

DOMESTIC IMPACT OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES'  
RIGHTS AND THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA:  
A CASE STUDY OF NIGERIA

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UNIVERSITY OF PRETORIA

BY

AYENI VICTOR OLUWASINA  
STUDENT NUMBER 11372002

PREPARED UNDER THE SUPERVISION OF  
PROF ATANGCHO NJI AKONUMBO

AT

ASSOCIATION FOR THE PROMOTION OF HUMAN RIGHTS IN CENTRAL AFRICA  
CATHOLIC UNIVERSITY OF CENTRAL AFRICA  
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## **DEDICATIONS**

To Prof Yemi Akinseye-Goerge and Mr Adebisi Kolawole;  
for their support, encouragement and inspiration.

To the Centre for Human Rights and the European Union;  
for the opportunity to be part of this special programme.

To all men and women who have contributed by any means to the  
implementation of the African Charter and the Women's Protocol.

## DECLARATIONS

I, AYENI VICTOR OLUWASINA, do hereby declare that this research - 'Domestic impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: A case study of Nigeria' - is my original work. It has not been submitted either in whole or in part to any other university or institution. Where other people's ideas are used, they have been duly acknowledged.

SIGNED AT **YAOUNDÉ** THIS **31ST** DAY OF OCTOBER 2011.



.....  
**AYENI VICTOR OLUWASINA**

(CANDIDATE)

E-mail: digitageglobalaccess@yahoo.com

I, ATANGCHO NJI AKONUMBO, being the supervisor, have read this research paper and approved it for partial fulfilment of the requirements of the Masters of Law Degree, Human Rights and Democratisation in Africa, of the University of Pretoria.

SIGNED AT.....THIS..... DAY OF OCTOBER 2011.

.....  
**PROFESSOR AN AKONUMBO**

(SUPERVISOR)

E-mail: atangcho@justice.com

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## LIST OF ABBREVIATIONS

ACHPR	Africa Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Report
AU	African Union
BUDFOW	Business and Development Fund for Women
CDCC	Constitution Debate Coordinating Committee
CDHR	Committee for the Defence of Human Rights
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CHR	Cases on Human Rights
DCIL	Department of Comparative and International Law
DRC	Democratic Republic of Congo
FGM	Female Genital Mutilation
HIV	Human Immunodeficiency Virus
HURILAWS	Human Rights Law Service
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Internally Displaced Persons
IHRI	International Human Rights Institution
LACoN	Legal Aid Council of Nigeria
LEDAP	Legal Defence and Assistance Project
LEAD	Leadership Empowerment and Attitude Development (LEAD Nigeria)
LFN	Laws of the Federation of Nigeria
LRC	Law Report of the Commonwealth
NAP	National Action Plan on the Promotion and Protection of Human Rights in Nigeria
NACA	National Agency for the Control of Aids
NACWIP	National Action Committee on Women in Politics
NAPTIP	National Agency on Prohibition of Trafficking in Persons
NCLR	Nigerian Constitutional Law Report
NCFR	National Commission for Refugees

NCPS	National Crime Prevention Strategy
NDDC	Niger Delta Development Commission
NDE	National Directorate of Employment
NEMA	National Emergency Management Agency
NESREA	National Environmental Standards and Regulations Enforcement Agency
NGO	Non Governmental Organisation
NHRC	National Human Rights Commission
NHRI	National Human Rights Institution
NIREC	National Inter-religious Council
NOA	National Orientation Agency
NOSDRA	National Oil Spill Detection and Response Agency
NPC	Nigerian Press Council
NPILR	Nigerian Public interest litigation report
NgHC	Nigerian High Court
NWLR	Nigerian Weekly Law Reports
OAU	Organisation of African Unity
OVC	Orphan and Vulnerable Children
FREP	Fundamental Rights Enforcement Procedure
SERAC	Social, Economic Rights Action Centre
SERAP	Social and Economic Rights Accountability Project
SSS	State Security Service
UN	United Nations
VVF	Vesico-vaginal Fistula
WILDAF	Women in Law and Development in Africa
WRAPA	Women's Rights Advancement and Protection Alternative
WOFEE	Women Fund for Economic Empowerment
WTOAT	World Trade Organisation Against Torture

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# CHAPTER ONE

## INTRODUCTION AND PRELIMINARIES

### 1.1 Background to the study

The achievements made at the continental level since 21 October 1986 when the African Charter on Human and Peoples' Rights (African Charter) came into force have been modest yet significant.<sup>1</sup> Following its adoption, the African Charter was hailed as a very ambitious document.<sup>2</sup> This is because of its uniquely African features:<sup>3</sup> emphasis on morality, anti-colonial stance, absence of derogations justiciability of economic, social and cultural rights, recognition of peoples' rights as well as the imposition of duties on states and individuals. As a result of these distinctive characteristics, many scholars have criticised the normative framework of the Charter. Sindjoun is of the view that the Charter is 'window-dressing for the purpose of acceding to international civilization.'<sup>4</sup> Ouguergouz described the rights guaranteed in the Charter as 'imprecise' and that 'the pertinent clauses of the African Charter offer only weak legal protection to the individual.'<sup>5</sup> Early writings on the Charter also raised doubts about the likelihood of its implementation.<sup>6</sup> Good or bad as the normative standards of the Charter may be, Heyns and Viljoen are of the view that 'the conceptual battle is over.'<sup>7</sup> The relevant battle now is for implementation. Thus recent discourses on the Charter have shifted from celebrating or further

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<sup>1</sup> OC Okafor *The Africa human rights system: Activist forces and international institutions* (2007) 593.

<sup>2</sup> R Murray 'The African charter on human and peoples' rights 1987-2000: An overview of its prospects and problems' (2001) 1 *African Human Rights Law Journal* 1.

<sup>3</sup> F Viljoen 'Africa's contributions to the development of international human rights and humanitarian law' (2001) *African Human Rights Law Journal* 20.

<sup>4</sup> 'simple habit de gala', 'civilisation internationale', L Sindjoun 'La civilisation internationale des murs: éléments pour une sociologie de l'ide'alisme structurel dans les relations internationales' (1996) 27 *Etudes internationales* 848 quoted in JD Boukongou 'The appeal of the African system for protecting human rights' (2006) 6 *African Human Rights Law Journal* 271.

<sup>5</sup> 'Un nouvel ordre humanitaire re'gional en Afrique', F Ouguergouz *La Charte africaine des droits de l'homme et des peuples. Une approche juridique des droits de l'homme entre tradition et modernite'* (1993) 389 quoted in Boukongou (n 4 above) 285.

<sup>6</sup> R Murray (n 2 above) 1. For an account of early writings criticising the implementation mechanism of the Charter, see R Gittleman 'The African Charter on Human and Peoples' Rights' (1981 – 1982) 22 *Virginia Journal of International Law* 694; E Bello 'The mandate of the African Commission on Human and Peoples' Rights' (1988) 1 *African Journal of International Law* 55; CE Welch 'The African Commission on Human and Peoples' Rights: A five year report and assessment' (1992) 14 *Human Rights Quarterly* 46; HJ Steiner & P Alston *International human rights in context: Law, politics and morals* (2000) 920.

<sup>7</sup> C Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* 2002 1.

criticising the Charter's distinctive normative framework to evaluating its implementation mechanism.<sup>8</sup> A system of human rights is only as good as its enforcement mechanism.<sup>9</sup>

Until 2004, the African Commission on Human and Peoples' Rights (African Commission or Commission) was the only body charged with primary responsibility for the implementation of the African Charter.<sup>10</sup> The Commission which has only recommendatory powers is entrusted with protective and promotional mandates. In the exercise of its protective mandate, the Commission examines state parties' reports and receives inter-state and individual complaints. As at July 2010, about twelve states have never submitted any report to the Commission, and additional 28 states have, at least, one report outstanding.<sup>11</sup> The complaint procedure does not portray a better picture. In a study conducted in 2003 by Lurette Louw, it was revealed that out of the 44 communications in which the Commission found violation of the Charter, only in six did the states concerned comply fully with the recommendations of the Commission.<sup>12</sup> State parties have generally ignored the Commission's recommendations(?).<sup>13</sup> In *International Pen and Others (on behalf of Ken Saro-Wiwa) v Nigeria* for instance, the Nigerian government ignored the Commission's provisional measure requesting the government to suspend execution of the Ogoni Nine pending the determination of their communication.<sup>14</sup> After having knowledge of the Commission's request, the Nigerian government proceeded with 'unseemly haste'<sup>15</sup> to execute all the nine applicants. Out of the 19 cases in which the Commission found against Nigeria, as at 2003, full compliance was recorded only in two.<sup>16</sup> In certain cases, the Commission does not even know the steps taken by the defaulting state to give effect to its recommendations.<sup>17</sup> These

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<sup>8</sup> F Viljoen 'Promising profile: An interview with the four new members of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 237.

<sup>9</sup> GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 467.

<sup>10</sup> In 2004, the African Court on Human and Peoples' Rights (African Human Rights Court) was established to complement the protective mandate of the African Commission.

<sup>11</sup> 28th Activity Report of the African Commission on Human and Peoples' Rights EX.CL/600(XVII).

<sup>12</sup> L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2005 61.

<sup>13</sup> C Mbazira 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6 *African Human Rights Law Journal* 255.

<sup>14</sup> *International Pen and Others (on behalf of Ken Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 8.

<sup>15</sup> GL Naldi 'Interim measures of protection in the African system for the protection of human and peoples' rights' (2002) 2 *African Human Rights Law Journal* 7.

<sup>16</sup> Louw (12 above) 56.

<sup>17</sup> Boukongou (n 4 above) 288.

developments seem to confirm the initial apprehension about the unlikelihood of getting African states to implement the Charter.

In 2003, the Protocol to the African Charter on the Rights of Women in Africa (Women's Protocol) was adopted in response to the lack of implementation of the African Charter and other international instruments pertaining to women, among other reasons.<sup>18</sup> The Protocol has been praised for its normative precision, African specificity and innovative approach to reproductive health rights of women, HIV, polygamy and domestic violence.<sup>19</sup> However, six years since its entering into force, no inter-state or individual communications alleging violation of the Protocol has yet been received by the Commission or the Court.<sup>20</sup> Could it be that African states have ceased to violate women's rights? It has been argued that as an integral part of the system, the Women's Protocol is likely to be impeded by the same problems of implementation that have hampered the success of the Charter.<sup>21</sup>

By ratifying the African Charter and the Women's protocol, state parties undertake to recognise all the rights, duties and freedoms enshrined in the instruments, and also to implement the provisions of these instruments in their respective states.<sup>22</sup> This obligation is peremptory.<sup>23</sup> As contended by Viljoen, the primary purpose of international human rights law is to take 'root at the national level', 'flourish in the soil of states and to bear fruits in the lives of people.'<sup>24</sup> Louis Henkin put it more comprehensively as follows:<sup>25</sup>

The purpose of international law is to influence states to recognize and accept human rights, to reflect these rights in their national constitutions and laws, to respect and ensure the enjoyment through national institutions, and to incorporate them into national ways of life.

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<sup>18</sup> F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 Washington & Lee Journal of Civil Rights & Social Justice 17; Preamble, Women's Protocol.

<sup>19</sup> F Viljoen *International human rights law in Africa* (2007) 271.

<sup>20</sup> Viljoen (n 18 above) 38-40.

<sup>21</sup> DM Chirwa 'Reclaiming (wo)manity: The merits and demerits of the African Protocol on Women's Rights' (2006) 53 *Netherlands International Law Review* 63-96.

<sup>22</sup> Art 1, African Charter; Art 26, Women's Protocol. See also Communication 251/2002, *Lawyers for Human Rights v Swaziland*, 18th Activity Report para 61.

<sup>23</sup> Communication No 211/98, *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 62.

<sup>24</sup> Viljoen (n19 above) 529.

<sup>25</sup> L Henkin 'International human rights and rights in the United States' in T Meron (ed) *Human Rights in international law: Legal and policy issues* (1984) 5 quoted in NJ Udombana 'Between promise and performance: Revisiting states' obligation under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 1.

State parties also have obligation under both the Charter and the Protocol to publicize the provisions of the Charter within their respective states.<sup>26</sup> As revealed by a former member of the African Commission, ‘the African Charter remains unknown to many people on the African continent, let alone policy makers in government’.<sup>27</sup> As the 30th anniversary of the adoption of the African Charter and 8th anniversary of the Women’s Protocol are being commemorated, ‘the national sphere’ is thus the ‘pre-eminent domain of concern.’<sup>28</sup> Taking Nigeria as a case study, this research attempts to investigate the extent to which the African Charter and the Women’s Protocol have flourished and taken roots on the Nigerian soil, and whether these instruments have made any difference to government institutions and ordinary Nigerians, whose interests the instruments are meant to serve.

The focus on Nigeria is strategic. First, Nigeria is one of the founding state parties to the African Charter and the Women’s Protocol, and the only anglophone African state to have ‘directly’ domesticated the African Charter.<sup>29</sup> Secondly, Nigeria’s population represents about 20 percent of Africa’s population.<sup>30</sup> Thus, the impact of the African Charter and the Women’s Protocol in Nigeria can be likened to the impact of the Charter and the Protocol for 20 percent of the people on the African continent. Additionally, individual communications originating from Nigeria to the African Commission constitute the largest chunk of complaints pertaining to a state party of the Charter.<sup>31</sup> In a study carried out in 1999, it was found that 28 percent of the cases finalised by the Commission pertain to Nigeria.<sup>32</sup> Another study carried out in 2003 revealed that 43 percent of the communications in which the Commission found violations as at 2003 were submitted against Nigeria.<sup>33</sup> The African Commission’s jurisprudence therefore is more about Nigeria than any other state party to the African Charter or the Women’s Protocol. Assessing the impact of these case laws jurisprudence of the Commission in Nigeria is of significance not only to Nigeria but also the rest of Africa.

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<sup>26</sup> Art, 25, African Charter; art 2(2), Women’s Protocol.

<sup>27</sup> BT Nyanduga ‘Conference paper: Perspectives on the African Commission on Human and Peoples’ Rights on the occasion of the 20th anniversary of the entry into force of the African Charter on Human and Peoples’ Rights’ (2006) 6 *African Human Rights Law Journal* 267.

<sup>28</sup> n 19 above, 529.

<sup>29</sup> AO Enabulele ‘Implementation of treaties in Nigeria and the status question: Whither Nigerian courts’ (2009) 17 *African Journal of International and Comparative Law* 326-341.

<sup>30</sup> Okafor (n 1 above) 5.

<sup>31</sup> n 1 above) 6.

<sup>32</sup> F Viljoen ‘The African Commission on Human and Peoples’ Rights: Introduction to the African Commission and the regional human rights system’ in C Heyns (ed) *Human rights law in Africa* (2004) 440.

<sup>33</sup> Louw (n 12 above) 56-60.

## 1.2 Problem statement and research questions

In Nigeria, the adoption of a new human rights instrument is eventful. The adoption of the African Charter and the Women's Protocol was particularly so.<sup>34</sup> Both state officials and the entire human rights community shared in the euphoria. But after the 'ceremony' is over and the confetti is swept away, these instruments seldom have any impact on the everyday life and the human rights situation of ordinary Nigerians, for whose benefit the instruments were ratified.

In order to investigate this problem in the context of the African Charter and the Women's Protocol in Nigeria, this research seeks to answer the following questions:

- i. What is the implementation status of the African Charter and the Women's Protocol in Nigeria?
- ii. What has been the impact of the Charter and the Protocol on the three branches of government in Nigeria; and is the impact satisfactory?
- iii. To what extent has the Charter and the Protocol made impact on the civil society and non-state actors in Nigeria; and how significant is such impact?
- iv. What factors impede or enhance the impact of the African Charter and the Women's Protocol in Nigeria?

## 1.3 Assumptions underlying the study

Four assumptions underpin this study, namely:

- i. That the Charter and the Women's Protocol are at different levels of implementation in Nigeria;
- ii. That the impact of the Charter and the Protocol on the executive and legislative authorities in Nigeria is less than satisfactory; and
- iii. That the African Charter and the Women's Protocol have had significant impact on the judiciary and civil society in Nigeria;
- iv. That creative use of article 18(3) of the African Charter (Act) has enormous potentials to enhance the impact of the Women's Protocol in Nigeria.

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<sup>34</sup> Both instruments were the first of their kind in Africa. Whilst the African Charter was the treaty that ushered Africa into an era of regional protection of human rights, the Women's Protocol is the first African effort at the regional level to put women's rights in a legally binding instrument.

## 1.4 Objectives of the study

The overall aim of this study is to assess the impact of the African Charter and the Women's Protocol on the human rights system in Nigeria. Because of its general nature, this overall objective has been broken down into specific and verifiable sub-objectives. This study therefore aims at achieving the following specific objectives:

- i. To identify the processes and reasons for ratification and domestication of the African Charter and the Women's Protocol in Nigeria;
- ii. To ascertain the constitutional status of these instruments, the extent to which the bill of rights correspond to the Charter or the Protocol and legislative efforts taken so far to align the Nigeria's bill of rights with the normative standards of the Charter and the Protocol;
- iii. To identify government policies which have been adopted or reviewed in order to give effect to the Charter or the Protocol;
- iv. To identify and critique steps taken by the government if any to give effect to the recommendations and concluding observations of the African Commission;
- v. To identify and assess all judicial references to the Charter, the Women's Protocol, the Commission's case-law or resolutions and the effect of such references on the human rights system in Nigeria;
- vi. To assess the extent of awareness and frequency of usage of the Charter, the Women's Protocol and the jurisprudence of the Commission among civil society organisations, non-governmental organisations (NGOs), legal practitioners, academics, national human rights institutions, educational institutions and the media.

