



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

**A CRITIQUE OF THE EFFICACY OF THE COMMUNICATIONS PROCEDURE OF
THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

**MINI-DISSERTATION SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF LAW IN RESEARCH**

**FACULTY OF LAW,
UNIVERSITY OF PRETORIA**

SUBMITTED BY

INUTU AKOLWA

STUDENT NUMBER 14444845

SUPERVISOR

PROFESSOR M HANSUNGULE

NOVEMBER 2017

DECLARATION

I, the undersigned, hereby declare that the mini-dissertation with the title **A Critique of The Efficacy of the Communications Procedure of the African Commission on Human and Peoples' Rights** is my own original work and that it has not previously, in its entirety or in part, been submitted at any other university for a degree, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signature..... Date.....

DEDICATION

To my dearest father Libakengi, Wamunyima Akolwa, thank you for all the love and support you gave to me, though you were not able to see me through to the end of this work, I hope it embodies what you aspired for me.

AKNOWLEDGEMENTS

I thank you my Heavenly father, for granting me the wisdom and the courage to do this work, indeed all things are possible in you.

I would like to thank my supervisor Professor Hansungule, for all the materials he shared with me and his insightful comments which have resulted in a complete draft. I also thank Professor Viljoen who saw the work through to a sound end.

I thank Cristiano D'orsi, for diligently going through all my work and for his feedback, your commitment was truly appreciated.

I thank you, Felicity Kalunga and Josy Tapsoba for taking time off your very busy schedules to review my drafts.

My heartfelt thanks to my family for your unwavering support, thank you mum for being my rock, Bo Nyambe, Muletambo, Muyunda, thank you for being my biggest cheerleaders and for your encouragement! Mundia and Wam my lawyer's thank you for believing in me! Mundia a special thank you for neglecting your babies to proofread my work, God bless you abundantly!

ABSTRACT

The study aims at showing how the African human rights system provides protection to its people, while trying to assess how effective the system is. The study attempts to show the relevance of the African system as a home-grown system in the realm of international human rights protection today.

The study discusses the African Union (AU) human rights architecture. The AU's mandate on human rights is set out, outlining its institutional and normative framework for the protection of human rights.

The study also analyses the normative framework on the African Charter on Human and Peoples' Rights (Charter). Discussed are the rights and duties proclaimed by the Charter. The measures taken to safeguard these are also discussed highlighting the establishment of the African Commission on Human and Peoples' Rights (Commission) and its mandate and procedure.

The African Commission on Human and Peoples' Rights is identified as the main enforcement mechanism under the African Charter. An overview of the institutional and normative framework for human rights protection under the Commission is given. From this it is established that the communications procedure is an important means by which the Commission can fulfil its protection mandate.

A detailed explanation of the communication procedure in practice with consideration of the Rules of Procedure of the Commission is given. Its successes are balanced against its failings through a comparative analysis.

From the analysis herein the researcher concludes that the irregularities in the system, are adversely affecting the efficacy of its human protection mechanism, to this end the study concludes by giving recommendations to pertinent stakeholders aimed at enhancing the efficacy of the communications procedure of the African Commission by directly and indirectly addressing the challenges highlighted in the study.

LIST OF ABBREVIATIONS

| | |
|-----------------------|---|
| ACERWC | African Committee of Experts on the Rights and Welfare of the Child |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| African Charter | African Charter on Human and Peoples' Rights |
| African Commission | African Commission on Human and Peoples' Rights |
| African Court | African Court on Human and Peoples' Rights |
| AHoSG | Assembly of Heads of State and Government |
| AU | African Union |
| Court Protocol | Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights |
| Grand Bay Declaration | Grand Bay Declaration and Plan of Action |
| Maputo Protocol | Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa |
| OAU | Organization of African Unity |
| RECs | Regional Economic Communities |
| Special Rapporteur | Special Rapporteur on the Rights of Women in Africa |
| Strategic Plan | Human Rights Strategic Plan of the African Commission on Human and Peoples' Rights |
| The Strategy | AU Human Rights Strategy for Africa |

TABLE OF CONTENTS

| | |
|--|----|
| CHAPTER ONE..... | 10 |
| INTRODUCTION | 10 |
| 1.1 Background | 10 |
| 1.2 Statement of the Problem | 12 |
| 1.3 Research Questions | 13 |
| 1.4 Delineations of the Study..... | 13 |
| 1.5 Significance of the Study..... | 13 |
| 1.6 Literature overview..... | 14 |
| 1.7 Methodology..... | 18 |
| 1.8 Structure of the Mini Dissertation | 19 |
| CHAPTER TWO..... | 21 |
| 2.1 Introduction | 21 |
| 2.2 A General Overview of the Institutional and Normative Framework for Human Rights Protection under the AU | 22 |
| 2.3 The African Charter on Human and Peoples' Rights..... | 24 |
| 2.3.1 The African Commission on Human and Peoples' Rights | 27 |
| 2.4. The Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol)..... | 28 |
| 2.4.1 The African Court on Human and Peoples' Rights..... | 29 |
| 2.5 The Protocol on the Rights of Women in Africa (Maputo Protocol)..... | 32 |
| 2.5.1 The Special Rapporteur on Rights of Women in Africa..... | 34 |
| 2.6 The African Charter on the Rights and Welfare of the Child | 35 |
| 2.6.1 The Committee on the Rights and Welfare of the Child | 36 |
| 2.7 The Protection of Human Rights by Soft Law under the African Union..... | 37 |

| | |
|--|----|
| 2.7.1 Grand Bay (Mauritius) Declaration and Plan of Action and the Kigali Declaration..... | 38 |
| 2.7.2 The Grand Bay Declaration | 38 |
| 2.7.3 Kigali Declaration | 40 |
| 2.8 Human Rights Strategy for Africa..... | 41 |
| 2.9 African Commission Human Rights Strategic Plan (2015-2019) | 44 |
| 2.10 The New Partnership for Africa’s Development and the African Peer Review Mechanism. | 46 |
| 2.11 Conclusion..... | 48 |
| CHAPTER THREE | 50 |
| 3.1 Introduction | 50 |
| 3.2 Rights and Duties | 50 |
| 3.2.1 Individual Rights..... | 51 |
| 3.2.2 Social, Economic and Cultural Rights | 54 |
| 3.2.3 Peoples’ Rights..... | 55 |
| 3.3 Establishment of the African Commission | 56 |
| 3.4 Mandate and Procedure of the Commission | 57 |
| 3.5 Conclusion..... | 57 |
| CHAPTER FOUR | 59 |
| 4.1 Introduction | 59 |
| 4.2 Overview of the Normative Framework for human rights protection under the African Commission. | 59 |
| 4.2.1 Human Rights Instruments and Sources..... | 60 |
| 4.3 An Overview of the Institutional Framework for Human Rights Protection under the African Commission. | 62 |
| 4.3.1 Special Mechanisms of the African Commission on Human and Peoples’ Rights..... | 64 |
| 4.3.2 Reporting Mechanism..... | 67 |
| 4.3.3 Friendly Settlement of Disputes, Letters of Allegation and Urgent Appeals | 69 |

| | |
|--|-----|
| 4.3.4 Communications Procedure. | 73 |
| 4.4 Conclusion..... | 75 |
| CHAPTER FIVE | 76 |
| 5.1 Introduction | 76 |
| 5.2 The Communication Procedure. | 76 |
| 5.2.1 Seizure of the Commission. | 76 |
| 5.2.2 Admissibility..... | 77 |
| 5.2.3 Consideration on the Merits. | 79 |
| 5.2.4 Follow-up on the recommendations of the Commission | 80 |
| 5.3 Challenges to the Communications Procedure which hinder the Efficacy of the Protective Mandate of the Commission. | 81 |
| 5.3.1 Inordinate delays in the various stages of the Communication Procedure | 81 |
| 5.3.2 Lack of implementation | 88 |
| 5.3.3 Gaps and inconsistent application of the Rules of Procedure by the Commission..... | 93 |
| 5.3.4 Failure to cater for all the working languages of the African Union | 95 |
| 5.4 Conclusion..... | 96 |
| CHAPTER SIX..... | 98 |
| 6.1 Summary and Conclusions | 98 |
| 6.2 Recommendations | 99 |
| 6.2.1 Recommendations for the Assembly of Heads of State and Government. | 99 |
| 6.2.2 Recommendations for the African Union Commission..... | 101 |
| 6.2.3 Recommendations for the States Parties to the African Charter | 102 |
| 6.2.4 Recommendations for the African Commission | 103 |
| BIBLIOGRAPHY | 105 |

A CRITIQUE OF THE EFFICACY OF THE COMMUNICATIONS PROCEDURE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

CHAPTER ONE

INTRODUCTION

1.1 Background

The African Charter on Human and Peoples' Rights (African Charter)¹ provides for a process by which bodies may be established under the African Union (AU) on the continent to protect human and peoples' rights.² In this regard, the African Charter establishes the African Commission on Human and Peoples' Rights (the African Commission) to promote human and peoples' rights and ensure their protection in Africa.³

The African Commission represents one of the central institutions, responsible for the promotion and protection of human and peoples' rights in Africa,⁴ as also stipulated by the African Charter: *'it is the function of the Commission to ensure the protection of human and peoples' rights under conditions laid down under the present Charter'*⁵.

The African Commission fulfils its protective mandate through its communications procedure, the review of periodic state reports on the implementation of the Charter, friendly settlement of disputes and other activities of special rapporteurs and working groups and missions.⁶ Of these activities, the communications procedure is described in detail under Chapter III of the African Charter which outlines the procedure of the Commission

¹ Adopted on 27 June 1981 and entered into force on 21 October 1986.

² At the 16th Ordinary Session held in Monrovia, Liberia² from 17 to 20 July 1979, the AoHSG decided that a preliminary draft of the African Charter on Human and Peoples' Rights (the African Charter) be prepared providing the establishment of bodies to protect human and peoples' rights. See preamble of African Charter on Human and Peoples' Rights

³ African Charter on Human and Peoples' Rights (African Charter) Article 30

⁴ It derives its mandate directly from the African Charter, which is the central document for the African Regional Human Rights System see D Shelton "Regional Protection of Human Rights" in C Heyns *The African Regional Human Rights System: The African Charter* (2004) 107

⁵ African Charter Article 45 (2)

⁶ In line with its mandate under Article 45 of the African Charter

The Commission is considered the main forum for upholding the rights of those who have suffered human rights violations, having rendered important decisions for over 25 years.⁷ In this light the Communications Procedure has been regarded by important stakeholders as the most accessible human rights mechanism on the continent for victims of human rights violations.⁸ As at 12th December 2016 the Commission has 194 communications pending at different stages⁹.

The African Commission together with the African Court on Human and Peoples' Rights which was established to complement the former's protective mandate¹⁰ called upon the AU to declare the year 2016 as the African Human Rights Year,¹¹ to celebrate efforts of promoting and protecting peoples' rights across the continent. The declaration of 2016 as African Human Rights Year provides an opportunity for the entire continent to take stock of the human rights situation on the continent in general.¹²

Considering the above Declaration, now, appears to be an opportune time to also take stock of the contribution made by the communications procedure, which is one of the main activities of the African Commission under its protective mandate, towards the realisation of the legitimate aspirations of the African people as enshrined in the African Charter. In so far as human rights protection is concerned this evaluation as a continent is pertinent if the continent is to maintain an effective African human rights system in which all Africans have confidence and from which they would enjoy the highest level of protection of human and peoples' rights.

⁷ Per the findings of a group of civil society organizations during the 51st Ordinary Session of the African Commission who as litigants before the African Commission formed a group for strengthening the protective mandate of the African Commission and which would also discuss and exchange on current challenges and experiences made in litigating before the African Commission, see "Filing a Communication before the African Commission on Human and Peoples' Rights: A complainant's manual" (2013) The Egyptian Initiative for Personal Rights and others document available <http://www.redress.org/downloads/country-reports/1307%20Manual%20to%20the%20African%20Commission.pdf>

⁸ *ibid*

⁹ "40th Activity Report of The African Commission on Human and Peoples' Rights" <http://www.achpr.org/activity-reports/40/> (accessed 12/01/2016)

¹⁰ Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol) Article 2

¹¹ " Ethiopia/AU: AU Summit asked to declare 2016 African Human Rights Year" available at: <http://www.panapress.com/Ethiopia-AU--AU-Summit-asked-to-declare-2016-African-Human-Rights-Year--12-895369-20-lang2-index.html>

¹² "Concept Paper on the Declaration of 2016 as Africa Year of Human Rights on" available at http://www.achpr.org/files/news/2016/07/d246/concept_note_project2016_eng.pdf accessed 11/16/16

1.2 Statement of the Problem

The Commission currently has about 194 communications pending before it at different stages.¹³ On an average the Commission has only been able to conclude not more than 10 decisions at merit stage per year.¹⁴ The Commission faces numerous challenges in respect to its communication procedure, which hinder the efficacy of its protective mandate.¹⁵ Some specific challenges include:

1. **Inordinate delays in the various stages of the Communication Procedure:** This is due to many reasons including, respondent states failing to make submissions within the stipulated times and inadequate time for Commissioners to deliberate on the communications during sessions..
2. **Lack of implementation:** The Commission does not have a proper system by which its member states are obliged to implement its recommendations after a decision on the merits of a communication has been made.
3. **Inconsistent application of the Rules of Procedure by the Commission:** Different directions have been taken in resolving similar issues before the Commission at different sessions, for instance in the way strike out decisions have been handled, in some matters a party may be allowed a little more time to make submissions, whilst in other matters the Commission proceeds to strike out as soon as a certain time frame elapses.
4. **Failure to cater for all the working languages of the African Union:** This is mainly due to

¹³ Working Group on Communications Inter-Session Activity Report (May 2015 – October 2015)“ page 4 available http://www.achpr.org/files/sessions/57th/inter-act-reps/245/57os_intersession_report_wgc_eng.pdf accessed 3/7/2016

¹⁴ See last 5 published Activity Reports of the Commission In the combined 32nd and 33rd Activity Reports, a total of communications were considered on the merits see page 8 of the Report http://www.achpr.org/files/activity-reports/32-and-33/achpr5152_actrep32and33_eng.pdf accessed 02/28/15, in the 34th Activity Report, 3 communications were considered on the merits see page 5 of the Report http://www.achpr.org/files/activity-reports/34/achpr53eos13_actrep34_2013_eng.pdf accessed 02/28/15 ,in the 35th Activity Report 6 Communications were considered on the Merits see page 7 of the Report http://www.achpr.org/files/activity-reports/35/achpr54eos14_actrep35_2014_eng.pdf accessed 02/28/15 ,in the 36th Activity Report 2 Communications were considered see page 7 of the Report http://www.achpr.org/files/activity-reports/36/achpr54eos15_actrep36_2014_eng.pdf accessed 02/28/15 ,in the 37th Activity Report 2 communications were again considered on the Merits see page 9 of the Report http://www.achpr.org/files/activity-reports/37/actrep37_2015_eng.pdf accessed 02/28/15,

¹⁵ These challenges are discussed in detail with illustrations in chapter three of this dissertation

understaffing at the Secretariat of the African Commission. For instance, complaints have been presented to the African Commission in which the complainants face the death sentence especially Arab spring related cases, but deliberations on these have been delayed, among other reasons, due to the lack of officers with proficiency in the Arabic language. In such cases the delays may result in justice being denied.

1.3 Research Questions

- a) Why are there inordinate delays in concluding communications before the Commission?
- b) What system does the Commission have in place to ensure that member states implement its decisions on the merits of communications?
- c) How have the 2012 Rules of Procedure of the Commission had an impact on the Communications Procedure?
- d) How do institutional constraints of the Commission such as inadequate human resources affect the efficacy of the communications procedure?

