution for the resolution of conflicts. Boutros-Boutros-Ghali, when giving reasons for the failure of the Commission said that the Commission failed because its jurisdiction competed with that of the Assembly of Heads of States and Government of the African Union and of the Committee of Ministers. He said: It looked to us as if Africa cannot carry the burden of more than one body for the settlement of international disputes. See *Les difficultés institutionnelles du panafricanisme*, (I.U.H.E.I, Collection Conferences, No. 9, Geneva, 1971 at 31.

<sup>947</sup> See AHG/Res. 4 (I) First Ordinary summit of the Assembly of Heads of States and Government, Cairo, Egypt, 17-21 July 1964.

<sup>948</sup> Bedjaoui M. *Le règlement pacifique des différends africains* (1972) *Annuaire Français de Droit International* (AFDI) 85-99 particularly at 87.

<sup>949</sup> Doc OAU Jur/3 Annex 1.

<sup>950</sup> Borella F (1971) 241. Borella opined that through the Commission of Jurists the OAU seemed to be setting the official stamp on the Commission of African Jurists set up on the initiative of the International Commission of Jurists [...] which is distinctly Western in outlook. See pages 241-242.

At the various deliberations held before the adoption of the African Charter in 1981, the issue of the continent having its own judicial mechanism came up severally. The coming in of democracy in Africa also played a major role in the discussion on a regional human rights instrument in the continent. Young<sup>951</sup> identified three major waves of democratisation in Africa with the first being embodied in the constitutional changes dictated by colonial powers that were leaving.<sup>952</sup> The second ‘wave’ according to him came in the period just before the adoption of the African Charter and it was the handing over of power to a democratically elected leader. Ghana and Nigeria serve as good examples of this wave even though the gains were not for long.<sup>953</sup>

Before the adoption of the OAU Charter, a proposal was submitted by Keba M’Baye<sup>954</sup> to the meeting of Experts in Senegal but instead of supporting the establishment of the implementation mechanism, he chose to leave out the establishment of a Court. He explained the reason for his omission of a Court in his draft to be the fact that it is ‘thought premature to do so at that stage’<sup>955</sup> even though he admitted in the same draft that the idea of having a court in the continent was not a bad idea, he believed that it could be introduced in the future by a protocol to the Charter.<sup>956</sup> Some critics even argued that the introduction of the Court does not conform with African traditional ways of dispute

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<sup>951</sup> Young C, Africa: ‘An Interim Balance Sheet’ (1996) 7 *Journal of Democracy* 53-54.

<sup>952</sup> This wave according to him had little momentum because immediately after independence democratic governance largely ceased to exist and was replaced by one-party rule which was what was in vogue then, military dictatorship and Afro-Marxism. See Heyns C (ed), ‘Human Rights Law in Africa’ (2004) vol.2, at 904; 1311-1313; 1444-1446.

<sup>953</sup> The military, in 1979 in Ghana agreed to full democratisation. In Nigeria, former President, Olusegun Obasanjo, in 1979 handed over power to a democratically elected government. Broad public participation in establishing the second republic in Nigeria which led to the adoption of the 1979 Constitution which was described by Akande J.O. in his book ‘Introduction to the Nigerian Constitution’ (1982) as Nigerias first autochthonous Constitution was overthrown by a coup *détat* by General Buhari followed by General Ibrahim Babangida.

<sup>954</sup> Introduction of M’Baye Draft African Charter on Human and Peoples Rights, OAU Doc CAB/LEG/67/1. The document was prepared for the Meeting of Experts held in Dakar, Senegal from 28<sup>th</sup> November to 8<sup>th</sup> December, 1979.

<sup>955</sup> Introduction of M’Baye Draft African Charter on Human and Peoples Rights, paragraph 4. See also Heyns C (ed), ‘Human Rights Law in Africa: 1999’ (2002) 65-77.

<sup>956</sup> Introduction of M’Baye Draft African Charter on Human and Peoples Rights, OAU Doc CAB/LEG/67/1. At the Ministerial meeting held in Banjul, The Gambia from the 7-19 January, 1981; the establishment of a Tribunal to preside over crimes against humanity and to protect human rights was proposed by Guinea. See Ouguerougou Fatsah, *La Charte Africaine des Droits de l’Homme et des peuples* (1993) 75. This was as a result of the uprising in Soweto, South Africa then. M’Baye who was the Rapporteur at the Ministerial meeting, reported as follows: It should be mentioned that a delegation proposed an amendment according to which the meeting was to draft a text establishing an African Court on Human and Peoples Rights to judge crimes against mankind and violations of human rights. The participants took note of this amendment but were of the opinion that it was untimely to discuss it. See OAU Doc CM/1149 (XXXVII) (1981), 37<sup>th</sup> Ordinary session of the Council of Ministers held in Banjul, the Gambia particularly at paragraph 117.

resolution. They suggested that mediation and conciliation would be better for dispute resolution in Africa since they are rooted in the tradition of Africa.<sup>957</sup> With this, the question that readily comes to mind is: should tradition play a major role in the issue of human rights considering the fact that domestic legal institutions were not designed in line with African traditional way of dispute resolution? In resolving this, Adama Dieng stated that ‘the delights of traditional anthropology should not lull us to the point of obscuring reality. Today, the time has come to accede to the demand of Africans who feel it indispensable for the victims of human rights violations, or their representatives, to have recourse to judicial process on demand.’<sup>958</sup>

In the 1980s, changes were witnessed and this could be associated with the determination of African States to allow disputes which arose between them to be settled by the International Court of Justice.<sup>959</sup> This was evidenced by the number of cases filed at the Court from Africa.<sup>960</sup> Between 1982 and 1997, the International Court of Justice received 26 cases out of which 10 had an African State as a party.<sup>961</sup>

Furthermore, the increase in the number of judicial bodies set up by the various regional integration agreements can also be said to have played a major role in helping to change the attitude of African States in relation to settlement of their disputes since the coming into existence of the African Charter.<sup>962</sup> Examples include Courts and Tribunals established by

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<sup>957</sup> See the Address by Adama Dieng, Secretary-General of the International Commission of jurists at the meeting of Government Experts on the question of the creation of an African Court on Human and Peoples Rights held in Cape Town, South Africa, September 6-12, 1995.

<sup>958</sup> Dumas, Nanette, ‘Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals’ (1990) 13 *Hastings International and Comparative Law Review* 593.

<sup>959</sup> This is the principal organ of the United Nations. See Higgins R, ‘The International Court of Justice and Africa’ in Yakpo E & Boumedra T (eds.) *Liber Amicorum Judge Mohammed Bedjaoui* (1999) 343-369. See also Bedi S, ‘African Participation in the International Court of Justice: A Statistical Appraisal’ (1946-1998) (1998) 6 *African Yearbook of International Law* 181-222; Mubiala M., *La contribution des Etats africains a la renaissance de la Cour internationale de Justice* (1994) 2 *African Yearbook of International Law* 173-180.

<sup>960</sup> Out of the 75 contentious cases referred to the Court between 1947 and 1998, 15 of these cases involved African States while the ratio of these cases as compared to the number of contentious cases submitted to the Court was put at 20 per cent. See Ouguergouz F ‘The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa’ (2003) 690.

<sup>961</sup> Out of the 13 disputes brought before the International Court of Justice by a Special Agreement, four involved two African States as parties. The States were Tunisia and Libya Arab Jamahiriya with special agreement notified on 1 December 1978; Burkina Faso and Mali with special agreement notified on 20 October, 1983; Libya Arab Jamahiriya and Chad with special agreement notified on 31 August, 1990 to 3<sup>rd</sup> September, 1990 and also Botswana and Namibia special agreement notified on 29 May 1996. See Ouguergouz F (2003) 690.

<sup>962</sup> Kamto M, *Les cours de justice des communautés et des organisations d'intégration économique africaines* (1998) 6 *African Yearbook of International Law* 107-150.

the treaty establishing the Economic Community of Central African States,<sup>963</sup> the treaty establishing the Union of the Arab Maghreb,<sup>964</sup> the treaty establishing the African Economic Community,<sup>965</sup> the treaty establishing the African Development Community,<sup>966</sup> the revised treaty of the Economic Community of West African States,<sup>967</sup> the treaty relating to the Harmonisation of Business Law in Africa,<sup>968</sup> the Treaty establishing the West African Economic and Monetary Union,<sup>969</sup> the treaty establishing the Economic and Monetary Union of Central Africa<sup>970</sup> and the Treaty establishing the Economic Community of the Countries of the Great Lakes.<sup>971</sup>

However, the process of formulating the protocol on the Establishment of the African Court on Human and Peoples' Rights began when the Assembly of Heads of State and Government of the OAU adopted a resolution to 'ponder over ways and means of strengthening the African Commission on Human and Peoples' Rights...'<sup>972</sup> and it continued up till the formal adoption in 1998.<sup>973</sup> In adopting the Protocol, the Assembly of Heads of State and Government of the OAU requested the OAU Secretary-General:

to convene a meeting of government experts to ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights.<sup>974</sup>

### 6.1.1 Cape Town Draft

As a result of this, a meeting of Government Legal Experts was organised and held in

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<sup>963</sup> The treaty was signed at Libreville, Gabon on 18<sup>th</sup> October, 1983.

<sup>964</sup> This was signed in Marrakech, Morocco on the 17<sup>th</sup> of February, 1989.

<sup>965</sup> Signed in Abuja, Nigeria on the 3<sup>rd</sup> of June, 1991.

<sup>966</sup> Signed at Windhoek, Namibia on the 11<sup>th</sup> of August, 1992.

<sup>967</sup> This was signed in Cotonou the Republic of Benin on the 24<sup>th</sup> July, 1993.

<sup>968</sup> It was signed at Port-Louis, Mauritius on the 17<sup>th</sup> October, 1993.

<sup>969</sup> Signed at Dakar, Senegal on 10<sup>th</sup> January, 1994.

<sup>970</sup> Signed in NDjamena, Chad on the 16<sup>th</sup> of March, 1994.

<sup>971</sup> Signed at Gisenya, Zaire on the 5<sup>th</sup> of November, 1996.

<sup>972</sup> Resolution AHG/Res.230 (XXX), the resolution was adopted on the 15<sup>th</sup> June, 1994 in Tunis, Tunisia

<sup>973</sup> The protocol was adopted on the 9<sup>th</sup> of June, 1998 in Ouagadougou, Burkina Faso.

<sup>974</sup> Resolution AHG/Res.230 (XXX).

Cape Town, South Africa<sup>975</sup> at which the text of a Draft Protocol to the African Charter was adopted. This Draft Protocol was prepared by the Secretary-General of the OAU along with the African Commission and International Commission of Jurists.<sup>976</sup> This meeting also had in attendance, fifty six (56) delegates from twenty three (23) OAU Member States, national and international observers, legal experts and representatives of international organisations.<sup>977</sup> At the end of the meeting, a Draft Protocol with thirty two Articles which can be referred to as the first draft Protocol was adopted (Cape Town draft).<sup>978</sup> A notable provision of this first adopted draft was the provision on access to the Court. The Draft Protocol gave direct access to the Court to individuals by making it an automatic consequence of ratification.<sup>979</sup>

At the 64<sup>th</sup> Ordinary Session of the Council of Ministers of the OAU,<sup>980</sup> the Cape Town draft was to be considered as it was distributed to the OAU Member States for their comments and observations along with the report of the group of government legal experts,<sup>981</sup> but unfortunately the Council had to defer the consideration of the draft due to insufficient comments and observations from Member States.<sup>982</sup> This led to the Council directing the Secretary-General to redistribute the Draft Protocol to Member States and asking for their comments and observations but this time around, with a clause that the

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<sup>975</sup> The meeting was held from the 6<sup>th</sup> to the 12<sup>th</sup> of September, 1995.

<sup>976</sup> The International Commission of Jurists played a major role here as it recommended the establishment of an African Court. It also played an active role in raising awareness for the need to establish a Human Rights Court among African States. Examples can be found in the conclusions and recommendations of a number of workshops on NGO participation in the work of the African Commission on Human and Peoples Rights which were organised by the International Commission of Jurists in conjunction with the Africa Commission on Human and Peoples Rights in Banjul, The Gambia between October, 1991 and 1992; at Addis Ababa, Ethiopia in March 1993; Banjul, The Gambia in November 1993 and October 1994. See *The Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples Rights - A Compilation of Basic Documents* International Commission of Jurists (1996) 22, 31, 36, 41 and 55.

<sup>977</sup> DOC OAU/LEG/EXP/AFC/HPR/RPT (I) Rev.1, *Report of the Meeting of Government Experts on the Establishment of an African Court of Human and Peoples Rights*, 6-12 September, 1995, Cape Town, South Africa.

<sup>978</sup> DOC OAU/LEG/EXP/AFC/HPR/PRO (I) Rev. 1, Draft Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights adopted by the Meeting of Government Legal Experts on the Establishment of an African Court on Human and Peoples Rights, 6-12 September, 1995 in Cape Town, South Africa. For an in-depth discussion draft protocol see Naldi G. J. & Magliveras K, 'The Proposed African Court of Human and Peoples Rights: Evaluation and Comparison' (1996)8 *African Journal of International and Comparative Law* 944.

<sup>979</sup> Article 6 Cape Town draft allowed individuals, non-governmental organisations and groups of individuals to bypass the African Commission on exceptional ground. See Kioko B (1998) 7. See also Viljoen (2012) 412.

<sup>980</sup> The 64<sup>th</sup> Ordinary Session was held in Yaounde, Cameroon from 1 -5 July, 1996.

<sup>981</sup> *Report of the Meeting of Government Experts on the Establishment of an African Court on Human and Peoples Rights* held from 6-12 September, 1995.

<sup>982</sup> Only Burkina Faso, Lesotho and Mauritius submitted their comments. See Kioko Ben, 'The Road to the African Court on Human and Peoples Rights' in *African Society of International and Comparative Law - Proceedings of the Tenth Annual Conference* held in Addis Ababa, Ethiopia from the 3- 5 August, 1998 at 77.

comment and observations should be submitted within a reasonable time.<sup>983</sup> This eventually yielded positive response as by the 65<sup>th</sup> Ordinary Session<sup>984</sup> the General-Secretary had received comments and observations from ten Member States of the OAU including the earlier three comments from Member States thereby making the Draft Protocol to be considered at the session.<sup>985</sup> It is important to point out here that as at this time, Ethiopia was not yet a State Party to the African Charter but despite this it was participating actively at every activity that had to do with the amendment of the Charter to establish a human rights court in the continent.<sup>986</sup>

The Council of Ministers at the 65<sup>th</sup> Ordinary Session agreed that another meeting of legal experts should be convened in order to finalise the Draft Protocol having in mind the comments and observations received from Member states.<sup>987</sup> The meeting was scheduled for April, 1997.<sup>988</sup>

#### 6.1.2 The ‘Nouakchott draft’

The Nouakchott meeting of government legal expert which was also the second meeting of government legal experts led to the adoption of the “Nouakchott draft”.<sup>989</sup> The adopted draft was made up of thirty four Articles and it amended the Cape Town draft<sup>990</sup> in two ways, first, it increased the number of ratifications required for the entry into force of the Protocol from 11 to 15<sup>991</sup> and made state acceptance of the Court’s competence to receive petitions directly from individuals dependent on an optional

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<sup>983</sup> Resolution CM/Res. 1674 (LXIV).

<sup>984</sup> The 65<sup>th</sup> Ordinary Session was held in Tripoli, Libya from 24-28 February, 1997.

<sup>985</sup> Mauritius, Lesotho, Burkina-Faso, Senegal, Tunisia, Sierra Leone, Benin, Cote d'Ivoire, Madagascar and Ethiopia all submitted their comments and observations to the Secretary-General of the OAU before the 65th Ordinary Session of the OAU. See ‘The Secretary-Generals Report on the Conference of Ministers of Justice/Attorneys General on the Draft Protocol on the Establishment of the African Court on Human and Peoples Rights’ DOC.CM/2051 (LXVII). See also Kioko Ben (1998) 78.

<sup>986</sup> Ethiopia only ratified the Charter on the 5<sup>th</sup> of June, 1998.

<sup>987</sup> Resolution CM/Res. 326 (LXV).

<sup>988</sup> This meeting was held in Nouakchott, Mauritania from 11-14 April, 1997 at the invitation of the Government of Mauritania and it had in attendance thirty-three delegates from nineteen OAU Member States and members of the African Commission on Human and Peoples Rights. See *Report of the Second Meeting of Government Legal Experts on the Establishment of an African Court on Human and Peoples Rights*, 11-14, Nouakchott, Mauritania, DOC OAU/LEG/EXP/AFCHPR/RPT (2).

<sup>989</sup> Draft Protocol to the African Charter on Human and Peoples Rights on the Establishment of the African Court on Human and Peoples Rights, OAU/LEG/EXP/AFCHPR/PROT(2).

<sup>990</sup> Frans Viljoen (2007) 422.

<sup>991</sup> Article 33 Nouakchott Draft.

declaration as opposed to the automatic consequence of ratification.<sup>992</sup>

The plan was that the Nouakchott draft will be submitted for consideration and formal adoption at the 66<sup>th</sup> Ordinary Session<sup>993</sup> of the OAU but unfortunately this could not be achieved as the Council of Ministers of the OAU deferred the presentation because they wanted more comments and observations from Member States.<sup>994</sup> The Council of Ministers at this session (66<sup>th</sup> Session), adopted a resolution wherein Member States of the OAU were requested to submit their further comments and observations before the 31<sup>st</sup> of August, 1997.<sup>995</sup> The resolution furthermore requested the General Secretariat to convene in Addis Ababa, a third Government Legal Experts Meeting enlarged to include diplomats to examine and finalise the Draft Protocol to be submitted to the Conference of Ministers of Justice/Attorneys General which will follow immediately at the same venue for consideration and submission to the Council of Ministers.<sup>996</sup>

### 6.1.3 Addis Ababa Meeting

As a result of Resolution mentioned above, the third meeting of the Government Legal Expert took place in Addis Ababa, Ethiopia between the 8<sup>th</sup> and 11<sup>th</sup> December, 1997. This meeting was expanded to accommodate diplomats while forty five (45) OAU Member States representatives were also in attendance.<sup>997</sup> At this third meeting, the Nouakchott draft along with the comments received from Member States was deliberated on<sup>998</sup> with the

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<sup>992</sup> Article 6 Nouakchott Draft.

<sup>993</sup> The 66<sup>th</sup> Ordinary Session was held in Harare, Zimbabwe from the 26<sup>th</sup> to the 30<sup>th</sup> of May, 1997.

<sup>994</sup> As at this period, only twenty (20) States had submitted their comments and observations. The States were Algeria, Burkina Faso, Burundi, The Gambia, Benin, Egypt, Ethiopia, Ivory Coast, Lesotho, Madagascar, Mauritius, Namibia, Niger, Senegal, Sierra Leone, South Africa, Tanzania, Tunisia, Togo and Swaziland. See Kioko Ben (1998)79.

<sup>995</sup> Resolution CM/Dec. 348 (LXVI). See also *Report of the Secretary-General on the Conference of Ministers of Justice/Attorneys General on the Draft Protocol on the Establishment of the African Court on Human and Peoples Rights to the Council of Ministers, Sixty-Sixth Ordinary Session, 26-30 May, 1997, Harare, Zimbabwe, CM/2020(LXVI)*; 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' (1997) 9 *African Journal of International and Comparative Law* 943-952. This article gave a brief and pointed history of the Protocol of the African Court.

<sup>996</sup> Resolution CM/Dec. 348 (LXVI) paragraph B. The Council of Ministers further requested all Member States especially those not represented in Addis Ababa to ensure they are duly represented at the Conference of Ministers slated for Addis Ababa. See paragraph D of the Resolution.

<sup>997</sup> *Report of the Third Governmental Legal Experts Meeting (enlarged to include diplomats) on the Establishment of an African Court on Human and Peoples Rights, 8-11 December, 1997, Addis Ababa, Ethiopia* DOC OAU/LEG/EXP/AFCHPR/RPT (III) Rev. 1 particularly paragraphs 6 & 7.