## 1.5 Literature review

*Heyns and Viljoen*<sup>35</sup> described the domestic impact of human right treaties as any influence the treaties may have had in ensuring the realization of the norms they espouse in the individual countries. They also argue that the impact of a treaty may occur at two levels. The first level is the domestic enforcement of international human rights standards handed down through state reporting and individual complaints. The second level which of course is rarely considered is the 'internalization' of international human rights norms at the domestic level.<sup>36</sup> *Heyns and Viljoen* however did not address the subject matter of the present study.

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<sup>35</sup> Heyns & Viljoen (n 7 above)

<sup>36</sup> As above.

*Viljeon and Louw*<sup>37</sup> used the terms ‘impact’ and ‘effect’ interchangeably. They drew a distinction between the direct and indirect effects of human rights treaties. According to them, while the direct effect of a human rights treaty is immediate, the indirect effect may be less immediate and therefore less observable. However, *Viljoen and Louw’s* work is focused only on state compliance with the recommendations of the African Commission.

*Steiner and Alston*<sup>38</sup> equate ‘impact’ with ‘influence’ but added rather narrowly that in order to demonstrate that an international human rights institution (IHRI) has significantly influenced the system in practice in a given country, it must be shown that the given state had in fact complied with the decisions of the IHRI. Following this compliance-based model of impact assessment, a number of highly respected writers and commentators have described the African Charter as well as the Women’s Protocol and their implementation mechanisms as weak, ineffectual and dysfunctional.<sup>39</sup> For instance, *Gittleman*<sup>40</sup> see the Charter as ‘woefully deficient.’ *Steiner and Alston*<sup>41</sup> described it as the ‘least developed.’ In terms of impact, *Oloka-Onyango*<sup>42</sup> stated over a decade ago that the African Commission ‘has hardly made a dent.’ These views are inspired primarily by the non-compliance of states with the recommendations and concluding observations of the African Commission. None of these works, however, conceptualised the possibility of impact outside the narrow prism of state compliance.

Interestingly, *Kingsbury*,<sup>43</sup> *Shelton*<sup>44</sup> and *Okafor*<sup>45</sup> have criticised the compliance-centred approach to impact assessment. *Okafor*, for instance, argued against what he described as ‘compliance-centrism’ and ‘state-centrism’ of impact studies.<sup>46</sup> He opined that ‘compliance in and of itself does not exhaust the totality of ways in which international norms ... can have significant effects.’<sup>47</sup> He also emphasized the need to pay more attention to non-state actors and the civil society in impact analyses. Although *Okafor* rightly pointed out the significance of

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<sup>37</sup> Viljeon, F & Louw, L ‘State compliance with the recommendations of the African Commission on Human and Peoples’ Rights, 1993 – 2004 (2007) 101 *American Journal of International Law* 1.

<sup>38</sup> Steiner & Alston (n 6 above) 771.

<sup>39</sup> n 1 above, 41.

<sup>40</sup> Gittleman (n 6 above) 694.

<sup>41</sup> Steiner & Alston (n 6 above) 920.

<sup>42</sup> J Oloka-Onyango ‘Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons?’ (2000) 6 *Buffalo Human Rights Law Review* 72.

<sup>43</sup> B Kingsbury ‘The concept of compliance as a function of competing conceptions of international law (1998) 19 *Michigan Journal of International Law* 346.

<sup>44</sup> D Shelton ‘Law, non-law and the problem of ‘soft law’’ in D Shelton (ed) *Commitment and compliance: The role of non-binding norms in the international legal system* 2000 5.

<sup>45</sup> n 1 above, 92.

<sup>46</sup> n 1 above, 43&49.

<sup>47</sup> n 1 above, 33.

'correspondence in norms' as an alternative impact indicator, his work does not probe among other things the correspondence between the African Charter on the one hand, and the Nigerian Constitution, post-1999 legislations and policies on the other hand. *Okafor's* work also does not address the impact of the Women's Protocol in Nigeria. The advocacy tool produced by the *Centre for Human Rights, University of Pretoria*<sup>48</sup> is probably the pioneering study on the impact of the Women's Protocol. The advocacy tool however does not explore the impact of the Women's Protocol in Nigeria.

Primarily, this study seeks to complement the existing work on the impact of the African Charter in Nigeria. In doing so, the study will introduce fresh perspectives and also address some of the grey areas in existing literatures. No research has yet been undertaken on the impact of the Women's Protocol in Nigeria. In that respect, some measure of original thinking will be attempted.

## **1.6 Significance and scope of the study**

A study of the domestic impact of the African Charter and Women's Protocol is a very significant task in itself. This is because the success or failure of any international human rights system depends on the impacts it makes on the system in practice at the country level.<sup>49</sup> This study is even more crucial because of its focus on Nigeria. As earlier alluded to, Nigeria is one of the founding state parties to the African Charter and the Women's Protocol, and the only anglophone African state to have 'directly' domesticated the African Charter. As a result of the high level of engagement with the African Charter system by Nigerian civil society organisations, the African Commission's jurisprudence is more about Nigeria than any other state party to the African Charter or the Women's Protocol.<sup>50</sup> If the African Charter and the Women's Protocol are shown to have made any significant impact in Nigeria, that would be an impact in a direct sense for 20 percent of Africans.<sup>51</sup>

Currently, academic work on the impact of the African Charter and the Women's Protocol is meagre. The few available works are narrowly confined to domestication,

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<sup>48</sup> Centre for Human Rights, University of Pretoria *The impact of the Protocol on the Rights of Women in Africa on violence against women in six selected Southern African countries: An advocacy tool* 2009.

<sup>49</sup> Heyns & Viljeon (n 7 above).

<sup>50</sup> n 1 above, 5.

<sup>51</sup> n 1 above, 6.



implementation and application<sup>52</sup> or states' compliance with the Commission's recommendations.<sup>53</sup> Clearly, impact analysis covers a much wider field than implementation and state's compliance. It includes for the purpose of this study all forms of influence and effect which the African Charter and the Women's Protocol exert on state institutions, non-state actors and the civil society in Nigeria. Although the recent works by *Okafor*<sup>54</sup> and the *Centre for Human Rights*<sup>55</sup> are excellent models of impact studies on the African Charter and the Women's Protocol, these two leading works are limited in certain respects, as already pointed out in the literature review. This research therefore aims to be the most extensive study so far on the impact of the African Charter and the Women' Protocol on the human rights regime in Nigeria.

## 1.7 Research methodology

This research is essentially qualitative in nature. It follows the exploratory research design. In addition to intensive literature reviews and desktop study, the research involved a number of semi-structured interviews. An interview guide was prepared, a copy of which was administered on the respondents. The research also involved a review of Nigeria's periodic reports to the African Commission on Human and Peoples' Rights, the Commission's concluding observations in respect of Nigeria, decisions on communication involving Nigeria, Nigeria's official documents, hansards, minutes of parliamentary proceedings, newspaper articles, media reports, domestic court decisions, academic writings and NGO publications. Data obtained from the foregoing sources were analysed in order to determine the impact of the two instruments under study on the human rights system in Nigeria. In conducting the data analysis, the study employed impact measuring indicators sampled from existing impact studies. This has helped to guarantee some consistency in scope and depth with existing impact studies.

## 1.8 Delineations and limitations of the study

This study is limited to the impact of the African Charter and the Women's Protocol within Nigeria. Reference to other instruments or jurisdictions is for the purpose of shedding light on the issue under discussion only. Due to practical constraints, the impact of the Charter and the

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<sup>52</sup> F Viljeon 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1; CN Ojukwu 'Enforcement of the African Charter on Human and Peoples' Rights as a domestic law in Nigeria' (2000) 25 *International Legal Practitioner* 140; M Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in the light of the SERAC communication' (2003) 3 *African Human Rights Law Journal* 167.

<sup>53</sup> Wachira & Ayinla (n 9 above) 467; Viljeon & Louw (n 37 above) 1.

<sup>54</sup> n 1 above, 1-323.

<sup>55</sup> Centre for Human Rights (n 48 above).

Protocol on transnational corporations and other conventional non-state actors has been excluded from this study. The analysis on non-state actors is limited to NHRIs.

## **1.9 Synopsis of chapters**

The research is presented in five chapters. The present chapter which is adapted from the research proposal is the first chapter of the dissertation. In specifics, the chapter introduces the background to the research, objectives of the research, the research questions, significance of the research, the research limitations, methodology and a review of the relevant literatures. Chapter two provides useful background information about Nigerian legal system, the African Charter and the Women's Protocol. The chapter also interrogates issues such as ratification, domestication and status of the African Charter and Women's Protocol in Nigeria. Chapter three assesses the impact of the African Charter and the Women's Protocol on executive and legislative actions in Nigeria. And just like chapter three, chapter four investigates the impact of the African Charter and the Women's Protocol on judicial decisions, civil society and non-state actors in Nigeria. In chapter five, an attempt is made, albeit briefly, to explore the factors which enhanced or may enhance the impact of the African Charter and the Women's Protocol in Nigeria. The chapter ends with conclusions and some recommendations.

## CHAPTER TWO

### THE AFRICAN CHARTER SYSTEM AND NIGERIA

#### 2.1 Introduction

The idea of a regional mechanism for the protection of human rights in Africa was first mooted some 50 years ago at the first Congress of African Jurist held in Lagos Nigeria in 1961.<sup>56</sup> A regional human rights convention could not, however, be adopted in the 1960s because the Organisation of African Unity (OAU) now African Union (AU) favoured a policy of non-interference in the domestic affairs of members states over the need to protect human rights.<sup>57</sup> Following series of pressure from the civil society and the United Nations, the Assembly of Heads of States and Government of the OAU (now AU Assembly) adopted the African Charter on 27 June 1981. The Charter finally came into force on 21 October 1986 after ratification by an absolute majority of member states of the OAU. All member states of the OAU/AU are now parties to the African Charter.

#### 2.2 The African Charter

The African Charter consists of 68 articles, divided into three parts, namely; 'rights and duties', 'measures of safeguard' and 'general provisions'. The Charter contains a number of unique features; what some authors have referred to as the African fingerprints.<sup>58</sup> Whereas at the international level, the first and second 'generations of rights' are contained in two distinct documents,<sup>59</sup> the African Charter integrates the libertarian, egalitarian and solidarity rights into one justiceable instrument.<sup>60</sup> Another distinctive feature in the Charter is peoples' rights. The Charter guarantees peoples' right to equality, existence, free disposal of their wealth and natural resources, development, peace and security as well as generally satisfactory environment.<sup>61</sup>

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<sup>56</sup> G Baricako 'Introductory preface: The African Charter and African Commission on Human and Peoples' Rights' in M Evans & R Murray *The African Charter on Human and Peoples' Rights: The system in practice 1986 – 2006* 1.

<sup>57</sup> F Viljoen 'The African Charter on Human and Peoples' Rights: The travaux preparatoire in the light of subsequent practice (2004) 25 *Human Rights Law Journal* 313.

<sup>58</sup> M Mutua 'The Banjul Charter and the African cultural fingerprint: An assessment of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; Viljoen (n 19 above) 237.

<sup>59</sup> International Covenant on Civil and Political Rights (ICCPR) 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>60</sup> Udombana (n 25 above) 12-117.

<sup>61</sup> Arts 19-24, African Charter.

The African Charter also contains individual duties and state obligations. Most scholars agree that the Charter is the first human rights treaty to elaborate on the duties of individuals even though the actual normative value of such provisions remains largely disputed.<sup>62</sup> Unlike the ICCPR, ICESCR and other regional treaties, the African Charter does not allow derogation from its provisions even in situations of war or public emergency.<sup>63</sup> The only legitimate reason for limiting any of the rights contained in the Charter is provided in article 27(2) (of the Charter).<sup>64</sup>

The Charter established the African Commission on Human and Peoples' Rights (African Commission) as its primary supervisory body. The main mandates of the Commission are protective and promotional.<sup>65</sup> In specifics, article 45 of the Charter empowers the Commission to promote and protect human and peoples' rights, interpret the provisions of the Charter and perform any other tasks entrusted to it by the OAU Assembly of Heads of States and Government (now AU Assembly). In the exercise of its promotional mandate, the Commission has examined periodic reports submitted by state parties, undertaken promotional visits to states parties, created special mechanisms comprising special rapporteurs and working groups, adopted resolutions, organised seminars, and established a robust relationship with NGOs and national human rights institutions (NHRIs). In the exercise of its protective mandate, the Commission has received complaints from state parties as well as individuals and NGOs.<sup>66</sup> Deriving inspiration from article 56(1) of the Charter, the Commission has laid down very generous jurisprudence in respect of standing requirement for individual communications.<sup>67</sup> The Commission has also been very creative and dynamic in interpreting the provisions of the Charter.<sup>68</sup> This has toned down the effect of the Charter's 'opaque wordings',<sup>69</sup> masculine language,<sup>70</sup> claw-back clauses<sup>71</sup> and minimalist content.<sup>72</sup> The African Commission has also

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<sup>62</sup> UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 64; Mutua (n 57 above) 339; Viljoen (n 19 above) 248.

<sup>63</sup> *Commission Nationale des Droits de l'Homme et des libertes v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21.

<sup>64</sup> *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 41.

<sup>65</sup> Art 45, African Charter.

<sup>66</sup> CA Odinkalu & A Christensen 'The African Commission on Human and Peoples Rights: The development of non-state communication procedures' (1998) 20 *Human Rights Quarterly* 237-239; arts 47-55, African Charter.

<sup>67</sup> *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 78; *World Trade Organisation Against Torture (WTOAT) and Others v Zaire*, (2000) AHRLR 74 (ACHPR 2000).

<sup>68</sup> C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 157-158.

<sup>69</sup> See CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment (1998) 8 *Transnational Law and Contemporary Problems* 406.

<sup>70</sup> K Kibwana 'Empowering the African woman: A study of the protection of women's rights under the African Charter on Human and Peoples' Rights and a proposal regarding the development of a Charter on the rights of the African Woman' (1995) 5 *Review of African Commission on Human and Peoples' Rights* 7.

developed interesting jurisprudence on the rights of indigenous peoples,<sup>73</sup> the right to environment,<sup>74</sup> development,<sup>75</sup> peace and security<sup>76</sup> and other substantive rights in the Charter.<sup>77</sup> Even though the findings of the Commission are not legally binding on states, they have formidable moral clout and could be used by domestic courts as persuasive authorities or interpretive guidance. The findings are also useful advocacy tools for NGOs and civil society.

## 2.3 The Women's Protocol

The Protocol to the African Charter on the Rights of Women in Africa was adopted by the AU Assembly in Maputo, Mozambique on 11 July 2003. After achieving the required 15 ratifications, the Protocol came into force on 25 November 2005. Prior to the adoption of the Protocol, the existing instruments on women's rights in Africa include the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child (African Children's Charter). Although majority of African states were parties to these three instruments, women in Africa continued to suffer discrimination.<sup>78</sup> Soon, it became obvious that the normative content of the African Charter in respect of women was grossly inadequate to address the plights of women in Africa.<sup>79</sup> Apart from the non-discrimination and equality clauses,<sup>80</sup> the only reference to women in the African Charter is found in the provision dealing with the family. This indicates, as some writers have pointed out, that women's rights are viewed by the drafters of the Charter only within the family context.<sup>81</sup> Thus, the adoption of a supplemental instrument to the African Charter was motivated primarily by the need to compensate for the normative inadequacy of the

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<sup>71</sup> n 19 above, 414.

<sup>72</sup> n 19 above, 238.

<sup>73</sup> *Centre for Minority Rights Development (Kenya) and Another v Kenya (Endorois Case)* Twenty-seventh Annual Activity Report.

<sup>74</sup> *Social Economic Right Action Centre (SERAC) and Another v Nigeria (Ogoniland case)* (2001) AHRLR 60 (ACHPR 2001) paras 50-52.

<sup>75</sup> *Endorois Case* (n 73 above) paras 269-298.

<sup>76</sup> *Democratic Republic of Congo (DRC) v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) para 73; *Malawi African association and Others v Mauritania* (n 67 above) para 139.

<sup>77</sup> For a brief overview of the Commission's case law on each of the substantive rights in the Charter, see C Heyns & M Killander *Compendium of key human rights documents of the African Union* 2010 214-216.

<sup>78</sup> Preamble, Women's Protocol.

<sup>79</sup> I Eze-Anaba 'Domestic violence and legal reforms in Nigeria: Prospects and challenges' (2007) 14 *Cardozo Journal Of Law & Gender* 31; n 19 above, 269; n 18 above.

<sup>80</sup> Arts 2&3, African Charter.

<sup>81</sup> Centre for Human Rights (n 48 above) 2.

Charter in respect of women's rights.<sup>82</sup> Another reason for the Protocol was the need to improve on the implementation of the existing norms.<sup>83</sup>

The Women's Protocol speaks with much specificity to the actual concerns of African women. It situated CEDAW within African reality.<sup>84</sup> The Protocol is widely regarded as the first legally binding international treaty to provide for the right to medical abortion,<sup>85</sup> protection against HIV/AIDS infections,<sup>86</sup> the right to know the HIV status of one's partner, 'regulation' of polygamy,<sup>87</sup> and prohibition of domestic violence.<sup>88</sup> Other salient provisions in the Protocol include the rights of women to peace, political participation, and access to justice,<sup>89</sup> prohibition of child marriage and female genital mutilation (FGM),<sup>90</sup> provision for economic and social welfare rights for women,<sup>91</sup> protection of vulnerable women,<sup>92</sup> endorsement of affirmative action<sup>93</sup> and recognition of women's right to participate in peace building and all decision making processes.<sup>94</sup> 'Traditional African values', a concept which has generated much controversy under the African Charter<sup>95</sup> is clearly defined by the Protocol to include values based on 'the principles of equality, peace, freedom, dignity, justice, solidarity and democracy.'<sup>96</sup> Recognising the limits of the law in effecting social change in deep-seated societal notions about patriarchy, the Protocol requires states to strive to 'modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies.'<sup>97</sup> States are also obliged to take all appropriate measures to eliminate stereotypes in textbooks, syllabuses and the media.<sup>98</sup> In relation to the African Charter and CEDAW, the Protocol contains a wider socio-economic rights provision ranging from rights to education, socio-economic welfare and food security to housing rights.