1.4 Delineations of the Study

The scope of the study covers issues which affect the efficacy of the Communications Procedure of the African Commission. The study also highlights the successes which have been achieved by the Commission in the Communication Procedure. The study further involves a scrutiny of the bi-annual activity reports and other pertinent publications of the African Commission. The application by the Commission of its Rules of Procedure before and after their revision will also be considered as well as informal discussions with pertinent stakeholders.

1.5 Significance of the Study

The study is important as it shows how the African human rights system provides protection to its people, while trying to assess how effective the system is. It is necessary to continually monitor and evaluate the system to ensure that it fulfils its purpose in a consistent and

satisfactory manner. The study will therefore highlight any irregularities and will also show good practices and attempts to show the relevance of the African system as a home-grown system in the realm of international human rights protection today.

1.6 Literature overview

The African Charter established the African Commission, a quasi-judicial body¹⁶ to monitor, by various means, the implementation of its provisions to ensure the protection of human and peoples' rights in Africa.¹⁷ The protective mandate of the Commission is outlined in Article 45 (2) of the Charter, which provides that, '*the function of the Commission is to **ensure the protection of human and peoples' rights under conditions laid down by the present Charter***'. Osterdahl,¹⁸ avers that this means, the Commission using the tools provided by the Charter, is to call attention to any violations of the Charter and try to stop the violations.¹⁹ She adds that, phrases like "*ensure the protection of human rights*" "in the context of human rights treaties normally refer to a procedure for handling complaints from states, individual citizens or both."²⁰ In this light, it would appear that the Communications Procedure is an important tool under the African Charter's protective ambit, a position also asserted by Evans and Murray.²¹

After considering its communications, the Commission is required to adopt recommendations for further adoption by the Assembly of Heads of State and Government (AHoSG) of the AU, which would then become binding decisions.²² The Communications Procedure therefore potentially

¹⁶ The Commission's mandate is quasi-judicial and, as such, its final recommendations are not legally binding and there is no mechanism that can compel states to abide by its recommendations see "African Union Handbook: A Guide For Those Working With And Within The African Union" Page 74 available at <http://www.un.org/en/africa/osaa/pdf/au/au-handbook-2014.pdf> (accessed 11/28/2016)

¹⁷ Articles 30 and 31 African Charter

¹⁸ I Osterdahl *Implementing Human Rights in Africa: The African Commission on Human and Peoples' Rights and Individual Communications* (2002) 22

¹⁹ Ibid page 22

²⁰ Ibid page 22

²¹ Evans and Murray (eds) *The African Charter on Human and Peoples Rights: The System in Practice* (2008) 76

²² S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003)3 *AHRLJ* 120 and Article 59 of the African Charter

offers a concrete, result-oriented approach to human rights practice,²³ helping the African Commission fulfil its protective mandate.

However, some practical, institutional and legal challenges have been identified that appear to prevent the African Commission from playing a more meaningful role in protecting human rights on the continent through its Communication Procedure.²⁴

According to Gumedze²⁵ a major challenge to the Communications Procedure is the overall poor human rights records of African States. He states, this is so despite almost all African states being party to the African Charter and individual African states being party to a plethora of other human rights treaties at the international and regional levels²⁶.

Another challenge to the Communications Procedure as identified by Odinkalu,²⁷ is that not much is known about the work undertaken by the Commission to protect human rights in specific cases or countries. This is due substantially to the strict interpretation placed on Article 59(1) of the African Charter which prohibits disclosure of 'all measures' adopted in respect of protective activities by the Commission 'until such a time as the AoHSG shall otherwise decide'²⁸. This appears to support the notion of the subordination of the African Commission to the political organs of the AU, which undermines its reputation.

Odinkalu²⁹ also avers that the ambiguity of the protective mandate of the African Commission in the African Charter proves to be a great challenge to the communications procedure. The provisions concerning the Commissions' protective mandate are not notable for their clarity or

²³ S Gumedze 'The African Union and the responsibility to protect' (2010) 10 *AHRLJ* 120 <http://www.ihrda.org/> (accessed on 24 October 2017)

²⁴ 'Filing a Communication before the African Commission on Human and Peoples' Rights A complainant's manual' The Egyptian Initiative for Personal Rights and others (2013) 2

²⁵ Ibid page 138

²⁶ Ibid page 138

²⁷ C Odinkalu-'The Individual Complaints Procedures of the African Commission: A preliminary Assessment' in HJ Steiner(ed) *International Human Rights Law in Context* (2007) 924

²⁸ Ibid

²⁹ Ibid.

precision³⁰. For instance, the African Charter provides, among other conditions, that the African Commission shall consider communications if they simply indicate their author's even if the latter request anonymity.³¹ The Charter appears to be silent on the issue of standing, an individual or NGO submitting a communication on behalf of another need not obtain the express consent of the victim and this has been the practice.³² However, in **Communication 464/14 – Uhuru Kenyatta and William Ruto (represented by Innocence Project Africa) v. Republic of Kenya**³³ which was rejected at seizure the African Commission, contrary to the abovementioned practice, appeared to be of the view that the express consent of the victim was required³⁴.

Keetharuth³⁵ asserts that a fundamental element of a fair hearing is the entitlement to a determination of rights and obligations without undue delay and with adequate notice of and reasons for the decisions. She observes that the African Commission in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*,³⁶ found a violation of Article 7 of the African Charter when several people were arbitrarily arrested by security forces and never brought before a court, even if they were eventually set free.¹⁴⁷ In another case, where a complainant was detained in prison for seven years without trial, the Commission held it was a violation of Article seven. She however notes that, the Commission itself fails to satisfy this provision in that its efficiency in delivering decisions in cases brought to it is quite poor.³⁷ Keetharuth highlights the SERAC Decision³⁸ as a case in point, lodged in 1996, the decision was delivered in 2000, at a time when the military regime which perpetrated the violations was no longer in power

³⁰ Ibid.

³¹ Rules of Procedure of the African Commission Rule 56 (1)

³² 'Celebrating the African Charter at 30: A guide to the African human rights system' Pretoria University Law Press (PULP) 2011 25

³³ Available http://www.achpr.org/files/sessions/15theo/comunications/464.14/achpr15eo_decis_464_14_kenya_2014_eng.pdf (accessed 02/04/16)

³⁴ See paragraph 21 of the Communication

³⁵ S.B. Keetharuth 'Major African legal instruments' in Bösl, A and Diescho, J (eds) Human Rights in Africa Legal Perspectives on their Protection and Promotion (2009) 196 also see the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A(2)(a).

³⁶ Communication 74/929th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 72–76]

³⁷ Ibid page 196

³⁸ *155/96 Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2008, pp.277–293]

Chowdhury et al aver that,³⁹ the African Charter created the African Commission as the only mechanism for supervising State Parties' compliance with obligations arising under it. Chowdhury et al add that while the Commission has an elaborate promotional mandate under the Charter, it does not possess sufficient protective powers, they further suggest that in reality, neither the Charter nor the Commission provides for enforceable remedies.⁴⁰

Gawanas is of the same view submitting that there are legitimate concerns about the AU and its institution's abilities to live up to the high expectations of making a real difference to human rights in Africa, major concerns are that:⁴¹ the implementation and enforcement mechanisms are toothless; the political will is lacking, as evidenced by the failure to implement agreed policies, values and standards; and countries fail to comply with the requirement to report on the domestic implementation of ratified instruments.

It has also been found that Institutional constraints affect the smooth running of the communications procedure. The AU continues to face organisational and financial challenges within its institutions.⁴²The Commission subsequently also suffers from a serious lack of funding and for this and other reasons, the special mechanisms of the Commission have not been effective⁴³

Despite these challenges, Ibrahim posits that, primarily through its professionalism and the assertiveness of its members, the African Commission has been able to overcome many of its structural difficulties hindering the fulfilment of its protective mandate⁴⁴. The Commission's attempts to overcome its structural deficiencies include: its publication of a strong condemnation of noncompliance with its decisions; making binding '*decisions*' in place of '*recommendations*';

³⁹ A.R Chowdhury, S Sessaiah & J.H Bhuiyan In 'Role of Regional Human Rights Instruments in the Protection and Promotion of Human Rights' in A. R Chowdhury & J.H Bhuiyan (eds) *An Introduction to International Human Rights Law* (2010) 281

⁴⁰ *Ibid*

⁴¹ B Gawanas 'The African Union: Concepts and implementation mechanisms relating to human rights' in Bösl, A and Diescho, J (eds) *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009) 140

⁴² *Ibid*

⁴³ F. Martin et al *International Human Rights and Humanitarian Law :Treaties, Cases and Analysis* (2006) 19

⁴⁴ AM Ibrahim 'Evaluating a Decade of the African Union's Protection of Human Rights and Democracy: A Post Tahrir Assessment' (2012) 12 *AHRLJ* 41

the appointment of Special Rapporteurs; and the initiation of visits, in addition to a plethora of jurisprudential innovations.⁴⁵

This study endeavours to fill the academic void and expand on existing information by providing a critical analysis of other pertinent, above mentioned challenges which continue to significantly affect the effectiveness of the communications procedure.⁴⁶

1.7 Methodology

The desktop research methodology was employed in this research, using both primary and secondary data. Primary data included communications of the Commission, other decided cases from similar bodies, international and regional instruments, legislation, rules of procedure, principles and guidelines and resolutions. Secondary data included books, journals and online publications.

To add to the body of information in the main text of the dissertation, unstructured interviews were also conducted with persons directly connected to the protective mandate of the Commission, such as legal officers from the Secretariat of the African Commission, nongovernmental organisations with observer status before the Commission, representatives of states parties to the African Charter. Additionally, interviews were also conducted with other relevant stakeholders who have interacted with the communications procedure of the Commission to allow access to perceptions on the impact of the communications procedure to establish how visible/popular, accessible and efficient the said procedure is.

I adopted a comparative analytical framework to compare the protective mandate of the African Commission with those of the UN, European and Inter-American systems. This framework was also used to compare the different practices of the African Commission with the ones of its world and regional counterparts.

⁴⁵ Ibid 42

⁴⁶ See the Statement of the Problem, page 3 above

1.8 Structure of the Mini Dissertation

Chapter One: Introduction- This introduces and gives a background to the Study, framing the key conceptual issues and putting them into context. It gives the problem, objectives and methodology adopted in the research as well as the literature review.

Chapter Two: The African Union Human Rights Architecture-This Chapter sets out the African Union's (AU) mandate on human rights. It outlines, the institutional and normative framework for the protection of human rights by the AU, locating the relevant organs and institutions of the AU responsible for fulfilling its human rights mandate.

Chapter Three: An Analysis of the Normative Framework on the African Charter on Human and Peoples' Rights - In this Chapter the normative framework of the African Charter on Human and Peoples' (African Charter) is outlined. Discussed are the rights and duties proclaimed by the Charter. The measures taken to safeguard these are also discussed highlighting the establishment of the African Commission on Human and Peoples' Rights and its mandate and procedure.

Chapter Four: The African Commission on Human and Peoples' Rights and its Human Rights Protection Mandate-An overview of the institutional and normative framework for human rights protection under the Commission, with a focus on the Communications Procedure.

Chapter Five: The Communications Procedure- A detailed explanation of the procedure in practice with consideration of the Rules of Procedure of the Commission. This is followed by an attempt to balance the successes of the communications procedure against its failings including a comparative perspective. This seeks to reconcile the different approaches to regional human rights protection, highlighting the Inter-American system and the former European Commission.

Chapter Six: Conclusion- summarises and concludes the Study by giving recommendations to pertinent stakeholders aimed at enhancing the efficacy of the communications procedure of the African Commission by directly and indirectly addressing the challenges highlighted in the Study.

CHAPTER TWO

The African Union Human Rights Architecture

2.1 Introduction

This Chapter sets out the African Union's (AU) mandate on human rights. It outlines, the institutional and normative framework for the protection of human rights by the AU, locating the relevant organs and institutions responsible for fulfilling its human rights mandate. In this regard, the Constitutive Act of the AU is considered, as well as the African Charter on Human and Peoples' Rights (the African Charter) and the African Charter on the Rights and Welfare of the Child (the ACRWC). Also considered are protocols to the African Charter, in particular the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). Additionally specific soft instruments having an impact on the human rights mandate of the AU are identified and discussed. The Grand Bay Declaration and Plan of Action (Grand Bay Declaration) and the Kigali Declaration to this end are considered, being important landmarks leading towards the current human and peoples' rights promotion and protection mandate of the AU. The AU Human Rights Strategy for Africa (the Strategy) which provides a guiding framework for collective action to strengthen the African human rights system is also considered together with the recently adopted Human Rights Strategic Plan (the Strategic Plan) of the African Commission on Human and Peoples' Rights (the Commission). The African Peer Review Mechanism (APRM) under the New Partnership for Africa's Development (NEPAD) is also highlighted being one of the institutions recently established by the AU to enrich the African human rights system.

Following the review of the instruments above, some of the main implementation bodies under the African Human Rights System are also discussed, which include the African Commission, the African Court on Human and Peoples' Rights (African Court), and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). The role of the Special Rapporteur

on the Rights of Women in Africa (the Special Rapporteur) is also discussed being the mechanism under the African Commission on Human and Peoples' Rights which spearheaded the adoption of the Maputo Protocol and today playing a key role in ensuring the implementation of the Protocol.

2.2 A General Overview of the Institutional and Normative Framework for Human Rights Protection under the AU

The establishment of the AU on 26 May 2001,⁴⁷ to replace the Organization of African Unity (OAU), brought hope that human rights and democracy would finally have a prominent role, in the workings of the regional body. This was because, among other reasons, the AU's Constitutive Act's provisions were seen to be more empathetic for the cause of human rights and democratic ideals.⁴⁸

To begin with the Constitutive Act specifically provides that one of the objectives of the AU shall be to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments⁴⁹. This is reinforced in the principles of the AU also outlined in the Constitutive Act which provide that the AU shall be guided by: respect for democratic principles, human rights, the rule of law and good governance.⁵⁰

From the above, all the organs and institutions of the AU in performing their functions have a potential role to play in the protection of human rights.⁵¹ Most of the key organs of the AU are established under the Constitutive Act, these include:⁵²

- The Assembly of Heads of State and Government;
- Executive Council of Ministers;
- Permanent Representatives Committee;
- AU Commission;

⁴⁷ The Constitutive Act entered into force on 26 May 2001

⁴⁸ A.M, Ibrahim 'Evaluating a decade of the African Union's protection of human rights and democracy: A post-Tahrir Assessment' (2012) 12 *AHRLJ* 1

⁴⁹ Article 3(h) Constitutive Act of the AU

⁵⁰ Article 4 (m) Constitutive Act of the AU

⁵¹ F Viljoen *International Human Rights Law in Africa* (2007) 180

⁵² 'Strengthening Popular Participation in the African Union: A Guide to AU Structures and Processes' AU publication By Oxfam, AfriMAP and the Open Society 5

- Pan African Parliament;
- Financial Institutions;
- Economic, Social and Cultural Council; and
- Specialized Technical Committees

The rest of the organs of the AU are established by other treaties, protocols and agreements, which all have elements of human rights protection. These include the:⁵³

- Peace and Security Council;
- African Commission on Human and Peoples' Rights;
- African Committee of Experts on the Rights and Welfare of the Child;
- African Court on Human and Peoples' Rights;
- New Partnership for Africa's Development;
- Africa Peer Review Mechanism; and
- Regional Economic Communities.