<sup>998</sup> See Comments and Observations Received from Member States on The Draft Protocol on The Establishment

changes made in the Nouakchott draft retained. Aside the comments which were received from Member States, additional amendments were submitted and distributed during this meeting.<sup>999</sup> At the end of the meeting, an amended draft with thirty five Articles was adopted<sup>1000</sup> and this draft was unanimously recommended by the Legal Experts and the Diplomats present at the meeting for adoption by the Conference of Ministers of Justice and Attorneys-General which was to be held the following day, the 12<sup>th</sup> of December, 1997.<sup>1001</sup>

At the Conference of Ministers of Justice and Attorneys-General,<sup>1002</sup> the Addis Ababa draft was adopted and subsequently recommended to the Committee of Ministers and OAU Assembly of Heads of States and Government for adoption.<sup>1003</sup> The Addis Ababa Draft Protocol was thereafter approved by the OAU Council of Ministers at its 67<sup>th</sup> Ordinary session<sup>1004</sup> while the Assembly of Heads of states and Government of the OAU at their 34<sup>th</sup> Session held in Ouagadougou, Burkina Faso<sup>1005</sup> approved the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (hereinafter called 'the Protocol').<sup>1006</sup> The very day

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of The African Court on Human and Peoples Rights, OAU/LEG/EXP/AFCHPR/Comm.(3) with addendum 1. See also Badawei El-Sheikh (1997) 944.

<sup>999</sup> The comments received were from Namibia, South Africa, Egypt, Senegal, Burkina Faso, Swaziland, The Gambia, Tanzania, Algeria, Burundi, Niger and Togo. See, 'The Secretary-Generals Report on the Conference of Ministers of Justice/Attorneys General on the Draft Protocol' DOC.CM/2051 (LXVII).

<sup>1000</sup> Draft Protocol to The African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights (hereinafter referred to as Addis Ababa Draft Protocol) adopted at the Third Government Legal Experts Meeting (enlarged to include diplomats) on the Establishment of an African Court on Human and Peoples Rights, 8-11 December, 1997 DOC OAU/LEG/EXP/AFCHPR/PROT (III) Rev. 1

<sup>1001</sup> Paragraph 38, Report of the Third Government Legal Experts Meeting (enlarged to include Diplomats).

<sup>1002</sup> The conference was held on the 12<sup>th</sup> of December, 1997 at Addis Ababa, Ethiopia. Though the conference was scheduled for two (2) days, it was able to conclude its work in a day with minor amendments to the Addis Ababa Draft Protocol (Article 34(3) & (6) of the Draft Protocol). The Conference had nineteen (19) Ministers of Justice/Attorneys General, Vice Ministers, Solicitors-General, Judges, Ambassadors, Public Prosecutors and senior government officials from forty-five (45) Member States in attendance.

<sup>1003</sup> Gina Bekker, 'The African Court on Human and Peoples Rights: Safeguarding the Interests of African States' (2007) 51 *Journal of African Law* 151-172.

<sup>1004</sup> The OAU Council of Ministers 67<sup>th</sup> Ordinary Session was held in Addis Ababa from 23-27 February, 1997.

<sup>1005</sup> The Session was held between the 8<sup>th</sup> and 10<sup>th</sup> of June, 1998.

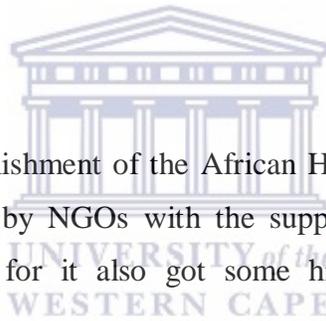
<sup>1006</sup> See Naldi G.J & Magliveras K, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples Rights' (1998) 16 *Netherlands Quarterly Human Rights* 431. See also OAU Doc OAU/LEG/MIN/AFCHPR/PROT (I) Rev. 2 adopted on the 10<sup>th</sup> of June, 1998; Quashigah E.K., 'The African Court of Human Rights: Prospects in Comparison with the European Court on Human Rights and the Inter-American Court of Human Rights' (1998) 10 *Proceedings of the African Society of International and Comparative Law* (Proceeding 59); Mutua M, 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 *Human Rights Quarterly* 342; Udombana N.J., 'Towards the African Court on Human and Peoples Rights: Better Late than Never' (2000) 3 *Yale Human Rights Development Law Journal*

the Protocol was adopted by the Assembly of Heads of States and Government of the OAU it was signed by thirty (30) Member States<sup>1007</sup> of the OAU. What this means simply is that the Member States at that point became aware of the fact that for the African Charter's objectives to be realised it was important for there to be in existence an African Court. They also felt when the Court comes into existence; it would reinforce and complement the work on the African Commission.<sup>1008</sup> To date, twenty six (26) States have ratified the Protocol.<sup>1009</sup>

Having successfully traced the historical birth of the Protocol which established the African Human Rights Court, I will now proceed to look at the Protocol itself to see if it is at par with the African notion of Justice. Furthermore, I will also try to compare the Court with the Inter- American Court of Human Rights and the European Court of Human Rights which are Courts established by the other regions to tackle human rights issues.

## 6.2 The Protocol

The process towards the establishment of the African Human Rights Court, started in 1994 and the fight for it was led by NGOs with the support of the African Commission on Human Rights. The demand for it also got some high-level political support<sup>1010</sup> even



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45; Fatsah Ouguergouz, 'The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa' (2003) (Ouguergouz: African Charter) 687-754; Harrington J, 'The African Court on Human and Peoples Rights' in Evans M.D. and Murray R (eds.) 'The African Charter on Human Rights: The System in Practice 1986- 2006' (2008) 39, Frans Viljoen, 'African Human Rights Court for Africans' (2004)30 *Brooklyn Journal of International Law* 1; Frans Viljoen, 'International Human Rights Law in Africa' (2007) 418-475.

<sup>1007</sup> International Commission of Jurists, African States Establish Supranational Human Rights, press release, Geneva, 12 June, 1998. The Member States that signed were Benin, Botswana, Burkina Faso, Burundi, Comoros, Congo, Ethiopia, Equatorial Guinea, Gabon, The Gambia, Ghana, Guinea-Bissau, Ivory Coast, Liberia, Libya Arab Jamahiriya, Malawi, Mali, Mauritius, Namibia, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Sudan, Tanzania, Togo, Tunisia, Zambia and Zimbabwe. See Report of the Progress made towards the establishment of an African Court on Human and Peoples Rights, OAU Ministerial Conference on Human Rights, 12-16 April, 1999, Grand Bay, Mauritius. OAU DOC MIN/CONF/HRA/4 (I), Paragraph 1.

<sup>1008</sup> See 'The preamble to the Protocol on the Establishment of an African Court on Human and Peoples Rights' particularly at paragraph 7.

<sup>1009</sup> The Member States that have ratified the Protocol are Algeria, Burkina Faso, Burundi, CotedIvoire, Comoros, Congo, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda. See [www.african-court.org/images/Basic%Documents/Statuts\\_of\\_the\\_Ratification\\_Process\\_of\\_the\\_Protocol\\_Establishing\\_the\\_African\\_Court.pdf](http://www.african-court.org/images/Basic%Documents/Statuts_of_the_Ratification_Process_of_the_Protocol_Establishing_the_African_Court.pdf) (Accessed 20<sup>th</sup> August, 2016).It also contains the list of Member States which have signed, Ratified/Acceded to the Protocol.

<sup>1010</sup> Example of this political support can be seen in the speech of the then Secretary-General of the OAU, Salim Ahmed Salim which he made at the 14 Session of the African Commission held in Ethiopia from the 1<sup>st</sup>- 10<sup>th</sup> December, 1993 where he stated that the time has come for an African Human Rights Court. See

though this support was with caution from OAU Assembly. The idea of establishing an African Court to handle human rights matters in the region, which was conceived and driven by NGOs and the African Commission, was eventually taken over by the OAU with its adoption of the Protocol on the Establishment of the Protocol.<sup>1011</sup>

The adoption of the Protocol has been described as ‘the breaking of further grounds in African Human Rights discuss.’<sup>1012</sup> It is also seen as an advancement of the emerging idea, within the modern African state which its conduct towards its citizens is no longer an internal, domestic matter.<sup>1013</sup> According to Mukundi<sup>1014</sup> ‘the adoption of the Protocol is seen as a result of solid years of hard work, intense negotiations and compromise to reach a common position.’

Looking at human rights violations in the continent, the coming into existence of the African Court can be said to be a great move and a welcome development towards putting an end to these violations. It is also expected to strengthen the regional human rights system and support it in order for it to bring to fulfilment, its promise.<sup>1015</sup> According to Mutua, the court must as much as possible, try to avoid the pitfall that trapped the African Commission if the purpose of its coming into existence is to be achieved.<sup>1016</sup>

The Protocol empowers the African Court to enforce the provisions of the African Charter and other human rights instruments that are in existence for the African states<sup>1017</sup> as this Preamble puts it ‘in the wider context of a natural progression’<sup>1018</sup> which links the fundamental objectives of the OAU with establishment of the African Court. It also reaffirms the commitment of the OAU to the principles of “freedom, justice, peace and dignity” and to the fundamental rights and duties contained in the declarations, conventions

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Ankumah E, *The African Commission on Human and Peoples’ Rights: Practice and Procedure* (1996) 70.

<sup>1011</sup> Frans Viljoen (2007) 170.

<sup>1012</sup> Vincent Nmehielle (2001) 259.

<sup>1013</sup> Makau Mutua, ‘The African Human Rights Court: A Two-Legged Stool?’(1999)21 *Human Rights Quarterly*342 at 349.

<sup>1014</sup> George Mukundi, ‘African Court on Human and Peoples Rights: Ten Years and Still No Justice’ (2008) 2.

<sup>1015</sup> Vincent Nmehielle (2001)258.

<sup>1016</sup> Makau Mutua, ‘The African Human Rights Courts: A Two-Legged Stool?’(1999) 21 *Human Rights Quarterly*342 at 353.

<sup>1017</sup> Nsongurua Udombana, ‘Towards the African court on Human and Peoples Rights: Better Late than Never’ (2000) 3 *Yale Human Rights & Development Law Journal* 45 at 82.

<sup>1018</sup> Naldi G.J & Magliveras K, ‘Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples Rights’ (1998) 16 *Netherlands Human Rights Quarterly* 431 at 433.

and other instruments adopted by OAU along with other international organisations.<sup>1019</sup>

The Protocol is made up of thirty-five (35) Articles and many of its provisions are similar to the statutes of the European Court of Human Rights and the Inter-American Court of Human Rights. Despite these similarities, there are still some features which distinguish the African Court from the European and Inter-American Courts on Human Rights.

### 6.2.1 Common Features

Under the regional systems, only States may be held accountable for human rights violations simply because each system was created on the basis of a regional inter-governmental agreement which establish specific obligations of signatory States, a minimum code of conduct for States in the region. What this means is that States have agreed to abide by certain standards in their actions and to ensure the enjoyment of certain guarantees by those within their jurisdiction, hereby establishing individual rights through the State. Accordingly, States may be held liable for a particular violation where such violation is attributable to the action of State agents, to those acting with the knowledge and acquiescence of State agents, or the failure of State to protect individuals from the actions of non-State actors.<sup>1020</sup>

Furthermore, the principles of subsidiarity and complementarity limit international human rights adjudication. What this means is that the relevant international decision-making organs are meant neither to replace nor form part of domestic judicial systems. Rather, those alleging human rights violations before an international tribunal must first have exhausted the appropriate, available domestic remedies. Also, the international tribunal will not review domestic judicial decisions which are fair procedurally.<sup>1021</sup> A State will only be considered internationally responsible for a violation where recourse is unavailable locally, unduly delayed, or inadequate at the domestic level. But where on the other hand, the violation was remedied by the State<sup>1022</sup> there is no violation for which the State may be

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<sup>1019</sup> Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III) particularly paragraphs 1, 2 and 7.

<sup>1020</sup> For example, such a duty may be found due to knowledge of a specific threat to protected rights.

<sup>1021</sup> See Regional Systems published by the International Justice Resource Centre. Available at [www.ijrcentre.org/?s=Regional+Systems](http://www.ijrcentre.org/?s=Regional+Systems) (Accessed 20<sup>th</sup> August, 2016).

<sup>1022</sup> An example is where police officer(s) are prosecuted for extra-judicial killing or discriminatory practices on time and the damage which may have been caused repaired as appropriate.

held internationally responsible.

In addition to individual complaints as regards contentious cases, the regional human rights systems engage in varying degrees of general human rights monitoring and promotion. In this vein, the Inter-American Commission and African Commission have established various thematic rapporteurs, and the Council of Europe on its part established the Commissioner for Human Rights.<sup>1023</sup>

### **6.3 Structures, Mandate and Composition of the African Court on Human and Peoples' Rights**

A solution to the problem of enforcement of human rights in Africa in the form of a structure, was for a long time been looked for by many in the form of an African Court on Human and Peoples' Rights whose Judgement would be binding<sup>1024</sup> on state parties and this was what led to the establishment of the African Court.<sup>1025</sup>

#### **6.3.1 Composition**

The composition of the court is crucial to its ability to function as an effective body for the protection of human rights. The way the judges of the court are nominated and eventually elected, their status as part-time and full-time judges and their independence from political pressures are all important and critical factors that will determine whether or not the structural deficiencies which have plagued the African Commission will be overcome by the Court.<sup>1026</sup>

The Court is expected to be an impartial arbiter between individuals and states which violate their fundamental human rights therefore the judges of the Court must be individuals of impeccable ethical character, they must be independent and competent.<sup>1027</sup>

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<sup>1023</sup> [www.achpr.org](http://www.achpr.org) (Accessed 5<sup>th</sup> September, 2016).

<sup>1024</sup> Harrington J, 'The African Court on Human and Peoples' Rights' in Evans & Murray (eds.) 'The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000' (2002) 305-334.

<sup>1025</sup> Adopted by the Assembly of Heads of State and Government of the AOU in Ouagadougou, Burkina Faso, on 9 June, 1998. See OAU/LEG/MIN/AFCHPR/PROT (111). It came into force on the 25<sup>th</sup> January, 2004. But at the 3<sup>rd</sup> Ordinary Session of the Assembly of Heads of State and Government of the AU it was decided that the Court will be integrated with the African Court of Justice of the AU whose protocol was adopted at the 2<sup>nd</sup> Ordinary Session of the Assembly of AU in Maputo, Mozambique on the 11<sup>th</sup> of July, 2003. See Assembly/AU/Dec. 45 (111).

<sup>1026</sup> Nsongurua J. Udombana, 'Towards the African Court on Human and Peoples Rights: Better Late than Never' (2000) 3 *Yale Human Rights and Development Law Journal* 45 at 82.

<sup>1027</sup> Mukundi Wachira, 'Structure, Mandate and Composition of the African Court on Human and Peoples

The Court is made up of eleven (11) judges<sup>1028</sup> who are nationals of Member States of the AU<sup>1029</sup> and are elected in an individual capacity from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and Peoples' rights. There cannot be more than one national from the same state at the same time as a judge of the court.<sup>1030</sup> The judges only need to be nationals of member states that have ratified either the African Charter or the Protocol just like what obtains under the Inter-American Court system.<sup>1031</sup> What this means is that there is the opportunity for competent Judges to be appointed to the Court even though they are nationals of Member States of AU that have not ratified the African Charter.<sup>1032</sup>

### 6.3.2 Nomination and Election of Judges

Membership of the Court is by election which is preceded by nomination. States Parties to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights may propose up to three candidates two of whom at least shall be nationals of that State.<sup>1033</sup> In nomination, the Protocol further emphasise that due consideration must be given to gender representation.<sup>1034</sup>

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Rights' in 'African Court on Human and Peoples Rights: Ten Years and still no Justice' (2008) Minority Rights Group International.

<sup>1028</sup> Article 11 Protocol to the African Charter on Human and Peoples Rights.

<sup>1029</sup> Article 34 of the African Charter lays down that candidates must have the nationality of a State Party to the charter. The American Convention for example, in Article 53 merely requires candidates for the office of judge to be nationals of an Organisation of American States (OAS) Member State. The European Convention, as amended by Protocol No. 11 (Article 20-22) also does not require candidates to have nationality of a State Party or even of a Member State of the Council of Europe.

<sup>1030</sup> Article 11(2) Protocol to the African Charter on Human and Peoples Rights. This is also adopted by the American Convention (see Article 52) and the International Court of Justice (see Article 3 (1) of the Statute). In the case of the European Convention, the situation is different as it does not lay down any condition as regards nationality. This is why the Convention speaks of Judge elected in respect of the state concerned (see Article 27 (2) for example). On the 1<sup>st</sup> of January, 2001, the Court elected two Italians as Judges in respect of Italy and San Marino and two Swiss Judges in respect of Liechtenstein and Switzerland respectively. See generally, Gino Naldi & Konstantinos Magliveras, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of Regional Court of Human and Peoples Rights' (1998) 16 *Netherlands Quarterly on Human Rights* 431 at 443, Davidson Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' in Davidson J. Harris & Stephen Livingstone (eds.) 'The Inter-American System of Human Rights' (1998) 123.

<sup>1031</sup> Article 52 of the American Convention.

<sup>1032</sup> Vincent Nmehielle, 'The African Human Rights System: Its Laws, Practice and Institutions' (2001) 284, said that two common examples that are usually given in this regards are the nomination of Thomas Beurgenthal, a citizen of the United States of America, who later became the president of the Inter-American Court, as a judge of the Inter-American Court by Costa Rica even though the United States had not ratified the American Convention. Also is the election of R. St. John MacDonald, a national of Canada as a judge of the European Court of Human Rights in the early 1990s. See also Gino Naldi and Magliveras (1998) 444.

<sup>1033</sup> Article 12(1) Protocol to the African Charter on Human and Peoples Rights.

<sup>1034</sup> Article 12(2) protocol to the African Charter on Human and Peoples Rights.

The provision of Article 14 (3) Protocol to the African Charter on the Establishment of an African Court simply reflects the development observed over the past 60 years in terms of the fight over gender equality and also expresses concern coming from the experience with the African Commission.<sup>1035</sup> This balance in the sexes has also to be ensured during election and not only during nomination of candidates by Member states.<sup>1036</sup> There exist presently at the Court, three (3) female judges<sup>1037</sup> from Cameroon, Rwanda and Uganda.<sup>1038</sup>

Election of the judges is by secret ballot by the Assembly of Heads of States and Government from the list of nominees prepared by the Secretary General<sup>1039</sup> for a term of six years which is renewable once by the AU General Assembly.<sup>1040</sup> Even though the Protocol does not indicate the margin of vote required for the election of judges to the Court, it is presumed that it will require a two-third majority of members present and voting in the Assembly.<sup>1041</sup> The provision for two- third majority of the Assembly of Heads of States and Government is harsh when compared to provisions in the European and American Conventions which require majority of votes cast and an absolute majority votes respectively.<sup>1042</sup> Aside the fact that the two-third majority might prove problematic, where

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<sup>1035</sup> The African Commission, until its 14<sup>th</sup> session, held in Addis Ababa, Ethiopia from 1-10 December, 1993 had no single female member. Mrs Vera Duarte from Cape Verde was actually elected at the 29<sup>th</sup> Ordinary Session of the OAU Assembly held in Cairo, Egypt from the 28<sup>th</sup> to the 30<sup>th</sup> June, 1993. At the 18<sup>th</sup> Ordinary session of the African Commission held in Cape Verde from 2-11 October, 1995, the Commission included two women, Mrs Vera V. Duarte Martins and Mrs Julienne Ondziel-Gnelenga from Congo. At the elections held during the 35<sup>th</sup> Ordinary Session of the OAU Assembly, Mrs Vera Martins term of office was renewed. Three other women; Mrs Florence Butegwa from Uganda (completed the remaining two years of the late Mr BlondinBeyes term), Mrs Vera Mlangazuwa Chirwa from Malawi and Mrs JainabaJohm from The Gambia were appointed for a six (6) year term of office.

<sup>1036</sup> Article 14(3) Protocol to the African Charter on the Establishment of an African Court on Human and Peoples Rights.

<sup>1037</sup> Lady Justice Ntem Ondo Mengue (Cameroon) and Lady Justice Marie Therese Mukamulisa (Rwanda) were both elected to a term of six years at the 27<sup>th</sup> AU Summit held in Kigali, Rwanda while Justice Solomy Balungi Bossa from Uganda was elected a Judge, of the Court in June, 2014 for a term of six years. See [en.african-court.org/index.php/judges](http://en.african-court.org/index.php/judges) (Accessed 24<sup>th</sup> September, 2016).