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<sup>82</sup> See F Banda 'Brazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72; MS Nsibirwa '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* 41.

<sup>83</sup> n 19 above, 268. See also preamble to the Protocol.

<sup>84</sup> n 19 above, 271; n 18 above, 21.

<sup>85</sup> Art 14(2), Women's Protocol.

<sup>86</sup> Art 14(1).

<sup>87</sup> Art 6(c).

<sup>88</sup> Art 4(2), Women's Protocol. See generally n 19 above; n 18 above and n 48 above.

<sup>89</sup> Art 9.

<sup>90</sup> Art 5.

<sup>91</sup> Art 13.

<sup>92</sup> Arts 22-24.

<sup>93</sup> Art 2(d).

<sup>94</sup> Art 9.

<sup>95</sup> See Article 29(2), African Charter.

<sup>96</sup> Preamble, Women's protocol.

<sup>97</sup> Art 2(2), Women's Protocol.

<sup>98</sup> Art 12 (1)(b), Women's Protocol.

To enable states implement its provisions, the Protocol places an obligation on states to reduce their military expenditure in favour of spending on social development and promotion of women.<sup>99</sup> Article 26 of the Protocol requires states parties to include in their periodic report to the African Commission pursuant to article 62 of the African Charter a report on the legislative and other measures they have taken to implement the provisions of the Protocol.<sup>100</sup> The Commission is also empowered to interpret the provisions of the Protocol pending the establishment of the African Court on Human and Peoples' Rights (African Human Rights Court).<sup>101</sup>

## **2.4 Nigeria, the African Charter and the Women's Protocol**

Nigeria is a federation of 36 states and 774 local government areas. Each state, like the national government, has its own apparatus of government: executive, legislature and judiciary. The national legislature otherwise called National Assembly is bicameral comprising a Senate and a House of Representative while the states' legislatures are unicameral. The executive arms at the national and state levels are headed by a president and governors respectively. Each state has its own judicial system from which appeal lie ultimately to the Supreme Court of Nigeria. As required of a federation, each of the tiers of government has exclusive spheres of operation. For instance, only the National Assembly may make laws in respect of matters listed in the Exclusive Legislative List.<sup>102</sup> Both the national and states assemblies have legislative competence over items listed in the Concurrent Legislative List.<sup>103</sup> The executives of the federation and states are responsible for performing 'executive duties' in respect of matters over which their respective legislatures have competence as set out the Exclusive and Concurrent Legislative Lists.<sup>104</sup>

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<sup>99</sup> Art 10(3), Protocol.

<sup>100</sup> In 2010, the African Commission adopted the Guidelines for Reporting on the Women's Protocol. The Guideline is reprinted in Heyns & Killander (n 77 above) 206.

<sup>101</sup> Art 32, Women's Protocol.

<sup>102</sup> See section 4(2)&(3) of the 1999 Nigeria Constitution (Nigerian Constitution or the Constitution). See also Parts I of the Second Schedule to the Constitution.

<sup>103</sup> See section 4(4)&(6). See also Part II of the Second Schedule to the Constitution.

<sup>104</sup> Section 5(1)&(2), Nigerian Constitution.

### 2.4.1 Process of ratification and domestication

The President is vested with power to conduct all external relations, including negotiation and ratification of international treaties, on behalf of Nigeria.<sup>105</sup> This power may be exercised by the President personally or through the Vice-President, minister or any duly designated officer.<sup>106</sup> The National Assembly is empowered to implement or in technical term 'domesticate' international treaties duly entered into by the president.<sup>107</sup> As the law currently stands, the National Assembly has no competence to ratify treaties between Nigeria and other countries.<sup>108</sup> Although the President may notify the National Assembly of his or her intention to ratify a treaty, there is no obligation to do so; neither can such a notification, without more, be regarded as a request for the National Assembly to ratify, that is, domesticate the treaty.<sup>109</sup> Nigeria ratified the African Charter on 22 June 1983 and the Women's Protocol on 16 December 2004.

The process of domestication depends largely on the subject matter of treaty being implemented. Where the subject of the treaty relates to any of the items under the Exclusive Legislative List, the treaty would be deemed to have been duly domesticated upon a law passed to that effect by the National Assembly.<sup>110</sup> However, where the subject matter of the treaty falls outside the Exclusive Legislative list, a law to domesticate such a treaty must be duly passed by the National Assembly and further ratified by a majority of the 36 state houses of assembly.<sup>111</sup>

### 2.4.2 Domestication of the African Charter and Women's Protocol in Nigeria

Domestication of treaties may take place at two levels: directly through incorporation or, indirectly through transformation.<sup>112</sup> Viljoen describes incorporation as the wholesale enactment of the provisions of a treaty, usually with specific reference to the treaty being incorporated.<sup>113</sup>

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<sup>105</sup> See Items 26&31 of Part I of the Second Schedule to the Constitution. See also E Egede 'Bringing human rights home: An examination of the Domestication of human rights treaties in Nigeria (2007) 51 *Journal of African Law* 250.

<sup>106</sup> See section 5(a) of the 1999 Nigerian Constitution.

<sup>107</sup> Section 12, Nigerian Constitution.

<sup>108</sup> AA Akinbuwa 'The concept of women's rights in Nigeria' (2009) 15 *East African journal of Peace and Human Rights* 474.

<sup>109</sup> As above .

<sup>110</sup> Section 12(1)&(2), Nigerian Constitution.

<sup>111</sup> Section 12(1)-(3), Nigerian Constitution.

<sup>112</sup> J James-Eluyode 'Enforcement of international humanitarian law in Nigeria' (2003) 3 *African Human Rights Law Journal* 266.

<sup>113</sup> n 19 above, 536.



On the other hand, transformation takes place where a domestic legislation is enacted or amended to conform with a treaty usually without any explicit reference to the treaty.<sup>114</sup>

Nigeria ratified the African Charter on 22 June 1983. However, 'prior' to this ratification, the Nigerian National Assembly, on 17 March 1983, passed a legislation titled African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act in order 'to enable effect to be given to the African Charter'.<sup>115</sup> Up to the time of this study, Nigeria is the only anglophone country in Africa to have directly domesticated the African Charter.<sup>116</sup> No official reasons could be found for this prompt domestication of the Charter. The only hint is a portion of the implementing legislation which states 'WHEREAS ... Nigeria is desirous of adhering to the said Charter.'<sup>117</sup> Since Nigeria in 1983 was not a model in terms of adherence to human rights treaties, the actual reason for domestication of the Charter must be located outside the preambular provision.

By ratifying the Women's Protocol on 16 December 2004, Nigeria ranked as the 6th state party to the Protocol.<sup>118</sup> While some attempts have been made at domesticating or implementing CEDAW, Nigeria has not taken any concrete steps towards domesticating the Women's Protocol.<sup>119</sup> Does that mean that the Women's Protocol is not part of the domestic law in Nigeria? The argument has been made that article 18(3) of the African Charter incorporates into the Charter by express reference internationally recognised women's rights instruments by obliging states to ensure the protection of the rights of women and the child as 'stipulated in international declarations and conventions.'<sup>120</sup> Viljoen and some human rights experts are of the view that article 18(3) makes CEDAW for instance applicable to all state parties to the African Charter irrespective of their ratification status under CEDAW.<sup>121</sup> It is further submitted that even the Women's Protocol could be considered part of the Charter under this provision.<sup>122</sup> The implication of such indirect incorporation for a dualist state like Nigeria is to empower domestic

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<sup>114</sup> As above.

<sup>115</sup> Preamble, African Charter Act, CAP 10 LFN 1990.

<sup>116</sup> n 19 above.

<sup>117</sup> Preamble, African Charter Act.

<sup>118</sup> See table of ratification of the Women's Protocol at

[http://achpr.org/english/ratifications/ratification\\_women%20protocol.pdf](http://achpr.org/english/ratifications/ratification_women%20protocol.pdf) (accessed 4 September 2011).

<sup>119</sup> Report of the 2nd Stakeholders Meeting on Domestication and Implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (held in Nairobi – Kenya from 5 - 7 April 2011) 19.

<sup>120</sup> n 19 above, 270.

<sup>121</sup> n 19 above; Women in Law and Development in Africa (WiLDAF) Nigeria, *Advocacy for better implementation of women's rights in Nigeria* (2002) 5 available at [www.wildaf-ao.org](http://www.wildaf-ao.org) (accessed 4 September 2004).

<sup>122</sup> See similar argument in Viljoen (n 32 above) 497-498.

courts to invoke the provisions of the Protocol through article 18(3) of the 'African Charter Act' even though the Protocol has not been specifically domesticated.

### 2.4.3 Status of the African Charter and Women's Protocol in Nigeria

Two principal theories govern the status as well the relationship between international law and domestic law. These are: monism and dualism. The world's legal systems are divided roughly along these two theories.<sup>123</sup> Most of the common law countries adopt the dualist theory following British constitutional tradition and the civil law countries following French constitutional law adopt the monist theory.<sup>124</sup> Under the monist system, international law and domestic laws form part of a single system of law. Thus, international agreements duly ratified and published by a monist state automatically become part of the domestic *corpus juris*.<sup>125</sup> Such treaties enjoy primacy over other domestic legislations.<sup>126</sup> In dualist systems on the other hand, international law and domestic laws are considered two separate legal systems. Duly ratified treaties do not become part of the domestic laws until such treaties are domesticated.

Nigeria has adopted the dualist approach.<sup>127</sup> Section 12 of the Nigerian 1999 Constitution provides as follows:<sup>128</sup>

No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

The status of the African Charter, domesticated as the African Charter Act, in relation to other national legislations received considerable attention in the case of *Abacha v Fawehinmi*.<sup>129</sup> In that case, Fawehinmi was arrested without a warrant and detained by members of the State Security Service (SSS). Fawehinmi alleged that his arrest and detention violated the 1979 Nigerian Constitution and provisions of the African Charter Act. During the hearing of the case,

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<sup>123</sup> The dichotomy between monism and dualism has been severely criticised. Some commentators now contend that application of international treaties depends on whether the treaty is self-executing or non-self-executing rather than whether the state applying the treaty is monist or dualist. See n 19 above, 534.

<sup>124</sup> ME Adjami 'African courts, international law, and comparative case law: Chimera or emerging human rights jurisprudence?' (2002) 24 *Michigan Journal of International Law* 103; n 19 above, 531&535.

<sup>125</sup> C Harland 'The status of the International Covenant on Civil and Political Rights in the domestic laws of state parties: An initial global survey through the UN Human Rights Committee documents' (2000) 22 *Human Rights Quarterly* 187.

<sup>126</sup> Umozurike (n 62 above) 107.

<sup>127</sup> *Abacha v Fawehinmi* May [2000] 6 NWLR (Pt 660) 228 SC; *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Part 498) 124 at 150.

<sup>128</sup> See also section 12(1) of the Nigerian 1979 Constitution; section 13 of the 1989 Nigerian Constitution, Sec 74 of the 1963 Nigerian Constitution, and sec 69 of the 1960 Nigerian Constitution,

<sup>129</sup> [2000] 6 NWLR (Part 660) 228.

counsel for Abacha raised a preliminary objection contending that the court was incompetent to hear the case since its jurisdiction has been ousted by various decrees. Counsel for Fawehinmi on the other hand argued that the African Charter Act vests the court with jurisdiction to adjudicate over violations of human rights notwithstanding the ouster clauses contained in the decrees. The Court was therefore invited to pronounce on the hierarchical relationship between the African Charter Act and the military decrees which allegedly ousted the court's jurisdiction. The trial court ruled in favour of the military decrees. On appeal, the Court of Appeal overruled the trial court, thereby upholding the supremacy of the African Charter Act over the decrees and all other domestic legislations including the Constitution.<sup>130</sup> In arriving at this decision, the court asserted that the African Charter Act is legislation with an international flavour and that Nigeria cannot through a decree or other domestic legislations contract out its international obligation under the Charter.<sup>131</sup> On further appeal to the highest court, the Supreme Court, there was a unanimous finding that the African Charter Act was superior to every other domestic legislation in Nigeria except the Constitution.<sup>132</sup> Their lordships further stated that in the case of conflict between the African Charter Act and other existing or subsequent domestic legislations, the African Charter Act shall prevail. However, the legislature may by an express provision of a subsequent legislation repeal or amend the African Charter Act.<sup>133</sup> Although there is no case-law on the status of the Women's Protocol, it is only logical to conclude that in line with Nigeria's dualist tradition, the Protocol technically does not form part of Nigerian laws until it has been duly domesticated.

#### 2.4.4 Compatibility analysis

In most francophone African countries, international treaties are ratified only after compatibility studies comparing the treaties with domestic legislations have been undertaken.<sup>134</sup> Where a proposed treaty conflicts with domestic legislations, the treaty is usually ratified after the conflicting provisions in the national legislation have been amended.<sup>135</sup>

No evidence was found during this study of a compatibility enquiry undertaken in Nigeria prior to the ratification of either the African Charter or the Women's Protocol. As a result, real

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<sup>130</sup> *Fawehinmi v Abacha* [1996] 9 NWLR (Part 475) 710.

<sup>131</sup> *Fawehinmi v Abacha* (n 130 above) 747.

<sup>132</sup> *Abacha v Fawehinm* (n 127 above) 289-343.

<sup>133</sup> As above.

<sup>134</sup> M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 5.

<sup>135</sup> As above.

conflict still exists between the African Charter as well as the Women's Protocol on the one hand, and Nigeria's national laws on the other. Whereas under the African Charter, both civil and political rights as well as socio-economic rights are justiceable, the fundamental rights provisions of the Nigerian Constitution are limited to only civil and political rights.<sup>136</sup> Socio-economic rights generally are non-justiciable.<sup>137</sup> The Nigerian Constitution also does not recognise the rights of peoples to existence, free disposal of their wealth and natural resources, development, peace and security as well as generally satisfactory environment.<sup>138</sup> Although some provisions in the Directive Principles in Chapter Two of the Constitution speak to peoples' rights, these Directive Principles are not enforceable in court.

Notwithstanding the provision of section 42 of the Nigerian Constitution which generally prohibits discrimination on a number of grounds including sex, several domestic laws in Nigeria still conflict with the Women's Protocol. Section 26(2) of the Nigerian Constitution for instance limits women's rights to transmit their nationality to their foreign spouses. Sections 228 - 230 of the Criminal Code still criminalise medical abortion. Section 357 of the Criminal Code justifies marital rape. Wife 'beating' is permitted in Northern Nigeria under section 55 of the Penal Code. A comprehensive table of compatibility between Nigerian laws and the African Charter as well as the Women's Protocol is attached to this study as Annex I.

## 2.5 Conclusion

Treaties like humans have life cycles; and scholars have described the life cycle of a treaty in varied ways. Muluwa identified four phases: initiation, formulation, adoption and entry into force.<sup>139</sup> Viljoen however proposed the following seven-phase model:<sup>140</sup> elaboration, adoption, ratification, entry into force, operationalisation, domestication, and internalisation. This chapter has reviewed albeit briefly the first six phases in respect of the African Charter and the Women's Protocol. The chapter has also attempted to demonstrate the various stages of implementation as well as compatibility of national laws with the African Charter and the Women's Protocol.

From the analysis, two issues of concern deserve some reiteration. One is the number of national laws that are still in conflict with the Women's Protocol. The other subject of concern is

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<sup>136</sup> Chapter IV, Nigerian Constitution.

<sup>137</sup> Section 6(6)(c), Nigerian Constitution. See Archbishop *Okogie v Attorney General of Lagos State* (1981) 2 NCLR 337 at 350.

<sup>138</sup> Sections 14-17 as well as section 6(6)(c), Nigerian Constitution.

<sup>139</sup> T Muluwa 'International law-making in the Organisation of African Unity: An overview' (2000) 12 *African Journal of International and Comparative Law* 201.

<sup>140</sup> n 19 above, 20.

the near absence of concrete effort to domesticate the Women's Protocol. Domestication is a *sine qua non* for the implementation of the Women's Protocol. Until full domestication is achieved however, the author is of the view that article 18(3) of the African Charter has enormous potential as a formidable entry point for the implementation of the Women's Protocol.

## CHAPTER THREE

### IMPACT OF THE AFRICAN CHARTER AND THE WOMEN'S PROTOCOL ON EXECUTIVE AND LEGISLATIVE ACTIONS IN NIGERIA

#### 3.1 Introduction

Article 1 of the African Charter provides that 'parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt *legislative and other measures* to give effect to them.'<sup>141</sup> The Women's Protocol provides in similar terms.<sup>142</sup> The African Commission has described the duty to 'take legislative and all other necessary measures' as peremptory, and the foremost obligation of states under the Charter.<sup>143</sup> This chapter will focus on two of the measures which states are required to take to implement the Charter and the Protocol, namely legislative and executive measures. The assumption here is that the impact of the African Charter and the Women's Protocol on legislative and executive actions in Nigeria though significant has been less than satisfactory.