The AU Commission is responsible for the AU's executive functions and everyday management.⁵⁴ It acts as the Secretariat of the AU and has numerous interactions with all the organs of the AU,⁵⁵ and is therefore a vital tool for ensuring a human right component in all the work of the AU.⁵⁶ The AU Commission is composed of a chairperson, deputy chairperson and eight commissioners, and staff.⁵⁷ Of these commissioners, two are significant to human rights, they are the Commissioner for Political Affairs and the Commissioner for Social Affairs.⁵⁸

The Commissioner for Political Affairs is responsible for promoting democratic principles, the rule of law, respect for human rights, participation of civil society organizations in development of the continent, and implementation of sustainable solutions to humanitarian crises.⁵⁹ The Commissioner for Social Affairs promotes the AU's labour, social development and cultural agenda. The two Commissioners are responsible for the African Commission and the African

⁵³ *ibid*

⁵⁴ 'African Union Handbook: A Guide for Those Working with And Within the African Union' 46 available at <http://www.un.org/en/africa/osaa/pdf/au/au-handbook-2014.pdf> assessed 11/28/2016

⁵⁵ Article 3 of the Statutes of The Commission of The African Union (Commissions Statutes)

⁵⁶ F, Viljoen (n 5 above) 203

⁵⁷ Article 20 Constitutive Act (n 8 above) 46

⁵⁸ n 5 above 204

⁵⁹ n 8 above 55

Committee of Experts on the Rights and Welfare of the Child. This Chapter discusses these two important organs of the AU together with the African Court and the Special Rapporteur on Women as important components of the institutional framework for the protection of human rights under the AU.

The organs of the AU require funds to carry out their activities. The AU has three main sources of revenue, which are:⁶⁰

- Contributions by State members according to a scale of assessment approved by the executive council;
- Additional voluntary contributions by member states to the solidarity fund; and
- Funding from external partners

Individually, the organs of the AU can also get funding directly from external partners.⁶¹

2.3 The African Charter on Human and Peoples' Rights

At the core of the AU's human rights normative framework is the African Charter. The African Charter is supplemented by other instruments, of which include the: Court Protocol; Maputo Protocol; and the ACRWC.

The African Charter was adopted in Nairobi, Kenya, in June 1981. It entered into force six years later in October 1986, providing a system for the protection and promotion of human rights, designed to function within the institutional framework of the O.A.U. The Charter sets standards and establishes the groundwork for the promotion and protection of human rights in Africa.⁶²

Unlike the OAU Charter which prioritized the respect for the sovereignty and territorial integrity of its member states,⁶³ the African Charter watered down the dominance of sovereignty by emphasizing that human rights violations could no longer be swept under the carpet of internal affairs.⁶⁴

⁶⁰ n 6 above 35

⁶¹ For instance, the African Commission under Rule 66 of its Rules of Procedure

⁶² 'Celebrating the African Charter At 30: A Guide to The African Human Rights System' 2011 (PULP) page 7

⁶³ n 5 above, 163

⁶⁴ n 16 above, 7

The African Charter establishes the primary human rights protection mechanism in Africa.⁶⁵ It promulgates a wide range of rights combining civil and political rights together with socio-economic rights in a single instrument. The Charter thus affirms the recognition by its states parties that civil and political rights cannot be disassociated from economic, social and economic rights in their conception as well as their universality.⁶⁶ An important effect of this feature is that socio economic rights are as unequivocally justiciable as any other rights in the Charter.⁶⁷ This was affirmed in the celebrated decision of the African Commission *SERAC vs. Nigeria*,⁶⁸ where the African Commission made it clear that there is no right in the African Charter that cannot be made effective.⁶⁹

However, the practice by some states parties has been to the contrary. In some cases only civil and political rights are enshrined in the Constitution, social and economic rights not being accorded the same status, being relegated to the status of directive principles of state policy, which are not justiciable.⁷⁰ Though the *SERAC* communication had a favourable ruling, the Respondent State failed to adequately implement the recommendations of the Commission.⁷¹ *SERAC* taking charge pursued various strategies to ensure implementation of the recommendations by the State.⁷² However it has been argued that it should not be the responsibility of the Complainant to alone ensure the implementation of the recommendations of the Commission.⁷³ The Commission needs to establish an effective mechanism to ensure the implementation of its recommendations. It has been affirmed that there is need for a follow up

⁶⁵ Ibid page 8

⁶⁶ See preamble of Charter

⁶⁷ Article 22 African Charter also <http://www.achpr.org/instruments/achpr/main-features/>

⁶⁸ *SERAC vs. Nigeria* (2001) AHRLR 60 (ACHPR 2001)

⁶⁹ n 16 above, 30

⁷⁰ For example, this is the position under the current constitution of Zambia also see D Olowu *an integrative rights-based approach to human development in Africa* (2009) Pages 97-98 available at http://www.pulp.up.ac.za/pdf/2009_08/2009_08.pdf

⁷¹ Transcript of the oral statement delivered by the Anti-Racism Information Service before the 61st session of the UN Commission on Human Rights Oral Submission by Mr. Legborsi Saro Pyagbara, Anti-Racism Information Service Mr. Chairperson, in which implementation of the *SERAC* decision was found to be lacking. Available at <http://www.unpo.org/article/2311> accessed 10/31/2016

⁷² M van der Linde, and L Louw 'Considering the Interpretation and Implementation of article 24 of the African Charter on Human and Peoples' Rights in Light of the *SERAC* Communication' (2003) 3 *AHRLJ* 184-185

⁷³ Ibid

mechanism within the African regional human rights system, functioning along the lines of those under the European and Inter-American regional human rights systems.⁷⁴

The member states of the OAU in adopting the African Charter agreed that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.⁷⁵ States parties to the African Charter, in ensuring the protection of human rights on the Continent have the duty to recognize the rights, duties and freedoms enshrined therein and adopt legislative or other measures to give effect to them.⁷⁶ The African Charter differs by defining duties that run from individuals to the state as well as to other groups.⁷⁷ The African Charter provides that all individuals have a duty not only to their families but to society, the State and other legally recognized communities and the international community.⁷⁸ The duties of all individuals are listed in general terms in articles 27, 28 and 29 of the African Charter ranging from the duties: to preserve the harmonious development of the family; not to compromise the security of the state; strengthen positive African Cultural values; and to contribute to the promotion and achievement of African unity .

A pertinent question which could be posed is how, these unique duties under the Charter are to be implemented. No information is given in the Charter as to what these duties entail and they remain vague and ambiguous. This concern has been raised regarding other provisions of the Charter particularly social and economic rights.⁷⁹

The Charter not only protects human rights but also protects 'peoples' rights. A wide definition of *peoples'* rights could be drawn from the provisions in the Charter. '*Peoples'* rights are listed from Articles 19 to 24 of the Charter and from this, one can glean the extent of their scope. Article 19 talks about all peoples being equal, and no one group having the right to dominate

⁷⁴ Ibid page 185

⁷⁵ Preamble charter

⁷⁶ Article 1 African Charter

⁷⁷ Evans and Murray(Eds), 2002 *The African Charter on Human and Peoples' Rights; The System in Practice* (2000) 385

⁷⁸ Article 27 African Charter

⁷⁹ van der Linde and Louw affirm that article 24 as promulgated in the Charter lacks clarity on the substance of the right to a satisfactory environment, they posit that the right is 'vague' and 'ambiguous', which allows for different interpretations which could either be positive or negative. van der Linde and Louw 'Considering the Interpretation and Implementation of article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication' (2003) 3 *AHRLJ* 173-174

another group. The Charter elaborates on this stating that,⁸⁰ all peoples' have an alienable right to self-determination and shall freely determine their political status and pursue their economic and social development according to the policy they have freely chosen. The Charter specifically proscribes the domination of peoples' stating that colonized or oppressed peoples shall have the right to free themselves from the bonds of domination.⁸¹The Charter buttresses the concept of peoples' rights by placing a duty individually or collectively on States to ensure this right to development of all peoples'.⁸²

All the member states of the African Union have ratified the African Charter apart from South Sudan which has only signed the treaty.

The normative framework on the African Charter will be analysed further in the following chapter.

2.3.1 The African Commission on Human and Peoples' Rights

To safeguard the rights and duties which it enshrines, the African Charter established the African Commission.⁸³ The Commission is the primary body responsible for human rights within the AU.⁸⁴ It was specifically established to promote and protect human and peoples' rights and ensure their protection in Africa.⁸⁵

The Commission has four broad functions under its mandate:⁸⁶

- to promote Human and Peoples' Rights;
- to ensure the protection of human and peoples' rights under conditions laid down by the present Charter;
- to interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU; and
- to perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

⁸⁰ Article 20 (1) African Charter

⁸¹ Article 20(2) African Charter

⁸² Article 22(2) African Charter

⁸³ Article 30 African Charter

⁸⁴ n 5 above, 217

⁸⁵ African Charter Article 30

⁸⁶ Article 45 African Charter

Under its protective mandate the African Commission is responsible for monitoring compliance of states parties with the provisions of the African Charter. The Commission has the mandate to employ any appropriate method of investigation in carrying out this responsibility.⁸⁷ It has over the years developed numerous mechanisms and specific tools to ensure these responsibilities are fulfilled. These include country visits, friendly settlement of disputes, and the state reporting procedure to mention some. These procedures are discussed in chapter four where the institutional framework for human rights protection under the African Commission is discussed in detail.

2.4. The Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol)

The Assembly of Heads of State and Government adopted Resolution AHG/Res 230(XXX) in June 1994, which called for a government experts' meeting to be convened in conjunction with the African Commission, to consider means to enhance the efficiency of the African Commission and to consider the establishment of an African Court on Human and Peoples' Rights.⁸⁸ The member states of the OAU recognized that the objectives of the African Charter required the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission. The creation of the Court was also intended to provide recourse to persons under the jurisdiction of states parties.⁸⁹ The Protocol establishing an African Court on Human and Peoples' Rights was adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 January 2004.

⁸⁷ Article 46 of the African Charter

⁸⁸ Preamble African Court Protocol

⁸⁹ Alfredsson et al (Eds), *The Protection Mechanism under the African Charter*, Erika de Wet, Raol Wallenberg Institute Human Rights Library Volume 7, International Human Rights Monitoring Mechanisms, Martinus Nijhoff Printers 2001 page 717

2.4.1 The African Court on Human and Peoples' Rights

The African Court is composed of 11 judges who are nationals of member states of the African Union.⁹⁰ The Judges are elected in their individual capacity from among jurists of high moral character and of recognized practical, judicial or academic experience in the field of human rights.⁹¹ An attendant risk of this process is horse-trading in the selection of the judges by states parties. The selection of judges for international bodies is renowned for exploiting personal networks and social currency, some appointments are deemed rewards for political loyalty, in other cases a means of advancing political agendas.⁹² Where horse-trading is practiced, the most qualified candidates are often not selected.⁹³

It is however hoped that these risks, will remain just that, with the renewed commitment of the African States for a more effective protection of human rights evidenced by certain features of the African Court which set it apart, not only from its American and European equals, but from all other judicial bodies.⁹⁴

Apart from having jurisdiction over all cases and disputes submitted to it regarding the interpretation and application of the Charter, the Court's Protocol provides that actions may be brought before the African Court on the basis of any instrument, including international human rights treaties, which have been ratified by the states concerned.⁹⁵ Additionally, the Court can apply as sources of law any relevant human rights instrument ratified by the state in question, in addition to the African Charter.⁹⁶ In this regard the African Court is well placed to become the judicial arm of a good number of human rights instruments applicable to its members, as most of

⁹⁰ Article 11 African Court Protocol

⁹¹ Article 11 African Court Protocol

⁹² See Memooda Ebrahim –Carstens Gender Representation on the Tribunals of the United Nations Internal Justice System: A Response to Nienke Grossman page 98

<https://www.asil.org/sites/default/files/EbrahimCarstens%2C%20Gender%20Representation%20on%20the%20Tribunals%20of%20the%20United%20Nations%20Internal%20Justice%20System%20%282%29.pdf> and Grossman, N : *Achieving Sex-Representative International Court Benches*(2016)AJIL Volume 110 No1 page 86 <http://www.jstor.org/stable/pdf/10.5305/amerjintelaw.110.1.0082.pdf> accessed 11/03/2016 martinus Nijhoff online

⁹³ Ibid

⁹⁴ African Court of Human and Peoples' Rights Project on International Courts and Tribunals <http://www.pict-pcti.org/courts/ACHPR.html> accessed 11/3/2016

⁹⁵ Ibid also see Article 3(1) African Court Protocol

⁹⁶ Ibid also see Article 7 African Court Protocol

these agreements do not contain judicial mechanisms of ensuring their implementation.⁹⁷ The Court therefore potentially provides several African states with a dispute settlement and implementation control system.⁹⁸

The Court Protocol lists institutions entitled to submit cases to the African Court.⁹⁹ These include: The Commission; the state party which had lodged a complaint to the Commission; the state party against which the complaint has been lodged at the Commission; the state party whose citizen is a victim of a human rights violation and African Inter-governmental organizations.¹⁰⁰

In addition, where a state party to the Protocol has made a declaration under Article 34 (6) accepting the jurisdiction of the Court, non-governmental organizations with observer status before the Commission and individuals from such a state party can also institute cases directly.

The Court may also, at the request of a Member State of the African Union, any of the organs of the African Union, or any African organization recognized by the African Union, provide an advisory opinion on any legal matter relating to the Charter or any other relevant human rights instruments.¹⁰¹ The Court also has jurisdiction to promote amicable settlement in cases pending before it in accordance with the provisions of the Charter.¹⁰²

Apart from its relationship with the African Court, the Commission has synergies with other AU institutions with protective mandates. The relationship with the Court however, offers great potential as far as human rights protection is concerned because of its complementarity nature.

To ensure good working relations, the rules of the Court stipulate that the two institutions meet at least once a year.¹⁰³ In regard the two institutions operation's, the Commission may consult the Court, interpret the Charter if requested to do so by the Court, or request the Court to provide

⁹⁷ Ibid

⁹⁸ <http://www.pict-pcti.org/courts/ACHPR.html>

⁹⁹ Article 5 Court Protocol

¹⁰⁰ <http://www.african-court.org/en/index.php/vacancies-3/frequent-questions#court-mandate> accessed 6/15/2015

¹⁰¹ Article 4 (1) Court Protocol

¹⁰² Article 9 Court Protocol

¹⁰³ Rule 29 of the Rules of Court and Rule 115 of the Commission's Rules of Procedure the Activity reports of the Commission shows that the commission has on several occasions had meetings with the Court Activity reports available at www.achpr.com

an opinion on any legal matter relating to the Charter or any other relevant human rights instruments.¹⁰⁴

Furthermore as indicated earlier the Commission may submit communications to the Court. This maybe in instances where the Commission considers that a State has not complied or is unwilling to comply with its recommendation in respect of the communication within the period stipulated in the Rules of the Commission.¹⁰⁵ The Court may also be seized of a matter by referral from the Commission, where the Commission made a request for provisional measures against a state party and the state did not comply with the same.¹⁰⁶ Where serious or massive violations as provided for in the Charter are alleged, the Commission may also submit a case before the Court against a state party.¹⁰⁷

An advantageous feature of the Court in comparison to the Commission is that the Court's mandate is judicial in contrast to the quasi-judicial mandate of the African Commission. When the Court finds that there has been a violation of human and peoples' rights, it will issue appropriate orders to remedy the violation, including the payment of fair compensation or reparation.¹⁰⁸ Whilst the African Commission make recommendations the African Court makes binding decisions, whose implementation is monitored by the AU Council of ministers, thus injecting a political element of enforcement¹⁰⁹

All member states of the AU except Eritrea and Cape Verde have signed the Protocol, but so far only 29 states have ratified it.¹¹⁰ Seven states: Burkina Faso, Ghana, Mali, Malawi, Tanzania, Ivory Coast and Rwanda have made the declaration accepting the competence of the Court to receive cases from individuals and non-governmental organizations with observer status before the Commission.¹¹¹

¹⁰⁴ Part 4 of the Rules of Procedure of the Commission

¹⁰⁵ Rule 118(1) of the Rules of Procedure of the Commission

¹⁰⁶ Rule 118(2) *ibid*

¹⁰⁷ Rule 118(3) also see *Communication 381/09 - Centre for Minority Rights Development –Kenya and Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v. Kenya*

¹⁰⁸ Article 27 (1) Court Protocol

¹⁰⁹ <http://www.ihrda.org/afchpr/> accessed 6/10/2015

¹¹⁰ <http://www.african-court.org/en/index.php/about-the-court/brief-history> accessed 10/8/2015

¹¹¹ http://www.africancourt.org/en/images/documents/New/Statuts_of_the_Ratification_Process_of_the_Protocol_Establishing_the_African_Court.pdf accessed 10/8/2015

In the 12 years of its existence, the Court has only received 54 applications.¹¹² This could be a result of the failure of states to make the Declaration under Article 34 (6) accepting the jurisdiction of the Court which would enable more NGOs with observer status before the Commission and individuals to bring matters before the Court. Contrasting the Court with the Commission, the Commission receives more communications because any individual or NGO may bring a communication before it.¹¹³ The low ratification of the Court Protocol most likely also contributes to the low utilization of the Court as actions cannot be commenced against non-states parties to the Protocol. More promotion activities need to be carried out encouraging states to not only ratify the Charter, but to also make the Declaration. The Commission and the Court must also consolidate their complementary relationship, with the Commission taking a lead role in referring more matters to the Court, which would also ease its workload.