<sup>1038</sup> See [en.african-court.org/index.php/judges](http://en.african-court.org/index.php/judges). (Accessed 24<sup>th</sup> September, 2016).

<sup>1039</sup> Article 14(1) The Protocol.

<sup>1040</sup> Article 15(1) The Protocol.

<sup>1041</sup> In the Cape Town Draft, Article 13(1) provided for Judges to be elected by two-third majority of votes of the members present and voting but this provision was removed in the Nouakchott Draft which still forms part of the final Protocol. It has also been argued that in spite of the amendment to the Cape Town Draft the effect of the two- third majority of vote still remain unchanged. This is because Rule 25 of the Rules of Procedure of the Assembly of Heads of States and Government states that a two-third majority of all Members present and voting is required for votes on resolutions and decisions of the Assembly. It is therefore presumed the same rule will be applied to the election of Judges. See further Gino Naldi & Magliveras (1998) 445.

<sup>1042</sup> Gino Naldi & Magliveras (1998) 445 where they referred to Article 22(1) of the European Convention

no general consensus can be reached on the candidates to be elected, insisting on such stringent voting requirement due to an existing provision in the Rules of Procedure of the Assembly Heads of States and Government appears to be an approach too formal as it will raise suspicion that the Assembly of Heads of States and Government may put undue influence on the Court.<sup>1043</sup> Even though this concern is genuine, it is expected that the Assembly of Heads of States and Government will not frustrate any particular election most especially since the same procedure is used in electing members of the African Commission.<sup>1044</sup> So far in all the elections of Judges of the Court carried out there has not been any frustration either witnessed or complained of.

A balanced representation of the main regions of Africa and of their principal legal traditions is also required in the election of judges to the Court.<sup>1045</sup> It is believed that this provision is aimed at accommodating the various African geographical divides and principal legal traditions so as to maintain equitable representation. Issues bordering on customary Law or Native Law and Custom, Islamic Law, Common Law and Civil Law as legal traditions are prominent in various African legal systems and will in one way or the other find their way in the Court's proceedings.<sup>1046</sup> The question which readily comes to mind is whether the provision of Article 14(2) can be observed like Article 14(3) since in the process of nomination it is not required that Member States should take the geographical regions and legal traditions into consideration.<sup>1047</sup> To this, my view is that since geographic regions and legal traditions were not listed as part of the requirements that must be put into consideration when nominating candidates by States Parties, it will not defeat the intention of the drafters of the Protocol towards achieving a balanced geographical representation and legal traditions.<sup>1048</sup>

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and Article 53(1) American Convention.

<sup>1043</sup> Vincent Nmehielle (2001) 286.

<sup>1044</sup> Article 13 of the African Charter provides that the members of the African Commission shall be elected by secret ballot by the Assembly of Heads of State and Government from the list of persons nominated by the State Parties to the Charter. While it may be an easier mode of election to adopt a simple majority in electing members of the Court, it must be observed that till date, there had not been any known case where by the use of the two-third majority rule in the Rules of Procedure of the AHSG had resulted in an impasse in the election of members of the African Commission.

<sup>1045</sup> Article 14(2) The Protocol.

<sup>1046</sup> Vincent Nmehielle (2001) 287.

<sup>1047</sup> Gino Naldi & Magliveras (1998) 445 - 446.

<sup>1048</sup> The belief is that the nomination process will cut across the continent of Africa and the election process will harmonise the requirement in Article 14(2). Furthermore, the experience the region has had with the African Commission is expected to also guide the Court.

Presently there are eleven Judges in the Court with the inaugural Judges sworn in on the 2<sup>nd</sup> of July, 2006 by the AU Assembly in Banjul, The Gambia. Justice Sylvain Ore from Cote d' Ivoire was elected president of the Court on the 5<sup>th</sup> of September, 2016 for a two year term and he was elected as a judge of the Court for the first time in 2010 for a four year term and was re-elected in 2014 for a second term of six years.<sup>1049</sup>

Concerns about the competence of the Judges of the Court have also been raised by the Coalition for an Effective Human Rights Court<sup>1050</sup> and the procedures under which they were selected. The Coalition noted that the Judges do not have demonstrable human rights experience.<sup>1051</sup> The Coalition also criticised the nomination process of most member states as flawed as it failed on account of not being open, transparent and inclusive of civil society.<sup>1052</sup> Although one of the qualifications to be appointed as a judge of the Court is to have experience in human rights matters, the lack of this experience will not be disastrous where their competence is in focus. Looking at their profiles one can see that they are all experienced lawyers and academics who have served or qualified to be appointed as senior judges in their respective domestic courts and vast in matters of law.<sup>1053</sup>

### 6.3.3 Term of Office

Judges of the African Court are elected for a term of six years and they may also be re-elected for another one term once more.<sup>1054</sup> This provision is similar to what obtains in the

<sup>1049</sup> [www.african-court.org/en/index.php/judges/current-judges](http://www.african-court.org/en/index.php/judges/current-judges) (Accessed 20 march, 2019).

<sup>1050</sup> The Coalition is a network of non-governmental organisations and independent human rights institutions formed during the first conference for the promotion of the Protocol to the African Charter on Human and Peoples Rights establishing the African Court on Human and Peoples Rights in Niamey, Niger in May 2003. The purpose for its establishment is to have an effective and independent African Court in order to provide redress to victims of human rights violations and strengthen the human rights protection system in Africa. The Coalition was formally registered as an NGO in Tanzania in September 2007 and it has observer status with the African Commission. See <http://www.africancourtcoalition.org/> (Accessed 20<sup>th</sup> August, 2016).

<sup>1051</sup> Motala A, 'Election of Judges Marks Historic Step in Establishment of the African Coalition for an Effective African Court,' Newsletter, No. 5 at page 10. Available at [www.africancourtcoalition.org/images/docs/newsletters/accnewsletteredition5.pdf](http://www.africancourtcoalition.org/images/docs/newsletters/accnewsletteredition5.pdf) (Accessed 20<sup>th</sup> August, 2016).

<sup>1052</sup> Motala A, 'Election of Judges Marks Historic Step in Establishment of the African Coalition for an Effective African Court' Newsletter, No. 5 at page 10. Available at <http://www.africancourtcoalition.org/images/docs/newsletters/accnewsletteredition5.pdf> (Accessed 20<sup>th</sup> august, 2016).

<sup>1053</sup> See Current Judges of the African Court on the official website of the Coalition for an Effective African Court Available at [www.africancourtcoalition.org/index.php?option=com\\_content&view=category&layout=blog&id=14&Itemid=30&Lang=en](http://www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=14&Itemid=30&Lang=en) (Accessed on 20<sup>th</sup> August, 2016).

<sup>1054</sup> Article 15(1) The Protocol.

European and Inter-American systems<sup>1055</sup> with the only difference being that the American Convention Protocol made room for just one term of office for judges.<sup>1056</sup> The European system on its part does not have a particular number of re-election as it adopted the system in place under the International Court of Justice (ICJ).<sup>1057</sup>

In order to ensure a gradual renewal of the composition of the Court, the term of office of four of the judges elected at the first election expires at the end of two years and the term of four more judges expires at the end of four years.<sup>1058</sup> In arriving at the Judges whose tenure will expire either after two years or four years, the names of members concerned are chosen by lot by the Secretary-General of the AU immediately after the first election of Judges.<sup>1059</sup> Where a judge is elected to replace a judge whose term of office has not expired, such judge will complete the remainder of the predecessor's term.<sup>1060</sup>

Where a vacancy is created at the Court either by the death of a judge or by resignation, the President of the Court shall immediately inform the Secretary General of the AU who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.<sup>1061</sup> Where a seat is declared vacant, such seat must be replaced unless the remaining period of the term of office is less than 180 days<sup>1062</sup> and in replacing such a judge, the procedure and considerations set out in Articles 12, 13 and 14 as regards nomination of candidates by State Parties, compilation of list by the Secretary general and election by secret ballot shall be followed.<sup>1063</sup>

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<sup>1055</sup> Article 23(1) European Convention as amended by Protocol 11. See also Article 54(1) of the American Convention.

<sup>1056</sup> Gino Naldin & Magliveras (1998) 446.

<sup>1057</sup> Article 23(6) & (7) of the European Convention provides that the term of office of judges shall expire when they reach the age of 70 years or until replaced.

<sup>1058</sup> Article 15(1) The Protocol.

<sup>1059</sup> Article 15(2) The Protocol. This similar practice exists also in the European and Inter-American systems as provided by Article 23(2) of the European Convention and Article 54(1) of the American Convention. Under the European Convention, the choice by lot is made by the Secretary-General of the Council of Europe while under the American Convention, the choice is determined in the General Assembly of the Organisation of American States (OAS) after the election. Furthermore, Article 37 of the African Charter as regards the election of members of the African Commission states that the task of drawing lots shall be performed by the Chairman of the OAU Assembly of Heads of States and Government. By the time the Charter was ratified Zambia made a reservation with respect to Article 37 stressing that it was a minor task which should be entrusted not to the chairman of the OAU Assembly but to the Secretary-General of the OAU. See Michelo Hansungule, 'The African Charter on Human and Peoples Rights: A Critical Review' (2000) 8 *African Yearbook of International Law* 281.

<sup>1060</sup> Article 15 (3) The Protocol.

<sup>1061</sup> Article 20(1) The Protocol.

<sup>1062</sup> Article 20(2) The Protocol.

<sup>1063</sup> Article 20(3) The Protocol.

It is important to point out here that the Protocol did not make provision on what should be done where a judge sitting on a case ends up not re-elected unlike what obtains in the other regions. Whether such a judge can continue to preside over a case he began consideration of or such a case will be reassigned to another judge is not made provision for by the Protocol. The European and Inter-American systems provide for such judge not re-elected to continue to preside over cases they have begun to hear for which they shall not be replaced by the newly elected judge.<sup>1064</sup> In the African Human Rights System, it is the Rules of Procedure of the Court that took care of this.<sup>1065</sup>

#### 6.3.4 Discharge of Official Duties by the Judges

After the election of candidates as judges of the Court and prior to the commencement of their official assignment as judges, the newly elected judges are required to make a solemn declaration to discharge their duties impartially and faithfully.<sup>1066</sup> The judges are elected to function on a part-time basis with the exception of the President who performs his judicial function on full time basis and as expected, this caused a lot of disagreement among members but they were eventually convinced that a full-time court will increase expenses considerably and that the initial caseload might not justify the appointment of judges on full-time basis.<sup>1067</sup> This arrangement may be changed by the Assembly of Heads of States and Government as it deems appropriate.<sup>1068</sup> The Inter-American Court

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<sup>1064</sup> See Article 54(3) American Conventions on Human Rights and Article 23(7) European Convention on Human Rights. See also Article 13(3) Statute of International Court of Justice.

<sup>1065</sup> Rule 2(2) of the Rules of Procedure of the African Court provides thus: notwithstanding the foregoing sub-rule, outgoing Members of the Court shall remain in office until such time as they are replaced; after they are replaced, they shall continue to sit until the completion of all stages of any case in which the court has met for an oral hearing prior to the date of replacement.

<sup>1066</sup> Article 16 The Protocol; this provision was not included in the Cape town Draft Protocol but was added to the Nouakchott Draft. The provision was adopted by everyone without any objection and this led to its subsequent adoption at Addis Ababa without any modification. The reason behind this may not be farfetched as making solemn declaration is an act known to all national and international courts. See the Nouakchott Legal Experts Report, OAU/LEG/EXP/AFCHPR/RPT(2) and the Addis Ababa Legal Experts Report, OAU/LEG/EXP/AFCHPR/RPT(III) Rev. 1.

<sup>1067</sup> Article 15(4) of the Protocol. This caused a lot of debate and objections from delegates at the Ministers of Justices Conference held in Addis Ababa with their reason being that Judges acting on a part-time basis may engage in other professions that might be incompatible with their responsibilities as Judges of the Court. The fear that Judges working on a part-time basis may cast doubt on the mind of members of the public on the image of the Court as a Court of law was also expressed by the delegates. This led to the suggestion to either reduce the number of Judges to seven and make them full time or have a number of judges from the eleven Judges to act with the president of the Court on full time basis. See Ibrahim Ali Badawi El-Sheikh, Draft Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights: Introductory (1997) Note 9 *African Journal of International and Comparative Law* 943-952 at 948. See also Gino Naldi & Magliveras (1998) 448-449.

<sup>1068</sup> Article 15(4) The Protocol.

also operates on a part-time basis<sup>1069</sup> just like the African Court. However, the European Court,<sup>1070</sup> functions on a full time basis.<sup>1071</sup>

In my view, the low level of patronage the African Court is witnessing will put the Judges of the Court on break most of the time and this can lead to a situation where they might want to take up additional posts in order to keep them busy even though they are not allowed to participate in any other activities which are not compatible to their position as judges.<sup>1072</sup> These activities might not be compatible with their judicial duties. The situation with the African Commission's Commissioners who are also elected on part-time basis is a good example and this can be described as one of the weaknesses of the Commission which should be avoided by the African Court as the workload of the Commission is huge. The judges serve in personal capacities and cannot perform any other activities other than as judges.<sup>1073</sup>

The Rules of Procedure of the Court have been able to clarify this ambiguity by listing out activities, which if embarked on by the Judges, will compromise their impartiality and independence. The rule states that Judges may not hold political, diplomatic or administrative positions or function as government legal advisers at the national level.<sup>1074</sup>

When examining cases, the Court's quorum will only be deemed formed when there are at least seven (7) judges in attendance.<sup>1075</sup> A Judge who is a national of any State which is a State Party to an Application before the court will be excluded from presiding over such an Application.<sup>1076</sup> This is contrary to the initial suggestion of the drafters of the Protocol as it was recommended in the initial Cape Town Draft that such Judges should be allowed to

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<sup>1069</sup> See, Article 11, Rules of Procedure of the Inter-American Court on Human Rights, *Inter-Am. Ct. H.R.* 18, Article 11 OEA/Ser.L/V/III.25 doc.7 (1992) Available at [hrlibrary.umn.edu/humanrts/oasinstr/zoas7ctr.htm](http://hrlibrary.umn.edu/humanrts/oasinstr/zoas7ctr.htm) (Accessed 24<sup>th</sup> August, 2016).

<sup>1070</sup> Article 19 revised European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>1071</sup> See Statute of International Court of Justice Available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (Accessed 24<sup>th</sup> August, 2016).

<sup>1072</sup> This situation has improved now as the judges are more busy compared to what obtained when the Court was still newly established. Cases are being filed before the Court more now. The Court has received 83 applications since it was established 28 of which has been finalized, four referred to the Commission and 11 are still pending before the Court. Available at [en.african-court.org/index.php/cases](http://en.african-court.org/index.php/cases) (Accessed 24<sup>th</sup> August, 2016). See also Article 18 of the Protocol.

<sup>1073</sup> Article 11(1) The Protocol.

<sup>1074</sup> Rule 5, Rules of Procedure of the African Court on Human and Peoples Rights which entered into force on 2<sup>nd</sup> June 2010.

<sup>1075</sup> Article 23 The Protocol.

<sup>1076</sup> Article 22 The Protocol.

partake in the hearing of such cases.<sup>1077</sup> The reason given was that the decision to either participate in a case or not should be made by the Judges and not subjected to a predetermined rule.<sup>1078</sup> They emphasised that the Judges being people with integrity and independence, should be allowed to take part in all cases without any exception including the ones that involve their States of origin.<sup>1079</sup>

Quorum at the Inter-American Court which also has 11 judges is five<sup>1080</sup> while the European Convention did not lay down any quorum. Instead, it is the Rules of Court of the European Court which came into force on the 1<sup>st</sup> of November, 1998 that made provision for this. The Rules state that a quorum will be formed with the two-third of the elected judges in office.<sup>1081</sup> In the case of the International Court of Justice which has 15 Judges, quorum will be formed with nine Judges.<sup>1082</sup> For the African Commission on Human and Peoples' Rights, quorum will be formed where there are seven members in attendance as provided for by the African Charter.<sup>1083</sup>

Having looked at the Protocol from the first article to the last one, there is no place where reason(s) was given as to why the drafters of the Protocol wanted Judges not to take part in cases which involve their state of origin; in my view it is as a result of not wanting the national interest of the Judges to interfere with the administration of justice.

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<sup>1077</sup> Article 19 Cape Town Draft Protocol.

<sup>1078</sup> Explanatory notes to The Protocol to the African Charter on the Establishment of an African Court on Human and Peoples Rights 1 (6-12 September, 1995) Cape Town South Africa at 6.

<sup>1079</sup> Explanatory notes to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples Rights 1(6-12 September, 1995) Cape Town, South Africa at 6. The provision of Article 22 of the Protocol forbids a judge from Member States to form part of the quorum to preside over a suit involving its State of origin. This appeared first in the Nouakchott draft as there was a deviation from the position under the Cape Town draft. The change came mainly to avoid having *ad hoc* judges in the Court (See the Nouakchott Legal Experts Report at page 8 particularly paragraph 39) and this was why at the Third Legal Experts Meeting in Addis Ababa, Ethiopia the proposal to include the notion of ad hoc judges was generally rejected thereby preventing an amendment of the provision. See The Addis Ababa Legal Experts Report at page 7 particularly paragraph 28.

<sup>1080</sup> Article 56 of the American Convention.

<sup>1081</sup> Rule 20(2) Rules of Procedure of the European Court on Human Rights.

<sup>1082</sup> Article 25, Statute of the International Court of Justice.

<sup>1083</sup> Article 42(3) African Charter. Although there has been an instance where the Commission did not attain quorum as set out in the African Charter; on the first day of the 21<sup>st</sup> Ordinary Session of the Commission which was held in Nouakchott, Mauritania from the 15<sup>th</sup> to the 24<sup>th</sup> of April, 1997 only five (5) members were present while two (2) Commissioners arrived on the second day. See Rachel Murray, Report on the 1997 Sessions of the African Commission on Human and Peoples Rights-21<sup>st</sup> and 22<sup>nd</sup> Sessions:15-25 April, and 2-11 November 1997, 19 (5-7) *Human Rights Law Journal* 170.

### 6.3.5 Independence of the Judges of the African Court

By virtue of the provision of Article 17 of the Protocol to the African Charter on the Establishment of an African Court and in line with the practice of international law, the independence of judges of the Court must be ensured.<sup>1084</sup> The Judges shall enjoy, right from the moment they are elected till the end of their tenure, the immunities extended to diplomatic agents in accordance with international law.<sup>1085</sup> This can be seen as a way of helping the judges in the performance of their duties.

Article 17(1) of the Protocol was introduced by the Nouakchott draft which is a revision of the provision of Article 15(1) of the Cape Town draft<sup>1086</sup> which was amended because it was seen as being overloaded with biased language.<sup>1087</sup> Perhaps the reason for this provision in the Cape Town draft was because of the fear of the fact that the independence of the Court might be compromised by State parties. This can be said to be against a practice which is still in existence in most African domestic justice administration.<sup>1088</sup>

Any decision taken by the judges of the Court in the course of exercising their official duty is binding unless and until such decision is set aside by the Assembly at its next session.<sup>1089</sup> This provision gives power to the Assembly to interfere in the activities of the Court. Neither the European Convention on Human Rights, the Inter-American Convention on Human Rights nor the Statute of the International Court of Justice made provision for this. They cannot be held responsible or liable for any decision or opinion issued in the course of carrying out their functions;<sup>1090</sup> this is also provided for in the

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<sup>1084</sup> Article 17(1) the Protocol.

<sup>1085</sup> Article 17(3) the Protocol, see also Article 51 of the Revised European Convention on Human Rights and Article 70(1) of the American Convention.

<sup>1086</sup> Article 15(1) of the Cape Town Draft Protocol read thus: Judges shall be independent in the exercise of their functions. The Court shall decide matters before it impartially, on the basis of fact and in accordance with law, without restriction, undue influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason.

<sup>1087</sup> See the Nouakchott Legal Experts Report at pg. 8 para. 34.

<sup>1088</sup> Michelo Hansungule, 'African Courts and the African Commission on Human and Peoples Rights' in Anton Bosl & Joseph Diescho (eds) 'Human Rights in Africa: Legal Perspectives on their Protection and Promotion' (2009) 233.

<sup>1089</sup> Article 19(2) the Protocol.