#### 3.2 Impact on executive actions

Between 1984 and mid-1998, Nigeria was notorious for its antagonistic posture towards the African Charter and the activities of the African Commission. The strained relationship was the result of the African Commission's repeated condemnations of the Nigerian military administration in series of communications and resolutions. Following expression of intention by the Commission in 1995 to undertake a mission to Nigeria, the Nigerian government persistently refused to grant permission to the Commission until 1997.<sup>144</sup> Provisional measures and decisions on merit issued by the Commission were disregarded in a number of communications.<sup>145</sup> Country-specific resolutions adopted by the Commission in respect of Nigeria were hardly ever complied with.<sup>146</sup> The government repeatedly criticised the Commission for intruding into Nigeria's domestic affairs through its communication and other

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<sup>141</sup> Emphasis mine.

<sup>142</sup> Arts 26&27, Women's Protocol.

<sup>143</sup> *Legal Resources Foundation v Zambia* (n 23 above); *Udombana* (n 25 above) 121.

<sup>144</sup> n 19 above, 365.

<sup>145</sup> *International Pen case* (n 14 above); Communication 101/93, *Civil Liberties Organisations v Nigeria* 8th Annual Activity Report.

<sup>146</sup> n 1 above, 120-121.

procedures.<sup>147</sup> Against this backdrop, it is apposite to inquire whether the African Charter and the Women's Protocol have made any difference to the behaviours of the executive branch of government in Nigeria. A few of the instances where the Charter and the Protocol appear to have exerted some influence on executive actions will now be considered.

### **3.2.1 Designation of focal points on implementation of the Charter and the Protocol**

At its Thirteenth Ordinary Session, the African Commission recommended to the OAU Assembly of Heads of States and Governments to direct all member States of the African Charter to designate high ranking officials in their respective countries to act as Focal Point(s) in the relations between the African Commission and the States.<sup>148</sup> This recommendation was approved by the OAU Assembly at its Twenty-Ninth Ordinary Session in 1993.<sup>149</sup> Since then, several state parties have designated their focal points.

The Federal Ministry of Justice is the 'focal point' responsible for coordinating Nigeria's response and responsibilities on the African Charter.<sup>150</sup> The actual department in charge of the ministry's activities in respect of the Charter is the Department of Comparative and International Law (DCIL).<sup>151</sup> The national focal point for the implementation of the Women's Protocol is the Federal Ministry of Women Affairs.<sup>152</sup> Based specifically on the African Commission's recommendation, a National Working Group on Human Rights Treaty Reporting has been established.<sup>153</sup> The working group is mandated among other things to ensure effective coordination and regular consultations among stakeholders in line ministries, departments and agencies; and also to ensure follow-up actions on concluding observations and recommendations of the African Commission and other treaty monitoring bodies.

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<sup>147</sup> ACHPR, Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights' Second Extraordinary Session of ACHPR, Kampala, 18-19 December, 1995, DOC. II/ES/ACHPR/4.

<sup>148</sup> Sixth Activity Report of the African Commission (1992-1993) 105-106.

<sup>149</sup> Resolution on the African Commission on Human and Peoples' Rights, Twenty-Ninth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, 28 - 30 June 1993, Cairo, Egypt available at <http://www1.umn.edu/humanrts/africa/resafchar29th.html> (accessed 1 October 2011).

<sup>150</sup> Nigeria: Third Periodic Report to the African Commission (2008) 15; Nigeria's Fourth Periodic Report to the African Commission (2008) 5.

<sup>151</sup> The DCIL is located within the Federal Ministry of Justice Complex, Maitama District, Abuja Nigeria.

<sup>152</sup> Nigeria: Initial Country report on implementation of AU Solemn Declaration on Gender Equality in Africa (2004-2006).

<sup>153</sup> Nigeria's Fourth Periodic Report to the African Commission (2011) 18.

### 3.2.2 Implementation of the African Commission's recommendations

Contrary to popular assertions that the recommendations of the African Commission have generally been disregarded by states,<sup>154</sup> this study finds that in a significant number of cases, states have complied with or at least implemented the Commission's recommendations. The study also finds that the popular assertions on state's non-compliance are generally not supported with empirical evidence<sup>155</sup> and in most cases overly exaggerated.<sup>156</sup> In an empirical study conducted by Viljoen and Louw in 2003, it was revealed that out of the 44 communications in which the Commission found violations of the Charter between 1987 and mid-2003, some form of compliance (whether full, partial or situational) was recorded in 27 cases representing 62 percent of the total number of communications finalised by the Commission.<sup>157</sup>

Between 1987 and 2010, a total of 31 communications were submitted to the African Commission in respect of Nigeria.<sup>158</sup> Out of these communications, eight were declared inadmissible; three were withdrawn; one was resolved via friendly settlement; and 19 were declared admissible.<sup>159</sup> Violations were found in all the 19 communications that were found to be admissible. Out of the 19 cases in which the Commission found violations against Nigeria, full compliance with the recommendations of the Commission was recorded only in two; partial compliance in 14<sup>160</sup> and total non-compliance in three.<sup>161</sup> Each of these forms of compliance will be interrogated a little further.

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<sup>154</sup> N Enonchong, 'The African Charter on Human and Peoples' Rights: effective remedies in domestic law?' (2002) 46 *Journal of African Law* 197; F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 13; Wachira & Ayinla (n 9 above) 471; Mbazira (n 13 above).

<sup>155</sup> Louw (n 12 above) 21.

<sup>156</sup> See for example the statement by the Chairperson of the Commission at its 22nd Session that 'none of the decisions on individual communications taken by the Commission and adopted by the [AU] Assembly had ever been implemented.' R Murray 'Report on the 1997 sessions of the African Commission on Human and Peoples' Rights – 21st and 22nd Sessions: 15 – 25 April and 2-11 November 1997' (1998) 19 *Human Rights Law Journal* 170; OAUDOC/OS/50b(XXIV).

<sup>157</sup> Viljoen & Louw (n 37 above) 1-34; n 19 above, 357.

<sup>158</sup> This information is based on facts available on the Commission's website: [http://www.achpr.org/english/\\_info/index\\_Decision\\_Nigeria.html](http://www.achpr.org/english/_info/index_Decision_Nigeria.html) (accessed 3 October 2011).

<sup>159</sup> These figures are based on the author's analysis of all the 31 communications submitted to the Commission in respect of Nigeria. See Analysis of the Communications against Nigeria in Annex II.

<sup>160</sup> n 12 above, 56. This rate of partial compliance reduces if the 10 cases of situational compliance are treated as non-compliance.

<sup>161</sup> As above.



(a) *Full compliance*

In *Constitutional Rights Project v Nigeria*,<sup>162</sup> five Nigerians, accused of various acts of robbery as well as kidnapping of children, were arrested and detained by the Nigerian military government without trial for about two years. Constitutional Rights Project, on behalf of the detainees submitted a communication to the African Commission. In its findings, the Commission found Nigeria in violation of the applicant's rights to personal liberty and fair trial as enshrined in articles 6 and 7 of the African Charter. The Commission urged Nigeria to charge or release the complainants. Soon after the Commission's decision, the Nigerian government complied by charging the detainees.<sup>163</sup>

In another case, *Centre for Free Speech v Nigeria*,<sup>164</sup> four Nigerian journalists were tried and convicted secretly by a military tribunal. During the trial, they were not allowed access to counsels of their choice. The military decree setting up the tribunal also ousted the jurisdiction of ordinary courts. The complainants thus were without a right of appeal. In a communication submitted on their behalf by the Centre for Free Speech, the African Commission found Nigeria in violation of articles 6, 7 and 26 of the African Charter. The Commission urged the Nigerian government to release the journalists. They were eventually released.<sup>165</sup>

(b) *Partial compliance*

Partial compliance was recorded in another four cases.<sup>166</sup> In *Constitutional Rights Project (in respect of Akamu, Adegba and Others) v Nigeria*,<sup>167</sup> the complainants had been convicted and sentenced to death by a military tribunal. The decree under which they were convicted prohibited the courts from entertaining an appeal arising from the tribunal's verdict. The complainants argued that the absence of judicial appeals for judgments of the tribunal violated their rights under article 7(1)(a) of the African Charter. After consideration of the Communication, the African Commission recommended that the complainants should be released. Although the complainants were not released, the death sentence imposed upon them was commuted to terms of imprisonment.<sup>168</sup> In a similar case, *Constitutional Rights Project (in*

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<sup>162</sup> (2000) AHRLR 248 (ACHPR 1999).

<sup>163</sup> n 37 above, 10.

<sup>164</sup> (2000) AHRLR 250 (ACHPR1 999).

<sup>165</sup> n 12 above.

<sup>166</sup> As above.

<sup>167</sup> (2000) AHRLR 180 (ACHPR 1995).

<sup>168</sup> n 12 above, 26

*respect of Zamani Lekwot and Six Others) v Nigeria*,<sup>169</sup> the African Commission recommended the release of the complainants who had been sentenced to death (by hanging) on allegation of causing civil disturbances. Following the Commission's recommendation, the complainants' death sentence was commuted to five year imprisonment; they were later released.<sup>170</sup> In another case, *Constitutional Right Project v Nigeria*,<sup>171</sup> 11 soldiers who had been detained unjustly for about nine years were released consequent upon the Commission's recommendations.<sup>172</sup> They were however not paid any compensation as recommended by the Commission.

Following the Commission's recommendations in *SERAC v Nigeria*,<sup>173</sup> the Nigerian government in 2006 established the National Oil Spill Detection and Response Agency with responsibility for detecting and responding to cases of all oil spillages in Nigeria. In 2007, a fully fledged ministry, Ministry of Niger Delta Affairs was established with special mandate on the development of the Niger Delta area. This was followed by the design of a development Master Plan for the Niger Delta. The Niger Delta Development Commission (NDDC) which was established in 2000 (while the communication was pending before the Commission) has also taken some measures to address health and development concerns of the Ogoni people.<sup>174</sup> However, some critical aspects of the Commission's recommendations, such as the requirement of impact assessment, prosecution of erring officials, and comprehensive clean-up of the Ogoniland are yet to be addressed.<sup>175</sup>

### *(c) Situational compliance and total non-compliance*

The then military junta in Nigeria clearly failed to comply with the Commission's recommendations in 13 cases. However, upon return to civil rule in 1999, the Commission's recommendations in at least ten cases were to some extent implemented.<sup>176</sup> A number of military decrees earlier declared by the African Commission to violate the African Charter were repealed or amended.<sup>177</sup> Some of the detainees that have been vindicated by the African

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<sup>169</sup> (2000) AHRLR 183(ACH PR 1995).

<sup>170</sup> n 1 above) 124; n 12 above, 27.

<sup>171</sup> (2000) AHRLR 241 (ACHPR 1999).

<sup>172</sup> n 12 above, 36.

<sup>173</sup> *Ogoniland case* (n 74 above).

<sup>174</sup> Linde & Louw (n 52 above) 184.

<sup>175</sup> As above.

<sup>176</sup> n 12 above, 56.

<sup>177</sup> See Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree 63 of 1999.

Commission were also released.<sup>178</sup> If these ten cases of 'situational compliance' are taken off, the recommendations of the Commission in at least three communications have not been complied with or implemented by the Nigerian government till date. But if these cases of situational compliance are treated as non-compliance, then Nigeria's non-compliance status stands at 13 communications, approximately 68 percent. No communication has so far been filed against Nigeria under the Women's Protocol. The question of state compliance in that regard therefore does not arise for the purpose of this study.

### **2.2.3 Implementation of the Commission's concluding observations**

Nigeria has thus far complied with its reporting obligation under the Charter, having submitted four periodic reports to the African Commission. The first report was submitted in 1990; second in 2003; third in 2008; and fourth in 2011. However, the Commission's practice in respect of concluding observations was not fully developed until 2001,<sup>179</sup> thereby limiting this study to the second, third and fourth reports. The concluding observations in respect of the second periodic report could not be accessed by the author. There is also no information in the third periodic report on steps taken by the government to implement the Commission's observations on the second periodic report. However, the fourth periodic report outlined specific steps taken by the government to implement observations made by the Commission in the third periodic report.<sup>180</sup> Each of the areas of concerns, matters for follow up and recommendations made in the concluding observation was responded to. A closer look at the responses however reveals that five out of the seven recommendations are yet to be fully implemented.<sup>181</sup>

### **3.2.4 Policy reforms**

The African Charter and the Women's Protocol have inspired the development of a number of national policies in Nigeria. These policies seek to protect human rights in general or the rights of specific group of people. Unlike legislations, policies are usually comprehensive, flexible and goal-oriented. Although these policies are not legally binding, they provide moral compass for legal actions. National policies have functioned as the preferred entry point in cases where mainstream perceptions stand in the way of an implementing legislation. In some cases, the

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<sup>178</sup> n 12 above.

<sup>179</sup> n 19 above, 387. See Fourteenth Activity Report of the African Commission.

<sup>180</sup> Nigerian Fourth Periodic Report to the African Commission (2011) 6-14.

<sup>181</sup> See recommendations 35, 36, 37, 41 & 42 of the Concluding Observations and Recommendations on the Third Periodic Report of the Federal Republic of Nigeria.

policies have served as 'interpretive guidance' to the courts and advocacy tools for NGOs. Two principal policies relevant for this study are: The National Action Plan for the Promotion and Protection of Human Rights in Nigeria 2009-2013, and the National Gender Policy 2007.

The National Action Plan (NAP) for the Promotion and Protection of Human Rights in Nigeria was developed in response to the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in Vienna Austria in 1993.<sup>182</sup> Although the NAP document claims that the rights contained in the document are drawn from domestic, regional and international human rights instruments,<sup>183</sup> an intimate look at the NAP document shows significant influence of the African Charter. For instance, the NAP document recognises the rights to development, peace and protected environment. There is no question about these rights been the African Charter's 'fingerprints' on the NAP document. In addition, the document contains over 50 references to the African Charter.<sup>184</sup>

The National Gender Policy was adopted in 2007. It replaced the erstwhile National Policy on Women of 2000. The Gender Policy is aligned with the provisions of major international instruments on women's rights, including the Women's Protocol. Although the Women's Protocol was not the only inspiration for the new Gender Policy, there are a number of reasons to believe that the entering into force of the Women's Protocol played crucial role in mobilising support for the new gender policy. The process that culminated in the adoption of the Policy started in August 2006,<sup>185</sup> less than a year after the Protocol came into force and within one month after Nigeria submitted its initial report on the AU Solemn Declaration on Gender Equality in Africa. The Gender Policy contains at least four references to the Women's Protocol. The Policy also reinforces article 2(d) of the Women's Protocol by adopting 35 percents affirmative action in favour of women. The affirmative action clause of the Policy was used by various women's rights organisations in Nigeria to push for and realise 31 percent women representation in the present national cabinet.<sup>186</sup>

In addition of these principal policies, a number of national policies have been adopted to promote specific provisions of the African Charter and the Women's Protocol. Although these policies do not in most cases reference the Charter and the Protocol, they represent as

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<sup>182</sup> NAP Document (2009 - 2013) 4.

<sup>183</sup> NAP (2009-2013) 8-10.

<sup>184</sup> The Women's Protocol is referred to only about eight times in the NAP documents.

<sup>185</sup> National Gender Policy (2007)

<sup>186</sup> See 'Nigerian women take key cabinet posts' < <http://www.afronline.org/?p=17786>> (accessed 18 October 2011)

contended by Viljoen a form of 'transformation' – internalising international treaty norms without explicit reference to the treaties. A list of the relevant policies, setting out the provisions of the Charter and Protocol which they seek to promote, is attached as Annex III.

### 3.3 Impact on legislative actions

The ultimate objective of the international human rights system is to ensure that states adhere to the dictates of human rights treaties within their territories. Such adherence may be achieved either by directly 'enforcing' treaty norms or by obliging states to adopt national laws that are consistent with treaty norms.<sup>187</sup> Under the African human rights system, there is generally no effective mechanism for 'direct enforcement' of treaty norms. Thus efficacy of human rights treaties in Africa may depend essentially on their incorporation into national laws. Udombana contends that any attempt to examine the impact of treaties on domestic legislations must begin with the constitution.<sup>188</sup> This is because the constitution is the foundation of the legal system and the blue-print for inter-governmental relations. This is more so in Nigeria where the dualist system has been adopted. The impact of the African Charter and the Women's protocol on the Constitution and other domestic legislations will be the next focus of this chapter.

#### 3.3.1 The constitution

The African Charter did not play any clear role during the drafting process of the 1999 Nigerian Constitution.<sup>189</sup> This is because the 1999 Constitution is a near-verbatim adaptation of Nigeria's 1979 Constitution, which predated the Charter.<sup>190</sup> The bills of rights in the 1979 and 1999 Constitutions are identical except for some slight variations in numbering. As a result, there is no explicit reference to the African Charter in the entire 318 sections of the 1999 Constitution. There is also no reference to the Charter in some of the drafting documents reviewed during this study.<sup>191</sup> In fact, human rights was not included in the Terms of Reference (ToR) of the Constitution Debate Coordinating Committee (CDCC) that prepared the initial draft of the 1999 Constitution.<sup>192</sup> The only item of the ToR that shared some semblance with human rights is the

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<sup>187</sup> HJ Steiner, P Alston & R Goodman *International human rights in context: Law, politics and morals* 2007 1087.

<sup>188</sup> Udombana (n 25 above) 47.

<sup>189</sup> See Speech Delivered by the Chairman of the Constitution Debate Coordinating Committee (CDCC), Justice Niki Tobi, while presenting the Committee's report to the Head of State, General Abdulsalami Abubakar <On file with the author>

<sup>190</sup> As above.

<sup>191</sup> See speech (n 189 above)

<sup>192</sup> As above.

proposal to create a Constitutional Court with power to handle election petitions and matters pertaining to the enforcement of fundamental rights. This proposal was eventually dropped. Clearly, the Constitution predates the Women's Protocol. For that reason, the question of the protocol influencing the Constitution-making process does not arise.