2.5 The Protocol on the Rights of Women in Africa (Maputo Protocol)

The Assembly of Heads of State and Government of the Organization of African Unity during its 31st Ordinary Session, in June 1995 endorsed a recommendation of the African Commission on the need of a protocol on the rights of women in Africa¹¹⁴. To this end the Protocol on the Rights of Women in Africa (the Maputo Protocol) was adopted on 11 July 2003 at the 2nd Ordinary Session of the African Union held in Maputo, Mozambique, and entered into force on 25 November 2005.

The Protocol attempts to reinvigorate the African Charter's commitment to women's equality by expanding the substance of existing rights in the Charter to address pertinent issues which were not well addressed and to also clarify government's obligations with respect to women's rights.¹¹⁵

The additional principles and standards in the Protocol were designed to expand on the protection mandate of the African Commission. For instance the Protocol introduced, for the first

¹¹² List of applications received by the Court <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1> accessed 11/3/2016

¹¹³ The practice of the Commission reflects this

¹¹⁴ Preamble Maputo Protocol

¹¹⁵ The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights (Centre for Reproductive Rights Briefing Paper) page 3 available at http://www.reproductiverights.org/sites/default/files/documents/pub_bp_africa.pdf accessed 04/29/2016

time in an international treaty, health and reproductive rights.¹¹⁶ Furthermore, the Protocol was the first international human rights treaty to explicitly refer to HIV/AIDS, in the context of sexual and reproductive health rights.¹¹⁷ Under the Guidelines for State reporting under the Maputo protocol, states parties to the Charter and the Protocol are expected to report to the Commission measures taken to ensure the implementation of the Maputo Protocol.¹¹⁸ The Guidelines were adopted by the African Commission during its 46th Ordinary Session.¹¹⁹

By ratifying the Maputo Protocol, states parties undertake to ensure, by the implementation of the provisions of the Protocol, that the rights of women are fully realized and enjoyed. Ratification is therefore crucial if these rights are to be brought to fruition. The Guidelines for State Reporting under the Maputo Protocol (the Guidelines) require state parties to the Maputo Protocol, in their reporting obligations under the African Charter, to give a description of their respective overall legal framework as it relates to women's rights in the Constitution, other laws, policies and programmes.¹²⁰

As of 4 November 2016,¹²¹ 36 States have signed and ratified the Protocol whilst fifteen States have only signed it. The Periodic Reports presented to the Commission by States Parties to the Maputo Protocol, do not often adhere to the Maputo Guidelines for Reporting,¹²² which hinders the efficacy of the reporting procedure, as the Commission is not able to measure the level of compliance of the states with its provisions and a consequence is that the level of enjoyment of the rights of women cannot be easily ascertained. This has been affirmed in numerous Activity Reports of the Special Rapporteur on Women's Rights¹²³ which have indicated that the low ratification rate of the Maputo Protocol by States and non-compliance by States Parties with the Guidelines for State Reporting remain to be a challenge.¹²⁴

¹¹⁶ n 16 above, 14

¹¹⁷ Article 14 of the African Charter and n 16 above, 14

¹¹⁸ <http://www.achpr.org/mechanisms/rights-of-women/about/> accessed on 04/29/2015

¹¹⁹ held from 11 to 25 November 2009 in Banjul, Gambia

¹²⁰ Guidelines page 6 available at www.achpr.org

¹²¹ <http://www.achpr.org/instruments/> accessed on 6/15/2016

¹²² Intersession Report of the Mechanism of the Special Rapporteur on the Rights of Women in Africa Since presented at the 52nd Ordinary Session of the African Commission paragraph 42 <http://www.achpr.org/sessions/52nd/intersession-activity-reports/rights-of-women/> accessed 5/9/2016

¹²³ The current Special Rapporteur is Commissioner Lucy Asuagbor

¹²⁴ Intersession Report of the Mechanism of the Special Rapporteur on the Rights of Women in Africa Since presented at the 52nd Ordinary Session of the African Commission <http://www.achpr.org/sessions/52nd/intersession-activity-reports/rights-of-women/> accessed 5/9/2016

2.5.1 The Special Rapporteur on Rights of Women in Africa

As indicated above the Maputo Protocol requires implementation of its provisions by the state parties at national level. The Special Rapporteur on Rights of Women in Africa was established by the African Commission at the 23rd Ordinary Session in April 1998, in recognition of the need to place emphasis on the problems and rights specific to women in Africa¹²⁵. Its establishment is in line with the Commission's mandate to promote the rights of women and girls and combat the discrimination and injustice that they continue to experience on the continent.¹²⁶

The mandate of the Special Rapporteur requires him/her to assist African governments in the development and implementation of their policies of promotion and protection of the rights of women in Africa, particularly in line with the domestication of the Maputo Protocol.¹²⁷ In this regard the Mechanism developed the Guidelines for State reporting to bring member states to adequately address women's rights issues in their periodic reports submitted to the African Commission.¹²⁸

The part time nature of the office of the Special Rapporteur proves to be a great challenge. The Special Rapporteur is responsible for the 36 States which have ratified the Protocol,¹²⁹ and has the duty to assist them develop and implement policies for the promotion and protection of the rights of women. It is impossible for the Commission to carry out missions to even half of these countries in a year because almost all the Commissioners hold full time jobs besides offering their services to the Commission.¹³⁰ This challenge is compounded by the underfunding of the Commission,¹³¹ the Special Rapporteur does not have adequate financing to enable her carry out all the activities under her mandate and follow up on the implementation of the Maputo Protocol.

¹²⁵ <http://www.achpr.org/mechanisms/rights-of-women/> accessed 24/07/2015

¹²⁶ Inter Session Report of the Special Rapporteur on the Rights of Women 52nd Ordinary Session Yamoussoukro Cote d'Ivoire, 9 - 22 October 2012 paragraph 3

¹²⁷ Mandate of Special Rapporteur on the Rights of Women in Africa <http://www.achpr.org/mechanisms/rights-of-women/about/> accessed on 9/24/14

¹²⁸ Ibid. The Guidelines were adopted by the African Commission during its 46th Ordinary Session held from 11 to 25 November 2009 in Banjul, The Gambia see 52nd Ordinary Session inters session report

¹²⁹ As of 11/4/2016 see <http://www.achpr.org/instruments/women-protocol/ratification/>

¹³⁰ African Commission Strategic Plan 2015-2019 Page 35 available at <http://www.achpr.org/about/strategic-plan/>

¹³¹ Ibid page 25

2.6 The African Charter on the Rights and Welfare of the Child

The Assembly of Heads and State and Government recognized the need to take all appropriate measures to promote and protect the rights and welfare of African children and adopted the Declaration on the Rights and Welfare of the African Child.¹³²

The OAU member states reaffirming adherence to the principles of the rights and welfare of the child contained in such declarations as the one above, conventions and other instruments of the OAU and of the UN and the United Nations Convention on the Rights of the Child, adopted the African Charter on the Rights and Welfare of the Child in Addis Ababa, Ethiopia on 11 July 1990.

The African Charter on the Rights and Welfare of the Child (ACRWC) was created to protect children. The Charter spells out the rights that African countries must ensure for their children, and it is the main instrument of the African human rights system for promoting and protecting child rights.¹³³ The ACRWC is the only region-specific child rights instrument.¹³⁴ It highlights issues of special importance in the African context, whilst building on the same basic principles as the UN Convention on the Rights of the Child (UNCRC).¹³⁵

It was deemed necessary to adopt an African Children's Charter because African countries were under-represented in the drafting process of the UNCRC, and many felt another treaty was needed to address the specific realities of children in Africa.¹³⁶ Unlike other human rights treaties the ACRWC covers a whole range of rights including civil, political, economic, social and civil rights.¹³⁷ The African states wanted the Charter to specifically address:¹³⁸ children living under apartheid, harmful practices against the girl child such as female genital mutilation, internal conflicts and displacement, the definition of a child, the rights of children of imprisoned mothers, poor and unsanitary living conditions, the African conception of communities' responsibilities

¹³² adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its sixteenth ordinary session in Monrovia, Liberia, from 17 to 20 July 1979

¹³³ http://www.unicef.org/esaro/children_youth_5930.html accessed 7/27/2015

¹³⁴ <http://acerwc.org/> accessed 22/06/15

¹³⁵ ibid

¹³⁶ http://www.unicef.org/esaro/children_youth_5930.html accessed 7/27/2015

¹³⁷ http://www.unicef.org/esaro/children_youth_5930.html accessed 7/27/2015 The Convention on the Rights of the Child also covers the same scope

¹³⁸ ibid accessed 7/27/2015

and duties, weak enforcement and monitoring mechanisms, role of the family in adoption and fostering, and the duties and responsibilities of the child towards the family and community.¹³⁹

2.6.1 The Committee on the Rights and Welfare of the Child

The ACRWC has its own implementing body, the Committee on the Rights and welfare of the Child (the Children's Committee) which sets up mechanisms for the protection of children's human rights in Africa. The Committee comprises of 11 individuals of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child.¹⁴⁰ The Committee has a wider mandate than that conferred on the UNCRC. While the UNCRC has the mandate to consider reports from state parties, the Children's Committee in addition to state reporting has put in place an individual complaint and an investigative procedure as additional mechanism for protecting children.

The reporting procedure of the ACRWC requires state parties to submit their initial state party reports within two years of ratification and periodic reports on its implementation every three years.¹⁴¹ Through the reporting procedure state parties can periodically review their national legislations and administrative rules, procedures and practices in relation to children's rights. Reporting is also viewed as a means by which the commitment expressed through ratification of the ACRWC can be verified whether it is translated into actual practice or improvements in the realization of children's rights.¹⁴²

At the national level, the reporting process presents a platform for national dialogue on children's rights issues among the stakeholders in a state party and an opportunity for public scrutiny of government policies, thereby encouraging the involvement of various sectors of society in the formulation, evaluation, and review of policies and laws.¹⁴³

In line with the ACRWC, in fulfilling its protective mandate the Children's Committee may:¹⁴⁴ collect and document information; commission inter disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child; organize meetings;

¹³⁹ Also see the African Children's Charter

¹⁴⁰ <http://acerwc.org/the-experts/> accessed 22/06/15

¹⁴¹ Article 43 Children's Charter

¹⁴² African Committee of Experts on the Rights and Welfare of the Child: Initial Reports <http://acerwc.org/initial-reports/> accessed 7/27/2015

¹⁴³ Ibid <http://acerwc.org/initial-reports/> accessed 7/27/2015

¹⁴⁴ Articles 42 ACRWC

encourage national and local institutions concerned with the rights and welfare of the child and where necessary give its views and make recommendations to Government.

The challenges experienced by the Children's Committee as reflected in its activity reports are like those of the African Commission.¹⁴⁵ A comparison shows that the mandates of the Committee as well its implementation procedure are like those of the Commission. Taking this into consideration it can be concluded, that the establishment of the Committee amounts to an unnecessary duplication, and is a case in point of the proliferation of organs of the AU which increases its running costs and affects its efficiency.

Instead of the Children's Committee a special mechanism could have been established under the African Commission, operating on the same basis as the Special Rapporteur on the Rights of Women, with a reporting mechanism of its own. This would be a saving measure on the already highly strained resources of the AU.

It is well known, that few states are up to date in their reporting obligations, for various reasons. This being the case, it would not be prudent to increase the number of bodies to which the same defaulting States would have reporting obligations. To increase the efficiency of the AU, a better option would be to devise a mechanism by which all these reports would be presented to one body sitting in one session. This would give room to the African Union, to focus on other equally important issues such as the establishment of its implementation and follow up mechanisms.

2.7 The Protection of Human Rights by Soft Law under the African Union.

In addition to the treaties discussed above, the AU has adopted numerous soft instruments, which are pertinent to its normative framework for the protection of human rights. Though these instruments are not legally binding, they are relevant in the framework for the protection of human rights of the AU for legal development,¹⁴⁶ and therefore a few pertinent instruments are identified and considered below.

¹⁴⁵ A general comparison of the activity reports of the two bodies, reports available at <http://www.achpr.org/search/?t=826> and <http://www.peaceau.org/uploads/ex-cl-744-xxi-e.pdf> accessed 11/4/2016

¹⁴⁶ M Shaw, *International Law* (2008)117

2.7.1 Grand Bay (Mauritius) Declaration and Plan of Action and the Kigali Declaration.

Considering the deterioration of the human rights situation on the Continent even after the adoption of the African Charter on Human and Peoples Rights, the OAU saw the need to “*carry out a comprehensive analysis and reflection on the mechanisms for the protection of human rights to guarantee human rights for the accelerated development of the Continent.*”¹⁴⁷ In this light the Grand Bay Declaration and Plan of Action (Grand Bay Declaration) was adopted by the First OAU Ministerial Conference on Human Rights, held in April 1999 in Grand Bay, Mauritius. Four years later, in May 2003 the Kigali Declaration was adopted by the First African AU Ministerial Conference on Human Rights in Africa on May 8. The Kigali Declaration endorses the Grand Bay Declaration and calls on members of the AU to support the latter’s African human rights initiatives.

2.7.2 The Grand Bay Declaration

The First OAU Ministerial Conference recognized the African Charter as the pivotal human rights instrument of the OAU, and in this regard brought to the fore the various rights it promulgates. The Conference went further to make a call on the States to implement the Charter and the relevant international human rights treaties. Noting the deterioration of human rights on the Continent, the Conference implored the African Commission to fulfil its protective and promotional mandate under the Charter. On the part of the OAU the Conference recognized that it had the duty to ensure that Human Rights considerations were integrated into all OAU activities.

Specific Issues Addressed

The Conference reaffirmed, the principle that human rights are universal, indivisible, and interdependent and inter related, and urged governments, in their policies, to give priority to economic, social and cultural rights as well as civil and political rights. This was in line with the position of the African Charter of equal recognition of all rights, whether civil or political; economic, social or cultural; or peoples’ rights. This was an important advancement against a background where many African states considered economic, social and cultural rights as not justiciable but merely directive principles of state policy.

¹⁴⁷ See pre-amble of Grand Bay Declaration

The Conference also affirmed specific rights such as the right to development, and the right to a generally satisfactory healthy environment which had not received much attention before in human rights instruments.¹⁴⁸ The Conference gave cognisance to them as the African Charter specifically makes provision for them.¹⁴⁹

The Conference recognized among other things that the development and reviving of the civil society, the strengthening of the family unit as the basis of human society, the removal of harmful traditional practices and consultation with community leaders should all be building blocks in the process of creating an environment conducive to human rights in Africa and as tools for fostering solidarity among her peoples.¹⁵⁰

Recognizing the democratization processes taking place on the Continent, the Conference also affirmed the interdependence of the principles of good governance, the Rule of Law, democracy and development.