<sup>1090</sup> Article 17(4) the Protocol and Article 70(2) of the American Convention has a similar provision. The Cape Town Draft Protocol stressed that the independence provision of the Protocol is crucial for the functioning of the Court and therefore derives from Article 10 of the 1985 UN Basic Principles on the Independence of the Judiciary. Therefore in order to ensure that the judges carry out their functions without fear or favour and with the diligence required of them, it is important to provide them with the maximum immunity allowed under international law. See Explanatory notes to the Cape Town Draft Protocol at page 5.

Banjul Charter in relation to the members of the African Commission.<sup>1091</sup> This is to secure the full independence of the judges.<sup>1092</sup>

Furthermore, in order to further ensure the independence of the Judges, it is provided that no judge of the Court shall be suspended or removed from office unless by the unanimous decision of other judges of the Court where the judge in question has been found to be no longer fulfilling the required conditions to be a judge of the Court.<sup>1093</sup> This decision, once it is taken by the Judges, becomes final and binding except and unless it is set aside by the Assembly at its next sessions.<sup>1094</sup> What this means is that the Judge affected can appeal to the Assembly of the OAU against his removal.

The European Convention on its part lays down a two-thirds majority decision of other Judges of the Court before a Judge of the Court can be either removed or suspended<sup>1095</sup> while the American Convention states that the General Assembly of the American States may, only at the request of the Court, determine sanctions to be applied against Judges when there are justifiable grounds for such action as set forth in the Statute of the Court.<sup>1096</sup> What the provision of Article 19 means is that it will be difficult to remove a serving Judge of the Court and this is a guarantee of their independence vis-a-vis States and this is reinforced by the enjoyment of the diplomatic privileges and immunities as laid down by the OAU Convention on the Privileges and Immunities<sup>1097</sup> and implicitly pointed out in Article 17 (1 & 3) of the Protocol to the African Charter on the

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<sup>1091</sup> Article 43 Banjul Charter.

<sup>1092</sup> Experience with the African Commission has shown that while these measures are important and necessary they are not enough to ensure the independence of institutions in situations where there are no other measures put in place. Such other measures can be said to include provision of sufficient funding for these institutions and enforcement powers.

<sup>1093</sup> Article 19(1) The Protocol.

<sup>1094</sup> Article 19(2) The Protocol.

<sup>1095</sup> Article 24 of the European Convention.

<sup>1096</sup> Article 73, American Convention See also Article 19 of the Statute of the American Court adopted in 1979 as revised in 1992, Buergenthal T & Dinah Shelton, 'Protecting Human Rights in the Americas: Cases and Materials' (1995) 667-671. The protocol to the American Convention did not provide for the conditions to be fulfilled in order to become a judge at the Inter-American Court on Human Rights but reference can be made to Article 18(1) of the Statute of the Inter-American Court which provides that the position of the judge is incompatible with being a member or high-ranking official of the executive branch of government, official of international organisations or any other position which prevents discharge of duties or affects independence or impartiality or the dignity and prestige of the office. See Statute of the Inter-American Court on Human Rights O.A.S. Res. 448 (IX-0/79), O.A.S. Off Rec. OES/Ser.P/IX.0.2/80, Vol. 1 at 98, Inter-Am. Ct. H.R. 16, OEA/Ser.L/V.III.3 doc.13 corr.1 (1980).

<sup>1097</sup> General Convention on the Privileges and Immunities of the Organisation of African Unity, adopted at Accra, Ghana on the 25<sup>th</sup> of October, 1965. Text of it can also be found in United Nations Treaty Series (1979) 1000 No. 14688 at 403-409.

establishment of an African Court.

Furthermore, in order to ensure that there is no conflict of interest and further ensuring the independence of the judges, no judge may hear any case which he/she had previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity.<sup>1098</sup> This can be said to be a guarantee to parties appearing before the Court that their legitimate interest is guaranteed. Any dispute or doubt that may arise as a result of the conflict of interest provision will be resolved by the Court.<sup>1099</sup>

As can be seen from the above, the Protocol is made up of important guarantees put in place to ensure that the Judges' independence and impartiality are secured with the safeguards resting extensively on international law as can be seen from the provision of Article 17 of the Protocol. In Africa especially with the leaders, what is written down on paper does not always transform into practice and this was what played out with the nomination of the judges to replace those whose terms lapsed in July 2008. This also raised suspicion of possible threats to the independence of the judges. As the Protocol provided in Article 12 that Members State should nominate judges for election to the Court, the decision of Uganda to replace George Kanyeihamba with Joseph Mulenga was filled with controversy.<sup>1100</sup> The government of Uganda blocked the nomination of Justice Kanyeihamba because of the fear that he would 'embarrass' the state at the Court.<sup>1101</sup> The government did not give any reason for not nominating the Judge for a second term thereby prompting members of the Coalition of an Effective African Court to express concern that the actions of Uganda could spell disaster for the independence of Judges of the Court. With this incidence from Uganda, it is believed there is a need to revisit the issue of tenure of the Judges. A single term of six years just will not be bad as tenure for the Judges of the Court just like what obtains at the Inter-American Court.

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<sup>1098</sup> Article 17(2) the Protocol.

<sup>1099</sup> Article 17(2) the Protocol; there is no directly similar provision under the European and Inter-American Conventions.

<sup>1100</sup> See 'Ugandas Government Accused of Blocking the Re-election of Judge to the African Court' Available at <http://www.voanews.com/a/a-13-2008-06-23-voa4-66821492/374439.html>. (Accessed 5<sup>th</sup> September, 2016).

<sup>1101</sup> See 'Ugandas Government Accused of Blocking the Re-Election of Judge to the African Court' Available at

<http://www.voanews.com/a/a-13-2008-06-23-voa4-66821492/374439.html>. (Accessed 5<sup>th</sup> September, 2016).

### 6.3.6 Procedures before the Court

Aside the power to create its own Rules, there are other compulsory provisions on procedure which are already set out in the Protocol and these provisions are on admissibility requirements, hearing procedures and finality.<sup>1102</sup>

#### 6.3.6.1 Admissibility

In admitting cases, the Protocol provides that the Court will take into consideration the provision of Article 56 of the Banjul Charter when making admissibility determinations on pending communications.<sup>1103</sup> Before a communication can be admissible, it must be compatible with the Charter,<sup>1104</sup> it must be filed within a reasonable time after domestic remedies have been exhausted and not deal with matters that have been settled by other means.<sup>1105</sup> Looking at the provision of sub-paragraph (1) of Article 6 of the Protocol, it is clear that the provision relate mainly to cases filed before the Court by 'individual' and 'non-government organisations' as it gives an option to the Court by not making it compulsory on it to seek opinion from the Commission.<sup>1106</sup> The Court can decide to seek the opinion of the Commission before deciding to admit an application filed before it in accordance with Article 5(3) of the Protocol. Communications filed before the Commission which are coming from States parties have only one condition to fulfil which is exhaustion of local remedies compared to what individual and non-governmental organisations are subjected to. This is also the case under the European system as reflected by the provision of Article 35 of the European Convention.<sup>1107</sup> The Rules of Procedure of the Court also has the same conditions for the admissibility of applications by the Court just like as it is set out for the Commission.<sup>1108</sup>

Even looking critically at the provision of Article 6(2) of the Protocol reading it vis-à-vis the provision of Article 56 of the African Charter, one will not be wrong to conclude

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<sup>1102</sup> Nsongurua Ndombana (2000) 3 *Yale Human Rights & Development Journal* 45 at 96.

<sup>1103</sup> Article 6(2) The Protocol.

<sup>1104</sup> Article 6(2) The Protocol.

<sup>1105</sup> Article 56(2)(6) & (7) of the African Charter on Human and Peoples Rights (hereinafter referred to as the Banjul Charter). See also Rule 40(6) Rules of Procedure of the African Court.

<sup>1106</sup> Article 6(1) The Protocol states thus: The Court, when deciding on the admissibility of a case instituted under Article 5(3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.

<sup>1107</sup> See Article 35 of the European Convention. See also Obiora Chinedu Okafor, 'The African Human Rights System, Activist Forces and International Institutions' (2009) 99; Dinah Shelton et al, 'Regional Protection of Human Rights (2013) 1 at 402.

<sup>1108</sup> Rule 40 Rules of Procedure of the African Court.

that the provision also referred to applications submitted before the Court by individuals and non- governmental organisations because Article 56 of the Charter set out conditions that have to be met before a communication can be admissible by the Commission other than communications coming from States.<sup>1109</sup>

Provisions such as the one requiring applicants to identify themselves even where they request anonymity<sup>1110</sup> and the one requiring that the language not be disparaging or insulting<sup>1111</sup> in relation to a State or regional institution can be said to be questionable.<sup>1112</sup> This is because they are not relevant either to the merit of the complaint or do they serve any important procedural functions. The Court has the discretion to retain any case before it where it feels such case is in order if not such application will be referred back to the Commission.<sup>1113</sup>

General international law practice requires that local remedies must be exhausted and this extends to both judicial and administrative remedies,<sup>1114</sup> before making recourse to international remedies to which the Court proffers. Where a case suffers unduly prolonged procedures and unjustified delay then recourse can be made to international remedies.<sup>1115</sup> This can be said to be as a result of the problems associated with the administration of justice in Africa such as the slow and ineffective domestic judicial interventions in cases of violations of human rights;<sup>1116</sup> the exception can be applied here. Also, the exception can be brought into play where there are no domestic remedies in place to protect a right which is being violated or where the party alleging violations has been denied access to the remedies under domestic laws, just as it obtains under the American system.<sup>1117</sup>

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<sup>1109</sup> The first sentence of Article 56 reads thus: Communications relating to human and peoples rights referred to in Article 55 received by the Commission, shall be considered if they: [...]. Article 55 states thus: 1. 'Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.'

<sup>1110</sup> Rule 40(1) Rules of Procedure of the African Court.

<sup>1111</sup> Rule 40(3) Rules of Procedure of the African Court.

<sup>1112</sup> Article 56(1)(3) Banjul Charter.

<sup>1113</sup> Article 6(3) The Protocol.

<sup>1114</sup> Rule 40(5) Rules of Procedure of the African Court.

<sup>1115</sup> Rule 40(5) Rules of Procedure of the African Court; see also Article 56(5) Banjul Charter.

<sup>1116</sup> See *Communication 477/14, Crawford Lindsay Von Abo v The Republic of Zimbabwe* adopted at the 57<sup>th</sup> Ordinary Session of the African Commission held in Banjul, The Gambia from 4 – 18 November, 2015; *Communication 60/91 Constitutional Rights Project* (in respect of Akamu& Others) v *Nigeria*; *Communication 101/93 Civil Liberties Organisation* (in respect of Bar Association) v *Nigeria*.

<sup>1117</sup> Article 46(2) American Convention on Human Rights.

### 6.3.6.2 Hearing Procedure

The Protocol provides for hearing procedures for the Court<sup>1118</sup> and it functions as a single chamber when examining cases brought before it as long as there is a quorum of seven Judges of the Court.<sup>1119</sup> The Court has power to preside over plenary hearings and to receive written or oral evidence including expert testimony.<sup>1120</sup> The written procedure shall consist of the communication to the Court, the Parties, as well as the Commission, as appropriate, of applications, statements of the case, defences and observations and of replies if any, as well as all papers and documents in support, or of certified copies thereof.<sup>1121</sup> Oral proceedings on its part shall consist of a hearing by the Court of representatives of parties, witnesses, experts or such other persons as the Court may decide to hear.<sup>1122</sup> Where the Court deems it necessary, it shall hold an inquiry<sup>1123</sup> while it is expected of Member States concerned to assist the Court by making available to it, relevant facilities which will aid the Court to efficiently handle the case before it.<sup>1124</sup>

The sessions of the Court are held in public as cases brought before it are heard in open court<sup>1125</sup> this is aimed at ensuring transparency and fairness in the hearing proceedings. This is an act which the African Traditional Justice system is known for as it is also an important guarantee which is not mentioned in either by the American Convention or by the European Convention before its amendment by Protocol No.11.<sup>1126</sup> However, the Court can decide either of its own volition or on the request of a party to hold its hearing in camera where in its opinion, it is in the interest of the public, morality, safety or public order to do so.<sup>1127</sup> Whenever the Court decides to preside over a case in camera, the

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<sup>1118</sup> Article 10 The Protocol.

<sup>1119</sup> Article 23 The Protocol.

<sup>1120</sup> Article 26(2) The Protocol. See also Rule 27 Rules of Procedure of the African Court.

<sup>1121</sup> Rule 27(2) Rules of Procedure of the African Court. See also Manisuli Ssenyonjo (2011) 276.

<sup>1122</sup> Rule 27(3) Rules of Procedure of the African Court.

<sup>1123</sup> Article 26(1) The Protocol states that The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. Also according to the Rules of Procedure of the Court, The Court may, at any time during the proceedings, assign one or more of its Members to conduct an enquiry, carry out a visit to the scene or take evidence in any other manner. See Rule 45(2) Rules of Procedure of the African Court.

<sup>1124</sup> Article 26(1) The Protocol and Rule 32 Rules of Procedure of the African Court.

<sup>1125</sup> Article 10 The Protocol. See also Rule 43(1) Rules of Procedure of the African Court.

<sup>1126</sup> Article 40(1) of the European Convention now expressly lay down that hearings shall be in public unless the Court in exceptional circumstances decides otherwise. The Court found the protection of the interest of children to require a restriction on public hearing in *O, H, W, B and R v. United Kingdom* (1987) Series A, Vols. 120 and 121, reprinted in Naldi and Magliveras, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples Rights' (1998) 16 *Netherlands Quarterly on Human Rights* 431. See also Rule 33 Rules of Procedure of the European Court.

<sup>1127</sup> Rule 43(2) Rules of Procedure of the African Court.

reason(s) for making such a decision must be given and parties or their legal representative will be permitted and heard in camera.<sup>1128</sup> It should be noted that the public nature of the proceedings which Article 10 of the Protocol covers only concern the hearings and does not extend to the deliberations of the Court as it will be confidential just as what obtains with cases in local courts.<sup>1129</sup>

### 6.3.6.3 Representation

A party before the Court is entitled to representation by a legal representative of his choice<sup>1130</sup> who may be any person appointed to carry out this task without necessarily having the status or qualification of a legal counsel.<sup>1131</sup> Free legal representation will also be provided by the Court where the interest of justice will be required.<sup>1132</sup> The lack of provision of free legal representation for indigent parties was an issue upon which the African Charter was criticised considering the level of poverty in the continent.<sup>1133</sup> Therefore, allowing parties who cannot afford to hire the services of a legal counsel to stand in on their behalf before the court, to have access to free legal representation should be seen as an attempt to ensure the realisation of the right to fair hearing.

Furthermore, the protocol gives protection to parties, their witnesses or their representatives before the Court. They will also enjoy all facilities in accordance with international law which are necessary for the discharge of their functions, tasks and duties in relation to the Court.<sup>1134</sup> The extension of immunity to parties, witnesses and representatives of parties appearing before the Court is a standard practice which is aimed at ensuring the protection of human rights.<sup>1135</sup> Aside this, the relevance of the protection of

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<sup>1128</sup> Rule 43(3) Rules of Procedure of the African Court.

<sup>1129</sup> Rule 14(2) of the Rules of Procedure of the Inter-American Court and the Article 54(3) of the Statute of the International Court of Justice.

<sup>1130</sup> Article 10(2) the Protocol.

<sup>1131</sup> Fatsah Ouguergouz (2003) 737.

<sup>1132</sup> Article 10 The Protocol.

<sup>1133</sup> Odinkalu Chidi & Camilla Christensen, 'The African Commission on Human and Peoples' Rights: Development of its Non-States Communication Procedures' (1998) 20 *Human Rights Quarterly* 273.

<sup>1134</sup> Article 10(3) of the Protocol.

<sup>1135</sup> The provisional measure and practice of the Inter-American system under Article 63(2) of the American Convention covers all persons who appear before the Inter-American Court. Therefore, States are prohibited from either instituting proceedings against witnesses or expert witnesses or bring illicit pressure to bear on them or their families on account of declarations or opinions they have delivered before the Court. See David Harris & Stephen Livingstone (eds.), 'The Inter-American System of Human Rights' (1998) 545. The Statute of the International Court of Justice on the other hand makes available to agents, counsel and advocates of parties appearing before it, privileges and immunities necessary for the independent performance

witnesses and parties in the African human rights mechanism cannot be overemphasised because in many parts of African continent, State harassment and intimidation of parties and witnesses against the States is rampant therefore, the protection will enable individuals or groups of persons to appear before the Court without fear of retribution.<sup>1136</sup>

It has been suggested that one of the ways to ensure the implementation of the provisions of Article 10(3) of the Protocol by the Court is by it inserting corresponding provisions into the headquarters agreement which the Court signed with the host country.<sup>1137</sup>

### 6.3.7 Rules of Procedure

The power to develop its own rules of procedure was granted to the Court by the Protocol<sup>1138</sup> and this came with a further requirement that it must consult with the African Commission as appropriate when drawing up these rules. This can be said to be in line with international best practice as experience from other regions has shown.<sup>1139</sup>

The Rules of Procedure of the Court entered into force on the 2nd of June, 2010 and it replaced the interim Rules of Procedure of 20<sup>th</sup> June, 2008. This was as a result of the harmonisation of the Interim Rules of Procedure of the Court and the Commission carried out during the joint meetings held in July 2009 in Arusha, Tanzania in October, 2009 in Dakar, Senegal and in April, 2010 in Arusha, Tanzania.<sup>1140</sup>

Article 2 of the Protocol to the African Charter on the Establishment of an African Court recognised the complementarity between the Court and the Commission in discharging the protective mandate under the Charter.<sup>1141</sup> This is further reiterated by the

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of their duties. See Article 42, paragraph 3, Statute of the International Court of Justice. These privileges and immunities are also extended to witnesses, experts and other persons who may be performing missions on the order of the Court during the duration of their mission including times spent on journeys in connection with them. See paragraph 5 (iii) of Resolution 90 (I) of the United Nation General Assembly adopted on the 11<sup>th</sup> of December, 1956 and titled privileges and Immunities of Members of parties and of Witnesses and Experts.

<sup>1136</sup> Naldi & Magliveras (1998) 442.

<sup>1137</sup> Fatsah Ouguergouz (2003) 739.

<sup>1138</sup> Article 33 the Protocol.

<sup>1139</sup> See Article 26(d) European Convention and Article 60 American Conventions. Also the African Charter in Article 42(2) gave power to the Commission to formulate its own Rules of Procedures.

<sup>1140</sup> See Rules of Court of the African Court on Human and Peoples Rights available at [en.african-court.org/images/Basic%20Documents/Final\\_Rules\\_of\\_Court\\_for\\_Publication\\_after\\_Harmonization -](http://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf)

[Final\\_English\\_7\\_sept\\_1\\_.pdf](http://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf). (Accessed 5<sup>th</sup> September, 2016).

<sup>1141</sup> It provides that the Court shall, bearing in mind the provisions of the Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the African

Rules of the Court where it laid down the modalities for the relationship between the Commission and the African Court.<sup>1142</sup> This Complementarity between the two organs will be discussed at length under a separate sub-heading in this chapter.

The Rules of Procedure of the African Court laid down the detailed conditions with which the Court considered applications brought before it, bearing in mind the complementarity between the Court and the Commission.<sup>1143</sup> The formulation of the Rules of Procedure by the African Court is crucial to the effectiveness with which it will be able to carry out its tasks. The Rules of the Court make provision for issues such as personal jurisdiction, particularly regulation of NGO status, questions of standing, direct access to the Court by individuals, and application to individual cases of the provisions on ‘other treaties,’ ‘economic, social and cultural rights’, and group rights’ in the Charter.<sup>1144</sup>

Furthermore, the Rules also define the precise relationship between the Commission and the Court<sup>1145</sup> as well as the scope of the exception of automatic jurisdiction for ‘non-state cases’ (that is for NGOs and individuals). The Rules also touches on how proceedings are to be commenced before the Court,<sup>1146</sup> written briefs by the parties,<sup>1147</sup> oral evidence,<sup>1148</sup> preliminary Objections<sup>1149</sup> and interim measures of protection.<sup>1150</sup> These are areas seen during the drafting of the Protocol as the important problematic areas which the Court has tried to deal with in its Rules of Procedure in a comprehensive manner.

#### 6.4 Jurisdiction and Access to the Court

The establishment of the Court can be said to be a significant achievement in the institutionalisation of human rights in the continent. The Protocol established the Court’s jurisdiction and the provisions on jurisdiction can be seen as the heart of the Protocol since they determine who will have access to the Court, what conditions are to be met in

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Charter.