### 3.3.2 Other legislations

The African Charter has influenced legislative outcomes in Nigeria in at least two major ways. There are cases of direct causality and also instances of correspondence in norms.

#### *(a) Direct causality*

Soon after the African Charter was adopted by the OAU Assembly, the Nigerian National Assembly on 22 June 1983 passed the African Charter (Ratification and Enforcement) Act, thus incorporating the African Charter into the Nigerian legal system. This Act remains the most significant impact of the African Charter on legislative business in Nigeria. However, less than 6 months after this domestication, Nigeria's democratic government was overthrown in a military *coup d'état*, which led to series of military juntas that lasted between 31 December 1983 and 28 May 1999. Ironically, the clearest illustration of the potential impact of the African Charter on domestic legislations is to be found during these extremely repressive military regimes.<sup>193</sup>

In 1987, the then junta in Nigeria promulgated a decree – the Civil Disturbances (Special Tribunal) Decree. This Decree set up a special tribunal to try persons accused of causing civil disturbances. Membership of the tribunal as stipulated by the Decree included a superior court judge and four other members, one of which must be a serving member of the Armed Forces. Right of appeal was not allowed against the decisions of the tribunal. The jurisdiction of courts was also ousted. This Decree was challenged in a number of communications submitted to the African Commission, and the Commission found the Decree to be a violation of the African Charter. The Commission's decisions were used widely by activist organisations to mount pressure on the government for an amendment or repeal of the decree. On 5 June 1995, the Decree was amended.<sup>194</sup>

On another occasion, activist organisations within Nigeria used the Commission's decisions to press for the repeal of the State Security (Detention of Persons) (Amendment) Decree 2 of 1994. This Decree which was promulgated by the then military government of

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<sup>193</sup> Viljoen (n 38 above) 7.

<sup>194</sup> For a more detailed account of the process leading up to the repeal of the Decree, see generally n 1 above, 128-130.

Nigeria empowered law enforcement officers to detain persons for acts prejudicial to state security for up to six months. Section 2A of the Decree prohibited the courts from issuing writ of *habeas corpus* for the release or production in court of the detainees. In a number of communications as in the earlier case, the African Commission condemned this Decree as a flagrant violation of the right to liberty and fair trial under the Charter. As a result of massive condemnation by NGOs and civil society organisations; using the Commission's decisions as a reference point; the Decree was repealed in June 1996.<sup>195</sup> Upon transition to democracy in 1999, a number of decrees which were subject of litigation in various communications before the Commission were also repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree 63 of 1999.

In a study conducted in 1999 on the domestic impact of the UN human rights treaties, Heyns and Viljoen argued that a direct causal link between the treaty system and legislative reforms at the domestic level is often difficult to establish conclusively.<sup>196</sup> Domestic legislative reforms may have been inspired by a number of factors including political and other considerations.<sup>197</sup> In all the cases referred to above, the influence of other factors such as the suspension of Nigeria from the Commonwealth of Nations and the widespread international criticisms cannot be ruled out from the list of causal factors. What is however certain is that the African Charter norms and the Commission's repeated condemnation were among the foremost considerations that triggered the legislative reforms.

### *(b) Correspondence in norms*

A number of human rights related legislations have been adopted since Nigeria transitioned to civil rule in 1999. This includes relatively recent ones such as the Freedom of Information Act 2011, National Health Act 2008, Universal Basic Education Act 2004, Trafficking in Persons Prohibition Act 2003 and the Child's Rights Act 2003. It is however difficult to establish any connection between these legislations and the African Charter as well as the Women's Protocol. In a review of all post-1999 legislations, carried out during this study, explicit reference to the Charter was found only in two legislations: National Human Rights Commission (Amendment) Act 2010 and the Treaty to Establish the African Union (Ratification and Enforcement) Act 2003. There is no reference to the Women's Protocol in all the post-2005 legislations reviewed. Terse

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<sup>195</sup> See State Security (Detention of Persons) (Amendment) (Repeal) Decree 18 of 1996. See n 10 above, 132-134.

<sup>196</sup> Heyns & Viljoen (n 7 above) 4.

<sup>197</sup> As above

allusions were however made to the African Commission's jurisprudence in some official documents, and memos used by NGOs to lobby legislators and mobilise public support for the adoption of some legislations.<sup>198</sup>

Another interesting discovery is the number of state legislative assemblies that have adopted laws on important provisions of the Women's Protocol, such as gender equality, trafficking in women, domestic violence, female genital mutilation, harmful traditional practices, reproductive health rights, prohibition of early marriage, and protection of widows.<sup>199</sup> It is, however, doubtful whether these laws were adopted *chiefly* to give effect to the Women's Protocol. Viljoen is of the view that 'it is the guarantee of particular rights that is important and not the route or chain that brought them there.'<sup>200</sup> One would agree here with Viljoen. It is further submitted that although the relevant domestic laws do not refer to the African Charter or the Women's Protocol, substantial correspondence exists between the norms espoused by these legislations and the norms prescribed by Charter and the Protocol. This again raises a strong inference of domestication by 'transformation'.<sup>201</sup> Annex IV contains a table of the relevant domestic laws, with an indication of the specific provisions of the Charter and the Protocol which the laws may have 'assimilated'.

### 3.4 Conclusion

This chapter has examined the impact of the African Charter and the Women's Protocol on the drafting of the Nigerian Constitution and other national laws. The chapter also analysed the relationship between specific government policies and the African Charter as well as the Women's Protocol. In respect of government's compliance with the recommendations of the African Commission, the study has demonstrated that the picture is not as gloomy as critics suggest.<sup>202</sup> It would be recalled that before the SERAC communication was finalised by the Commission, the newly constituted democratic government of Nigeria had taken some steps towards redressing the Ogoniland situation.<sup>203</sup> This in the author's view is an indirect impact of

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<sup>198</sup> See for instance Freedom of Information Coalition 'Memorandum on the Freedom of Information Bill submitted to the House of Representatives Joint Committee' <[http://www.humanrightsinitiative.org/programs/ai/rti/international/laws\\_papers/nigeria/Memo%20submitted%20to%20FOI%20Committee.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/nigeria/Memo%20submitted%20to%20FOI%20Committee.pdf)> (accessed 18 October 2011)

<sup>199</sup> See Annex IV.

<sup>200</sup> n 19 above, 537.

<sup>201</sup> See n 19 above, 536.

<sup>202</sup> Of course, it is also not as promising as sycophants contend.

<sup>203</sup> *Note Verbale* submitted by the government of Nigeria at the 28th Ordinary Session of the Commission held in Cotonou, Benin; *Ogoniland case*, (n 74 above) para 30.



the communication procedure under the African Charter. States are constrained to take some pre-emptive 'house-keeping' measures to redress the violation or simply to save their face before the African Commission. The inclusion, in the Nigeria's Fourth Periodic Report, of steps taken to implement the Commission's concluding observations is also considered laudable.

However, most of the Bills which the Commission recommended for adoption into law in the concluding observation are yet to be passed into law. As demonstrated in Annexes III and IV, there are no specific national laws or policies on, for example, the rights of elderly women and women with disability. Even the National Gender Policy hardly touches on these subjects. A great majority of the policies referred to in this study are mostly inaccessible to the public. Some members of the public do not even know of their existence.

One striking feature of the analysis on national legislations is the lack of concrete legislation at the national level addressing women's concerns as stipulated in the Women's Protocol. Most of the laws corresponding with the Protocol are state laws. While this may be a logical consequence of Nigeria's federal nature, and by extension demonstrates the centrality of state legislations in any effort to assess the impact of the African Charter and the Women's Protocol in Nigeria, the author is of the view that erratic state laws cannot substitute for national implementing legislations. As evident in the analysis and the relevant annexure, most of the state laws are lacking in depth and details. Worse still, the laws are couched in generic language as opposed to legally enforceable language. The recurrent theme in each of these analyses is that generally, the impact of the Charter and the Protocol on the legislative and executive authorities in Nigeria though significant has been less than satisfactory.

## CHAPTER FOUR

### IMPACT OF THE AFRICAN CHARTER AND THE WOMEN'S PROTOCOL ON JUDICIAL DECISIONS, CIVIL SOCIETY AND NON- STATE ACTORS IN NIGERIA

#### 4.1 Introduction

The African Charter obliges state parties to guarantee the independence of courts<sup>204</sup> as well as provide right of appeal to competent national organs in case of violations of the rights enshrined in the Charter.<sup>205</sup> State parties also undertake under article 26 of the Women's Protocol to provide 'appropriate remedies' to any woman whose rights under the Protocol are violated. These provisions underscore the crucial role of the justice system especially at the national level in the realisation of the rights enshrined in the Charter and the Protocol. This chapter examines the application of the African Charter and the Women's Protocol by domestic courts in Nigeria. In addition, the chapter will investigate the extent to which the civil society and non-state actors within Nigeria have deployed the Charter and the Protocol in their programmes and activities. The assumption here is that the African Charter, and to some extent the Women's Protocol, has had far reaching impact on judicial decisions and civil society activities generally in Nigeria.

#### 4.2 Impact on judicial decisions

Due to practical reasons including resource constraints, a country-wide assessment of all court decisions was not undertaken during this study. Although account was taken of landmark human rights cases since 1983 when Nigeria ratified the Charter, 'systematic analysis' was carried out only in respect of human rights cases reported by the *Nigerian Weekly Law Reports* (from 1986 to 2010) and the *Cases on Human Rights* (from 2008 to 2010). The cases reviewed covered decisions of the various hierarchies of courts, with human rights competence – high court, courts of appeal and the Supreme Court. Altogether, this study finds references to the African Charter in at least 70 (reported) cases, a list of which is attached as Annex V. No reference was made to the Women's Protocol in all the cases reviewed. In view of this limited judicial application of the Protocol, the ensuing discussion will focus more or less on the Charter. Based on a review of the 70 cases, the African Charter appears to have influenced the judiciary in Nigeria in at least three ways. These include the use of the Charter as independent

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<sup>204</sup> Art 26, African Charter

<sup>205</sup> Art 7(a), African Charter

basis of remedy and interpretive guidance; the development of African Charter supremacy jurisprudence, and the reform of fundamental rights enforcement procedures. Each of these will now be analysed in turn.

#### 4.2.1 African Charter supremacy argument

As early as 1990, the Nigerian Court of Appeal in the case of *Oshevire v British Caledonian Airways Ltd*<sup>206</sup> laid down the principle that a treaty which has been ratified and domesticated by Nigeria, (being an agreement of an international character which no State party can unilaterally modify) is superior to other domestic laws. This decision was followed in a long line of subsequent cases,<sup>207</sup> each of which cannot be examined here due to space constraint. However, the main jurisprudence of the courts in all these cases can be summarised as follows:<sup>208</sup>

- i. Treaties which have been ratified by Nigeria and domesticated cannot be modified or abrogated unilaterally by the Nigerian government. Such treaties can only be modified if they are renegotiated with other state parties;
- ii. International treaties which have been ratified and domesticated in Nigeria are of *sui generis* character. They cannot be subsumed under the hierarchy of domestic laws. Such treaties are superior to other domestic legislations in Nigeria;
- iii. The African Charter Act is a statute with international flavour. Where there is a conflict between the African Charter Act and other domestic legislations, the Charter's provisions will prevail over those of other domestic legislations based on the principle that Nigeria cannot through other domestic legislations 'contract out' its international obligation under the African Charter Act.
- iv. The provisions of the African Charter Act do not override the Constitution; neither does its international flavour prevent the legislature from 'expressly' amending or repealing it.

The main contributions of the African Charter supremacy argument are two-fold: It enabled courts to apply the higher, more progressive standards in the Charter as against restrictive

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<sup>206</sup> (1990) 7 NWLR 507.

<sup>207</sup> *UAC of Nigeria v Global Transporte Oceanic SA*(1996) 5 NWLR 291; *Constitutional Rights Project v Babangida and Others* (Unreported) suit M/102/92 (5 May 1992); *Comptroller of Nigerian Prisons v Dr Femi Adekanye and Twenty-Six Others* (1999) 10 NWLR 400; *Fawehinmi v Abacha*(1996) 9 NWLR 710 (CA); *Chima Ubani v Director of State Security Service* (1999) 11 NWLR 129; *Abacha v Fawehinmi* (2000) 13 NWLR (part 660) 228 (SC).

<sup>208</sup> OJ Ojigbo 'Evaluating the application, implementation and enforcement of international human rights instruments and norms in Nigeria' (2005) 31 *Commonwealth Law Bulletin* 109; n 1 above, 110.

provisions in Nigerian laws; secondly, it empowered domestic judges to continue to discharge their functions on the basis of the Charter although some domestic legislation have ousted their jurisdiction. The following dictum in the case of *Akinnola v Babangida*<sup>209</sup> demonstrates the creativity with which the African Charter was applied by domestic courts as an alternative, perhaps superior, basis of adjudication. In that case, the court was invited to invalidate the Newspaper Decree 43 of 1993. Although this decree expressly ousted the jurisdiction of courts, the court nevertheless held.<sup>210</sup>

Since the courts have held that the African Charter (Act) is like an enactment of the Federal Government like a decree, it follows that if there is a conflict between an enactment ousting the jurisdiction of the Court and another which does not, the Court should lean more on the one (referring to the African Charter) that preserves its jurisdiction.

#### 4.2.2 Reform of the Fundamental Rights Enforcement Procedure Rules

Another vital influence of the African Charter on the Nigerian judiciary is the reform of Fundamental Rights Enforcement Procedure (FREP) Rules. As a result of the delay and prohibitive cost usually associated with court processes, the FREP Rules was designed in 1979 to provide a special, fast-track and cost-effective judicial procedure for the enforcement of fundamental rights.<sup>211</sup> Because the Rules predated the adoption of the African Charter, no reference was made to the Charter in the Rules; and no Rules were made subsequently for the enforcement of the rights in the African Charter. Confronted with this tricky situation, the Supreme Court in what appeared to be a very liberal construction of the applicable laws held in *Ogugua v The State*<sup>212</sup> that although the 1979 FREP Rules did not prescribe procedures for the enforcement of the rights in the Charter, the provisions of the Charter are nonetheless enforceable under the FREP Rules. This reasoning was adopted in a number of subsequent cases.<sup>213</sup>

In 2009, the 1979 FREP Rule was abrogated and replaced with the 2009 FREP Rules. Under the new Rules, the African Charter is referenced in a number of provisions. The Overriding Objectives of the Rules, for instance, state as follow.<sup>214</sup>

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<sup>209</sup> Reprinted in (1994) *Journal of Human Rights Law and Practice* 250.

<sup>210</sup> As above.

<sup>211</sup> See sec 42, 1979 Nigerian Constitution; sec 46, 1999 Nigeria Constitution.

<sup>212</sup> (1994) 9 NWLR 1, 26-27.

<sup>213</sup> See *Nemi v The State* (1994) 1 LRC 376; *Bamidele v Professor Grace Alele-Williams* Suit B/6M89 (Benin High Court); *Ohakosin v Commissioner of Police, Imo State* (2009) 15 NWLR (part 1164) 229.

<sup>214</sup> Preamble, 2009 FREP Rules (Emphasis mine)

The Constitution especially Chapter IV as well as *the African Charter* shall be expansively and purposively interpreted and applied, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.

### 4.2.3 Interpretive guidance

The Charter is hardly invoked as a guide to clarify the human rights provisions in the Constitution. The only case that came close to using the Charter as an interpretive tool is *Agbakoba v Director of State Security Service*.<sup>215</sup> In this case, Mr Agbakoba's international passport was impounded by officials of the State Security Service, without any explanations offered to him. He petitioned the Director of the State Security Service and the Attorney General of Nigeria. He also filed a suit at the High Court for the enforcement of his right to movement. The High Court dismissed his claim arguing that the passport was a property of the Nigerian government which could be retrieved anytime. On appeal, the Appeal Court held that Mr Agbakoba's right to movement was violated. On further appeal, the Supreme Court upheld the decision of the Court of Appeal by specifically seeking guidance from the freedom of movement provision under article 12(2) of the African Charter.<sup>216</sup>

### 4.2.4 Basis of remedy

In a long line of cases, the African Charter and even the recommendations of the African Commission were used as basis for seeking remedies before domestic courts in Nigeria. Only few representative cases are referred to in subsequent paragraphs.<sup>217</sup>

In *Comptroller of Nigerian Prisons v Dr Femi Adekanye and Others*,<sup>218</sup> twenty-seven persons were arrested and detained for about 30 months under the Failed Bank (Recovery of Debts) and Financial Malpractices in Banks Decree 18 of 1994. They applied to the High Court for their release. Meanwhile, the Decree under which they were detained precluded courts from reviewing anything done pursuant to the decree. Notwithstanding the ouster provision, the trial court assumed jurisdiction, and gave judgment for the applicants. On appeal, the Court of Appeal, relying only on the African Charter invalidated several provisions of the offending decree. The Court also pointed out that the decree 'totally destroys the presumption of

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<sup>215</sup> (1994) 6 NWLR 475.

<sup>216</sup> As above. See also n 1 above, 106.

<sup>217</sup> See Annex V a detailed list.

<sup>218</sup> (1999) 10 NWLR 400

innocence in favour of the accused under article 7 of the African Charter.<sup>219</sup> In the words of the Appeal Court:

If I had to consider the issue of jurisdiction of the High Court in this matter without reference to the African Charter, I would not have had the slightest hesitation in concluding that the High Court had not supervisory jurisdiction in this matter.<sup>220</sup>

In *Jonah Gbemre v Shell Petroleum Development Company of Nigeria and two Others*,<sup>221</sup> Mr Gbemre filed a suit at the Federal High Court, Benin Division for himself and on behalf of the Iwherekan Community in Delta State, Nigeria. The applicant asked the court for a declaration that Shell's continued flaring of gas in the course of its exploration activities constitutes a violation of the rights to life and dignity the Iwherekan people, as provided in the Nigerian Constitution 'and reinforced by Articles 4, 16 and 24 of the African Charter Act.'<sup>222</sup> In its judgment, the court, per CB Nwokorie found among others that section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations of 1984, under which gas flaring in Nigeria may be allowed are inconsistent with the applicant's rights to life and dignity as prescribed in sections 33(1) and 34(1) of the Nigerian Constitution and articles 4, 16 and 24 of the African Charter Act.