The Conference identified specific human rights issues which were of great concern on the Continent such as the refugee problem, women and children's rights, the violation of the rights of people with disabilities and people living with HIV AIDS, in particular women and children.

The causes of human rights violations in Africa were analysed and those found included: Neo colonialism, racism and religious intolerance; Poverty, disease, ignorance and illiteracy; Mismanagement, bad governance and corruption; Harmful traditional practices; Lack of independence of the judiciary; Lack of independent human rights institutions; Lack of freedom of the press and association; Environmental degradation; Unconstitutional changes of governments.

To address these problems the Conference made numerous recommendations for states such as: to ratify all major OAU and UN Human Rights Conventions; to establish national human rights institutions and to provide them with adequate financial resources and ensure their independence; and to also fulfil their reporting obligations.

¹⁴⁸ M Shaw *International Law* (2008) 392

¹⁴⁹ Article 22(2)

¹⁵⁰ See the text of the Grand Bay Declaration

2.7.3 Kigali Declaration

The AU Ministerial Conference considered the achievements made by Member States in the promotion and protection of human rights since the adoption of the Grand Bay Declaration, with a view to building on what had been achieved, towards the realization of the full enjoyment of human rights on the Continent.

The Conference reaffirmed its commitment to the objectives and principles of the Constitutive Act of the African Union and gave recognition to all relevant AU declarations and decisions, the UN Charter 1948, Universal Declaration of Human Rights and the Vienna Declarations of 1989 and 1993 as cardinal references in the advancement of human rights.

Specific Issues Addressed

In accordance with the Grand Bay Declaration, the Conference reemphasized the need for member states of the AU and regional institutions to accord the same importance to economic, social and cultural rights and civil and political rights. This time around to ensure this, the Conference submitted that all the pertinent stakeholders apply, at all levels, a rights-based approach to policy, programme planning, implementation and evaluation.

In the wake of the Rwandan Genocide, the Conference reaffirmed its commitment to the principles enshrined in the Constitutive Act of the African Union on the prohibition of genocide, war crimes and crimes against humanity this time giving practical recommendations.

The Conference also reaffirmed its position on numerous issues elaborated in the Grand Bay Declaration including the protection of the rights of: women and children; people living with HIV and AIDS; refugees, asylum seekers and internally displaced persons and people with disabilities and the elderly.

To ensure the implementation, of the Grand Bay Declaration and bring forth its full realization, the Conference called upon the AU policy organs to provide the African Commission with a suitable headquarter an appropriate structure and adequate human and financial resources for its proper functioning. The Conference requested the Chairperson of the AU Commission to coordinate the follow up of the implementation of these declarations.

A general challenge experienced by the AU in the implementation of its declarations (and its treaties) as shown in this chapter, is non-compliance by the member states. The nature of declarations as soft laws is one factor of this non-compliance. Soft laws are non-binding, which

makes it difficult to hold the member states accountable for their obligations under them. As a result of this the success of declarations falling under the ambit of the AU is highly dependent on the political will of the member states. A general consideration of the human rights institutions responsible for ensuring compliance and enforcement of the Human Right norms of the AU in this chapter shows that there has been little cooperation from the member states in respect of observance of both soft laws and hard laws.

The adoption of the Kigali Declaration by the AU, was a good follow up action to the adoption of the Grand Bay Declaration, however it is hard to ascertain what value it has added to the African Human Rights System besides increasing the scope of specific human rights which need to be protected by the member states. The Conference in adopting the Kigali Declaration, reaffirmed its commitment to the objectives and principles of the Grand Bay Declaration, but did not adequately address the challenges experienced in the implementation of the Grand Bay Declaration and compliance by the member states.

It is worth noting that in the Kigali Declaration, the Conference requests the Chairperson of the AU Commission to coordinate the follow up of the implementation of the Grand Bay and Kigali Declarations. However, such general instructions leave room for avoidance of duties. The Conference should have given specific terms of reference clearly showing how the AU Commission will ensure the implementation of the Declarations. Additionally, the Declarations ought to have defined processes and interactions for the stakeholders so that they too could be held accountable under the Declarations.

2.8 Human Rights Strategy for Africa

The Human Rights Strategy for Africa (the Strategy) is a guiding framework for collective action by the AU, Regional Economic Communities (RECs) and member states for strengthening the African human rights system.¹⁵¹ The Strategy was adopted in 2012 to run for a period of 4 years, with the aim to build synergy and avoid duplication of efforts and resources to ensure effective functioning of the African human rights system.¹⁵² The Strategy is based on human rights,

¹⁵¹ 'Human Rights Strategy for Africa: Department of Political Affairs African Union Commission' page 4 available at <http://au.int/en/sites/default/files/HRSA-Final-table%20EN%5B3%5D.pdf> accessed 11/28/2016

¹⁵² *Ibid*

democracy and governance principles and norms, common to the various legal and policy instruments of the AU and RECs.¹⁵³

To achieve its purpose, the Strategy seeks to address the current challenges of the African human rights system:¹⁵⁴

- Inadequate coordination and collaboration among AU and RECs organs and institutions;
- Limited capacity of human rights institutions;
- Insufficient implementation and enforcement of human rights norms and decisions; and
- Limited awareness and access to the African human rights mechanisms.

The African Governance Platform (the Platform) provides the overall mechanism for implementation and review of the Strategy.¹⁵⁵ The Platform is an important mechanism of the African Governance Architecture which is responsible for improving coordination and complementarity among existing African governance institutions and initiatives.¹⁵⁶ The Platform comprises of the AU Commission; the African Court ; the African Commission; the Pan-African Parliament; the secretariat of the African Peer Review Mechanism; the Economic, Social and Cultural Council; the AU Advisory Board on Corruption; and RECs.

The Platform operates as an informal and decision-making mechanism to foster exchange of information and facilitate the elaboration of common positions on governance, between the various African governance actors.¹⁵⁷

The key stakeholders for implementation of the Strategy (inclusive of the members of the Platform) are at three levels: continental, regional and national:¹⁵⁸

- At the continental level, the AU organs and institutions are charged with the responsibility of providing direction, guidance and general political orientation on adoption of standards;

¹⁵³ Ibid

¹⁵⁴ Ibid page 7

¹⁵⁵ Ibid page 10

¹⁵⁶ N Tissi and F Aggad- Clerx "The Road Ahead for the African Governance Architecture: An Overview of Current Challenges and Possible Solutions" Page 6 available at <http://www.saiia.org.za/occasional-papers/502-the-road-ahead-for-the-african-governance-architecture-an-overview-of-current-challenges-and-possible-solutions/file> accessed 11/28/2016

¹⁵⁷ Ibid page 7

¹⁵⁸ n 99 above, 10

- At the regional level RECs play an important role in the harmonization and coherence of policies, programs and institutional co-ordination on the Continent; and
- At the national level member states ensure that the Strategy is implemented in a way that enhances compliance to the continental and regional instruments.

Considering the wide range of stakeholders for implementation of the Strategy, which span from AU organs, through RECs, to member states, a great threat to the coordination of this network lies in the reconciliation of the diverse mandates of these different stakeholders. The fact that they all aim at promoting the African Human Rights System is their common ground. However, it does not automatically follow that their human rights policies and practices are in accord which is a great drawback to the Platform achieving its goals.

Lessons can be drawn from the different approaches of governance and peace and security mechanisms during the Côte d'Ivoire crisis, which affirmed that the potential for "contradictory approaches is real".¹⁵⁹ In that instance, the condemnation by the African Commission of human rights abuses by pro-regime forces clashed with the Peace and Security Council's neutral approach, which undermined the AU's ability to support the Economic Community of West African States.¹⁶⁰

The Platform's individual members are affected by different factors which are detrimental to the achievement of their common goals. The African Commission faces a critical problem of lack of enforcement of human rights norms and decisions. This is due to many reasons including the failure of the pertinent AU Policy Organs to take responsibility for the implementation of the Commission's decisions and the failure of member States to submit Periodic Reports on the status of implementation of human rights standards in their countries. The RECs as pertinent stakeholders also have their shortcomings which are a challenge to the work of the Platform. A lack of political will has been exhibited by the member states of the RECs, a case in point being the Southern African Development Community (SADC), which suspended the SADC Tribunal and limited its jurisdiction to disputes between member states only. The jurisdiction of the

¹⁵⁹ n6 above, 9

¹⁶⁰ *ibid*

Tribunal to hear complaints by individuals against SADC States was done away with, effectively taking away its human rights protection mandate.¹⁶¹

The Platform is supposed to provide a solid framework of shared values among well-coordinated institutions, it cannot however be expected to do so with the challenges described above. As the term of the Strategic Plan ends, to develop more effective strategic plans in the future, there is a great need for the AU to clearly define the modalities of the interaction among the members of the Platform so that there is unity in intent and purpose. There should be uniformity and consistency in the members' actions which would require the establishment of a solid normative and institutional framework and not an informal framework where the members remain independent. Furthermore, specific tasks must be outlined with defined roles for each member in this regard. Additionally, to consolidate these measures, a Protocol could later be adopted by which all the stakeholders would be held accountable.

2.9 African Commission Human Rights Strategic Plan (2015-2019)

The African Commission is currently implementing its 3rd Strategic plan (the Strategic Plan) under the theme "Delivering Better" which runs from 2015 to 2019¹⁶². Providing a framework to guide the work of the Commission during its tenure, the Strategic Plan sets out, among other things, the Commission's objectives, key priority areas and activities.¹⁶³ This Strategic Plan was developed from the African Commission's own mandate as well as the human rights challenges currently being experienced on the Continent.¹⁶⁴ Therefore the Strategic Plan is a very important document in the fulfilment of the African Union's Human Rights Mandate.

The Strategic plan is a progressive document, which takes into consideration the shortcomings of previous plans and builds on them to ensure that past mistakes are not repeated.¹⁶⁵ For instance, the Strategic Plan observes that previous Plans had weak monitoring and evaluation frameworks. To cure this defect, an entire segment of the Report is dedicated to establishing an

¹⁶¹ "SADC Tribunal Petition" <http://www.southernafiralitigationcentre.org/2015/05/11/sadc-tribunal-petition/>
Accessed 11/28/2016

¹⁶² n79 above,5

¹⁶³ Ibid

¹⁶⁴ Ibid

¹⁶⁵ Ibid

“Implementation and Monitoring Framework” to ensure its implementation. Specific guidance is given in the Strategic Report on how its strategies will be implemented, monitored and evaluated.¹⁶⁶

Past Strategic plans have also recorded some successes in bringing human rights to the fore on the Continent, notable achievements are:¹⁶⁷ the clarification and consolidation of the complementarity between the Commission and the Court; formalization of collaboration between the Commission and some other AU organs with human rights mandates; formalization of cooperation with the United Nations Special Procedures, through the adoption of the Addis-Ababa Roadmap among other things; revision of the Rules of Procedure of the Commission to enhance the effectiveness of its various procedures; effective engagement with stakeholders; development and wide dissemination of information materials on the mandate and work of the Commission; and an increase in human and financial resources based on recent AU policy decisions.

The Strategic Plan also has its own innovations and does not focus solely on the shortcomings of previous Plans. The current report highlights a SWOT Analysis,¹⁶⁸ from which it derives program areas, referred to as strategies for implementation.¹⁶⁹ The specific strategies include: promotion of human rights; protection of human rights; receipt and examination of State Reports and reports of national human rights institutions and NGOs; establishment and implementation of activities by the special mechanisms; building the institutional capacity of the African Commission; communication strategy; sessions of the African Commission; and monitoring and evaluation of implementation of the Strategic Plan.

The Strategic Plan appears, to be well thought out, making sure possible risks which may prevent its implementation are addressed. Various human issues currently affecting the Continent are also considered and possible means of addressing them suggested. However, the certain implementation of this Plan rests solely on the attitude of States parties to it. The States have developed a reputation of not complying with the numerous human rights instruments adopted under the ambit of the African Union. If the Strategic Plan is to yield any fruit, the responsibility

¹⁶⁶ Ibid page 10

¹⁶⁷ Ibid page 21

¹⁶⁸ Strengths, weaknesses, opportunities and threats analysis

¹⁶⁹ n 79 above, 27

lies with the States Parties to fulfil their obligations arising in the numerous instruments of the African Union which apply to them.

The African Commission also has a role to play as an important partner for the implementation of the Strategic Plan. It must speedily and efficiently react to human rights issues presented before it by victims and provide timely interventions, and avoid procrastination of its work. It has been established it has an established system to enable it to fulfil its work, but it appears, this has not been applied to its full potential. The Communication procedure is characterized by delays in concluding its communications, and failing to hold States parties accountable, after it has verified allegations of human rights violations by State. However, the current Strategic Plan has only started running and provides a solid framework, which shall hopefully be able to address these concerns.

2.10 The New Partnership for Africa's Development and the African Peer Review Mechanism.

As alluded to in chapter one, the transformation of the OAU to the AU has brought about huge potential for human rights to play a greater role in the AU.¹⁷⁰ The AU continues to strengthen existing institutions and establish new ones for the implementation of human rights.¹⁷¹ The establishment of these institutions has enriched the African human rights protection system and provided an enabling environment within which to pursue human rights promotion and protection vibrantly.¹⁷² Amongst these mechanisms is the African Peer Review Mechanism (APRM), which supplements the New Partnership for Africa's Development (NEPAD).

New Partnership for Africa's Development

NEPAD is the pan-African strategic framework for the socio-economic development of the continent.¹⁷³ NEPAD was officially adopted by the AU in 2002¹⁷⁴ as the primary mechanism to coordinate the pace and impact of Africa's development in the 21st century.¹⁷⁵

¹⁷⁰ Also see B Gawanas 'The African Union: Concepts and implementation mechanisms relating to human rights' in Bösl, A and Diescho, J (eds) *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009)139

¹⁷¹ *ibid*

¹⁷² *ibid*

¹⁷³ Oxfam AfriMAP and the Open Society Institute (2009) "Strengthening Popular Participation in the African Union: A Guide to AU Structures and Processes" page 110

¹⁷⁴ It was endorsed by the first AU summit in Durban in 2002

The primary objective of NEPAD is to provide a new mechanism, spearheaded by African leaders, to:¹⁷⁶

- Eradicate poverty
- Place African countries, both individually and collectively, on a path of sustainable growth and development
- Halt the marginalisation of Africa in the globalisation process
- Accelerate the empowerment of women
- Fully integrate Africa into the global economy.