<sup>1142</sup> Rule 29, Rules of Court of the African Court.

<sup>1143</sup> Article 8 The Protocol.

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See

[en.african-court.org/images/basic%20Documents/Final\\_Rules\\_of\\_Court\\_For\\_Publication\\_after\\_Harmonisation\\_Final\\_English\\_7\\_sept\\_1\\_pdf](http://en.african-court.org/images/basic%20Documents/Final_Rules_of_Court_For_Publication_after_Harmonisation_Final_English_7_sept_1_pdf) (Accessed 5<sup>th</sup> September, 2016).

<sup>1145</sup> Rule 29 Rules of Procedure of the African Court.

<sup>1146</sup> Rule 33 Rules of Procedure of the African Court.

<sup>1147</sup> Rule 70 Rules of Procedure of the African Court.

<sup>1148</sup> Rule 45 Rules of Procedure of the African Court.

<sup>1149</sup> Rule 52 Rules of Procedure of the African Court.

<sup>1150</sup> Rule 51 Rules of Procedure of the African Court.

order to have access to the Court and the types of violations which will be redressed. The Protocol gives to the Court, a broad mandate and provides for automatic jurisdiction once a State ratifies it.<sup>1151</sup> There is no need for a further deposit of additional declaration before the Court can entertain petitions filed by the Commission, a State party or an African Inter-Governmental Organisation.<sup>1152</sup>

The African Human Rights Court, just like other regional human rights Courts, has both adjudicatory and advisory jurisdiction<sup>1153</sup> which can be said to be a prospect in strengthening the African human rights system and ensuring the protection and fulfilment of fundamental rights and duties in the continent. With this, caution has been called for as it is believed that the establishment of the Court is by no means a panacea to the normative and institutional pitfalls of the African Human Rights System<sup>1154</sup> and the Commission whose function the Court is to 'complement and reinforce.'<sup>1155</sup> A major concern has been the restricted direct access of individuals to the Court.<sup>1156</sup>

It has power to try disputes between individual and State parties and to also issue general interpretative opinions regarding subjects that are not the subject of contentious proceedings. The adjudicatory jurisdiction of the Court extends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the

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<sup>1151</sup> Article 34(3) the Protocol.

<sup>1152</sup> There is an exception to this general rule but it relates to individual and NGOs. Under Article 34(6) of the Protocol, the Court does not have jurisdiction to entertain cases filed by individuals and NGOs except where the State against which the complaint is filed has made an explicit declaration to that effect and it has deposited its declaration with the OAU Secretariat. See Article 34(6) the Protocol.

<sup>1153</sup> Articles 3 and 4 the Protocol. For an analysis of the Courts jurisdiction, see Osterdahl I, 'The Jurisdiction *rationemateriae* of the African Court on Human and Peoples' Rights: A Comparative Critique' (1998) 7(2) *Review of the African Commission on Human and Peoples' Rights* 132; see also Van der Mai A.P., 'The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?' (2005) 18 *Leiden Journal of International Law* 113; Robert Wundeh Eno, 'The Jurisdiction of the African Court on Human and Peoples Rights' (2002) 2 *African Human Rights Law Journal* 223-233.

<sup>1154</sup> Mutua M., 'The African Human Rights Court: A Two Legged stool?' (1999) 21 *Human Rights Quarterly* 342 at 357-362. See also Frans Viljoen, 'A Human Rights Court for Africa and Africans' (2005) 30 *Brooklyn Journal of International Law* 1 at 14-22.

<sup>1155</sup> Paragraph 7, Preamble to the Protocol.

<sup>1156</sup> Mutua M, 'The African Human Rights Court: A Two Legged Stool?' (1999) 21 *Human Rights Quarterly* 342 at 355- 360; Harrington J, 'The African Court on Human and Peoples Rights in Evans M. & Murray R, 'The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000' (2002) 319, 320. See also Mohammed A.A., 'Individual and NGO Participation in Human Rights Litigation before the African Court on Human and Peoples' Rights: Lessons from the European and Inter-American Courts' (1999) 43(2) *Journal of African Law* 202- 203; E de Wet, 'The Protection Mechanism under the African Charter and the Protocol on the African Court on Human and Peoples' Rights' in Alfredsson et al., 'International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller' (2001) 724-725.

Protocol and other relevant human rights instruments ratified by States concerned.<sup>1157</sup>

On access to the Court, only the African Commission, States Parties and African Inter-governmental Organisations have automatic direct access to the Court.<sup>1158</sup> The Court has the discretion to allow relevant non-governmental organisations with observer status with the Commission and individuals to institute cases directly before it<sup>1159</sup> provided that the state concerned makes a declaration accepting the competence of the Court to receive such cases at the time of the ratification of the Protocol or any time thereafter.<sup>1160</sup> A substantive analysis of the provisions on access to court will be looked into later on in this chapter.

#### 6.4.1. Contentious Jurisdiction

The Court has jurisdiction to adjudicate over disputes brought against a State party to the Protocol in which it is alleged that the State has violated the African Charter or any other human rights instrument which it has ratified.<sup>1161</sup> Such claims can be filed either directly by the party complaining to the Court<sup>1162</sup> or filed indirectly through the Commission.<sup>1163</sup>

In comparing the material jurisdiction of the African Human Rights Court with that of the European Human Rights Courts in contentious matters, the European Court's material jurisdiction extends only to matters concerning the interpretation and application of the European Convention and its Protocols.<sup>1164</sup> Also the material jurisdiction of the Inter-American Court is also limited to the interpretation and application of the American Convention alone.<sup>1165</sup> What this means is that the interpretation and application of the European Social Charter of 18<sup>th</sup> October, 1961 and of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights of 17<sup>th</sup> November, 1988 fall outside the jurisdiction of both the European Court and

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<sup>1157</sup> Article 3 the Protocol.

<sup>1158</sup> Article 5(1) the Protocol.

<sup>1159</sup> Article 59(3) the Protocol.

<sup>1160</sup> Article 34(6) the Protocol.

<sup>1161</sup> Article 3 and 7 the Protocol.

<sup>1162</sup> See *Falana v The African Union*, Application No. 001/2011.

<sup>1163</sup> See *Michelot Yogombaye v The Republic of Senegal*, Application No. 001/2008; *African Commission on Human and Peoples Rights v Libya*, Application No. 002/2013.

<sup>1164</sup> Articles 32, 33 and 34 of the European Convention.

<sup>1165</sup> Article 62 (1) American Convention.

the Inter-American Court respectively<sup>1166</sup> despite the fact that these are two instruments which recognise the important category of the economic, social and cultural rights.<sup>1167</sup>

The main purpose of a court's contentious jurisdiction is to rule on whether a State has violated any rights contained in a particular human rights instrument ratified by the State Parties for which the victim seeks redress.<sup>1168</sup> In this case, we are looking at the rights contained in the African Charter. The exercise of the contentious jurisdiction by the Court enables it to apply the instruments and issue a decision on the merit which may include the award of reparations or other remedies where the Court finds a violation.<sup>1169</sup>

#### 6.4.1.1 Who can file a Complaint with the Court?

The Protocol provides for the Commission,<sup>1170</sup> state party which has lodged a complaint to the Commission, state party against which the complaint has been lodged at the Commission, the state party whose citizen is a victim of human rights violation and African intergovernmental organisations as entities which may submit contentious cases to the Court.<sup>1171</sup> Furthermore, Article 5(3) of the Protocol provides that 'the Court may entitle relevant NGOs with observer status before the Commission and individuals, to institute cases directly before it, in accordance with Article 34(6) of the Protocol'.<sup>1172</sup> The discretion to allow direct access to the Court by individuals and NGOs lies jointly with

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<sup>1166</sup> Given the legal nature of the rights recognised by these two instruments, their implementation is monitored by the submission of periodic reports by States parties. The Additional Protocol to the American Convention provides however for the two exceptions which concern the rights of workers to organise trade unions and to join the union of their choice, and the right to education. Paragraph 6 of Article 19 provides: Any instance in which the rights established in paragraph (a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Articles 44 - 51 and 61- 69 of the American Convention on Human Rights.

<sup>1167</sup> See *Selmouni v France* (1999) *ECHR* 100, 25803/94. See also, Lucas Lixinski, 'Treaty Interpretation by the Inter-America Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 (3) *European Journal of International Law* 585 - 604.

<sup>1168</sup> Dinah Shelton & Paolo Carozza (2013) 249.

<sup>1169</sup> Art. 27. See Vincent Orlu Nmehielle, 'The African Human Rights System: Its laws, Practice and Institutions' (2001) 263.

<sup>1170</sup> *African Commission on Human and Peoples Rights v Libya* Application No002/2013; *African Commission on Human and Peoples Rights v Great Socialist Peoples' Libyan Arab Jamahiriya* Application No 004/2011; *African Commission on Human and peoples' Rights v Kenya* Application No 006/2012

<sup>1171</sup> Article 5(1) The Protocol.

<sup>1172</sup> Article 34(6) provides that at the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under article 5(3). See *Tanganyika Law Society and Legal and Human Rights Centre v The United Republic of Tanzania* Application No 009/2011; See also *Request for Advisory Opinion by Socio-Economic Rights and Accountability Project (SERAP)* Application No. 001/2012.

the Court and the target State but on one hand, the Court has discretion to either grant or deny individual and NGO access at will.

Looking at the provision of Article 34(6) of the Protocol, one will believe that it was inserted as a compromise to facilitate the adoption of the Protocol. The issue of access to Court by individuals and NGOs during the process of the drafting of the Protocol generated a lot of views; there was a struggle to adopt either the position under the Inter-American system, the old European system or the UN system under the First Optional Protocol to International Covenant on Civil and Political Rights, or a variation of these systems.<sup>1173</sup> The Cape Town draft allowed NGOs and individuals direct access to the Court to file cases before it in ‘exceptional circumstances’, with each case to be determined by the Court.<sup>1174</sup> The Draft did not require separate acceptance by the States Parties of the Court’s competence over such cases.<sup>1175</sup> This provision was eventually criticised by NGOs as being too restrictive and subjective,<sup>1176</sup> opening decisions about what constitutes ‘exceptional circumstances’ to political considerations.

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<sup>1173</sup> It should be mentioned that under Article 61 of the American Convention only States Parties and the Inter-American Commission have the right to submit cases to the Inter-American Court. Therefore, individuals do not have access to the Court, even though individual access to the Inter-American Commission is automatic under Article 44. In the same vein, the European Convention before subsequent amendments through Protocols 9 and 11, limited access to the European Court on Human Rights to the High Contracting Parties and the European Human Rights Commission under Article 44, but recognised individual access to the former European Commission on Human Rights only after a declaration by a State Party to that effect. Protocol 9, however, introduced individual access to the Court after the consideration of a case by the Commission where the respondent State has ratified the Protocol. The European Convention has been amended since by Protocol 11 which makes provision for the Court as the only institutional organ of the European system, and providing for direct individual access to the Court. The Optional Protocol to the International Covenant on Civil and Political Rights is primarily an instrument that recognises the competence of the UN Human Rights Committee to receive cases from individuals when ratified by the particular State Party concerned. The inter-play of these various instruments and their effect on human rights dispute resolution in these systems, as well as their application to the African situation, especially the African Indigenous Justice System, can be said to be the guides of the drafters of the Protocol on the Establishment of the African Court.

<sup>1174</sup> Article 5(1) Cape Town Draft Protocol. See also Badawi El-Sheikh, ‘Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights: Introductory Note’ (1997) 9 *African Journal of International and Comparative Law* 943-952 at 947.

<sup>1175</sup> The drafters of the Cape Town Draft Protocol contended that there may be instances where it may be necessary for victims of human rights abuse or their representatives and NGOs to file complaints directly in Court without first approaching the Commission, especially where irreparable harm may be caused by the delay in consideration of the matter. Such persons do not have the rights for their complaints to be heard and therefore a preliminary hearing has to establish whether the Court will hear the matter. They argued that this provision which gives the Court original jurisdiction, once domestic remedies have been exhausted, being unique, is in keeping with the unique provisions of the Charter which allows the Commission, in Article 55 of the Charter to receive other communications, and as such, was moving in the right direction. See Explanatory Notes to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples Right 1 (6-12 September, 1995) Cape Town, South Africa at page 4.

<sup>1176</sup> Vincent Orlu Nmehielle, ‘The African Human Rights System: Its Laws, Practice and Institutions’ (2001) 266.

The Nouakchott Draft Protocol in amending the Cape Town draft protocol, modified the access of non-State entities by limiting it to ‘urgent cases or serious, systematic or massive violations of human rights,’ but subject to a declaration by States Parties accepting the competence of the Court to receive such cases.<sup>1177</sup> States parties were also allowed to exclude by declaration, the Court’s jurisdiction over non-state cases filed against it. Another limitation was a requirement that the Commission decide the admissibility of all cases submitted to the Court by non-State actors.<sup>1178</sup> A compromise was reached at the Nouakchott meeting of the Legal Experts after a prolonged debate; they eventually gave in to the preferred optional clause for submission by Member States to the contentious jurisdiction of the Court.<sup>1179</sup> The final draft of the Protocol amended this by making the consultation of the Commission on admissibility issues optional;<sup>1180</sup> in cases where the Court is required to act in utmost urgency it may waive this in order to avoid irreparable damage.

The practice in international human rights protection is to give to States Parties an unfettered right of access to a court on human rights or other institutional organs and this was what was borrowed when Article 5 of the Protocol to the African Charter on the Establishment of an African Court was being drafted. The direct access to the Court by the Commission and State Parties is therefore not something new as it is the practice under the European and the Inter-American systems.<sup>1181</sup> The only new addition can

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<sup>1177</sup> Article 6(1)&(5) Nouakchott Draft Protocol.

<sup>1178</sup> This provision suffered some criticism as some NGOs argued then that to make the Commission determine the admissibility of urgent cases sent directly to the Court would defeat the very purpose of the provision as it would increase delay in those cases in which urgency was the decisive factor. See Dan Juma, ‘Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher turned Gamekeeper’ (2007) 4 (2) *Essex Human Rights Law Review* 3-7. See also Nsongurua Udombana, ‘Towards the African Court on Human and Peoples’ Rights: Better Late than Never’ (2014) 3 *Yale Human Rights and Development Journal* 45.

<sup>1179</sup> See Nouakchott Legal Experts Report, OAU/LEG/EXP/AFCHPR (2) at page 6. Most of the delegates were of the view that the Court should be accessible to individuals and non-governmental organisations just like the Commission and States Parties. They even pointed it out at the meeting that instruments of other regional human rights systems were being amended to allow individuals and NGOs to have access to their Courts without any hindrance. See Manisuli Ssenyonjo, ‘Direct Access to the African Court on Human and Peoples’ Rights by Individuals and Non-Governmental Organisations: An Overview of the Emerging Jurisprudence of African Court 2008-2012’ (2013) 2 *International Human Rights Law Review* 17-56.

<sup>1180</sup> Article 6(1) The Protocol.

<sup>1181</sup> The Protocol borrowed more from the European system based on the old European Convention as Article 5(b),(c) and (d) of the Protocol to the African Charter on the Establishment of an African Court are similar to the provisions of Article 48 of the European Convention before the amendment by Protocol 11. Comparing with the new Article 36 of the European Convention which was amended by Protocol 11, it now requires that in all cases before a Chamber or the Grand Chamber, a High Contracting Party, one whose national is an

be said to be the adding of Inter-Governmental Organisations to the list of those that are entitled to submit cases to the Court<sup>1182</sup> and what makes this interesting is the fact that the access granted is in relation to contentious applications and not in seeking advisory opinion from the Court.<sup>1183</sup>

Looking critically at the provision of Article 5 of the Protocol, it shows that even States Parties to the Protocol do not have a general direct access to the Court like the Commission as reflected by the wording of Article 5 of the Protocol. What this mean is that a Communication must first be filed at the Commission either by a State or against a State before an application can be lodged before the Court.<sup>1184</sup> It is only the Commission that can be said to have unlimited direct access to the Court not only in referring cases to the Court but also in filing new cases before it especially cases which reveals the existence of a series of violations human rights as expected under Article 58 of the Charter.<sup>1185</sup>

The limited direct access of individuals and NGOs to the Court should be seen as limiting and representing a shortcoming to the jurisdiction of the Court but however, they should also be seen as an innovation among regional human rights systems giving traditional notions of how two- legged systems work.<sup>1186</sup> Looking at the Inter-American system as an example, it is only States Parties and the Commission that have the right to submit

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applicant, shall have the right to submit written comments and to take part in the hearings. This is absent in the American convention.

<sup>1182</sup> Article 5(e) The Protocol.

<sup>1183</sup> Among the entities listed under Article 4 of the Protocol which can request for an advisory opinion is the African Intergovernmental Organisation. See Article 4 (1) the Protocol. Article 64 of the American Convention allows the organs of the Organisation of American States that are listed under chapter X of the OAS Charter to consult the Court regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in American States. Interpreting this refers to the ability of the OAS organs to make use of the advisory jurisdiction of the Inter-American Court. Similarly, there is no direct provision in the European Convention allowing European intergovernmental organisations access to the contentious jurisdiction of the court. It can however be argued that since individuals now have access to the European Court on Human Rights under the European Convention as amended by Protocol 11, intergovernmental organisations where they exist can also be allowed access.

<sup>1184</sup> Article 5(b) and (c) of the Protocol appears to suggest that there need not be an outcome of the complaint lodged by a State or against a State before the State proceeds to the Court, the interest of justice will not be served by waiting for such outcome and the procedure will ridicule the object of the Protocol. See Gino Naldi & Magliveras (1998) 437. A possible exception to this can be said to be the situation under Article 5(d) of the Protocol where a State Party whose citizen is a victim of human rights violation is allowed to file a case before the Court. See Gino Naldi & Magliveras (1998) 437.

<sup>1185</sup> Gino Naldi & Magliveras (1998) 437.

<sup>1186</sup> Inger Osterdahl, 'The Jurisdiction *Ratione Materiae* of the African Court of Human and Peoples Rights: A Comparative Critique' (1998) 7 *Revue Africaine Des Droits de L'Homme* 132-134.

cases directly to the Court while individuals must first go to the Commission.<sup>1187</sup>

Another feature of the Protocol as regards access to Court is the provision for joinder of parties. The Protocol allows a State Party to join a case before the Court where such State Party has an interest in the matter.<sup>1188</sup> The nature of the 'interest' here was not defined by the Protocol<sup>1189</sup> like what obtains in the Revised European Convention where a request for joinder must be 'in the interest of the proper administration of justice.'<sup>1190</sup> In determining the level of interest that is required before a State can be allowed to be joined as a party before the court the court might want to be guided by its own interest for proper administration of justice. In doing this, caution must however be exercised by States Parties since real danger exists in that States could exercise their rights to intervene too readily in an attempt to subvert the administration of justice.<sup>1191</sup> The Court can also be guided by the practice of other international tribunals, like the International Court of Justice which have adopted a fairly strict approach to request for intervention.<sup>1192</sup>

Allowing States whose citizens are victims of human rights violations to submit cases before the Court<sup>1193</sup> can be said to be an African classification of the provision of Article 48(b) of the European Convention which allows a State to embrace the claims of its citizens.<sup>1194</sup> See *Loizidou v Turkey*.<sup>1195</sup> This provision, one can say will make African States show interest in the vindication of the rights of their citizens against other States Parties. This provision can also be seen as an opportunity to bring in inter-state petitions since under the provision; it is only a State that can be the respondent.

#### 6.4.1.2 Jurisdiction on Subject-Matter

As earlier mentioned in this chapter, the adjudicatory jurisdiction of the African Court

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<sup>1187</sup> Article 61 American Convention. The contentious jurisdiction of the Court is not automatically accepted through ratification of the Convention instead, the State Party must file a declaration or enter a special agreement to that effect. See Article 62(1) American Convention.

<sup>1188</sup> Article 5(2) of the Protocol. Under the new Article 36(1) of the European Convention, a variation of this provision is that in all cases before the European Court, a State Party one of whose national is an applicant shall have the right to submit written comment and to take part in the hearing.

<sup>1189</sup> The earlier draft Protocols of Cape Town and Nouakchott made provision that States have a legal interest but the final protocol eliminated the qualification of the interest to be shown by States Parties as a legal one. See Articles 5(2) of the Cape Town and Nouakchott Draft Protocol.