The Charter has also been applied as basis of remedy in several other cases.<sup>223</sup> One recurring feature in all the foregoing cases, including the 70 cases referred to in Annex V, is the general enthusiasm of the judiciary when applying the African Charter. The study finds a number of creative judicial applications of the Charter between 1990 and 1998. However, since return to civil rule in 1999, the Charter has been referenced more frequently as a matter of routine rather than for effect. Despite the high judicial patronage of the Charter, the Women's Protocol has not enjoyed similar benefaction. The Protocol, as alluded to earlier, has scarcely made any dent on the judiciary.

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<sup>219</sup> n 218 above, 423.

<sup>220</sup> n 218 above, 419.

<sup>221</sup> (2005) AHRLR 151 (NgHC 2005); Suit No: FHC/B/CS53/05. Judgment delivered on 14 November 2005.

<sup>222</sup> Applicant's pleadings, available at <http://www.climatelaw.org/cases/case-documents/nigeria/nileadings.doc> (accessed 3 October 2011)

<sup>223</sup> See *Garuba and Nine Others v Attorney General of Lagos State* Suit ID/599M/91 (31 October 1991); *Inspector General of Police v All Nigeria Peoples' Party* (2008) CHR 131; *Okeke v Rear Admiral Arogundade* (2009-2010) CHR 22; *Moujekwu v Ejikeme* (2000) 5 NWLR (part 567) 402, 409. See also Annex V.

### 4.3 Impact on civil society and non-state actors

Traditionally, international human rights law draws a clear distinction between governmental and non-governmental as well as state and non-state entities.<sup>224</sup> States are generally considered to bear primary responsibility for the protection of human rights.<sup>225</sup> Human rights violations by non-state actors are treated as part of the state's duty to ensure respect for human rights. This state-centralism has an 'inverse effect' on the way the impact of human rights treaties is assessed. There has been almost exclusive focus on states and state institutions. Civil society and non-state actors are generally excluded. On the contrary, this study contends that the most profound impact of both the African Charter and the Women's Protocol has been on the civil society. By contrast, the impact of the Charter and the Protocol on non-state actors has generally been scrawny. For the purpose of the present study, the following entities will be treated as civil society organisations (CSOs) or non-state actors:

#### 4.3.1 National human rights institutions (NHRIs)<sup>226</sup>

The Nigerian National Human Rights Commission (NHRC) was established in 1995. It is specifically mandated to deal with all matters relating to the protection of human rights as guaranteed by the Nigerian Constitution, the African Charter and other international human rights treaties.<sup>227</sup> It was granted affiliate status by the African Commission in 2003.<sup>228</sup> Since 1998, the NHRC in conjunction with civil society organisations has been organizing training workshop and publishing public lecture series on the African Charter on Human and Peoples' Rights.<sup>229</sup> It also attends African Commission's sessions and contributes to the drafting of Nigeria's periodic reports to the African Commission.<sup>230</sup> Beside these, the NHRC seems not to have clearly deployed the African Charter or the Women's Protocol in its activities. For instance, its Annual (Activity) Report between 2000 and 2009 contains only 13 references to the African Charter, ten of which simply reiterate the functions of NHRC as defined in section 5 of the

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<sup>224</sup> A Chapham *Human rights obligations of non-state actors* (2006) 1.

<sup>225</sup> As above.

<sup>226</sup> There is currently some ambiguity around the proper status of NHRIs in international law. It is not clear whether they are state or non-state actor? However, treaty bodies have generally treated them as non-state. For the arguments, see R Murray *The role of National human rights institutions at the international and regional levels: The African experience* (2007) 59.

<sup>227</sup> Sec 5, National Human Rights Commission (Amendment) Act 2010.

<sup>228</sup> 16th Activity Report of the African Commission (2002-2003) 15.

<sup>229</sup> Nigeria's Fourth Periodic Report to the African Commission (2011) 7.

<sup>230</sup> Nigeria's Third Periodic Report to the African Commission (2008) 15.

NHRC Act. There is also no reference to the Women's Protocol in the NHRC's Annual Reports between 2006 and 2009.

### 4.3.2 Non-governmental organisations (NGOs)

There is a huge NGOs presence in Nigeria and their level of awareness in respect of the African Charter and the Women's Protocol is generally high.<sup>231</sup> The African Charter and the Women's Protocol have made substantial impact on the activities of these NGOs. The most profound impact of the Charter on NGOs in Nigeria is the impressive engagement which these NGOs had with the African Commission's communication procedure during the period preceding return to civil rule in 1999. Twenty-two out of the 25 communications submitted to the Commission in respect of Nigeria during this period were submitted by NGOs and civil society activists.<sup>232</sup>

The jurisprudence of the African Commission also served as a key resource in the hands of the NGOs both during their struggle against military autocracy in Nigeria and since transition to civil rule.<sup>233</sup> Nearly every impact which the Charter or the Protocol is credited to have made on the Nigerian executive, legislature and judiciary in the preceding chapters, was set in motion by the civil society.<sup>234</sup> Clearly, the modest level of compliance with the recommendations of the Commission, the policy reforms, legislative reforms and the widely acclaimed Judicial decisions would not have been possible without the pull and push of the civil society who deployed the Charter in very ingenuous and creative ways during the darkest days of military rule in Nigeria. Okafor has argued that it is impossible to fully appreciate the role of the NGOs and the impact of the Charter on their activities without adequate account being taken of the extremely harsh conditions under which they had to function.<sup>235</sup> One cannot agree any less.

In addition to using the Charter and the Commission's decisions in their struggle for the enthronement of democracy and rule of law in Nigeria, the Charter as well as the Protocol features prominently in the promotional activities of a number of the NGOs. For instance, a textbook on 'Human Rights Teaching in Schools' produced by Constitutional Rights Project drew mainly from the text of the African Charter.<sup>236</sup> Another learning material, 'Manual on

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<sup>231</sup> The Nigeria's Fourth Periodic Report listed well over 300 human rights NGOs operating in Nigeria.

<sup>232</sup> This information is based on facts available on the Commission's website:

<[http://www.achpr.org/english/\\_info/index\\_Decision\\_Nigeria.html](http://www.achpr.org/english/_info/index_Decision_Nigeria.html)> (accessed 3 October 2011)

<sup>233</sup> n 1 above, 134.

<sup>234</sup> n 1 above, 142-143.

<sup>235</sup> OC Okafor 'Modest harvests: On the significant (but limited) impact of human rights NGOS on legislative and executive behaviour in Nigeria' (2004) 48 *Journal of African Law* 25.

<sup>236</sup> n 1 above, 135.



Gender Rights Litigation and Protection Strategies', produced by Shelter Rights Initiatives in 1998 draws chiefly from the Charter. WILDAF Nigeria, LEAD Nigeria, WRAPA, Baobab for Women's Human Rights, and Women Aid Collective (WACOL) have at different fora launched campaigns for the implementation of the Women's Protocol in Nigeria.<sup>237</sup> Under the Raise Her Voice (RHV) Project, a number of NGOs in Nigeria have partnered to push for the domestication and implementation of the Protocol in Nigeria.<sup>238</sup> Most of the 53 NGOs working on the rights of women (and children) in Nigeria have also included the Women's Protocol in their programmes.<sup>239</sup>

### 4.3.3 Lawyers, academia and the media

The African Charter is generally more popular among lawyers than the Women's Protocol.<sup>240</sup> It was also revealed that the Charter's provisions are less frequently used by government lawyers.<sup>241</sup> The provisions are more often invoked by lawyers to the complainants or the applicants. There is also wide reference to the Charter and to some extent the Women's Protocol in academic publications. Fifty-six out of the 104 faculties of law in Nigeria offer courses on the African human rights system at the undergraduate level.<sup>242</sup> The Nigerian Law School curriculum also includes aspects on the procedures for the enforcement of the rights in the African Charter Act.<sup>243</sup>

A random assessment of Nigerian newspapers was carried out *via* internet. The result showed modest yet significant number of references to the African Charter and the Women's Protocol. A senior media official interviewed conceded that the Protocol is much less popular in the media when compared with the Charter.<sup>244</sup> Some reasons were advanced for the high level of awareness about the Charter in the Nigerian media. The first reason was the wide publicity given to the African Commission's decisions in a number of communications which pertain to freedom of expression and the press. Secondly, a significant number of senior media officials are reported to possess some certifications in law in addition to their media qualifications. This provides opportunity for them to become more aware of the norms stipulated by the Charter.

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<sup>237</sup> See Solidarity for African Women's Rights (SOAWR) News (July –September 2009) 5 available at <[http://www.soawr.org/resources/SOAWRnews\\_July-september09.pdf](http://www.soawr.org/resources/SOAWRnews_July-september09.pdf)> (accessed 3 October 2011).

<sup>238</sup> As Above.

<sup>239</sup> See list of CSOs in the Nigeria's Fourth Periodic Report to the African Commission (2011).

<sup>240</sup> Email from A Omoware, legal practitioner, Akure Nigeria on 22 October 2011.

<sup>241</sup> Email from B Ikupolati, state counsel at the Federal Ministry of Justice Nigeria on 8 September 2011.

<sup>242</sup> See Nigeria's Fourth Periodic Report to the African Commission (2011) 6.

<sup>243</sup> Telephone conversation with V Adodo, student, Nigerian Law School on 26 October 2011.

<sup>244</sup> Telephone conversation with D Atunbi (Chairman, Ondo State's chapter of the Nigerian Union of Journalist) on 8 September 2011.

The African Charter provision on freedom of expression is part of the curriculum for the training of media students. The jurisprudence of the Commission on access to information is also sometimes taught at media colleges.

#### **4.4 Conclusion**

This chapter has attempted to analyse the extent to which the African Charter and the Women's Protocol have influenced judicial decisions and civil society activities in Nigeria. Following a review of all reported court decisions where the Charter has been applied, a list of which is attached as Annex V, the study finds no causal link between the hierarchy of courts and judicial application of the Charter. Both lower and superior courts alike have applied or failed to apply the Charter in pertinent cases. It was also found that judicial application of the Charter was almost entirely dependent on use by lawyers. In all the cases in which the African Charter was applied or not applied, the lawyers' briefs and arguments was almost always the determining factor. The Charter is 'more often' referred to by lawyers or applied by courts in cases that involved contentious 'legal' problem and less frequently in cases where only facts are in contention. Although the Commission's decisions were 'enforced' by local courts in a few cases, in no instance did any court expressly refer to the Commission's case law.

The study also notes with concern the fact that, despite the acclaimed engagement of Nigerian NGOs with the Commission's procedures, only 22 out of the over 300 Nigerian NGOs have observer status with the Commission.<sup>245</sup> It is also worrying that no communication has been submitted to the Commission, by Nigerian NGOs, since 2005.<sup>246</sup> From 1999 to 2011 (approximately 12 years), only six communications were submitted, in respect of Nigeria<sup>247</sup> Out of these (six) communications, only two originated from Nigerian NGOs. This contrasts sharply with the 26 communications submitted in the preceding 12 years (that is 1987 to 1999), 22 of which were initiated by Nigerian NGOs. These analyses and findings seem to point to the fact that the impact of the Charter on the civil society has been substantial only in the periods preceding return to civil rule in 1999. Creative use of the Charter by civil society organisations has diminished significantly in recent times. On the other hand, the analysis also indicates a growing and promising civil society engagement with the Women's Protocol in Nigeria.

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<sup>245</sup> A list of the observer-NGOs is attached as Annex VI.

<sup>246</sup> ACHPR's website: <[http://www.achpr.org/english/\\_info/index\\_Decision\\_Nigeria.html](http://www.achpr.org/english/_info/index_Decision_Nigeria.html)> (accessed 15 October 2011)

<sup>247</sup> As above.

## **CHAPTER FIVE**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1 Conclusions**

This study set out to investigate, among other questions, the implementation status of the African Charter and the Women's Protocol in Nigeria as well as the impact of these instruments on the three branches of government, the civil society and also non-state actors. In order to thoroughly engage with these questions, the study addressed a wide range of issues including the history and brief overviews of the African Charter and the Women's Protocol, the process of domestication and status of these two instruments in Nigeria, as well as the compatibility of Nigerian laws and policies with the instruments. The study also investigated the extent to which the African Charter and the Women's Protocol have influenced policies and legislations in Nigeria. Further, the study examined the level of compliance by Nigeria with the recommendations and concluding observations of the African Commission. Systematic analysis was also undertaken to track the applications of the Charter and the Protocol by Nigerian courts from 1986, when the Charter came into force, till date.

Flowing from these analyses, the study has come to the conclusion that the impact of the African Charter has been more visible at all levels of government than the Women's Protocol. This, it is believed, is due to the fact that the Protocol unlike the Charter was ratified relatively recently, and has not been domesticated. As a result of its limited visibility and impact, the Women's Protocol, it must be admitted, has not been accorded same degree of consideration and in-depth analysis, as the Charter, in this study. To the question whether the African Charter and the Women's Protocol have made any impact on executive, legislative and judicial actions in Nigeria, the study finds that it is more intricate and multifaceted than a simple yes or no. Although the Charter's most profound impact has been on the judiciary, the analysis seems also to point to the fact that since the return to civil rule in 1999, the number of creative use of the Charter by domestic courts has dropped considerably. Besides, the impact of the Charter on legislative actions and civil society activities also seems to have waned since 1999. However, this research proves that the Charter has continued to exert steady influence on executive actions in Nigeria. This is evident in the cited cases of policy reforms and the improved record of compliance with the recommendations and concluding observations of the African Commission.

Most worryingly, however, this research finds that the Women's Protocol has made no tangible impact on the judiciary and the legislature in Nigeria. It is nevertheless interesting to note that the Protocol has exerted some influence on the civil society, and also the executive branch of government in Nigeria. This again is indicated by the cited cases of policy reforms and the ongoing efforts to mainstream the Protocol's norms and standards into the activities of relevant government ministries and departments. Although the overall impact of two instruments under study is quite difficult to demonstrate statistically, there is a strong support for the argument that the African Charter, and to some extent the Women's Protocol, have made subtle alterations in the way the Nigerian government carries out its functions. Resources have been allocated or reallocated to fulfil obligations under the Charter and the Protocol; some laws have been repealed and policies reviewed.

Some of the factors which contributed to the modest achievement of the Charter include among other things; the presence of strong civil society, the exceptional courage and creativity demonstrated by activist judges, the massive literatures on the Charter and the Protocol written by Nigerian academics and commentators; direct support and encouragement offered to the civil society by the African Commission as well as the overall international context – the suspension of Nigeria from the Commonwealth of Nations and the general relegation of Nigeria to pariah status by foreign nations and donor agencies. Perhaps the most important factor which has enhanced the impact of the Charter in Nigeria is its domestication in 1983. In the case of the Women's Protocol, it is only logical to conclude that the relative absence of one or more of these preconditions accounts for the minimal impact of the Protocol in Nigeria six years since it came into force.

## **5.2 Recommendations**

In order to improve on the impact of the Protocol and also the Charter in Nigeria, there is a need for greater publicity, visibility and awareness about the provisions of these instruments among legal practitioners, law enforcement agents, judges, social workers, media practitioners, students and the general public. In this wise, the African Commission needs to increase its promotional visits and missions to Nigeria. In the future, the Commission may also consider the possibility of persuading the Nigerian government to host more sessions of the Commission. This will greatly improve the level of awareness and the overall impact of the Charter as well as the Protocol in Nigeria.

It is also recommended that Nigeria should domesticate the Women's Protocol without delay. This will promote application of the Protocol by domestic courts and other government institutions. However, pending such domestication, the courts and civil society organisations should avail themselves of the opportunity in article 18(3) of the African Charter Act. This provision which has been domesticated in Nigeria mandates the government to 'ensure elimination of all discrimination against women ... and protection of the rights of women ... as stipulated in international declarations and conventions.'<sup>248</sup> In view of the patronage which the Charter currently enjoins with the Nigerian judiciary, it would be strategic in the interim to channel women's rights litigations through article 18(3) of the Charter, thereby bringing in the Protocol through the back door.

It is further recommended that Nigerian courts should begin to apply the case-laws of the African Commission in their adjudicatory functions. The current state of affairs where no reference has been made to the Commission's decision in any reported human rights case is completely unacceptable. The courts cannot accept the 'oracle of Banjul' – the Charter; without accepting its priest – the Commission.

Although not directly connected with improving impact, this research recommends that further studies should be commissioned to among other things disaggregate and classify the cases elicited from the various law reports during this study. It would be interesting to know the number of cases that have used the Charter as basis of remedy in relation to those, if any, that have applied it as interpretive aid. Another avenue for further research is the impact of the Charter and the Protocol on transnational corporations and other non-state actors.

Finally, this study reiterates the need for Nigeria to make the relevant declaration under article 34 of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights. This will not only consistent with Nigeria's obligation under the African Charter to provide 'effective remedy', it will in addition provide an alternative judicial avenue for women's rights movements in Nigeria to challenge those laws and policies which this study has found to be incompatible with the Women's Protocol.

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<sup>248</sup> Emphasis mine.