NEPAD is primarily implemented at the Regional Economic Community (REC) level. It is widely used by international financial institutions, UN agencies and Africa's development partners as a mechanism to support African development efforts.¹⁷⁷

In terms of governance, NEPAD is overseen by the AHoSG, NEPAD Heads of State and Government Orientation Committee (HSGOC) and the NEPAD Steering Committee. The NEPAD Planning and Coordinating Agency coordinates and administers NEPAD's activities.¹⁷⁸

Africa Peer Review Mechanism

The African Peer Review Mechanism (APRM) established in 2003, is a voluntary process by which member states of the AU conduct self-reflection and independent assessment of various governance issues, including human rights.¹⁷⁹ The APRM is open to any AU country and a country formally joins the APRM upon depositing the signed MOU at the NEPAD Agency. The MOU effectively operates as a treaty. Signatories agree to conduct their own national self-assessments of compliance with a range of African and international governance standards.¹⁸⁰

Performance and progress are measured in four thematic areas: democracy and political governance; economic governance and management; corporate governance; and socio-economic development.¹⁸¹ Each review leads to a national programme of action for the state concerned to address problems identified. A monitoring body prepares a six-month and annual report on progress in implementing the programme of action for the APRM Forum of Heads of State and Government. Country review reports are made available to the public.¹⁸²

The review process which is set out in detail in the APRM base document is in five stages. Stage five requires that after the report of the APRM has been considered by the Heads of State and

¹⁷⁵ African Union Handbook: A Guide for Those Working with And Within the African Union' 46 available at <http://www.un.org/en/africa/osaa/pdf/au/au-handbook-2014.pdf> page 110

¹⁷⁶ Ibid

¹⁷⁷ Ibid page 110

¹⁷⁸ Ibid page 111

¹⁷⁹ M Killander & B Nkrumah 'Human rights developments in the African Union during 2012 and 2013' (2014) 14 *AHRLJ* 293

¹⁸⁰ Oxfam AfriMAP and the Open Society Institute (2009) "Strengthening Popular Participation in the African Union: A Guide to AU Structures and Processes" 31

¹⁸¹ AU Handbook page 114

¹⁸² Ibid

Government of the participating countries, it must be formally and publicly tabled in key regional and sub-regional structures, which includes the African Commission.¹⁸³

In its resolution on closer collaboration between the Commission and the APRM process,¹⁸⁴ the African Commission asserts it's self as one of the partner institutions of the African peer review institutions that has the capacity to conduct technical assessment on matters relating to human rights, democracy and political governance during the peer review process.¹⁸⁵ The resolution emphasises the need to explore ways and means of ensuring that these areas of cooperation are effectively utilised for purposes of synergizing human rights promotion and protection on the African continent, the resolution further appointed one of the Commissioners of the African Commission as the focal point between the African Commission and the APRM for a period of one year to coordinate and enhance cooperation between the APRM and the ACHPR.

However, years after the adoption of the above mentioned resolution we see a failure to renew the mandate of the focal point and there seems to be little evidence of the cooperation between the Commission and the APRM with little being reported in the Activity Reports of the African Commission.¹⁸⁶

2.11 Conclusion

It has been shown that the African Union has established a normative and institutional framework for the protection of human rights. This framework is functional, however it has not been able to attain its full potential. A recurring problem faced by the human rights institutions of the AU is the failure to implement their respective mandates. This is a result of numerous factors, including lack of political will by some states parties, lack of resources and lack of mechanisms to oversee the implementation on the part of the states parties and the institutions themselves. Another important factor affecting the effective implementation of the human rights mandate of the AU, is the duplicity of the functions of the institutions of the AU, resulting in a weak impact as the meagre resources are divided among institutions with similar functions. One of my recommendations in the chapter was that considering that the AU is still developing its human rights protection system, it should focus on ensuring that existing institutions such as the Commission are able to fully deliver on their mandates, rather than creating more institutions

¹⁸³ F Viljoen *International Human Rights Law in Africa* (2007)212

¹⁸⁴ ACHPR/Res.168 (XLV111) 10: Resolution on the cooperation between the African Commission on Human and People's Rights and the African Peer Review Mechanism

¹⁸⁵ ACHPR/Res.168 (XLV111) 10: Resolution on the Cooperation between the African Commission on Human and People's Rights and the African Peer Review Mechanism

¹⁸⁶ Also see M Killander & B Nkrumah 'Human rights developments in the African Union during 2012 and 2013' (2014) 14 *AHRLJ* 293

with similar mandates. This brings us to the next chapter which analyses the normative framework on the African Charter further, it being at the core of the AU's human rights normative framework.

CHAPTER THREE

An Analysis of the Normative Framework on the African Charter on Human and Peoples' Rights

3.1 Introduction

The Assembly of Heads of State and Government of the Organization of African Unity (now the African Union) at its sixteenth ordinary session¹⁸⁷ agreed that a draft African Charter on Human and Peoples' Rights be prepared. The proposed African Charter on Human and Peoples' Rights would among other things provide for the establishment of bodies to promote and protect human and peoples' rights.¹⁸⁸ The African Charter on Human and Peoples' Rights was to reflect the African conception of human rights.¹⁸⁹ In this Chapter the normative framework of the Africa Charter on Human and Peoples' (African Charter) is outlined. Discussed are the rights and duties proclaimed by the Charter. The measures taken to safeguard these are also discussed highlighting the establishment of the African Commission on Human and Peoples' Rights in particular its mandate and procedure.

3.2 Rights and Duties

The African Charter promulgates individual rights and social, economic and cultural rights.¹⁹⁰ The Charter also includes collective rights which are also described as peoples' rights, and for this reason is considered to be unique.¹⁹¹ All the rights in the Charter are contained in Chapter One of The Charter under the generic heading 'Human and Peoples Rights', no subheadings are given of the different type of rights which is indicative of the fact that the Charter ranks all categories of rights equally with no distinction.¹⁹² The Charter goes a step further too also define

¹⁸⁷ held in Monrovia, Liberia, from 17 to 20 July 1979

¹⁸⁸ Decision 115(XVI) of the AOHS of the OAU

¹⁸⁹ F Viljoen 'The African Commission on Human and Peoples' Rights: The Travaux Preparatoires in the light of subsequent Practice' in DL Shelton (ed) *Regional Protection of Human Rights* (2008) 105, also see preamble of African Charter

¹⁹⁰ Articles 1-18 of the African Charter

¹⁹¹ Articles 19-24 of the Charter also see R Murray *The African Commission on Human and Peoples' Rights & International Law* (2000) 103

¹⁹² P De Vos *a New Beginning? The Enforcement of Social, Economic and Cultural Rights under the African Charter on Human and Peoples Right's* <http://constitutionallyspeaking.co.za/wp-content/uploads/2015/11/A-new->

duties of both states parties and individuals which are said to stem from African tradition of individual responsibility to the community.¹⁹³

3.2.1 Individual Rights

The individual rights provided in the African Charter range from the rights not to be discriminated against to the right to participate freely in the government of one's country.¹⁹⁴ The Charter provides for freedom of conscience but in a claw back clause stipulates that this freedom is subject to "law and order". The same applies to the right to receive and disseminate information, the Charter provides that this right is to be enjoyed 'within the law'¹⁹⁵ The rights to free association, assembly and freedom of movement are also pronounced subject to restrictions provided by law.¹⁹⁶ The use of claw back clauses prevents the full enjoyment of rights in certain situations.¹⁹⁷ As was shown above the African Charter contains a good number of claw back clauses, which means the enjoyment of certain rights is compromised and the negative effects on the protection of human rights on the Continent are far reaching.¹⁹⁸ The claw back clauses in the Charter are left rather broad.¹⁹⁹ With such broad clauses the states parties to the Charter are given

[beginning-The-enforcement-of-social-economic-and-cultural-rights-under-the-African-Charter-on-Human-and-Peoples-Rights.pdf](#) Heinonline page 1 accessed 6/22/2017

¹⁹³ R Gittleman 'Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22.4 Virginia Journal of International Law 676

In other regional human rights instruments, duties are understood as only being obligations of a state towards its citizens or citizens of another state within its jurisdiction. The African Charter has a special stand, providing for specific duties for individuals resonating from African tradition of individual responsibility to the Community. The Charter specifically provides for duties by individuals towards their family and society, the state and other legally recognized communities and the international community. The Charter goes a step further to give a list of specific duties. Some of the duties include the duty to respect and consider others without distinction, and to maintain relations aimed at promoting, safe-guarding and reinforcing mutual respect and tolerance. However, no guidelines are given on how the implementation of these duties is ensured. No communication so far has been brought before the Commission on this basis and one wonders if these duties are not just cosmetic and there solely to reflect the African values of individual responsibility to their society. See Gittleman (n 7 above) 676 and Articles 27(1) and 28 of the African Charter

¹⁹⁴ See articles 2-13 of the African Charter, other rights and freedoms include: equality before the law; dignity; liberty; cause to be heard; and assembly.

¹⁹⁵ Article 9(2) of the African Charter

¹⁹⁶ Article 10(2), 11 and 12 of the African Charter

¹⁹⁷ MN, Shaw *International Human Rights* (2008) 275

¹⁹⁸ L Mapula 'Negating the Promotion of Human Rights through 'Claw-Back' clauses in the African Charter on Human and Peoples' Rights (2016) International Affairs & Global Strategy page 1 www.iiste.org

¹⁹⁹ S.B. Keetharuth 'Major African legal instruments' in Bösl, A and Diescho, J (eds) *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009) 169

blank cheques to deal with human rights in a manner they please without violating the text of the Charter at all.

For the reasons above, many states in Africa still have laws and regulations that directly violate human rights. For instance The *Zambian Constitution*,²⁰⁰ stipulates that ‘*no person shall be hindered in the enjoyment of his freedom of assembly and association, however nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision inter alia that is reasonably required in the interests of defence, public safety, public order, public morality or public health; that is reasonably required for the purpose of protecting the rights or freedoms of other persons*’. It has however been established that ‘Public Order’ is a very broad concept.²⁰¹ Accordingly it has been argued that such a concept ‘exerts a qualifying and narrowing influence on open ended criteria such as national security and public order which might otherwise lend themselves to repression’.²⁰² I tend to agree with this notion, illustrations can be drawn from many African states. Case in point the Public Order Act of Zambia which is the main law regulating public order and assembly in the country. This Act has been used as a used as a weapon of repression against the opposition, especially where the holding of public gatherings is concerned.²⁰³

Communications pertaining to the use of claw-back clauses by states parties to the Charter have been presented to the Commission, which gives us an opportunity to see the Commissions interpretation of claw back clauses. Despite the Charter containing claw back clauses in its provisions, the Commission in some of these communications has employed a purposeful interpretation of the Charter to prevent abuses.

An example is the matter of *Rencontre africaine pour la défense des droits de l'Homme (RADDHO) v Zambia*,²⁰⁴ where the Commission noted that the African Charter proscribes the

²⁰⁰ Article 21 of the Constitution of Zambia which is in accordance with the Charter which provides that every individual shall have the right to assemble freely with others subject to necessary restrictions provided for by law (Article 11)

²⁰¹ R Gittleman (n7 above) 696

²⁰² Ibid 697

²⁰³ LAZ concerned with the application of the Public Order Act. The Law Association of Zambia (LAZ) said it was concerned with the way the Public Order Act was being applied by the police. LAZ Council Member, Chishimba Kaela, said the Public Order Act had been applied unfairly by the police infringing upon those in opposition <https://www.lusakatimes.com/2016/07/21/laz-concerned-application-public-order-act/6/11/2017>

²⁰⁴ Communication 71/92(2000) AHRLR 321, (ACHPR 1996).

mass expulsion of non-nationals,²⁰⁵ and that it further provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in it without distinction of any kind including nationality.²⁰⁶ The provisions under the Immigration and Deportation Act of Zambia²⁰⁷ provide otherwise, as was shown in the above mentioned matter. In this communication contrary to the provisions of the African Charter the state relying on its Immigration and Deportation Act expelled 517 West Africans from Zambia on grounds of being in the country illegally. The Commission in its decision²⁰⁸ recognised that that the state had the right to bring legal action against all persons illegally residing in Zambia, and to deport them if the results of such legal action justified it, however the mass deportation of the individuals involved, including their arbitrary detention and deprivation of the right to have their cause heard, constituted a flagrant violation of the Charter.²⁰⁹

In another matter between Sir *Dawda K. Jawara v Gambia (the)*,²¹⁰ the Gambia justifying its use of claw back clauses, averred that it was acting in conformity with laws previously laid down by domestic legislation and that the national decrees did not prohibit the enjoyment of freedom of liberty but to the contrary were put in place to secure peace and stability.²¹¹

The Commission in this matter was of the view that, by suspending the Bill of Rights, the state restricted the enjoyment of the rights guaranteed therein, and, by implication, the rights enshrined in the Charter.²¹² To this end the Commission taking a very progressive stand, affirmed that the suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter and therefore the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution or international human rights standards²¹³ For this reason the Commission in its decision requested the Government of The Gambia to bring its laws in conformity with the provisions of the Charter.

To supplement the efforts of the African Commission, the African system could pick a leaf from the Inter American and European human rights systems. In the American and European Conventions on Human Rights, where there are provisions in the two conventions containing claw back clauses, guidance is given on the extent of restriction to ensure some form of external control or checks are in place. For instance, regarding the right to liberty, the African Charter

²⁰⁵ Article 12

²⁰⁶ Article 2

²⁰⁷ Act No. 18 of 2010

²⁰⁸ Paragraph 31

²⁰⁹ The said Immigration and Deportation Act has since been repealed and replaced by Act number 18 of 2010 which was aimed at among other things promoting a human rights based approach and culture in respect of immigration controls, but to the contrary one finds that the state is still left with unfettered powers to carry out arbitrary expulsions under section 17 of the new Act.

²¹⁰ Communications 147/95-149/96 (2000) AHRLR 107 (ACHPR 2000)

²¹¹ Paragraph 13

²¹² Paragraph 48

²¹³ Paragraph 59

allows for this right to be deprived under conditions previously laid down under the law, which gives states parties a lot of discretion in restricting the enjoyment of this right. To the contrary, the European Convention limits the powers of the state parties by specifically stipulating the cases in which one may be deprived of his liberty, further providing that this must be done in accordance with a procedure prescribed by law.²¹⁴ In this way, a comprehensive outline is given which safeguards against abuse. The European Convention goes a step further too also provide victims an enforceable right to compensation.²¹⁵ Similarly, the American Convention also provides for recourse for those deprived of their liberty or anyone who believes himself to be threatened with deprivation of his liberty.²¹⁶ It also gives an outline of how detained people are to be treated.

3.2.2 Social, Economic and Cultural Rights

Considering the economic imbalances of the Colonial era, the Charter addresses the attendant effects on the African Continent's development by including a set of economic, social and cultural rights.²¹⁷ There are no claw back clauses on the provisions for economic, social and cultural rights, therefore the Charter provides for the enjoyment of these rights with no restrictions.²¹⁸

The economic, social and cultural rights guaranteed under the Charter include the right to property²¹⁹ and the right to enjoy the best attainable state of physical and mental health.²²⁰ The Charter also provides for the right to work under equitable and satisfactory conditions and for the right to education.²²¹

South Africa is one of the few countries in Africa that has made significant progress towards the enjoyment of these rights without restriction. Socio-economic rights are expressly included in the Bill of Rights. Section 7(2) of the South African Constitution which requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights".

The South African Courts have taken a progressive approach in interpreting their Constitution as was seen in the Grootboom Case,²²² though the Court of Appeal finally ruled that Section

²¹⁴ Article 5

²¹⁵ Article 5(5)

²¹⁶ Article 7(6)

²¹⁷ De Vos (n 6 above)8

²¹⁸ Ibid 16, Media Rights Agenda and Constitutional Rights Project v Nigeria paragraph 64

²¹⁹ Article 14 of the African Charter

²²⁰ Article 16 African Charter

²²¹ Articles 15 and 17 of the African Charter

²²² Government of The Republic of South Africa And Others V Grootboom And Others 2001 (1) SA 46 (CC)

26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realize the right of access to adequate housing²²³

However other states parties to the Charter have found a way of avoiding their responsibilities by means of directive principles of state policy. The Zambian Constitution currently does not include economic, social and cultural rights in its Bill of Rights. ²²⁴Previous Constitutional Review Commissions²²⁵ averred that these rights could not be made legally binding because of ‘the formidable constraints in their realization’.²²⁶ In light of the above, economic, social and cultural rights are relegated to the part of the Constitution dealing with directive principles of State Policy and remain non-justiciable.²²⁷ Furthermore it has been established that even if economic, social and cultural rights were to be included in the Bill of Rights, the Zambian government could still include the progressive realization aspect in the national development plans.²²⁸

3.2.3 Peoples’ Rights

The Charter is different from other international instruments because of its inclusion of rights for peoples’ which include the rights to: equality; self-determination; benefit of natural resources; economic, social and cultural development; national and international peace; and a satisfactory environment.²²⁹

The right to self-determination is two pronged. All peoples’ have the right to determine their political status, and they also have the right to determine their economic development. Political self-determination appears to concern the rights of all peoples to freely determine, without external interference, their political status.²³⁰ On the other end economic self-determination is understood to stem from a concept of permanent sovereignty over natural resources.²³¹

²²³ Paragraph 99 Grootboom

²²⁴ The Constitution, Chapter One of the Laws of Zambia

²²⁵ Mvunga Constitutional Review Commission of 1990 and the Mwanakatwe Constitutional Review Commission of 1991

²²⁶ JS Macmillan Zambia *Justice Sector & the Rule of Law* (2013) 5

²²⁷ Article 111

²²⁸ JS Macmillan Zambia *Justice Sector & the Rule of Law* (2013) 5 and Part IX of the Constitution of Zambia

²²⁹ Murray 103 and Articles 19-24 of the African Charter

²³⁰ Gittleman (n 7 above) 678

²³¹ *Ibid* 680

The African Commission has considered some communications in which the complainants have alleged the violation of their right to self-determination. In the Katangese case,²³² the Commission averred that self-determination may be exercised in any of the following ways “*independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognizant of other recognized principles such as sovereignty and territorial integrity*”. The Commission further affirmed that it has the duty to uphold the sovereignty and territorial integrity of members of the OAU (now AU) and parties to the African Charter on Human and Peoples' Rights.²³³ The Commission in its decision concluded that to find a violation of the right to self-determination, solid evidence must be presented of violations of human rights to the point that the territorial integrity of the Respondent State would be impugned.