<sup>1190</sup> Article 36(2) Revised European Convention.

<sup>1191</sup> Gino Naldi & Magliveras (1998) 438.

<sup>1192</sup> See generally, Rosenne Shabtai, 'Intervention in the International Court of Justice' (1997) particularly chapter 7.

<sup>1193</sup> Article 5(d) The Protocol.

<sup>1194</sup> Vincent Nmehielle (2001) 269.

<sup>1195</sup> Application No 15318/89. See *Loizidou v Turkey*.

extends to all cases and disputes brought before it, concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by states concerned.<sup>1196</sup> The provision goes beyond Articles 60 and 61 of the Charter which require the Commission to merely look towards comparative and international human rights law when interpreting the provisions of the Charter. Infact the Commission may not interpret or apply any human rights instrument except the African Charter under its contentious jurisdiction.<sup>1197</sup> While the Charter may be interpreted by the Commission by drawing inspiration from other international and regional human rights instruments,<sup>1198</sup> other cases must be decided with reference to the African Charter.<sup>1199</sup>

The situation under the Protocol is pretty different as the Court will exercise direct jurisdiction over all human rights instruments that have been ratified by the States concerned. This can be said to extend to all regional, sub-regional, bilateral, multilateral and international treaties.<sup>1200</sup> This can be said to be encouraging and important because a person whose rights are not adequately protected in the African Charter can easily hold the state concerned accountable by invoking another treaty which such state is a party either at the UN or sub-regional level.<sup>1201</sup> Depending on how the Court interprets its mandate, it will give a wider consideration to international legal resources, standards and norms than is currently the practice with the Commission.<sup>1202</sup> By doing this, the Court will make use of alternative legal resources from other international and regional standard setting mechanisms such as the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Minorities by states parties.<sup>1203</sup>

The Court has the opportunity to interpret and determine violations of other important

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<sup>1196</sup> Article 3 The Protocol.

<sup>1197</sup> Article 45 African Charter on Human and Peoples' Rights.

<sup>1198</sup> Article 60 African Charter.

<sup>1199</sup> The same also obtains with the European and the Inter-American Courts whose direct subject matter is limited to the Conventions under which they were created. See Article 32 of the Revised European Convention and Article 62 of the American Convention. It should be pointed out here that this does not prevent the Courts from looking towards each others decisions and those of other human rights agencies in order to find solutions to questions concerning the interpretation and application of their own Convention.

<sup>1200</sup> Nsongurua J. Udombana (2000)3 *Yale Human Rights and Development Law Journal* 45 at 89.

<sup>1201</sup> Udombana N.J., 'Towards the African Court on Human and Peoples Rights: Better Late than Never?' (2000) 3 *Yale Human Rights and Development Law Journal* 45.

<sup>1202</sup> See Request No. 002/2013, Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of a Child on the Standing of the African Committee of Experts on the Rights and Welfare of a Child before the African Court on Human and Peoples' Rights.

<sup>1203</sup> George Mukundi, 'African Court on Human and Peoples' Rights: Ten Years and Still No Justice' (2008) 18.

human rights treaties within the AU framework such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Protocol to the African Charter on the Rights of Women in Africa. The interpretation of the Protocol on women by the Court will be particularly important for the development of women's rights in Africa as it contains important provisions which eliminate all forms of discrimination against women in Africa.<sup>1204</sup>

Also the Court can hear cases that could be submitted to it by the Committee on the Rights and Welfare of the Child on violations of children rights as protected by the African Charter on the Rights and Welfare of the Child in Africa.<sup>1205</sup> Cases on the Rights and Welfare of a Child where instituted before the Court, can make the Court attach a legally binding force to the Committee on the Rights of the Child's recommendations or make it hear such cases afresh thereby ensuring that the Court's enforcement mechanism is activated.<sup>1206</sup>

Furthermore, cases on treaties that may not expressly be human rights treaties can also be entertained by the Court because some of the existing regional and sub-regional instruments like bilateral and multilateral economic treaties may have traces of human rights. This is notwithstanding the Protocol's qualification to only 'human rights treaties ratified.'<sup>1207</sup> It also has jurisdiction to interpret and deliberate on cases on other international human rights treaties<sup>1208</sup> which are ratified by States concerned like the International Covenants on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR) and the Convention on the Elimination of all Forms of Discrimination Against Women. This provision is full of possibilities and potentials for the Court to give adequate protection to victims of

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<sup>1204</sup> Mukundi (2008)18; Robert Wundeh Eno, 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *AHRLJ* 223-233.

<sup>1205</sup> The Committee on the Rights and WELFARE of a Child fits within the definition of an African Inter- governmental Organisation and as such can take cases to the African Court just the same way the African Commission will do. See Article 5(e) of the Protocol.

<sup>1206</sup> Request No. 002/2013, *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights*.

<sup>1207</sup> Article 7 of the Protocol. Some of these treaties could include the sub-regional economic treaties like the ECOWAS, the East African Community (EAC), the SADC, the Common Market for East and Southern Africa (COMESA). It also includes Treaties to protect bio-diversity, natural resources, democracy, peace and security which all have an impact on the protection and abuse of human rights. See Wachira G.M. (ed.), 'Regional and Sub- Regional Platforms for Vindicating Human Rights in Africa' (2007) 6 *Judiciary Watch Report*, Nairobi, Kenya Section on International Commission of Jurists.

<sup>1208</sup> Article 3 of The Protocol.

human rights violations in Africa in line with international standards, norms and developing jurisprudence.

The danger associated with this is that it will lead to chaos of jurisprudence.<sup>1209</sup> What this will mean is that all human rights treaties ratified by State Party to the Protocol on the African Court in the past will become justiciable and future ratification will have the same effect.<sup>1210</sup> Infact, States can even get discouraged from ratifying the Protocol and other human rights treaties. The broad interpretation may flood the African Court with a lot of cases.

On the other hand, the broad jurisdiction of the African Court should be seen as a test for countries which have adopted strategies to beat international human rights mechanisms in order to escape scrutiny. The broad interpretation will expose States Parties which sees ratification of international treaties as a public relations exercise.<sup>1211</sup>

#### 6.4.2 Advisory Jurisdiction of the African Court on Human and Peoples' Rights

The Court may, at the request of a Member State of the African Union, any of the organs of the African Union, or any African organisation recognised by the African Union, provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.<sup>1212</sup> See, '*The Request for Advisory Opinion by Pan African Lawyers' Union and Southern African Litigation Centre.*'<sup>1213</sup>

Advisory opinions do not have the legally binding force like a Judgement in a contentious case though it has an alternative or additional value. First, the African Court is not bound by facts or legal details of the dispute under consideration by it. This enables them, more than in contentious cases to establish general legal principles and rules that will impact upon many more states unlike Judgement in contentious cases which will only be applicable to the few parties involved. Secondly, advisory proceedings are less

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<sup>1209</sup> Heyns C., 'The African Regional Human Rights System: In Need of reforms?' (2001) 2 *AHRLJ* 167.

<sup>1210</sup> Eno R.W., 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *AHRLJ* 227.

<sup>1211</sup> Ndombana N. J., 'Towards the African Court on Human and Peoples' Rights: Better Late than Never' (2000) 3 *Yale Human Rights and Development Law Journal* 45.

<sup>1212</sup> Article 4 of The Protocol.

<sup>1213</sup> Request No. 002/2012. See, '*The Request for Advisory Opinion by Pan African Lawyers' Union and Southern African Litigation Centre.*

confrontational unlike in contentious proceedings as States Parties are not placed in a position where they will see themselves as the ‘accused’ neither will they be ordered to alter a given rule.<sup>1214</sup> Parties are only advised and encouraged to put the advice into use; it is believed that this ‘soft’ method of promoting human rights norms can also be as effective as the ‘hard’ method of condemning states in contentious cases.<sup>1215</sup>

The Protocol confers on the Court, advisory powers which are wider than that of any other international human rights tribunal<sup>1216</sup> although this advisory jurisdiction of the Court cannot fully compensate for the absence of jurisdiction in dispute brought by individuals. Advisory Opinions maybe more influential and authoritative than a Judgement in a contentious case because it affect the general interpretation of International law for all States rather than for just parties to individual cases.<sup>1217</sup>

In looking at the advisory jurisdiction of the African Court as provided for by the Protocol, this thesis will look at it from three different angles which are: who can request an advisory opinion, what forms the subject matter of a request for an advisory opinion and the last will be what the effect of an advisory opinion will be on the compatibility of domestic laws with international law. This sub-paragraph will also seek to establish the extent to which the advisory power of the Court may enable the Court to strengthen the region’s human rights protection mechanism.

#### 6.4.2.1 Who can request an advisory opinion?

Requests for advisory opinions can be made by ‘a member state of the African Union, the AU, any of its organs, or any African organisation recognised by the AU.’<sup>1218</sup> Though the term ‘African’ is not defined, in practice, NGOs with observer status with the

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<sup>1214</sup> AP Van der Mei, ‘The Advisory Jurisdiction of the African Court on Human and Peoples’ Rights’ (2005) 5 *AHRLJ* 27-46 at 30.

<sup>1215</sup> See, *The Request for Advisory Opinion by Advocate Marcel Ceccaldi on behalf of the Great Socialist Peoples of Libyan Arab Jamahiriya* Request No. 002/2011.

<sup>1216</sup> Article 4 of the Protocol provides thus: (1). At the request of a Member State of the OAU, any of its organs, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any relevant human rights instruments, provided the subject matter of the opinion is not related to a matter being examined by the Commission. (2) The Judge shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting opinion.

<sup>1217</sup> Liz Heffernan, ‘The Nuclear Weapons Opinions: Reflections on the Advisory Opinion Procedure of the International Court of Justice’ (1998) 28 *Stetson Law Review* 133 at 139; Pasqualucci Jo M, ‘The Practice and Procedure of the Inter-American Court of Human Rights’ (2003) 3. See also, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (1950) ICJ Report 65.

<sup>1218</sup> Article 4(1) of The Protocol.

Commission and the ECOSOC are able to make requests for advisory opinions.<sup>1219</sup> As pointed out earlier, Advisory Opinions are not binding but they do have, according to Viljoen, 'profound persuasive force and international repercussions.'<sup>1220</sup>

The scope of the provision of Article 4 of the Protocol is very wide and it went further than Article 45(3) of the African Charter which entitles AU member states, AU organs and African Organisations recognised by the AU to ask the Commission to give an interpretation of the Charter. It also surpasses the provision of Article 64(1) of the American Convention on Human Rights which entitles member states of the Organisation of American States and within their spheres of competence, OAS organs, to consult the Inter-American Court regarding the interpretation of human rights treaties. The difference being that the Protocol extends *locus standi* to other African organisations recognised by the AU.<sup>1221</sup>

The AU, unlike other international organisations, can also request for an Advisory opinion from the Court.<sup>1222</sup> To be able to do this, the AU will have to be represented by one of its organs which in its own right, also enjoys the right to seek advisory opinion from the Court.<sup>1223</sup> The fact that the Protocol did not clearly require the AU organs to act within their area of competence is not likely to have much practical meaning because it can be assumed that if they were to have the right, they will rarely seek an opinion on an issue

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<sup>1219</sup> Request No. 001/2012, *Request for Advisory Opinion by Socio-Economic Rights and Accountability Project*; Request No. 002/2012, *Request for Advisory Opinion by Pan African Lawyers Union and Southern Africa Litigation Centre*; Request No. 002/2013, *Request for Advisory Opinion by The African Committee of Expert on The Rights and Welfare of the Child on the Standing of The African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights*.

<sup>1220</sup> Frans Viljoen, 'A Human Rights Court for Africa and Africans' (2004-2005) 30 *Brook Journal of International Law* 1.

<sup>1221</sup> Under Article 47(1) of the new European Convention, only the Committee of Ministers of the Council of Europe may request advisory opinion from the European Court on legal questions concerning the interpretation of the Convention and its protocols. Under Article 47(2), such opinions, however, would not deal with any question relating to the content or scope of the rights or freedoms defined in section 1 of the Convention and its Protocols, or with any other such proceedings as could be instituted in accordance with the Convention. Article 47(3) requires that a decision of the Council of Ministers to request an advisory opinion of the Court should require a majority vote of the representatives entitled to sit on the Committee. See Gino Naldi & Magliveras (1998) 439.

<sup>1222</sup> Article 4 The Protocol.

<sup>1223</sup> Such AU organs are the Assembly, the Executive Council, the AU Commission, the Pan-African Parliament and the Peace and Security Council. Each of these organs has a broad and general mandate which explicitly includes the promotion and protection of human rights. The other group of AU organs that can seek for advisory opinion on behalf of the AU are organs whose mandate covers specific areas like the AU Financial Institutions such as the African Central Bank, the African Monetary Fund and the African Investment Bank (Article 19, Constitutive Act ); the Specialised Technical Committees and the Economic, Social and Cultural Council (Article 22 Constitutive Act )

outside their entrusted field. Also, the fact that the Protocol does not explicitly limit the right of AU's organs to request opinions to issues they are made responsible for does not mean that they are entitled to do so.<sup>1224</sup>

All AU member states can seek for advisory opinion from the African Court<sup>1225</sup> and in seeking the advisory opinion; the Protocol did not impose the condition that a state must have ratified the Protocol before it can do so.<sup>1226</sup> This is in contrast with the provision of Article 5 of the Protocol which only allows States Parties to the Protocol to initiate a case against another state party. The notion that States not willing to accept the Court's jurisdiction should not have the right to initiate a case against another as underlined by Article 5 of the Protocol does not extend to Article 4. The purpose of advisory proceedings is to enable states to obtain a judicial interpretation on human rights matters which might also assist other states in fulfilling their human rights obligations.<sup>1227</sup>

The inclusion of African Organisations in Article 4(1) of the Protocol as organisations recognised by the AU stand out as the most important difference between the Protocol to the African Charter on the Establishment of an African Court and the American Convention on Human Rights; but what is still not clear is whether NGOs can be regarded as organisations recognised by the AU. Neither the Protocol nor the rules of procedure of the African Court clarified this. In arguing this provision of Article 4 of the Protocol, one will not be wrong to say that since the provision did not make a distinction between governmental and non-governmental organisations like in Article 5 of the Protocol which deals with contentious jurisdiction of the Court,<sup>1228</sup> therefore non-governmental organisations can request for legal opinions from the Court<sup>1229</sup> and this, they have been doing.<sup>1230</sup>

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<sup>1224</sup> AP Van der Mei (2005)33.

<sup>1225</sup> Morocco is the only African Country which is not part of AU and therefore cannot seek for advisory opinion from the Court. See <http://www.au.int/en/treaties> (Accessed 19<sup>th</sup> September, 2016).

<sup>1226</sup> Article 4 The Protocol.

<sup>1227</sup> AP Van der Mei (2005) 35.

<sup>1228</sup> By Article 5(1) of the Protocol, African intergovernmental organisations enjoy an absolute right to submit cases to the Court. From Article 5(3) through to Article 34(6) of the Protocol, it shows that non-governmental organisations only have direct access to the Court when the state in question has made a declaration accepting the Courts jurisdiction.

<sup>1229</sup> This is the view held by one of the Judges of the Court, Justice Fatsah Ouguergouz in, 'The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa' (2003) 750.

<sup>1230</sup> See Request No. 002/2015, *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and The Coalition for African Lesbians* (still pending before the Court); Request No. 002/2012

One can also argue that since NGOs have no direct access to the Court in contentious cases they have no right to request for an opinion since doing that will enable them to initiate disguised contentious cases against a member state which has not accepted the jurisdiction of the Court in cases brought by private parties.<sup>1231</sup> Obviously it will be in the interest of justice to ask the Court to opt for the first interpretation especially because NGOs in Africa play significant roles in the promotion of human rights.<sup>1232</sup> Infact, it cannot be imagined what would have become of the African Commission without the participation of NGOs in the protection of human rights as this can be justified by the number of NGOs with observer status with the Commission. Presently there are 477 NGOs recognised by the Commission.<sup>1233</sup> If given the right to ask for advisory opinion from the Court, it is definitely certain that NGOs will make contributions, no matter how little, to the Court.

#### 6.4.2.2 What forms the subject matter of a request for Advisory opinion?

At exercising its advisory opinion powers, the Court can provide opinion on any legal matter relating to the Charter or any other human rights instruments as long as the subject matter of the opinion is not related to a matter being examined by the Commission.<sup>1234</sup> The extent to which the Court can exercise its advisory jurisdiction, where compared to the interpretative powers of the African Commission, is larger because it covers any other human rights instrument. The interpretative power of the Commission is only limited to the Charter.<sup>1235</sup> This advisory power of the Court also exceeds that of the Inter-American Court which has jurisdiction over the American Convention and other treaties concerning the protection of human rights in the American States.<sup>1236</sup>

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*Request for Advisory Opinion by Pan African lawyers Union and Southern Africa Litigation Centre.*

<sup>1231</sup> Eno R.W., 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 227-228.

<sup>1232</sup> Mortala A, 'Non-Governmental Organisations in the African System' in Heyns C & Stefiszyn K (eds), 'Human Rights, Peace and Justice in Africa: A Reader' (2006) 220.

<sup>1233</sup> NGOs with Observer Status Available at [www.achpr.org/network/ngo/by-name/](http://www.achpr.org/network/ngo/by-name/) (Accessed 21<sup>st</sup> September, 2016).

<sup>1234</sup> Article 4(1) the Protocol. See also, request for Advisory Opinion by Pan African Lawyers Union and Southern African Litigation Centre Request No. 002/2012 wherein the Court declined to issue Advisory Opinion because the Commission confirmed there was a pending matter before it related to the subject matter of the request.

<sup>1235</sup> Article 45 the Charter.

<sup>1236</sup> Article 64(1) American Convention. Article 4(1) of the Protocol to the African Charter on the Establishment of an African Court, unlike the American Convention, does not refer to other treaties but rather to human rights instruments and interpreting this could mean that the Court is also empowered to give interpretations of non-binding instruments like resolutions or recommendations of relevant bodies. See Osterdahl I, 'The Jurisdiction *rationemateriae* of the African Court on Human and Peoples Rights' (1998) 7 *Revue Africaine des Droits de l'Homme* 132 at 144. This does not mean that the Court will completely not interpret other instruments aside treaties. This is evidenced when it interpreted the American Declaration of the Rights

In trying to interpret the phrase ‘relevant human rights instruments’ taking a hint from the Inter- American Court’s interpretation of the notion ‘other treaties’ as used in Article 64(1) of the American Convention will be adequate. In the first advisory opinion ever to be issued by the American Court it was suggested that ‘other treaties’ would refer to:

- (a) Only treaties adopted within the context of the Inter-American system
- (b) To treaties in which only American states are parties
- (c) To all treaties to which one or more American states are parties.

None of these options was chosen by the Court but instead it held that ‘other treaties’ include

‘[a]ny provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the purpose of such a treaty, and whether or not non-member states of the Inter-American system are or have become parties thereto.’<sup>1237</sup>

The African Court can interpret Article 4(1) of the Protocol in a broader manner just the same way the Inter-American Court interpreted ‘treaties concerning the protection of human rights.’ But in this case, the African Court will be interpreting human rights instruments and what this means is that the Court can only interpret treaties primarily or exclusively adopted to protect human rights.<sup>1238</sup> The wording of Article 4 of the Protocol has been said not to reflect a deliberate choice of those that drafted<sup>1239</sup> the protocol in denying the court the power to deliver advisory opinions on human rights issues which may arise within the context, for example, treaties mainly striving at

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and *Proceedings of the Tenth Annual Conference, held in Addis Ababa, Ethiopia 3 - 5 August, 1998*, 61 – 62. Duties of Man which was adopted in 1948 in the form of a resolution when it was necessary to classify the OAS Charter or the American Convention. See I/A Court HR Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 on the American Convention of Human Rights, Advisory Opinion OC-10/89 of 24<sup>th</sup> July, 1989, Series A No. 10 Paragraph 44. Secondly, Article 4(1) of the Protocol does not formally require that other treaties should protect human rights in African States. What this means is that the Court can also give opinion on issues like questions on the diplomatic protection to be offered to Africans in diaspora or African States treatment of nationals in exile. See Van der Mei A.P. (2005) 38.