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## **ANNEXURES**

ANNEX I

**Table of compatibility between Nigerian laws and the African Charter and the Women's Protocol**

S/N	Domestic legislations/policies	Charter or Protocol norms violated
1	<i>Section 6(6)(c) and sections 13-24, Nigerian Constitution:</i> states that socio-economic rights and peoples' rights are not justiciable.	<i>Articles 14 – 24 of the African Charter:</i> provides for justiciable socio-economic rights as well as peoples' rights.  <i>Articles 19 – 24 of the Women's Protocol:</i> provides for justiciable socio-economic rights for women.
2	<i>Section 26, Nigerian Constitution:</i> limits women's right to transmit their nationality to their foreign spouses.	<i>Article 6(g &amp; h), Women's Protocol:</i> envisages equal right to nationality by both male and female.
	<i>Section 29(4)(b), Nigerian Constitution:</i> recognises any woman who is married to be of full age. This provision implicitly authorise women to marry before they are of full age.	<i>Article 6(b), Women's Protocol:</i> specifically put the minimum age for marriage at 18 years.
	<i>Section 42(3), Nigerian Constitution:</i> justifies laws which impose restrictions with respect to the appointment of 'any person' to any office under the State or as a member of the armed forces of the Federation or a member of the Nigeria Police force or to an office in the service of a body corporate established directly by any law in force in Nigeria. This provision implicitly justifies restrictions imposed on women with respect to employment into the Armed Forces, police and other para-military organisations.	<i>Article 8, Women's Protocol:</i> requires equal representation of men and women in the judiciary and law enforcement organs.
3	<i>Sections 228-230, Nigerian Criminal Code:</i> Criminalise medical abortion.	<i>Article 14, Women's Protocol:</i> authorises medical abortion in cases of sexual assault, rape, incest and the protection of mental or physical health and life of the mother.
4	<i>Section 357, Criminal Code:</i> Justifies marital rape.	<i>Article 4(2), Women's Protocol:</i> Prohibits all forms of violence against women including unwanted or forced sex whether in <i>private</i> or public. <sup>249</sup>

<sup>249</sup> Emphasis mine.

5	<p><i>Section 55, Penal Code:</i> justifies wife beating 'so far as it does not constitute grievous harm'.</p>	<p><i>Article 4(2), Women's Protocol:</i> prohibits all forms of exploitation, cruel, inhuman or degrading <i>treatment</i> or punishment.<sup>250</sup></p>
6	<p><i>Nigerian Immigration Service Circular, Ref No: IMM/S/30/T/138 of 17 August 1994:</i> provides as follows:</p> <ul style="list-style-type: none"> <li>▪ Re-entry visa /permit issued to foreign women married to Nigerian men remains valid as long as the passport remains valid and her husband continues to accept Immigration responsibilities on behalf of his wife.</li> <li>▪ The foreign woman can work in a private company without being counted on the company's quotas provided, the usual formalities are fulfilled.</li> <li>▪ Where such wives are divorced (or widowed), it would not be necessary to demand responsibilities from their husband. Such a divorced or widowed wife can only remain in the country based on a request for permission to remain in the country; such request would be taken on merit after due examination from the Comptroller General of Immigration.</li> </ul> <p><i>Remarks</i> There are no corresponding provisions in relation to non-Nigerian men, married to Nigerian women.</p>	<p><i>Articles 6 and 7, Women's Protocol:</i> stipulates equal rights for men and women in marriage, separation, divorce or annulment of marriage.</p>
7	<p><i>Section 124, Nigeria Police Force Act:</i> requires every unmarried police officer who becomes pregnant to be discharge from the police force, and not to be re-enlisted except with the approval of the Inspector General.</p>	<p><i>Article 24, Women's Protocol:</i> requires states to ensure protection of women in distress including pregnant women.</p>
8	<p><i>Section 55, Labour Act:</i> prohibits women from night work, or any agricultural undertaking.</p>	<p><i>Article 13, Women's Protocol:</i> obligates states to promote equal access to employment for both men and women.</p>
9	<p><i>Section 56, Labour Act:</i> prohibits women from employment underground.</p>	<p><i>Article 13, Women's Protocol:</i> obligates states to promote equal access to employment for both men and women.</p>

<sup>250</sup> Emphasis mine.

10	<p><i>Nigerian Police Regulations</i></p> <p><i>Regulation 121:</i> provides that a married police woman shall not be granted any special privileges by reason of the fact that she is married and shall be liable to posting and transfer as if she were unmarried;</p> <p><i>Regulation 122:</i> prohibits the enlistment of a married woman in the police force;</p> <p><i>Regulation 124:</i> requires a female police officer desirous of marrying to first apply in writing to the to the Police Commissioner requesting permission to marry and giving the name, address and occupation of the person she intends to marry.</p> <p><i>Remarks</i></p> <p>There conditions are not prescribed for male applicants to the Nigerian Police or male officers who plan to marry.</p>	<p><i>Articles 6, Women's Protocol:</i> stipulates equal rights for men and women in marriage.</p>
11	<p><i>Section 353 of the Criminal Code:</i> makes it a <b>felony</b> when the victim of an indecent assault is a man, while <i>section 360 of the Criminal Code</i> makes it a <b>misdemeanour</b> where the victim is a woman.</p>	<p><i>Article 2, Women's Protocol:</i> requires states to prohibit all forms of discriminations against women.</p>
12	<p><i>Section 18 of the Marriage Act.</i> The mother of a minor can only give valid consent to his/her marriage where the father is dead, or is of unsound mind or absent from Nigeria</p>	<p><i>Articles 6, Women's Protocol:</i> stipulates equal rights for men and women in marriage;</p> <p><i>Article 13, Women's Protocol:</i> both parents shall bear responsibility for the upbringing and development of their children.</p>

ANNEX II

**Analysis of communications finalised by the African Commission in respect of Nigeria**

<b>S/N</b>	<b>Communications declared inadmissible</b>	<b>Communications declared admissible</b>	<b>Communications withdrawn by complainant(s)</b>	<b>Communication resolved through friendly settlement</b>
1	Comm 45/90 <i>Civil Liberties Organisation v Nigeria</i>	Comm 60/91 <i>Constitutional Rights Project v Nigeria</i>	Comm 62/91 <i>Committee for the Defence of Human Rights v Nigeria</i>	Comm 67/92 <i>Civil Liberties Organisation v Nigeria</i>
2	Comm 57/91 <i>Tanko Bariga v Nigeria</i>	Comm 87/93 <i>Constitutional Rights Project v Nigeria</i>	Comm 273/03 <i>Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare v Nigeria</i>	
3	Comm 72/92 <i>Bamidele Aturu v Nigeria</i>	Comm 101/93 <i>Civil Liberties Organisation v Nigeria</i>	Comm 269/03 <i>Interights on behalf of Safia Yakubu Husaini and Others v Nigeria</i>	
4	Comm 107/93 <i>Academic Staff of Nigerian Universities v Nigeria</i>	Comm 102/93 <i>Constitutional Rights Project v Nigeria</i>		
5	Comm 248/02 <i>Interights and World Organisation against Torture v Nigeria</i>	Comm 105/93, 128/94, 130/94, 152/96 (joined) <i>Media Rights Agenda, Constitutional Rights Project v Nigeria</i>		
6	Comm 252/02 <i>Stephen Aigbe v Nigeria</i>	Comm 129/94 <i>Civil Liberties Organisation v Nigeria</i>		
7	Comm 268/03 <i>Ilesanmi v Nigeria</i>	Comm 137/94, 139/94, 154/96, 161/97 (joined) <i>International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights v Nigeria</i>		

8	Comm 300/05 <i>Socio Economic Rights and Accountability Project v Nigeria</i>	Comm 140/94, 141/94, 145/95 (joined) <i>Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria</i>		
9		Comm 143/95, 150/96 (joined) <i>Constitutional Rights Project and Civil Liberties Organisation v Nigeria</i>		
10		Comm 148/96 <i>Constitutional Rights Project v Nigeria</i>		
11		Comm 151/96 <i>Civil Liberties Organisation v Nigeria</i>		
12		Comm 153/96 <i>Constitutional Rights Project v Nigeria</i>		
13		Comm 155/96 <i>Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria</i>		
14		Comm 205/97 <i>Kazeem Aminu v Nigeria</i>		
15		Communication 206/97 <i>Centre for Free Speech v Nigeria</i>		
16		Comm 215/98 <i>Rights International v Nigeria</i>		
17		Comm 218/98 <i>Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project</i>		
18		Comm 224/98 <i>Media Rights Agenda v Nigeria</i>		
19		Comm 225/98 <i>HURILAWS v Nigeria</i>		
<b>Total</b>	<b>8</b>	<b>19<sup>251</sup></b>	<b>3</b>	<b>1</b>

<sup>251</sup> Violation was found in all these 19 cases that were declared admissible.

ANNEX III

**National policies and institutional measures promoting the rights in the African Charter and the Women’s Protocol<sup>252</sup>**

<b>African Charter (Substantive Provisions)</b>	<b>Policy/Institutional measures</b>	<b>Women’s Protocol (Substantive Provisions)</b>	<b>Policy/Institutional measures</b>
Article 2 Non-discrimination	National Gender Policy, 2007; National Human Rights Commission Action Plan for the Promotion and Protection of Human Rights in Nigeria 2009-2013; Establishment of the Federal Character Commission to regulate discrimination on the basis of ethnicity.	Article 2 Elimination of discrimination against women.	National Gender Policy, 2007.
Article 3 Equality	Establishment of the Federal Character Commission to regulate discrimination on the basis of ethnicity.	Article 3 Dignity	National Policy on Women trafficking; Establishment of National Agency on Prohibition of Trafficking in Persons (NAPTIP).
Article 4 Inviolability of human life	The National Committee on the Death Penalty; Prerogative of Mercy Committees.	Article 4 Right to life, integrity and security of person	The National Committee on the Death Penalty; Prerogative of Mercy Committees; Establishment of National Agency on Prohibition of Trafficking in Persons (NAPTIP).

<sup>252</sup>

This study is not aimed at outlining all government policies or agencies whose responsibilities may have some bearing on specific human rights. Attention is given only to those policies or agencies with clear human rights mandate.

Article 5 Dignity of human person	National Policy on Trafficking in Persons; Establishment of National Agency on Prohibition of Trafficking in Persons (NAPTIP); National Crime Prevention Strategy (NCPS).	Article 5 Elimination of harmful practices	National Policy and Plan of Action on Elimination of Female Genital Mutilation in Nigeria 2002; Female Genital Mutilation (FGM) Day (6 February).
Article 6 Personal liberty	White Paper on Policing; Human Rights Desk in some Divisional Police Formations; Human Rights Desks in Prison zonal commands; Adult Remedial Educational Programme (AREP) in the Nigerian Prison Service.	Article 6 Marriage	National Gender Policy.
Article 7 Fair trial	Not available	Article 7 Separation, divorce and annulment of marriage	Not available
Article 8 Freedom of conscience and religion	Establishment of the National Inter-religious Council (NIREC).	Article 8 Access to justice	Establishment of the: Legal Aid Council of Nigeria (LACoN); National Human Rights Commission (NHRC); Office of the Public Defender (OPD) in the states; Public Complaints Commissions.
Article 9 Right to information and expression	Establishment of the: National Orientation Agency (NOA); Nigerian Press Council (NPC).	Article 9 Participation in political and decision-making process	Establishment of Ministry of Women Affairs and Social Development at the Federal and state levels; Establishment of the Office of the Special Adviser on



			<p>Women Affairs in the Office of the President;</p> <p>Establishment of National Action Committee on Women in Politics (NACWIP);</p> <p>Establishment of National Technical Team of Experts to Ensure Gender Mainstreaming in all Sectors;</p> <p>Establishment of the Office of the Special Rapporteur on Women and Gender Related Matters in National Human Rights Commission.</p>
Article 10 Freedom of association	<p>Establishment of Nigerian Labour Congress, Trade Union Congress and Independent National Electoral Commission;</p> <p>Guidelines on Labour Administration issues in Contract Staffing/Outsourcing in the Oil and Gas Sector.</p>	Article 10 Peace	<p>National Peace Policy 2009;</p> <p>Establishment of Inter-ministerial Committee on Gender and Peace Keeping.</p>
Article 11 Freedom of assembly	Public Order Act/Regulations	Article 11 Protection of women in armed conflict	<p>National Policy on Internally Displaced Persons (IDPs) 2008-9;</p> <p>National Policy on Migration 2008-9;</p> <p>Establishment of the National Commission for Refugees (NCFR) in 1989.</p>
Article 12 Freedom of movement	<p>The National Human Rights Commission Action Plan for the Promotion and Protection of Human Rights in Nigeria 2009-2013;</p> <p>Immigrations Regulations.</p>	Article 12 Education	<p>National Gender Policy on Education 2008;</p> <p>National Gender Policy and Strategy for the Acceleration of Girls' Education in Nigeria, 2003.</p>

Article 13 Participation	Not available	Article 13 Economic and social welfare	Micro-Credit Loan Scheme for Women, Women Fund For Economic Empowerment (WOFEE), Business and Development Fund for Women (BUDFOW)
Article 14 Property	The National Human Rights Commission Action Plan for the Promotion and Protection of Human Rights in Nigeria 2009- 2013.	Article 14 Health and reproductive rights	Health National Strategic Framework and Plan for Vesico-Vaginal Fistula (VVF) Eradication in Nigeria; National Guidelines and Strategies for Malaria Prevention Control During Pregnancy, 2005; Establishment of National Agency for the Control of Aids (NACA) and State Agencies for the Control of AIDS in 36 States; Work Place Policy on HIV/AIDS.  <i>Reproductive health</i> National Policy on Reproductive Health; National Reproductive Health and Strategic Framework and Plan(2005- 2010); National Policy on Sexuality and Family Life Education; National Policy on Maternal and Child Health, 1994.
Article 15 Right to work	National Policy on Employment ; National Workplace Policy on HIV/AIDS 2005; Establishment of National Directorate of Employment (NDE).	Article 15 Food security	National Policy on Food and Nutrition in Nigeria (2001); National Water Supply and Sanitation Policy (2000); National Guidelines on Micronutrients Deficiencies control in Nigeria (2005).

<p>Article 16 Physical and mental health</p>	<p>National Health Policy 2004; National Strategic Health Development Plan 2010 (2010-15); National HIV-AIDS Prevention Plan 2007 (2007-9); National Policy on Nutrition; National Health Insurance Programme; National Policy on Malaria Control (2005); National Programme on Immunization; National Guidelines on Micronutrients Deficiencies control in Nigeria (2005); National Policy on Drugs; National Policy on Roll Back Malaria; National Policy on HIV/AIDS 2003; National Strategic Framework on HIV/AIDS (NSF).</p>	<p>Article 16 Adequate housing</p>	<p>National Housing Policy for Nigeria.</p>
<p>Article 17 Education</p>	<p>National Policy on Education 2004; National Policy on Nomadic Education; National Policy on Adult and Non-formal Education; National Policy on Primary and Secondary Education; National Policy on Tertiary Education; National Policy on Education for persons with Disabilities.</p>	<p>Article 17 Positive cultural context</p>	<p>National Gender Policy.</p>

Article 18 Family	National Gender Policy, 2007 ; National Policy on Sexuality and Family Life Education; National Child Policy of 2007; National Plan of Action on OVC and its Guidelines and Standard of Practice, 2007.	Article 18 Healthy and sustainable environment	National Environmental Sanitation Policy 2005.
Article 19 Equality of peoples	Not available	Article 19 Sustainable development	Integrated Rural Development Policy 2001; National Policy on Poverty Eradication 2001.
Article 20 Peoples right to existence and self determination	Not available	Article 20 Widow's rights	National Gender Policy
Article 21 Peoples right to their wealth and natural resources	Not available	Article 21 Women's right to inheritance	Not available
Article 22 Peoples' right to development	Establishment of Niger-Delta Development Commission; Establishment of Development Agencies for Oil Producing Communities; Establishment of the Ministry of Niger Delta.	Article 22 Special protection of elderly women	Not available
Article 23 Peoples' right to peace and security	National Peace Policy 2009; Establishment of: Institute of Peace and Conflict Resolution; Peace and Reconciliation Commission for the Niger-Delta; National Boundary Commission.	Article 23 Special protection of women with disabilities	Not available

<p>Article 24 Peoples' right to satisfactory environment</p>	<p>National Policy on Environment 1999; Niger-Delta Development Plan; Establishment of the National Environmental Standards and Regulations Enforcement Agency (NESREA); Establishment of the National Oil Spill Detection and Response Agency (NOSDRA); Establishment of Niger-Delta Development Commission (NDDC).</p>	<p>Article 24 Special protection of women in distress</p>	<p>National Gender Policy.</p>
<p>Article 25 Duty to promote the rights in the Charter through teaching, education, publication, etc</p>	<p>Development of Curriculum for Human Rights Education for police and other law enforcement officials, and prison officers.</p>	<p>Article 25 Remedies</p>	
<p>Article 26 Duty to guarantee judicial independence and set up national human rights institutions</p>	<p>Establishment of the National Human Rights Commission in 1995.</p>	<p>Article 26 Implementation and monitoring</p>	<p>Ministry of Women Affairs; National Centre for Women Development; Committee on the Reform of Discriminatory Laws against Women in Nigeria in 2006.</p>

ANNEX IV

**National laws with corresponding provisions as the Charter and the Protocol<sup>253</sup>**

<b>African Charter (Substantive Provisions)</b>	<b>Constitutional and other legislative measures</b>	<b>Women's Protocol (Substantive Provisions)</b>	<b>Constitutional and other legislative measures</b>
Article 2 Non-discrimination	Section 42, Nigerian Constitution African Charter Act Federal Character Act.	Article 2 Elimination of discrimination against women	Section 42, Nigerian Constitution; Imo State Gender and Equal Opportunities Law 2007; Anambra State Gender and Equal Opportunities Commission Law 2007; National Centre for Women's Development Act.
Article 3 Equality	Section 42, Nigerian Constitution; section 17 (2)(a) Nigerian Constitution; Federal Character Act.	Article 3 Dignity	Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003, as amended in 2005; Trafficking in Women and Children, Edo State Criminal Code (Amendment) Law, 2000; Sections 207 to 239 of the Sharia Penal Code law of Zamfara State 2000.
Article 4 Inviolability of human life	Article 33, Nigerian Constitution Article 4, African Charter Act; Section 221, Child's Rights Act.	Article 4 Right to life, integrity and security of person	Criminal Codes; Penal Codes; A Law to Prohibit Domestic Violence Against Women and Maltreatment, Law 2004, Cross River State; Domestic Violence Law of Lagos State;

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This analysis is confined only to legislations that prescribe justiciable substantive rights; national laws relating to administrative, procedural or regulatory matters are generally not considered.