This Position was reaffirmed in the Ngambela of Barotseland Case where Zambia was the Respondent State.²³⁴ The Commission here held that “the Complainant had not shown good reason that would justify jeopardizing the territorial integrity of the Respondent State”. Where the sovereignty of a member state is involved the Commission is reluctant to interfere, perhaps this follows the Constitutive Act which instructs states parties not to interfere with the affairs of other states parties.²³⁵ It can be inferred that the focus of the Commission is to protect the territorial boundaries of parties to the Charter, at the expense of the protection of the human and peoples' rights of the inhabitants.²³⁶

3.3 Establishment of the African Commission

As was highlighted in the previous chapter Article 30 of the African Charter provides for the establishment of the African Commission on Human and Peoples' Rights', (African

²³² Communication 75/92 Katangese Peoples' Congress v Zaire (1995) ACHPR

²³³ Ibid paragraph 5

²³⁴ Communication 429/12 The Ngambela of Barotseland and Others v The Republic of Zambia 39th Activity Report

²³⁵ Article 4 of the Constitutive Act.

²³⁶ However it is interesting to note that the Commission recognizes the sovereignty of Western Sahara, whose circumstances are similar with Barotseland in the sense that they both had a prior autonomous status before colonization, (see the ICJ advisory opinion available at <http://www.icj-cij.org/docket/index.php?sum=323&p1=3&p2=4&case=61&p3=5> and paragraphs 63-64 of the decision on the admissibility of the Barotseland Communication)

Commission) as a supervisory mechanism, to promote human and peoples' rights and ensure their protection in Africa.

The Commission is increasingly playing an important role in the implementation of human rights in Africa and is considered as one of the main enforcement mechanism within the African Regional System.²³⁷

3.4 Mandate and Procedure of the Commission

As was alluded to in the previous chapter, the mandate of the Commission can be broken down into 4 broad functions:²³⁸

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

The relevance of the Commission is reflected in its mandate. Under its duty to protect, the Commission ensures protection of human and peoples' rights through its communication procedure, friendly settlement of disputes, state reporting and urgent appeals to name a few. The Commission may use any appropriate method of investigation in carrying out its responsibilities.²³⁹

The mandate and procedure of the Commission will be considered in the following Chapters where the protection mandate of the Commission is considered in detail.

3.5 Conclusion

This Chapter shows that the African Charter provides for all three generations of human rights namely: individual rights; economic, social and cultural rights; and peoples' rights. The Charter

²³⁷ Gumedze (n 5 above) 118

²³⁸ Article 45 of the African Charter

²³⁹ Celebrating the African Charter at 30: A guide to the African human rights system (Pretoria University Law Press (PULP)2011 17 <http://www.achpr.org/> and Article 46 of the Charter

provides for these generations of rights without distinction, showing that all rights should be given equal treatment. In the Chapter, it is noted that many of the individual rights come with claw-back clauses, which are seen to negatively affect the enjoyment of certain rights. It is submitted that the enjoyment of economic, social and cultural rights is also negatively affected by the use by states parties to the Charter of directive principles of state policy which allow for the progressive realization of these rights. A unique feature of the Charter was identified among other international instruments which is its inclusion of rights for peoples'. The right to self-determination was highlighted in this regard, and it was shown that the Commission has had challenges in defining the extent of this right.

In this Chapter, it was also shown that the Charter not only provides for duties of states to their citizens, but that it also provides for duties of citizens to one another, to the state and to other legally recognized communities. In conclusion, the African Commission was introduced as the main implementation mechanism under the Charter. Its mandate and procedures were briefly discussed enumerating the methods of investigation it engages in carrying out its responsibilities. In the next chapter, the African Commission is looked at further to give an overview of the normative and institutional framework for human rights protection under the African Commission.

CHAPTER FOUR

The African Commission on Human and Peoples' Rights and its human rights protection mandate.

4.1 Introduction

This chapter gives an overview of the normative and institutional framework for human rights protection under the African Commission on Human and Peoples' Rights (Commission). It establishes the African Charter on Human and Peoples' Rights (African Charter) as the source of the Commission's human rights protective mandate. The Chapter further discusses other instruments as provided in the Charter to which the African Commission may draw inspiration from to fulfil its mandate. The institutional framework of the Commission is then examined. In the Chapter, cognizance is taken of the fact that the Commission may resort to any appropriate method of investigation in considering human rights issues brought before it. The Special Mechanisms of the Commission which have been established over the years to address the different human rights issues affecting the African continent are discussed. The Reporting procedures of the Commission are also highlighted. The Chapter also sheds light on how the Commission handles information which does not end up being considered as communications and is addressed by means of urgent appeals and letters of allegations. Finally, the Communication Procedure (Procedure) is considered. It is established that it is one of the most important means by which the Commission considers information brought before it regarding the violation of human rights and has come to be perceived as the main protection mechanism of the Commission.

4.2 Overview of the Normative Framework for human rights protection under the African Commission.

The previous chapters showed some of the main instruments adopted by the African Union (AU) to enable it to ensure the protection of human rights on the Continent. The African Commission also relies on these instruments and in addition has adopted other instruments to help it fulfil its protective mandate. Some of the instruments adopted by the Commission include the : Guidelines on the Conditions of Arrest, Police Custody and Pre Trial Detention in Africa; Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights; State Party reporting Guidelines for economic, social and cultural rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines); Declaration of Principles on Freedom of Expression in Africa; General Comments on the Protocol to the African Charter on the Rights of Women in Africa; the Model Law on Access to Information in Africa ; the Report of the Study on Freedom of Association and Freedom of Assembly in Law and Practice in Africa and numerous resolutions on different human rights issues affecting the African Continent.

4.2.1 Human Rights Instruments and Sources.

At the core of the Commission's human rights normative framework is the African Charter on Human and Peoples' Rights²⁴⁰ (African Charter). As was alluded to in the previous chapter, the African Charter sets standards and establishes the groundwork for the promotion and protection of human and peoples' rights in Africa²⁴¹.

The African Charter allows the Commission to draw inspiration from other human rights instruments and sources including:²⁴²

“international law on human and peoples' rights, particularly from the provisions of various instruments on human and peoples' rights; the Charter of the United Nations; the Charter of the

²⁴⁰ Also, it being the Commission's Constitutive Act see Article 30 African Charter. The African Charter was adopted in Nairobi, Kenya, in June 1981 and entered into force on 21 October 1986.

²⁴¹ 'Celebrating the African Charter at 30: A guide to the African human rights system' Pretoria University Law Press (PULP) 2011 7

²⁴² Article 60 of the African Charter

Organization of African Unity; the Universal Declaration of Human Rights; and other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the African Charter are members."

Such a wide berth of sources of human rights protection ²⁴³ is necessary to ensure that the gaps where the Charter is lacking are filled and to strengthen the African Charter System.²⁴⁴

The African Charter further provides that:

*"the Commission shall also take into consideration as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine."*²⁴⁵

From the above provisions of the Charter, one may posit that there is almost no limit to the freedom of the Commission in choosing which human rights instruments or practices to invoke.²⁴⁶ Though persuasive these two provisions enable the Commission to maintain international standards and enrich the normative content of the Charter. As the Commission relies on these international provisions, it develops a rich jurisprudence, which complainants can rely on to buffer their submissions.²⁴⁷

²⁴³ Article 60 and 61 of the African Charter

²⁴⁴ I Osterdahl *Implementing Human Rights in Africa: The African Commission on Human and Peoples' Rights and Individual Communications* (2002) 43

²⁴⁵ Article 61 of the African Charter

²⁴⁶ Osterdahl (n 5 above) 43

²⁴⁷ How such Jurisprudence is developed can be illustrated using Communication 155/96 **Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria** one of the most celebrated cases of the Commission. This case has established jurisprudence for the Commission on the protection of economic, social and cultural rights and has since been cited in 18 decisions of the Commission. This case has developed jurisprudence for the Commission on several issues, for instance in the same matter the Commission, affirms that international law sets "*Internationally accepted ideas of the various obligations engendered by human rights...*" The Commission relying on international law in the said decision goes on to discuss the four levels of duties that both civil and political rights and social and economic, generate for a State. The Commission relies on this same position in *Dino Noca vs. Democratic Republic of the Congo* (Communication 286/2004, to elaborate the duty of the state to protect right holders against other subjects.

4.3 An Overview of the Institutional Framework for Human Rights Protection under the African Commission.

As was established in the previous chapter, the African Commission was established within the institutional framework of the OAU as the primary body responsible for human rights. The Commission is composed of 11 members elected by the Assembly of Heads of State and Government of the African Union (AoHSG) from African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human rights, who serve in their personal capacity.²⁴⁸ State parties in their process of selecting nominees for the position of commissioner are expected to ensure that: their preferred candidates should at a minimum qualify for judicial appointment in that state; civil society participated in the selection process; and that the selection process was transparent and in impartial.²⁴⁹

It has been argued that the actual practice does not reflect the procedure outlined above. NGOs have made attempts to present names of potential nominees with the required attributes as outlined above. Such attributes would entail one having the capacity to condemn acts of the government which are deemed to be in violation of the Charter. A question which would then arise is, whether states parties would be willing to nominate such a person to point out their ills?²⁵⁰

The process of selection of Commissioners has been characterised by horse trading block by block.²⁵¹ In such situations, you have countries quietly lobbying for their candidates. It has been

²⁴⁸ Article 31 African Charter

²⁴⁹ F Viljoen 'Promising profiles: An interview with the four new members of the African Commission on Human and Peoples' Rights' (2006) 1 *AHRLJ* 241 where a note verbale from the African Union (AU) Commission AU Doc BC/OLC/66/Vol XVIII, dated 5 April 2005 is discussed

²⁵⁰ Thulani Maseko who has clashed on several occasions with the state of Swaziland was presented as a potential nominee for Swaziland by a consortium of NGOs, he was not nominated by the state party (Swaziland) though he had suitable qualifications

²⁵¹ See S, Singh 'The Impact of Claw Back Clauses on Human and Peoples' Rights in Africa' page 95 http://webcache.googleusercontent.com/search?q=cache:xxB8UDNpZOWJ:kms1.isn.ethz.ch/serviceengine/Files/ISN/112077/ichaptersection_singledocument/292ecf24-66c7-4c59-8d4c-904d634f3a3d/en/Chapter%25208.pdf+&cd=1&hl=en&ct=clnk&gl=zm (accessed 08/07/2016) which quotes, A Stemmet, 'A future African Court for Human and Peoples' Rights and domestic human rights norms' (1998) 233. Also see A, Baffour 'Union: From Non-Interference to Non-Indifference' <https://www.questia.com/magazine/1G1-160922404/african-union-from-non-interference-to-non-indifference> (accessed 08/07/2016)

argued that political horse trading has resulted in the failure of the African Commission to impact meaningfully on the development and maintenance of human rights in Africa as this legitimises certain institutional practices of member states, however discriminatory they may be,²⁵² an argument I tend to agree with. Horse trading is done at the risk of not selecting people who are competent to fulfil the mandate of the Commission to this end Nongovernmental Organisations (NGOs) have in the past raised concerns about lack of independence of commissioners.²⁵³ This renders the Commission a political tool of African governments.²⁵⁴

The Commissioners elect Chairpersons from among themselves to form the Bureau of the Commission.²⁵⁵ The Bureau coordinates the promotion and protection activities of the members of the Commission.²⁵⁶ It also receives and considers requests for provisional measures when the Commission is not in session. This is necessary to prevent irreparable harm to the victim or victims of the alleged violation.²⁵⁷

The Charter provides for the appointment of a Secretary to the Commission to assist the Commission to effectively discharge its duties.²⁵⁸ The Secretary is responsible for the Secretariat of the Commission providing professional, technical and administrative services to the Commission.²⁵⁹

The Commission has the mandate to employ any appropriate method of investigation in carrying out its responsibilities²⁶⁰ and on this basis, has over the years developed numerous mechanisms and specific tools to ensure these responsibilities are fulfilled. These include country visits, friendly settlement of disputes, and the State Reporting procedure to mention some. The African

²⁵² Ibid

²⁵³ F Viljoen 'Promising profiles: An interview with the four new members of the African Commission on Human and Peoples' Rights' (2006) 1 *AHRLJ* 239

²⁵⁴ See S, Singh 'The Impact of Claw Back Clauses on Human and Peoples' Rights in Africa' page 95 http://webcache.googleusercontent.com/search?q=cache:xxB8UDNpZOwJ:kms1.isn.ethz.ch/serviceengine/Files/ISN/112077/ichaptersection_singledocument/292ecf24-66c7-4c59-8d4c-904d634f3a3d/en/Chapter%25208.pdf+&cd=1&hl=en&ct=clnk&gl=zm (accessed 08/07/2016) which quotes, A Stemmet, 'A future African Court for Human and Peoples' Rights and domestic human rights norms' (1998) 233 . Also see A, Baffour 'Union: From Non-Interference to Non-Indifference' <https://www.questia.com/magazine/1G1-160922404/african-union-from-non-interference-to-non-indifference> (accessed 08/07/2016)

²⁵⁵ Article 42(1) of the African Charter and Rules 10 and 11 of its Rules of Procedure

²⁵⁶ Rule 13 of the Rules of Procedure of the Commission

²⁵⁷ Rule 98 of the Rules of Procedure of the Commission

²⁵⁸ Article 41 of the African Charter

²⁵⁹ Rule 18 of the Rules of Procedure of the Commission

²⁶⁰ Article 46 of the African Charter

Charter also specifically establishes a Communications Procedure,²⁶¹ as one of the mechanisms to be employed by the African Commission to ensure compliance of states with the human rights standard promulgated in the Charter.²⁶² Discussed below are the mechanisms of the Commission and its Communications Procedure and the different methods they employ in carrying the work of the Commission forward.