<sup>1237</sup> See Advisory Opinion Requested by Peru, I/A Court HR Other Treaties Subject to the Consultative Jurisdiction of the Court (Article 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of 24 September, 1982, Series A No. 1, Paragraph 52.

<sup>1238</sup> Quasigah E, ‘The African Court of Human Rights: Prospects in Comparison with the European Court of Human Rights and the Inter-American Court of Human Rights’ in ‘African Society of International and Comparative Law’

<sup>1239</sup> The only conclusion that can be drawn from the drafting history of the Protocol is that the phrase any relevant human rights instruments was chosen by the drafters to confer upon the Court a broader jurisdiction than the African Commission which can only be asked to clarify the meaning of the Charter. See Article 45(3) African Charter.

economic integration.<sup>1240</sup> The objective of the Protocol and the text of Article 4(1) of the Protocol allow the Court to give a wider reading into other treaties aside just human rights treaties.

The African Court, like the Inter-American Court, is an independent and autonomous organ not subordinated to or formerly bound by Judgements, decisions or opinions of other regional or international Courts or organs. Its powers are conferred by its constituent treaty adopted within a framework of the AU. The Court can interpret any universal, regional or sub-regional instruments regardless of their purpose, main subject and state parties as long as the provision in question has bearing upon, affects or is in the interest of human rights protection in Africa.<sup>1241</sup>

## 6.5 Relationship between the African Court and the African Commission

Pursuant to Article 2 of the Protocol establishing the Court, the Court is established to complement the protective mandate of the Commission. However, Rule 29 of the Rules of the African Court on Human and Peoples' Rights and the Protocol establishing the Court, provides for the guiding provisions in regard to the relationship between these two organs. These Rules set out the basic interactive framework between the Commission and the Court, including provisions on:

- (a) Complementarities<sup>1242</sup>
- (b) Consultations between the Commission, the Court, and their respective Bureaux;<sup>1243</sup>
- (c) consultations on any amendment of any issue, or procedure governing the relations between the two institutions;<sup>1244</sup>
- (d) Requirements in situation where a case is submitted by the Commission under Article 5(1)(a) of the Protocol;<sup>1245</sup>

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<sup>1240</sup> Quasigah E, 'The African Court of Human Rights: Prospects in Comparison with the European Court of Human Rights and the Inter-American Court of Human Rights' in 'African Society of International and Comparative Law' *Proceedings of the Tenth Annual Conference held in Addis Ababa, Ethiopia 3-5 August, 1998*, 61-62.

<sup>1241</sup> I/A Court HR The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of 1 October, 1999, Series A No. 16 Paragraph 72.

<sup>1242</sup> Article 2 the Protocol.

<sup>1243</sup> Rule 29 (1)(a)&(b) Rules of Procedure of the African Court.

<sup>1244</sup> Rule 29(2) Rules of Procedure of the African Court.

<sup>1245</sup> Rule 29(3)(a) Rules of Procedure of the African Court.

- (e) the Court's ability under Rule 45 to hear individuals or NGOs with communication originating from the Commission pursuant to Article 55 of the Charter;<sup>1246</sup>
- (f) opinions on admissibility under Article 6 of the Protocol;<sup>1247</sup>
- (g) procedures to transfer a case to the Commission pursuant to Article 6 (3);<sup>1248</sup>
- (h) situations of examining an application before it on issues in a communication before the Commission.<sup>1249</sup>

As a result of the harmonisation of the Interim Rules of the Court and the Commission carried out during joint meetings<sup>1250</sup> the Court and the Commission have an understanding to meet at least once a year. Their primary objective is to discuss questions relating to their relationship.<sup>1251</sup>

While seeking to clarify the relationship between the Commission and the Court, the concept of complementarity comes with its own ambiguities. Infact, it has been described as 'a notion in motion,'<sup>1252</sup> and said to be usable in normative and descriptive dimension.<sup>1253</sup> Looking at it from the angle of African human rights system, the use of complementarity with little or no detailed explanations helps its character as a tool of description but in employing it to carry out this act, it does little as regards prescribing the relations between the African Human Rights Court and the African Court of Justice and Human Rights on one hand and the system's non-judicial supervisory institutions on the other hand.<sup>1254</sup> This despite the fact that it is normally that the establishment of the judicial institutions after many years of existence of the quasi-judicial bodies has the

<sup>1246</sup> Rule 29(3)(c) Rules of Procedure of the African Court.

<sup>1247</sup> Rule 29(4) Rules of Procedure of the African Court.

<sup>1248</sup> Rule 29(5)(a) Rules of Procedure of the African Court.

<sup>1249</sup> Rule 29(6) Rules of Procedure of the African Court.

<sup>1250</sup> The meetings were held in Arusha, Tanzania from 14-17, July, 2009; 12-16 October 2009 in Dakar, Senegal and Arusha, Tanzania in April 2010. See Higgins Gillian, 'The African Commission and the African Court on Human and Peoples' Rights: Case Progression from Commission to the Court' (2012) 1. See also Lucky Michael Mzimba & Stephen Waters, 'Jurisprudential Analysis of the African Court on Human and Peoples Rights: From 2004 to 2010' (2013) 20 *African Yearbook of International Law* 12.

<sup>1251</sup> Higgins Gillian, 'The African Commission and the African Court on Human and Peoples' Rights: Case Progression from the Commission to the Court,' ARC Project Paper (2012) 1.

<sup>1252</sup> Solomon Ebobrah, 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations' (2011) 22 *European Journal of International Law* 663-688.

<sup>1253</sup> Clapham A., 'On complementarity: Human Rights in the European Legal Orders' (2000) 21 *Human Rights Law Journal* 313.

<sup>1254</sup> Ebobrah Solomon, 'Towards a Positive Application of Complementarity in the Africa Human Rights System: Issues of Functions and Relations' (2011) 22 *European Journal of International Law* 663 – 668.

potential to impact significantly on the relationship between these institutions.<sup>1255</sup> What was expected was that the Rules of procedure of these institutions would give more concrete meaning to complementarity but neither the Rules of the Court nor that of the Commission did.

The use of the term ‘complementarity’ in the African human rights system has drawn more attention in the context of the relationship between the Court and the Commission such that the relationship has been characterised as ‘peculiar’,<sup>1256</sup> ‘unique’,<sup>1257</sup> and ‘organic.’<sup>1258</sup> Nevertheless, the lack of clarity is not restricted to this relationship as it is bound to appear in relation to other institutions of the African system.<sup>1259</sup>

Complementarity between the Commission and the Court can produce debilitating inefficiencies if the relationship between the two organs is not well conceived. In the Inter-American system because of the fact that the Commission and the Court apply themselves to the case at different times, there is duplication in procedure relating to contentious matters especially in fact-finding and admissibility proceedings.<sup>1260</sup> Although the Commission would have done this before submitting a dossier to the Court, the Court continues to do its own fact-finding and investigative research despite the fact that much of it mirrors the Commission’s earlier deliberations. For its part, the Court reviews the Commission’s findings on admissibility, especially in relation to domestic remedies and the result is a lengthier, more expensive proceedings.<sup>1261</sup> This is one of the challenges that come along with complementarity as it is also being experienced in other international legal sub-system.<sup>1262</sup>

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<sup>1255</sup> Vincent Nmehielle, ‘Towards an African Court of Human Rights: Structuring and the Court’ (2000) 6 *Annual Survey of International and Comparative Law* 27 at 46.

<sup>1256</sup> Osterdahl, ‘The Jurisdiction *Ratione Materiae* of the African Court of Human and Peoples’ Rights: A Comparative Critique’ (1998) 7 *Revue Africaine des Droits de l’Homme* 132 at 133.

<sup>1257</sup> Osterdahl (1998) 150.

<sup>1258</sup> Osterdahl (1998) 133.

<sup>1259</sup> Ebobrah Solomon (2011) 22 *EJIL* 665.

<sup>1260</sup> Ebobrah Solomon (2011) 22 *EJIL* 665.

<sup>1261</sup> Ibrahim Ali Badawi Elsheikh, ‘The Future Relationship between the African Court and the African Commission’ (2002) 2 *African Human Rights Law Journal* 252-260.

<sup>1262</sup> For example, under the Inter-American System of human rights, there is a sub-system which came into force with the adoption of the Organisation of American States Charter while the entry into force of the American Convention of Human Rights created another sub-system. The first sub-system comprises of members of OAS that has remain subject to the law of American Declaration of the Rights and Duties of Man as well as to the recommendations issued by the Inter-American Commission on Human Rights under the Declaration. The second sub-system consists of members that are parties to the American Convention on Human Rights and have also accepted the Inter-American Courts contentious jurisdiction. These States are

Other challenges which the Court and Commission are likely to face, aside the duplication of functions, include waste of resources,<sup>1263</sup> lengthening of the time frame for concluding procedures,<sup>1264</sup> the creation of institutional tension as a result of struggle for supremacy and finally the creation of loopholes for states to avoid responsibility by manipulating institutions.

Although critics and supporters have argued that it makes little sense to create an institution that duplicates the weakness of the African Commission.<sup>1265</sup> In the context of the African Union, an organisation with scarce financial resources and limited moral clarity, the establishment of a new body would have been approached sombrely.<sup>1266</sup> A human rights court would have been more useful if it genuinely sought out to correct the shortcomings of the African system, and provide the victims of human rights violations with a real and accessible forum to vindicate their basic rights.

Another concern is the likelihood of overlap and conflict of jurisdiction between the Court and sub-regional courts of justice which have sprung up recently in the continent<sup>1267</sup> like the ECOWAS Court<sup>1268</sup> and the East African Court of Justice.<sup>1269</sup> According to Nyaga, there are possible jurisdictional overlaps and conflicts that demand urgent resolution in ensuring that the Court does not duplicate efforts and are effective in protecting human rights on the continent.<sup>1270</sup> Some of these sub-regional Courts are vested with jurisdiction to pronounce on human rights violations whether expressly or implicitly;<sup>1271</sup> the Protocol is

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subject to the law of the binding Judgements issued by the Inter-American Court in cases referred to it by the Inter-American Commission and concurrently, to the law of the Inter-American Commissions resolutions and recommendations. These States are committed to honour both the American Declaration and the American Convention. See Dinah Shelton, 'Regional Protection of Human Rights' (2008) 70.

<sup>1263</sup> Supelveda C., 'The Inter-American Commission on Human Rights of the Organisation of American States' (1985) 65 *German Yearbook of International Law* 83. See also Cowen, Forward(2000)21 *Human Rights Law Journal* 290.

<sup>1264</sup> Pasqualucci, 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law' (1994-1995) 26 *U Miami Inter-Am L Rev* 297 at 311; Frans Viljoen, 'A Human Rights Courts for Africa and Africans' (2004-2005)30 *Brookes Journal of International Law* 1 at 19.

<sup>1265</sup> Wundeh Robert Eno, 'The Jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223.

<sup>1266</sup> Pityana Barney N., 'Reflections on the African Court on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 121.

<sup>1267</sup> Wachira George Mukundi (ed.), 'Regional and Sub-Regional Platforms for Vindicating Human Rights in Africa' (2007) 6.

<sup>1268</sup> Established by Section 6&15 of the ECOWAS Treaty.

<sup>1269</sup> Established under Article 9 of the East African Community Treaty.

<sup>1270</sup> Nyaga J.M, 'Conflicts and Overlaps of Jurisdiction of various regional Courts in Africa' (2007) 7 *Judiciary Watch Report*, Nairobi, International Commission of Jurists (Kenya).

<sup>1271</sup> See ECW/CCJ/APP/07/08 *HisseinHabre v Senegal*; ECW/CCJ/APP/13/11 *AliyuTasheku v Federal Republic Of Nigeria*; WCW/CCJ/APP/12/07 *Registered Trustee Of The Socio-Economic Rights And Accountability*

silent on this possibility thereby leaving it to the Court to determine how such overlap will be resolved.

There is a possibility that a matter may be brought before a sub-regional court and eventually ending up before the African Human Rights Court. Where this happens, the question then arises as to whether the sub-regional Courts can be referred to as an international tribunal, thereby precluding determination of matters before them by the African Court. In the event they are considered in this way, matters before the sub-regional courts will not be entertained by the African Court on the ground that they have already been deliberated upon by another international tribunal.<sup>1272</sup> It is therefore important that these institutions share their rules of procedure in a bid to avoid possible loop-holes that could potentially hamper the effectiveness of the African Court.

Interpretation of the Charter by the sub-regional courts is another potential difficulty.<sup>1273</sup> This may involve the sub-regional human rights courts applying directly, the provisions of the African Charter in a dispute or alternatively relying on the African Charter and the jurisprudence of the African Commission as well as that of the African Court as a source of law.<sup>1274</sup> The interpretation of the Charter by sub-regional human rights bodies may differ from that of the Commission and the Court, therefore in view of the possibilities of different outcomes depending on which forum a litigant decides to take a case to, there is need for proper coordination and harmony among the available platforms for defending fundamental human rights.<sup>1275</sup>

## 6.6 Courts' Merger with the African Court of Justice

The Constitutive Act of the African Union provides for the establishment of an additional judicial body to function as the primary judicial organ of the African Union,

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*Project (Serap) v President, Federal Republic Of Nigeria & Anor.* (All decided by the Community Court of Justice – ECOWAS).

<sup>1272</sup> Article 56(7) African Charter; see also, George Mukundi, African Court on Human and Peoples' Rights: Ten Years and Still no Justice (2008)14

<sup>1273</sup> Odinkanlu Chidi, Complementarity, Competition or Contradiction: The Relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa. Presentation to Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights, Gaborone, Botswana, 9-10 December, 2003 Available at [www.africancourtcoalition.org/images/docs/research-papers/chidionComplementarity.pdf](http://www.africancourtcoalition.org/images/docs/research-papers/chidionComplementarity.pdf) (Accessed 22<sup>nd</sup> September, 2016).

<sup>1274</sup> Chidi (2003) 10.

<sup>1275</sup> Mukundi (2008) 15.

to be called the ‘African Court of Justice.’<sup>1276</sup> The Protocol of the Court of Justice was thus adopted on the 11th of July, 2003 in Maputo Mozambique, but has yet to enter into force.

However, following a proposal by the then Chairperson of the Assembly of the African Union and Head of the Federal Republic of Nigeria, President Olusegun Obasanjo, the AU Assembly at its third<sup>1277</sup> and fifth<sup>1278</sup> Ordinary Sessions, decided to merge the African Court on Human and Peoples Rights and the Court of Justice of the African Union into a single court. The merger was mainly instituted for part implementation of the decision of the Assembly of Heads of States and Governments to rationalize institutions in order to avoid duplication of mandates and to ensure cost effectiveness within the African Union.<sup>1279</sup>

The draft on ‘The Protocol on the Statute of the African Court of Justice and Human Rights’ was adopted at the AU Summit in Sharm El-Sheikh, Egypt, on the 1<sup>st</sup> of July, 2008. The Protocol and the Statute annexed to it will enter into force 30 days after the deposit of the instruments of ratification by fifteen (15) Member States and so far, only five States, namely Libya,<sup>1280</sup> Mali,<sup>1281</sup> Burkina Faso,<sup>1282</sup> Congo<sup>1283</sup> and Benin<sup>1284</sup> have ratified the Protocol as at September 2016 while thirty (30) Member States have signed.<sup>1285</sup>

## 6.7 Judgement of the Court

Article 28 (1) of the Protocol requires the Court to deliver its Judgement within 90 days of having completed hearing.<sup>1286</sup> This was introduced in the Nouakchott draft protocol as it was deemed necessary to include a time frame within which the

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<sup>1276</sup> Article 5 and 17 Constitutive Act of the AU.

<sup>1277</sup> Assembly/AU/Dec.45 (III) adopted at the 3<sup>rd</sup> Ordinary Session held in Addis Ababa, Ethiopia from 6<sup>th</sup> – 8<sup>th</sup>, July 2004.

<sup>1278</sup> Assembly/AU/Dec.83 (V) adopted at the fifth Ordinary Session held in Sirte, Libya from 4<sup>th</sup> – 5<sup>th</sup> July, 2005 in Sirte, Libya.

<sup>1279</sup> Sutherland Kirsty & Sander Barrie, Endowing the African Court of Justice and Human Rights with Jurisdiction over International Crimes – A More Legitimate Form of Justice for Africa or a Recipe for Disaster?, Paper proposal for conference on International Law in Africa, International Criminal Law Bureau, p. 2

<sup>1280</sup> Signed on 14/05/2009, ratified on 06/05/2009, deposited instrument on 17/06/2009.

<sup>1281</sup> Signed on 24/12/2008, ratified on 13/08/2009, deposited instrument on 27/08/2009.

<sup>1282</sup> Signed on 21/01/2009, ratified on 23/06/2010, deposited instrument on 04/08/2010.

<sup>1283</sup> Signed on 28/06/2009, ratified on 14/12/2011, deposited instrument on 06/08/2012.

<sup>1284</sup> Signed on 14/01/2009, ratified on 28/06/2012, deposited instrument on 11/07/2012.

<sup>1285</sup> Available at [www.au.int/en/sites/default/files/treaties/7792-sl-protocol\\_on\\_stature\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_hr\\_0.pdf](http://www.au.int/en/sites/default/files/treaties/7792-sl-protocol_on_stature_of_the_african_court_of_justice_and_hr_0.pdf) (Accessed 21<sup>st</sup> September, 2016).

<sup>1286</sup> Rule 59 Rules of Procedure of the Court.

Judgement of the Court will be delivered.<sup>1287</sup> Judgement delivered by the Court as a result of majority decision will be final and will not be subject to appeal.<sup>1288</sup> The Court is also empowered to review its own decision in the light of new evidence<sup>1289</sup> and the Rules of Court went further to state the condition precedence for the review.<sup>1290</sup>

Furthermore, the Court can also interpret its own decisions.<sup>1291</sup> Any party may, for the purpose of executing a Judgement, apply to the Court for interpretation of the Judgement within 12 months from the date of delivery of the Judgement.<sup>1292</sup> This application for interpretation of the Judgement of the court will not stand as a stay of execution of the Judgement of the Court except in circumstances where the Court decides otherwise.<sup>1293</sup> The Judgement of the Court is read in open court upon adequate notice given to all parties to the suit,<sup>1294</sup> and the reason(s) for the decision must be given by the Court.<sup>1295</sup>

The Court has delivered some Judgements based on applications filed before it and issued Advisory Opinions. Notable among them is where it allowed for the first time, NGOs to make submissions before it as *amicus curiae*.<sup>1296</sup> The Court, on 30 March 2012, made an order granting the Pan African Lawyers Union (PALU) leave to participate as *amicus curiae* in the matter of the African Commission on Human and Peoples' Rights and the Great Socialist Libyan People's Arab Jamahiriya.<sup>1297</sup> On the 3<sup>rd</sup> of June, 2016, the Court, in delivering Judgement over an application submitted to it by the Commission on behalf of Mr. SaifKadhafi, finds that Libya has violated and continue to violate Articles 6 and 7 of the African Charter, thereby ordered Libya to protect and terminate all illegal criminal proceedings instituted against Mr. SaifKadhafi instituted before domestic courts.

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<sup>1287</sup> See Nouakchott Legal Experts Report, at 9 paragraph 43.

<sup>1288</sup> Article 28(2) The Protocol. This is similar to Article 67 of the American Convention and Article 44(1) of the European Convention.

<sup>1289</sup> Article 28(3) The Protocol.

<sup>1290</sup> Rule 67 Rules of Procedure of the African Court. This provision is consistent with Rule 118 of the Rules of Procedure of the African Commission which confers the Commission with the power to reconsider a Communication declared inadmissible. See *Urban Mkandawire v The Republic of Malawi*; Application No: 003/2011. See also, *Frank David Omary & Others v The United Republic of Tanzania* Application No; 001/2012.

<sup>1291</sup> Article 28(4) The Protocol.

<sup>1292</sup> Rule 66 Rules of Procedure of the Court.

<sup>1293</sup> Rule 66(5) Rules of Procedure of the Court.

<sup>1294</sup> Article 28(5) The Protocol and Rule 61(3) Rules of Procedure of the African Court.

<sup>1295</sup> Article 28(6) The Protocol. See also Article 66(1) of the American Convention; and Article 45(1) of the European Convention.