			Domestic Violence Law of Jigawa State.
Article 5 Dignity of human person	Section 34, Nigerian Constitution Article 5, African Charter Act; Criminal Codes; Penal Codes.	Article 5 Elimination of harmful practices	Abolition of Female Circumcision Law, No. 2, 2001, Rivers State; Dehumanizing and Harmful Traditional Practices (Prohibition) Law, 2003, Rivers State; Female Circumcision and Genital Mutilation (Abolition) Law 1999, Edo State; Female Circumcision and Genital Mutilation (Abolition) Law 2000, Ogun State; Female Genital Mutilation (Abolition), Delta State; Female Genital Mutilation(Abolition) Law, 2004, Osun State; Female Genital Mutilation(Abolition) Law, 2002, Ekiti State; .A Law to Prohibit Girl-Child Marriages and Female Circumcision, No. 2 of 2000, Cross River State; Law on the Abolition of Harmful Traditional Practices against Women and Children 2000, Ebonyi State.
Article 6 Personal liberty	Section 35, Nigerian Constitution Article 6, African Charter Act; Criminal Procedure Act; Criminal Procedure Code; Anti-Kidnapping Law 2009 of Rivers State; Anti-	Article 6 Marriage	Child's Right Act; Child Rights Laws of 18 States; Prohibition of Early Marriage Law of Kebbi State 2003; Prohibition of Early Marriage Law of Niger

	Kidnapping Law 2009 of Imo State 2009.		State 2003; Prohibition of Early Marriage Law of Osun State 2003; A Law to Prohibit Girl-Child Marriages and Female Circumcision, No. 2 of 2000, Cross River State; Withdrawal of Girls from School for Marriage (Prohibition) Laws of Bauchi, Gombe, Borno, Katsina, Yobe, Zamfara and Kano States.
Article 7 Fair trial	Section 36, Nigerian Constitution Article 7, African Charter Act.	Article 7 Separation, divorce and annulment of marriage	Marriage Act; Matrimonial Causes Act.
Article 8 Freedom of conscience and religion	Section 38, Nigerian Constitution; Article 8, African Charter Act; National Hajj Commission Act; Muslim and Christian Welfare Board Laws.	Article 8 Access to justice	Legal Aid Council Act; National Human Rights Commission Act.
Article 9 Right to information and expression	Section 39, Nigerian Constitution; Article 9, African Charter Act; Freedom of Information Act 2011.	Article 9 Participation in political and decision-making process	Nigeria Labour Congress' Gender Equality Policy 2003.
Article 10 Freedom of association	Section 40, Nigerian Constitution; Article 10, African Charter Act; Trade Union Act; Electoral Act and Laws of the 36 states.	Article 10 Peace	Not available



Article 11 Freedom of assembly	Section 40, Nigerian Constitution Article 11, African Charter Act.	Article 11 Protection of women in armed conflict	Not available
Article 12 Freedom of movement	Section 41, Nigerian Constitution; Article 12, African Charter Act; Nigerian Immigration Act, 1963; Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003.	Article 12 Education	Section 18, Nigerian Constitution; African Charter Act; Universal Basic Education (UBE) Act 2005; Child's Rights Act, 2003; States Child's Right's Laws of 18 States.
Article 13 Participation	Article 13, African Charter Act.	Article 13 Economic and social welfare	Not available
Article 14 Property	Sections 43 and 44, Nigerian Article 14, African Charter Act; Land Use Act, 1978 Recovery of Premises Act ; Copyright Act, 1958 Married women Property Laws in some States.	Article 14 Health and reproductive rights	Women's Reproductive Rights Law, 2005, Anambra State; Safe Motherhood Law Edo State; Reproductive Services Law, No 3 of 2003, Rivers State; People Living With HIV/AIDS, (Freedom from Discrimination Law) Akwa-Ibom State, 2007.
Article 15 <sup>254</sup> Right to work	Article 15, African Charter Act; National Directorate for Employment (NDE) Act LFN 2004; Workmen's Compensation Act 2011; Labour Act LFN 2004; Nigerian Oil and Gas Local Content Act 2010.	Article 15 Food security	Not available

<sup>254</sup> Provisions similar to articles 15 to 24 of the African Charter are contained in Chapter II (sections 13 to 24 of the Nigerian Constitution). However these provisions are deemed not to be justiciable in Nigeria because of the provisions of section 6(6)(c) of the Nigerian Constitution. In a long line of cases and academic authorities, it has been established that these socio-economic rights provisions are justiciable through other legislations which seek to give effect to the right. See *Attorney General of Ondo State v Attorney General of the Federation* (2002) 27 WRN 1. See also F Falana *Fundamental rights enforcement in Nigeria* (2010) 14. It is only logical to conclude that socio-economic rights contained in the African Charter Act are justiciable.

Article 16 Physical and mental health	Article 16, African Charter Act; National Health Act 2008; Section 24 of Child Rights Act 2003; National Health Insurance Scheme Act, 1999; National Agency for the Control of Aids (Establishment) Act 2006; National Agency for Food and Drugs Administration and Control Act, 1992.	Article 16 Adequate housing	Not available
Article 17 Education	Article 18, African Charter Act; Universal Basic Education (UBE) Act 2005; Child's Rights Act, 2003; Nomadic Education Act; Adult Literacy Act; Education Trust Fund Act.	Article 17 Positive cultural context	Not available
Article 18 Family	Article 18, African Charter Act Section 20, Child's Rights Act; Child's Rights Laws in 22 states. <sup>255</sup>	Article 18 Healthy and sustainable environment	Not available
Article 19 Equality of peoples	Article 19, African Charter Act.	Article 19 Sustainable development	Not available
Article 20 Peoples right to existence and self determination	Article 20, African Charter Act.	Article 20 Widow's rights	Inhuman Treatment of Widows (Prohibition) Law, Ondo State; Administration of Estates (Small Payments) Law, 2006, Lagos State; Prohibition of Infringement of a Widow's and Widower's Fundamental Human Rights Law, No.3 of 2001, Enugu State; Malpractices Against

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See Nigeria's Fourth Periodic Report to the African Commission (2011) 30.

			Widows and Widowers Law, 2002, Ekiti State; Malpractices Against Widows and Widowers (Prohibition) Law 2005, Anambra State; Widows' Empowerment Law, 2002, Oyo State; Inhuman Treatment of Widows (Prohibition) Law, 2004, Edo State Widowhood Practice Law 2003, Imo State.
Article 21 Peoples right to their wealth and natural resources	Article 21, African Charter Act.	Article 21 Women's right to inheritance	Administration of Estates (Small Payments) Law, 2006, Lagos State
Article 22 Peoples' right to development	Article 22, African Charter Act; Niger Delta Development Commission Act, 2000.	Article 22 Special protection of elderly women	Not available
Article 23 Peoples' right to peace and security	Article 23, African Charter Act; Institute for Peace and Conflict Resolution Act; National Emergency Management Agency (Establishment) Act, 1999; National Boundary Commission Act 1987.	Article 23 Special protection of women with disabilities	Not available
Article 24 Peoples' right to satisfactory environment	Article 24, African Charter Act; Environmental Impact Assessment Act (1992); National Environmental Standards and Regulation Enforcement Agency Act, 2007; National Oil Spillage and Detection Management Agency Act, 2006; Harmful Waste (Special Criminal Provisions, Etc.,) Act, 1988;	Article 24 Special protection of women in distress	Not available

	Endangered Species (Control of International Trade and Traffic) Act; National Oil Spill Detection and Response Agency Act, 2006 ; Gas (Re-injection Act) LFN, 2004; States Laws on Control of Erosion and Deforestation.		
Article 25 Duty to promote the rights in the Charter through teaching, education, publication, etc	Article 25, African Charter Act; National Human Rights Commission Act.	Article 25 Remedies	Section 46, Nigerian Constitution Order 11, Fundamental Rights Enforcement Procedure Rules (FREP Rules).
Article 26 Duty to guarantee judicial independence and set up national human rights institutions	Article 26, African Charter Act; Part I, Third Schedule to the Nigerian Constitution (National Judicial Council); National Human Rights Commission Act.	Article 26 Implementation and monitoring	Not available

## ANNEX V

### List of case-law references to the African Charter by Nigerian courts<sup>256</sup> (1986 – 2010)

1. *Bamidele v Professor Grace Alele-Williams* Suit B/6M/89.
2. *Oshevire v British Caledonian Airways Ltd* (1990) 7 NWLR 507.
3. *Garuba v Attorney General of Lagos State* Suit ID/599M/91.
4. *Constitutional Rights Project v Babangida and Others* Suit M/102/92.
5. *Agbakoba v Director, State Security Service* (1994) 6 NWLR (pt.351)475 CA.
6. *Ogugu v State* (1994) 9 NWLR (pt.366) 1 SC.
7. *Eleki v Oko* (1995) 5 NWLR (pt.393) 100 CA.
8. *Peter Nemi & Ors v The State* (1993-1994) All NLR 342.
9. *Effiom v The State* (1995-1996) All NLR 1.
10. *UAC of Nigeria v Global Transporte Oceanic SA* (1996) 5 NWLR 291.
11. *Fawehinmi v Abacha* (1996) 9 NWLR (pt.475) 710 CA.
12. *Nigerian National Petroleum Corporation v Fawehinmi* (1998)7 NWLR 598 CA.
13. *Ndigwe v Ibekendu* (1998)7 NWLR (pt.558) 486 CA.
14. *Enahoro v Abacha* (1998) 1 HRLRA 424.
15. *Ekpu v Attorney General of the Federation* (1998) 1 HRLRA 391.
16. *Punch (Nig.) Ltd v Attorney General of the Federation* (1998) 1 HRLRA 488.
17. *Jimoh v Attorney General of the Federation* (1998) 1 HRLRA 513.
18. *The Director State Security Service v Agbakoba* (1999)3 NWLR (pt.595) 314 SC.
19. *Ubani v Director, State Security Service* (1999)11 NWLR (pt.265)129 CA.
20. *Falae v Obasanjo* (1999) 6 NWLR (pt.606)283 CA.
21. *Moujekwu v Ejikeme* (2000) 5 NWLR (part 567) 402, 409.
22. *Abacha v Fawehinmi* (2000)6 NWLR (pt.660) 228 SC.
23. *Attorney General of the Federation v Ajayi* (2000) 12 NWLR (pt.682)509 CA.
24. *Danbaba v State* (2000)14 NWLR (pt.687)396 CA.
25. *Adekanye v Comptroller of Customs* (2000) 12 NWLR (pt.682) 563 CA.
26. *Paico (Press & Books) Ltd v Central Bank of Nigeria* (2001)3 NWLR (pt.700) 347 CA.
27. *Bamayi v State* (2001) 2 NWLR (pt.698) 435 CA.
28. *Bamayi v Attorney General of the Federation* (2001)12 NWLR (pt.725)468 SC.

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<sup>256</sup> Reference to the African Charter here includes references to the African Charter Act. The list is drawn mainly from cases reported in the Nigerian Weekly Law Reports (1986 - 2010) and Cases on Human Rights (2008 - 2010)

29. *Nigerian Breweries Plc v Osho* (2001) 8 NWLR (Pt.716)746 CA.
30. *Malizu v Assistant Commissioner of Police* (2002) 7 NWLR (pt.767)527 CA.
31. *Nwangwu v Duru* (2002) 2 NWLR (pt.751)265 CA.
32. *Johnson v Lufadeju* (2002)8 NWLR (pt.768) 192 CA.
33. *Adeyanju v West African Examination Council* (2002)13 NWLR (pt 785)479 CA.
34. *Abaribe v Abia State House of Assembly* (2002) 14 NWLR (pt.788)466 CA.
35. *Comptroller, Nigeria Prisons Service v Adekanye (No.2)* (2002)15 NWLR 332 SC.
36. *Alubankudi v Attorney General of the Federation* (2002) 17 NWLR (pt.796) 338 CA.
37. *Mobil Prod (Nig) Unltd v LASEPA* (2002) 18 NWLR (pt.798) SC.
38. *West African Examination Council v Akinkunmi* (2002)7 NWLR (pt.766)327 CA.
39. *L.C.D.C.Ltd v Attorney General of the Federation* (2002)14 NWLR (pt.786)1 CA.
40. *Oruk Anam Local Government v Ikpa*(2003)12 NWLR(pt.836)558 CA.
41. *Fawehinmi v. Babangida* (2003) 3 NWLR (pt.808) 604 SC.
42. *Governor of Ebonyi State v Isuama* (2004)6 NWLR (pt.870)511 CA.
43. *Haruna v University of Agriculture, Makurdi* (2005)3 NWLR(pt.912)233 CA.
44. *Jonah Gbemre v Shell Petroleum Dev Co (Nigeria)* (2005) AHRLR 151.
45. *Oshiomole v Federal Government of Nigeria* (2005) 1 NWLR (pt.907)414 CA.
46. *Tell Communication Ltd v Markia* (2006) 4 NWLR (pt.970)315 CA.
47. *Abiodun v Attorney General of the Federation* (2007)15 NWLR (pt. 1057)359 CA.
48. *Shekete v Nigerian Armed Forces* (2007)14 NWLR (pt 1053) 159 CA.
49. *M.C.S Ltd v Adeokin Records* (2007)13 NWLR (pt 1052)616 CA.
50. *Ukegbu v N.B.C* (2007)14 NWLR (pt.1055) 551 CA.
51. *Action Congress v Independent National Electoral Comm* (2007)12 NWLR 222 SC.
52. *Governor of Kwara State v Lawal* (2007) 13 NWLR (pt. 1051) 347 CA.
53. *Attorney General of the Federation v Abubakar* (2008) 16 NWLR (pt.1112)135 SC.
54. *West African Examination Council v Adeyanju* (2008) 9 NWLR (pt.1092)270 SC.
55. *West African Examination Council v Akinkunmi* (2008) 9 NWLR (pt.1091)151 SC.
56. *Inspector General of Police v All Nigeria's Peoples' Party* (2008) CHR 131.
57. *Fajemirokun v C.B. Nig Ltd* (2009)5 NWLR (pt.1135)588 SC.
58. *Unachukwu v Ajuzie* (2009) 4 NWLR (pt.1131)336 CA.
59. *Onyiriorha v Inspector General of Police* (2009) 3 NWLR (pt.1128) 342 CA.
60. *Ohakosim v Commission of Police* (2009) 15 NWLR (pt.1164) 229 CA.
61. *Constitutional Right Project v President of Nigeria* 1 NPILR 21.
62. *Fugu v President, Federal Republic of Nigeria* (2009-2010) CHR 1.

63. *Okere v Rear Admiral Arogundade & Ors* (2009-2010) CHR 22.
64. *Awoyera v Inspector General of Police* (2009-2010) CHR 118.
65. *Ezeizwe v Nwawulu* (2010) 4 MWLR (pt.1183) 159 SC.
66. *Attorney General of Lagos State v Osuoka* (2010) 4 NWLR (pt.1183)68 CA.
67. *Gabriel v State* (2010) 6 NWLR (pt.1190) 280 CA.
68. *Igwe v Ezeanochie* (2010) 7 NWLR (pt.1192) 61 CA.
69. *Ajakaiye v Federal Republic of Nigeria.*(2010)11 NWLR (pt.1206) 500 CA.
70. *Shibkau v Attorney General of Zamfara State* (2010) 10 NWLR (pt.1202) 312 CA.

ANNEX VI

**Nigerian NGOs that have observer status with the African Commission**

S/N	Name of NGO	Session where status was granted	Year
1	Civil Liberties Organisations (CLO)	8th	1990
2	Committee for the Defence of Human Rights (CDHR)	9th	1991
3	Constitutional Rights Project (CRP)	9th	1991
4	Human Rights Africa	9th	1991
5	Legal Research and Development Centre	10th	1991
6	Universal Defenders of Democracy	13th	1993
7	Women Concerned	13th	1993
8	Media Rights Agenda (MRA)	14th	1993
9	Women Justice Programme	17th	1995
10	Shelter Rights Initiative	19th	1996
11	Women Law and Development Centre	21st	1997
12	Prisoners Rehabilitation and Welfare Action (PRAWA)	22nd	1997
13	Legal Defence Centre	23rd	1998
14	Centre for Democracy and Development	29th	2001
15	Women's Aid Collective (WACOL)	30th	2001
16	Human Rights Law Service (HURILAWS)	31st	2002
	Legal Defence and Assistance Project (LEDAP)	35th	2004
17	Access to Justice	38th	2005
18	Baobab Organisation for Women's Rights	40th	2006
19	Nigeria Bar Association (NBA)	42nd	2007
20	Socio-Economic Rights and Accountability Project (SERAP)	43rd	2008
21	Rights Enforcement and Public Law Centre (REPLACE)	44th	2008
22	CLEEN Foundation	45th	2009

**Source:** Source: African Commission's Communiqués and Activity Reports (19878 – 2010)