<sup>1296</sup> A copy of the Order is available at [www.african-court.org/en/images/documents/orders/ORDER-%20PALU%20Amicus%20Curie%20-%20APPLICATION%20004.2011.pdf](http://www.african-court.org/en/images/documents/orders/ORDER-%20PALU%20Amicus%20Curie%20-%20APPLICATION%20004.2011.pdf) (Accessed 20<sup>th</sup> April, 2015).

<sup>1297</sup> Application No. 004/2011.

The Court went further in its Judgement to order Libya to submit to it, within sixty days, a report on the measures taken to guarantee the rights of Mr. Kadhafi from the date of notification of the Judgement.<sup>1298</sup>

In another major Judgement of the Court, in the matter of *LoheIssaKonate v Burkina Faso*,<sup>1299</sup> unanimously declared Burkina Faso to have violated the Article 9 of the African Charter, Article 19 of the Covenant and Article 66 (2)(c) of the revised ECOWAS treaty due to the existence of custodian sentences on defamation in its laws.<sup>1300</sup> The Court, in its Judgement, also found the State to have violated Article 9 of the African Charter, Article 19 of the Covenant and article 66 (2) (c) of the Revised ECOWAS Treaty because of the conviction and sentence to a term of imprisonment of the Application in a defamation case. It holds that this is against the Applicant's freedom of speech.<sup>1301</sup>

The Court also at its 20<sup>th</sup> Ordinary Session<sup>1302</sup> issued an order for provisional measures in relation to an application received from the Commission alleging serious and widespread violations of human rights by the government of the Great Socialist People's Libyan Arab Jamahiriya. The case concerned the violent repression of the anti-government protest that started in Benghazi and then spread to other major cities in Libya including Tripoli. Government forces responded to the protest with live ammunition and violent attacks, resulting in numerous deaths and injuries. According to the Applicant, these actions amounted to serious and widespread violations of the rights enshrined in Articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the African Charter.<sup>1303</sup>

During the session, the Court deliberated on the application and decided that in view of the extreme gravity and urgency of the matter, and in accordance with its powers under Article 27 (2) of the Protocol establishing the Court and Rule 51 (1) of the Rules of Court, it was necessary to order provisional measures with a view to avoid irreparable harm being caused to persons who are the subject of the application.<sup>1304</sup>

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<sup>1298</sup> See Application No. 002/2013, *African Commission on Human and Peoples Rights v Libya*

<sup>1299</sup> Application No. 004/2013, Judgement delivered on the 5<sup>th</sup> of December, 2014.

<sup>1300</sup> See Par. 176 (3) of the Judgement.

<sup>1301</sup> See par. 176 (5) & (6) of the Judgement.

<sup>1302</sup> Held in Arusha, Tanzania from 14-25 March, 2011.

<sup>1303</sup> See [en.african-court.org/en/images/documents/Court/Cases/casae\\_summaries/Application\\_No\\_004\\_-\\_libya\\_summary\\_-\\_august\\_2011\\_update.pdf](http://en.african-court.org/en/images/documents/Court/Cases/casae_summaries/Application_No_004_-_libya_summary_-_august_2011_update.pdf) (Accessed 20<sup>th</sup> September, 2015).

<sup>1304</sup> [en.african-court.org/en/images/documents/Orders-](http://en.african-court.org/en/images/documents/Orders-)

In the order, issued on the 25<sup>th</sup> of March 2011, the Court called on the Great Socialist People's Libyan Arab Jamahiriya to 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the African Charter on Human and Peoples' Rights or of other international human rights instruments to which it is a party.'

The Court also delivered a judgement in the case *African Commission on Human and Peoples' Rights v Republic of Kenya*<sup>1305</sup> wherein it classified the Ogiek People of Kenya as 'indigenous people' living in the Mau Forest.<sup>1306</sup> The Court further affirmed the Commission's (Applicant) assertion that the Mau Forest as the Ogieks' ancestral home by stating that the most salient feature of most indigenous populations is their strong attachment with nature, particularly, land and the natural environment. That their survival in a way depends on unhindered access to and use of their traditional land and the natural resources thereon.<sup>1307</sup> It described the Ogieks as hunter-gatherer community which has depended on the Mau Forest for centuries for their residence and livelihood.<sup>1308</sup>

## 6.9 Conclusion

The African human rights system, despite various challenges, is full of promises as regards the protection of human rights in the continent. Despite the fact that the journey towards the effective protection of human and Peoples' rights has been a long and difficult one, the Commission, it cannot be denied, laid the foundation for greater advances. The adoption of the Protocol to the African Charter on the Establishment of an African Court raised hopes among victims of human rights abuses ranging from minority groups to indigenous people.

Despite this, there is still a long way to go with part of the solutions being with the States themselves. They have to demonstrate political will in order for the Court to succeed in the fight against human rights abuses in the continent. They should step up their ratification of the Protocol as well as declare direct access to the Court for individual and

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(Accessed 20<sup>th</sup> April, 2015).

<sup>1305</sup> Application No: 006/2012, Judgement delivered on the 26<sup>th</sup> May, 2017.

<sup>1306</sup> Paragraph 109 of the Judgement.

<sup>1307</sup> Paragraph 109 of the Judgement.

<sup>1308</sup> Application No> 006/2012, judgement delivered on the 26<sup>th</sup> May, 2017, paragraph 109.

NGOs.

Furthermore, it is important that African people are aware of the existence of the African Court's potential and ability to redress human rights violations.<sup>1309</sup> The enforcement and implementation of the Court's decisions can also be influenced by the role played by victims of human rights violations to illuminate the Court's decisions and the measures adopted by the state. The Court should ensure that the hopes and confidence of Africans as regards its effectiveness in protecting their fundamental rights is not just a dream.

The coming into existence of the Court is seen as the turning point in the protection of human rights in the continent and can be said to be a welcome development from African leaders. This phase which they have embarked upon as regards human rights issues in the last two decades can be said to be a welcome development even though, in many aspects it is a necessary condition for reinforcing human rights protection in Africa; the introduction of judicial protection of human rights by the Protocol can be said not to be sufficient to attain this objective.<sup>1310</sup> The Protocol establishing the Court has its weaknesses and shortcoming such as the access to the Court by NGOs and individuals is subject to an optional declaration by States Parties. The Protocol is also generous with some of its provisions, for example, with respect to the material jurisdiction of the Court and its often uncertain language can profitably be exploited by the Judges.<sup>1311</sup>

The location of the Court too will play a role in its success especially by the effectiveness of the overall African system of promoting and protecting human rights.<sup>1312</sup> The war against

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<sup>1309</sup> According to Barney Pityana, it is unfortunate that judges of the African Court on Human and Peoples Rights and indeed the Court itself have not provided much information, if any, to the public it is expected to serve on progress made, which is a cause for concern. It is essential that the African Court on Human and Peoples Rights provides sufficient information on its progress if it hopes to receive requisite support and cases from individuals and peoples it is created to protect. Professor Barney Pityana is the former Chairman of the African Commission and Vice-Chancellor and Principal of the University of South Africa, Pretoria, South Africa.

<sup>1310</sup> See Frans Viljoen, 'Argument in favour of and against an African Court on Human and Peoples' Rights' (1998) *African Society of International and Comparative Law – Proceedings of the Tenth Annual Conference*, Addis Ababa, 3-5 August, 21-44.

<sup>1311</sup> Fatsah Ouguergouz (2003) 755.

<sup>1312</sup> See I.A.B El-Sheikh, 'Draft Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights – Introductory Notes' (1997) 9 *African Journal of International and Comparative Law* 951. See also the Conclusion of the Report Presented to the OAU Ministerial Conference on Human Rights held in April 1999 which states thus: 'The proposed African Court on Human and Peoples Rights is expected to be an important instrument for the protection and promotion of human rights in Africa. However, the existence of such a Court will not per se ensure the protection of rights, if the necessary political goodwill and sense of tolerance and accommodation continues to elude our societies and particularly its leaders and opinion makers. However, the Court can be an effective weapon for the protection of

human rights violation in Africa is a collective effort which requires the cooperation of many actors; the Court is no doubt an important component in the normative and institutional structure established in the regional context but it will be dangerous to attach much importance to it over the Commission whose role in the protection of human rights will prove crucial to the eventual success of the Court. In the next chapter, which is the conclusion and recommendation chapter of this thesis, some of the recommendations that have been made by other scholars and academics will be revisited.



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rights, if individuals of goodwill, both State and non-State actors, play their part.' (Report on the progress made towards the establishment of an African Court on Human and Peoples Rights, OAU Ministerial Conference on Human Rights) 12-16 April, 1999, Grand Bay, Mauritius; OAU DOC MIN/CONF/HRA/4 (1) particularly at 39.

## Chapter 7

### RECOMMENDATION AND CONCLUSION: TOWARDS AN EFFECTIVE AFRICAN HUMAN RIGHTS JUSTICE SYSTEM

#### 7.1 INTRODUCTION

The question of justice is not for the law courts alone and denying this will amount to assuming a position which does not only suggest a lack of awareness of the existence of traditional African perspectives on justice but the inability to appreciate the cultural realities of post colonial Africa.

The interpretation of justice brings out the notion of 'equality' because justice appears operational on the condition that all human beings are deemed to require, deserve and entitled to the same treatment of restoration.<sup>1313</sup> The African indigenous justice system, as demonstrated in this thesis, is community based and employs restorative and transformative ideas in resolving conflicts.<sup>1314</sup>

This research presents the central question around the notion of justice in Africa by highlighting the answers to the research questions posed at the beginning of the study in order to bring this thesis to a close. My conclusions will be drawn and recommendations targeted at the improvement of human rights protection in Africa will be made.

#### 7.2 Research questions answered

Chapter 1 of this thesis laid out the structure of the work particularly the background to the research, definition of the problem and the scope of the research work. The thesis set out to answer and indeed answered the following questions:

- (a) Whether the African value of reconciliation and non-confrontation upon which the African Commission was built is compatible with the idea of western-style-Court systems?
- (b) Whether these values are been reflected in the conceptualisation of the African Human Rights Court and the proposed African Court of Justice and Human Rights?

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<sup>1313</sup> Majeed M. H., 'The Notion of Justice in Akan Culture: How Consequential is it?' (2014) 2 *Contemporary Journal of African Studies* 99 – 112.

<sup>1314</sup> Elechi O. O., 'Human Rights and the African Indigenous Justice System' (2004) 2.

- (c) Whether adequate promotion and protection of human rights require judicial enforcement mechanisms at the regional level?

### **7.3 Findings**

Conclusions to each chapter of the thesis have already been made at the end of each chapter however; in order to appreciate the conclusion arrived at in this chapter it is important to show in brief, the findings of the research in line with the research questions highlighted at the beginning of the thesis.

Chapter 2 provided an historical insight into the development of human and Peoples' rights in Africa by examining the historical development of events during pre-colonial and colonial eras. The chapter examined the process of administration of justice during these periods by looking at roles played by the major actors in the administration of justice ranging from the Kings to the family heads. It also looked at the role of the colonial masters.

History plays a role in how pattern of African traditional family subsists even till today. Despite the changes that have impacted on the indigenous method of dispute resolution in Africa over time as a result of colonisation and the introduction of western style of dispute resolution, Africa has adapted rather than be overwhelmed.

### **7.4 Status of Dispute Resolution**

Upon establishing the fact that disputes resolution has always been an integral part of indigenous African societies, colonialism, urbanisation and industrialisation grew thereby alienating people and giving birth to new communities. The communities based on relationship gave way to a society made up of rights which prompted a system to mediate claims based on rights.

This led to the discussion in chapter 3 wherein the notion of justice was discussed. Here, the concepts of justice in relation to human rights from an African perspective were examined and in achieving this, an examination of African belief systems, values, culture and the economic, social and political structure of African societies was carried out.

Although what is left of traditional African society is its history, none the less it cannot be ignored as it was a victim-centred justice system aimed at restoration of victims and integrating them back into the community. The African system of justice administration promotes a spirit of communalism wherein an individual exist for the benefit of the greater community. The justice system was a negotiative and democratic one; a system where the victims, their family and the entire community participated in the identification, definition of harm and the search for restoration, healing, responsibility and prevention.<sup>1315</sup>

The African communities play a major role in dispute resolution due to the restorative nature of justice in Africa. African communities rely on each other to find solutions to problems among themselves. Indigenous African societies also dealt with human rights issues like right to life (where they believed that no one has the right to take the life of another) and freedom of association (age group societies and the women's group) among others. A situation where the victim, the offender and the community participate in defining the harm done and finding a solution to rectify such harm, all complaints and issues relevant to such a case are openly discussed. Where people are free to openly express themselves in an environment free of power there will be nothing left to embitter thereby peace will reign.<sup>1316</sup>

An understanding of the background to the African human rights regime will enable us to understand and appreciate the coming into existence of the African human rights regime. To appreciate this, chapter four of this thesis took us on an historical journey into African human rights regime.

The coming into existence of the Organisation of African Unity (now known as 'African Union') and the development of the African Charter, which marked the beginning of human rights regime in Africa after colonisation was critically analysed. The content, application, enforcement and implementation of the African Charter were looked into.

There is no denying the fact that colonialism relegated African traditions and values; it destroyed the evolution of African societies and abolished some traditional practices which were prevalent in indigenous Africa but carried into colonial African society. This can be

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<sup>1315</sup> Elechi O. O., 'Human Rights and the Africa Indigenous Justice System' (2004) 19.

<sup>1316</sup> Elechi O. O. (2004) 23.

said to be against the promotion and protection of human rights. Human rights, as argued in this thesis, are the rationale for the quest for justice, peace, reconciliation and democracy in Africa. Under the African indigenous justice system, opportunities for the achievement of justice and the respect and protection of the rights of victims, offenders and the community are higher than under African state criminal justice system. It must be noted though that in indigenous Africa societies, like other societies, there are times when ideal will contradict the practice as it relates to justice and human rights.<sup>1317</sup> Some cultural practices denied individuals or groups human dignity and human rights.

### 7.5 Human Rights Protection

The objective of the promotion and protection of human rights is to reduce their violation. The African Commission, created by Article 30 of the African Charter, is playing an important role with the implementation of human rights in Africa. Established as a quasi-judicial body, its recommendations have been ignored by States parties since it is not binding. This explains why it is termed 'toothless.'<sup>1318</sup> In chapter 5 of the thesis, an appraisal of the African Commission as an organ of human rights in Africa was done. The structure, mandate and rules of procedure of the African Commission were discussed in order to determine whether it reflects the African system of justice.

Problem of lack of awareness of the existence of the Commission, inadequate funding and independence of the Commission are some of the factors that has prevented the African Commission from being successful. Although the Commission has witnessed improved budgetary allocation of late, the need to create public awareness of the existence of the Commission and the African Charter cannot be over emphasised.<sup>1319</sup> Lack of implementation and enforcement of the Commission's recommendations is a major setback for the Commission.<sup>1320</sup> This has been associated with the refusal of minorities and indigenous communities to submit cases before the Commission.<sup>1321</sup>

The adoption of the Protocol to the African Charter raised hope among victims of human

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<sup>1317</sup> Elechi O. O. (2004) 24.

<sup>1318</sup> Viljoen & Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights: 1994 - 2004' (2007) 101 *American Journal of International Law* 1-34.

<sup>1319</sup> George Mukundi, 'African Court on Human and Peoples' Rights: 10 years on and still no Justice' (2008) 11.

<sup>1320</sup> *Civil Liberties Organisation v Nigeria* (2000) *AHRLJ* 188.

<sup>1321</sup> Mukundi (2008) 13.

rights violations that finally an end to their human rights abuses has come. But States still have a massive role to play in the Court's achievement of success. They should declare direct access to the Court for individuals and NGOs and also show political will to support the court. Furthermore, more awareness about the existence of the African Court should be created among Africans of the ability of the court to redress human rights violations in the continent.

The creativity of the judges of the African Court in the interpretation of the mandate and jurisdiction of the court will also play a role in the success story of the Court. There is a strong need for a broad interpretation of the Protocol by the judges in order to overcome the problem of implementation of the Protocol.<sup>1322</sup> This strong interpretation of the Protocol will also give an effective role to the Court in the protection of human rights in the region. The Court has the ability to take the lead on innovative trends in regional and international human rights protection if it can interpret its mandate right as spelt out under the Protocol.

## 7.6 Recommendations

In this section, recommendations to the various stakeholders involved in the administration of justice under the African Human Rights System are made. These recommendations are aimed towards having a more effective protection of human rights and justice in Africa.

### 7.6.1 State parties

State Parties must show political will to support the Court by ratifying the Court's Protocol and also declare direct access to the Court for individuals and NGOs. The Court cannot exercise its jurisdictional power over many of the State Parties due to the fact that such State Parties have not ratified the Court's Protocol. A treaty does not create either obligations or rights for a third State without its consent<sup>1323</sup> and what this means is that the Tanganyika case does not put duties and obligation on Zambia and Sierra Leone that prohibit independent candidacy because they are yet to ratify the Protocol.<sup>1324</sup>

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<sup>1322</sup> Udombana N. J., 'Towards the African Court on Human and Peoples' Rights: Better Late than Never' (2003) 3 *Yale Human Rights and Development Law Journal* 45 at 57.

<sup>1323</sup> Article 34 Vienna Convention on Laws of Treaties. See also Charney J. I., 'Universal International Law' (1993) 87 *American Journal of International Law* 529.

<sup>1324</sup> Enabulele A. O., 'Incompatibility of National Law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the Final Say?' (2016) 16 *AHRLJ* 15.

It is doubtful we witness a situation where State Parties sue each other on behalf of individuals either as an interested party for the safeguard of the African Charter or in its exercise of its rights to diplomatic protection because African States are unwilling to bring human rights claims against another African State and the African Commission is generally unwilling to refer cases to the Court.<sup>1325</sup>

Furthermore, State Parties should come up with a means by which the Judgement of the African Court will be enforced within their national frameworks. The fact that a final Judgement has been delivered by the Court and State Parties have made an undertaking (by adopting the Protocol) to comply with the decisions of the Court does not make such Judgement enforceable within member States. Likewise judicial powers of the African Court as an international Court does also not necessarily amount to compliance under the local laws of members States. What this means in essence is that the binding nature of the Judgement of an International Court, like the African Court, does not lead to compliance by Member States.<sup>1326</sup> The consequence of this on State Parties that have ratified the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights and have made the optional declaration is that they still have to face the problem of interpreting international norms into something acceptable locally.

With the new international legal regime of the African Union especially where there is no legal relationship between the African Court and the legal system of State Parties, a national judge faced with an application for the enforcement of a Judgement of the African Court to make recourse to the decision of the Court as precedence will ask himself if the Court's Protocol is recognised under their law or whether he is under any obligation to take into account, the judgement of the African Court or any of its jurisprudence. Where the national Court Judge finds that his answers to these two questions are in the negative he is likely to decline jurisdiction over such matters.<sup>1327</sup> It must be pointed out here that for African Court's Protocol to function properly within the legal system of member States it needs domestic status.

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<sup>1325</sup> *Michelot Yogogombaye v Republic of Senegal* (2010) 104 *American Journal of International Law* 620.

<sup>1326</sup> Dan Juma, 'Provisional Measures under the African Human Rights System: The African Court's Order against Libya' (2012 – 2013) 30 *Wisconsin International Law Journal* 344.

<sup>1327</sup> Frans Viljoen, 'Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa' (1999) 43 *Journal of African Law* 1.

### **7.6.2 The Role of the African Commission and the African Court**

The complementarity relationship between the African Commission and the African Court should be clearly defined. The Commission should be allowed to conduct full procedural investigation before it makes any referral to the Court and in doing this, Articles 55 and 56 of the African Charter must be taken into consideration. By doing this, all admissibility issues would have been resolved by the Commission before it is referred to the Court. It will also give opportunity to the Commission to properly outline all its decisions and consideration in a report which will form part of the referral. With this, ample time of the Court will be saved in deciding whether a case was properly conceived or not.

### **7.6.3 The Role of the AU**

The tenure of office of the Judges of the Court should be guaranteed. This, the AU can achieve by having a fixed term of office for the judges of the Court. It can either be a fixed single term of 6 years or 8 years. The essence of this is to enable the Judges focus fully on the administration of justice without the fear of reappointment. Where the judges know that their appointment is secured for the duration of their term of office, they will be able to concentrate on other things.

Furthermore, the AU should amend the instrument establishing the Court of Justice and Human Rights in order for it to allow NGOs and individuals to have direct access to the merged court. This will be in line with the notion of justice in Africa which is about fairness to all the parties involved.

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