4.3.1 Special Mechanisms of the African Commission on Human and Peoples' Rights.

The African Charter empowers the Commission to resort to any appropriate method of investigation;²⁶³ in this regard the Commission has over the years established fourteen Special Mechanisms comprising special rapporteurs, committees and working groups to help it fulfil its mandate under the Charter.²⁶⁴

The current Special Mechanisms are as follows:²⁶⁵

- Special Rapporteur on Prisons and Conditions of Detention;
- Special Rapporteur on the Rights of Women in Africa;
- Working Group on Indigenous Populations/Communities in Africa;
- Special Rapporteur on Freedom of Expression and Access to Information;
- Special Rapporteur on Human Rights Defenders;
- Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons;
- Committee for the Prevention of Torture in Africa;
- Working Group on Economic, Social and Cultural Rights;
- Working Group on Specific Issues Related to the work of the African Commission;
- Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa;

²⁶¹ Article 47 African Charter

²⁶² n 2 above)24

²⁶³ Article 46 of the African Charter

²⁶⁴ n 2 above 43 and 'African Commission on Human and Peoples' Rights "Delivering Better" Strategic Plan, 2015-2019' 2015 17

²⁶⁵ *ibid*

- Working Group on Rights of Older Persons and People with Disabilities;
- Working Group on Extractive Industries, Environment and Human Rights Violations;
- Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV; and
- Working Group on Communications.

The mandate holders under these Mechanisms are the Commissioners in collaboration with independent experts in some cases. The special mechanisms investigate human rights violations, research human rights issues relevant to their mandate and undertake promotional activities through country visits. The findings from these activities form the basis of some of the Commission's resolutions.²⁶⁶ The respective mechanisms present reports to the Commission of their activities at each Ordinary Session.²⁶⁷

Naldi opines that while these different mechanisms have significant potential, the results do not appear to be very reassuring,²⁶⁸ a position I am inclined to agree with. This appears to be the result of many factors which could include the failure by the Commission to utilize the available tools for implementing the respective mandates of the mechanisms which tools include country visits and the state reporting process to name a few.

Country visits may be for the promotion or for protection of human rights.²⁶⁹ Through these visits the Commission is able to promote the African Charter and all the other regional and international human rights legal instruments. During the visits the Commission, among other activities, holds discussions with States Parties to the Charter on the legislative and other measures taken to give full effect to the provisions of the African Charter, the Maputo Protocol and the other ratified instruments. The Commission also engages all pertinent stakeholders to gather information on the human rights situation in the state it visits.

²⁶⁶ Ibid

²⁶⁷ Rule 23(3) also States parties to the African Charter are expected to report to the African Commission every two years on the legislative and other measures they have taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter see Article 62 of the African Charter

²⁶⁸ n 22 above,38

²⁶⁹ Rules 70 and 81 of the African Charter

The Rules of the Commission stipulate that States Parties shall provide the Commission with an open invitation for protection missions.²⁷⁰ Furthermore States Parties to the Charter must respond promptly to any request by the Commission for authorization to undertake a protection mission.²⁷¹ During these visits, the concerned State must guarantee the free movement of the members of the mission throughout the territory of the country, and in this regard, provide corresponding facilities, including any necessary internal authorization.²⁷² The visits are usually for five days and in some cases, have gone up to ten days.²⁷³ Through these visits the special mechanisms are able to raise awareness of their work and are also able to monitor the situation of human rights in each country.²⁷⁴

As can be seen the success of these visits is highly dependent on the goodwill of the host State.²⁷⁵ Where the host State is not well organised, the Commission will not be able to meet and engage all the pertinent people and further not be able to get all the information it needs. The level of involvement of the State in organising these visits also has the potential to compromise them. This is because as the host State remains in control of the crucial aspects such as the provision of internal authorisation for movement of the members of the mission throughout the territory of the country, and facilitation of access by the mission to documents that the mission may consider necessary for the preparation of the Reports. The State can restrict access of the Commissioners only to such places from where favourable Reports can be given and in like manner regulate the documents the Commission has access to. Such factors are most likely to prevent the Commission from attaining the objectives of their visits.

Another restriction is insufficient time for the visits. The Commission needs adequate time to be able to engage all the stakeholders. Looking at the Reports of the Missions, lack of time often

²⁷⁰ Rule 81(2)

²⁷¹ Ibid

²⁷² Rule 82(b)

²⁷³ See Report of the Joint Human Rights Promotion Mission to the Republic of Chad which was from 11 -19 March 2013 http://www.achpr.org/files/sessions/54th/mission-reports/chad-promo-2014/misrep_promo_chad_2013_eng.pdf (accessed 7/13/2016)

Report of the Human Rights Promotion Mission to the Gabonese Republic held from 13 -18 January 2014 http://www.achpr.org/files/sessions/54th/mission-reports/gabon-promo-2014/achpr54os_misrep_promo_gabon_2014_eng.pdf (accessed 7/13/2016)

Report of the Joint Human Rights Promotion Mission to the Republic of Uganda held from 25 -30 August 2013 http://www.achpr.org/files/sessions/14th-eo/mission-reports/uganda-promo-2013/achpr14eos_misrep_promo_uganda_2013_eng.pdf (accessed 7/13/2016)

²⁷⁴ n 22 above, 323

²⁷⁵ See the Rules of Procedure of the Commission, Rule 82

appears to be a constraining factor, as there are so many important issues which cannot be well addressed in a space of a week as was the case in the most recent mission to Uganda which lasted for five days. Due to time constraints, the delegation limited its visit to the capital of the country, Kampala. As a result, the Commission was not able to meet a wider segment of the stakeholders.²⁷⁶ Taking in consideration the fact that such trips are not undertaken frequently, it is critical for the Commission to ensure that when they do take place they are well utilized.

Another constraint arises from the fact that many States do not respond promptly and favourably to the Commission's requests for country visits.²⁷⁷ The Special Mechanisms have continuously made appeals to the states parties in their activity reports, for them to facilitate country visits. However, most states remain non-committal. As earlier indicated the process is dependent on the goodwill of the host state, so in some unfortunate cases, the trips may not be well organised, which is an obstacle to the Commission in attaining their goals for the visit. Through these visits the mechanisms have an opportunity to investigate human rights violations by interacting directly with those affected, and from this would be able to make well informed decisions taking their work forward. These visits represent, therefore, an important means by which the special mechanisms of the Commission can fulfil their respective mandates.

4.3.2 Reporting Mechanism

The periodic reports constitute an effective way of verifying the compliance of states parties to the Charter by the Commission in comparison to country visits. The State parties are obliged to indicate what they are doing to implement the various thematic issues arising in the numerous mechanisms of the Commission. Statistics from the Commission on the status of submission of the reports²⁷⁸ show that most States do not report and when they do, they are usually late.²⁷⁹

²⁷⁶ Joint Uganda Mission page 55 http://www.achpr.org/files/sessions/14th-eo/mission-reports/uganda-promo-2013/achpr14eos_misrep_promo_uganda_2013_eng.pdf (accessed 7/13/2016)

²⁷⁷ See the Activity reports of the Commission, many Commissioners have cited this as one of the main challenges they face, for instance in the Commissions 30th Activity Report the Chairperson of the Working Group on the Rights of Indigenous Peoples' reported that they had made up to three requests to the Government of Tanzania to invite the Working Group to undertake a promotion mission to Tanzania without the request being granted. Also see Report on the Implementation of the Mandate of the Special Rapporteur on Human Rights Defenders in Africa of the African Commission on Human and Peoples' Rights Yamoussoukro, 9 - 22 October 2012 page 14

²⁷⁸ <http://www.achpr.org/states/reports-and-concluding-observations/>

The Activity Reports of most States furthermore do not adhere to the guidelines established for reporting under certain special mechanisms. The Special Rapporteur on the Rights of Women in Africa expresses this concern, affirming that most States do not adhere to the Guidelines for State Reporting under the Maputo Protocol, so far only 3 states (Malawi, South Africa and Namibia) of the 38 States Parties to the Protocol have reported under the Guideline.²⁸⁰ The Working Group on Economic, Social and Cultural Right has a similar concern and has repeatedly called upon States Parties to the Charter to report on how they have made use of the State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter (Tunis Guidelines) when preparing periodic reports.²⁸¹ When States adhere to such guidelines, all areas relating to the thematic issues a mechanism is concerned with are integrated in the report and addressed.

Following the presentation and examination of the periodic reports the Commission prepares its concluding observations where, among other things, it gives an account of the factors restricting the enjoyment of human rights and of the areas of concern identified in the Report. Most, importantly the Commission makes recommendations to the concerned state on measures needed to ensure the enjoyment of human rights. The concluding observations most times are issued way after States present their Reports. The impact of the concluding observations would be harder hitting if presented during the session when the report is considered, in the presence of the concerned State's peers. Furthermore, the Commission would be able to directly engage the representatives of the State. Apart from utilizing country visits there is no set procedure for the Commission to follow up on the implementation of its recommendations. This renders the entire reporting process an empty exercise.

(accessed 5/9/2016)

²⁷⁹ *ibid* Only 8 States have submitted all their Reports, 17 States are late by one or two reports whilst 22 States are late by three or more reports. 7 States that have not submitted any reports.

²⁸⁰ Inter-Session Report by Commissioner Soyata MAIGA Special Rapporteur on the Rights of Women in Africa at the 57th Ordinary Session of the African Commission http://www.achpr.org/files/sessions/57th/inter-act-reps/234/57os_intersession_report_women_eng.pdf paragraph 37 accessed 07/19/2016, ²⁸⁰ Inter-Session Report by Commissioner Lucy Asuagbor Special Rapporteur on the Rights of Women in Africa at the 58th Ordinary Session of the African Commission paragraph 25 accessed 07/19/2016 http://www.achpr.org/files/sessions/58th/inter-act-reps/254/58os_inter_session_report_asuagbor_eng.pdf

²⁸¹ Inter-Session Report by Commissioner Jamesina Essie. King Chairperson of the Working Group on Economic, Social and Cultural Rights in Africa at the 58th Ordinary Session of the African Commission Page 7 http://www.achpr.org/files/sessions/58th/inter-act-reps/248/58os_inter_session_report_king_eng.pdf accessed 07/19/2016

4.3.3 Friendly Settlement of Disputes, Letters of Allegation and Urgent Appeals

The information received by the Commission from different sources, does not all end up being considered as communications. To efficiently fulfil its protective mandate, the Commission acts upon this information in different ways and engages different frameworks of action which include the '*friendly settlement of disputes*'²⁸² and engaging dialogue with States by writing confidential communications called²⁸³ '*letters of allegation*' or '*urgent appeals*'.²⁸⁴

Friendly Settlement of Disputes

The Rules of the Commission provide that at any stage of the examination of a Communication, the Commission, on its own initiative or at the request of any of the parties concerned, may offer its good offices for an amicable settlement between the parties.²⁸⁵ The amicable settlement procedure shall only proceed, with the consent of both parties.²⁸⁶ Where it is necessary, the Commission designates one or more of its members to facilitate the negotiations between the parties. When the Commission receives information from parties that an amicable settlement has been reached, it ensures that such amicable settlement adheres to the prescribed conditions one of which is that the settlement must comply with or respect the human rights and fundamental freedoms enshrined in the African Charter and other applicable instruments.²⁸⁷

The Commission then prepares a Report with the terms of the amicable agreement, which includes recommendations by the Commission for steps to be taken by the parties to ensure the maintenance of the settlement, and steps which the Commission itself takes to monitor the parties' compliance with the terms of the settlement.²⁸⁸ If the terms of the settlement are not

²⁸² Alluded to above page

²⁸³ <http://www.achpr.org/communications/> decisions by outcome

²⁸⁴ Report on the Implementation of the Mandate of the Special Rapporteur on Human Rights Defenders in Africa of the African Commission on Human and Peoples' Rights Yamoussoukro, 9 - 22 October 2012 paragraph 26 <http://www.achpr.org/sessions/56th/intersession-activity-reports/human-rights-defenders/> accessed 04/29/2016 and Office of the United Nations High Commissioner for Human Rights Information Brochure special procedures of the Human Rights Council Urgent appeals and letters of allegation on human rights violations page 1

²⁸⁵ Rule 109(1)

²⁸⁶ Rule 109(2)

²⁸⁷ Rules 109 (3), (5)

²⁸⁸ Rule 109(6)

implemented within six months, the Commission at the request of the Complainant may continue to process the Communication.²⁸⁹

In *Mr. Brahim Koné and Mr Tiéoulé Diarra v. Côte d'Ivoire*²⁹⁰, the Commission received a letter from the Respondent State requesting it to stay its consideration of the Communication, given that the internal Ivorian mechanisms wanted to work with the Complainants to explore the possibility of an amicable settlement. The Commission forwarded a copy of the letter on the amicable settlement initiated by the Respondent State to the Complainants for their consideration. The Complainants in their response confirmed they were agreeable to the proposal of the Respondent State for a compromise settlement. However, no settlement was reached and the matter was struck out due for lack of diligent prosecution by the parties.

In *Henry Kalenga vs. Zambia*²⁹¹, (a communication decided much earlier on false imprisonment) no information is given in the Decision of the procedure of the Commission in arriving at the amicable settlement. The Decision simply states that the author (victim) was released after a member of the African Commission effected an amicable settlement and for this the file was closed.

The procedure for amicable settlements in practice appears to be ad hoc, looking at the different approaches which have been taken by the Commission; however, the primary consideration is that the settlement should be based on the respect of human rights.²⁹²

Amicable settlements appear to be a good alternative to a communication considering parties have to endure the procedure from the seizure of a communication through to its consideration on the merits, taking into consideration the record of the Commission of taking years in concluding its communications.²⁹³ However it appears this method is not often used to finalize

²⁸⁹ Rule 109 (7)

²⁹⁰ Communication 289/2004, ACmHPR. October 22, 2012

²⁹¹ Communication 11/88, ACmHPR · April 27, 1994

²⁹² Evans and Murray, R (eds) (2008) *The African Charter on Human and Peoples Rights: The System in Practice* 2nd ed page 83

²⁹³ For example, Communication 400/11 West African Network of Human Rights Defenders (ROADDH-WAHRDN) and another v. Côte d'Ivoire, also Communication 377/09 – Mendukazi Patricia Monakali v. South Africa And Communication 332/06 - CEMIRIDE v. Kenya which were still being considered at admissibility stage per the 37th Activity Report of the Commission- over 4 (four) years of being considered by the Commission

cases.²⁹⁴ This is reflected in the Commission's online resources available to the public where in the segment for *decisions by outcome*, there is no indication of any decisions finalised by friendly settlement.²⁹⁵ Viljoen posits that 'the competence of the Commission to consider communications, has been institutionalized without much resistance and over time its procedure has become increasingly judicialised'²⁹⁶

Letters of Allegation

The Letters of Allegation also known as "Communications"²⁹⁷ are confidential letters sent by the Commission to states parties on alleged violations of human rights. They are used by the Commission as a means of engaging dialogue with States over reports reaching the Commission of human rights violations.²⁹⁸ The Commission through these letters request the state party accused of the alleged violation for clear information on the allegations reaching them and what action the respective state party to the Charter has taken to address the situation.²⁹⁹

A challenge arising with the use of communications is the failure of the concerned states to respond, which hinders the Commission from verifying the allegations brought before it to enable it to make the necessary recommendations to remedy the situation complained of. The Special Rapporteur on Human Rights Defenders in her Activity Report commemorating the 25th Anniversary of the African Commission submitted that from 2004 to 2008 she had written 264 communications to States Parties on alleged violations of the rights of human rights defenders.³⁰⁰

²⁹⁴ Frans Viljoen in Evans and Murray, R (eds) *The African Charter on Human and Peoples Rights: The System in Practice* (2008) page 81 for instance at the time of the 19th Activity Report only 1 (one) 5 of all cases finalized by the Commission were by friendly settlement.

²⁹⁵ <http://www.achpr.org/communications/> accessed decisions by outcome 5/9/2016

²⁹⁶ Frans Viljoen in Evans and Murray, R (eds) *The African Charter on Human and Peoples Rights: The System in Practice* (2008) page 77

²⁹⁷ Intersession Report of The Mechanism of The Special Rapporteur on Human Rights Defenders as presented at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights Yamoussoukro - Côte d'Ivoire, 9 - 22 October 2012 paragraph 26

²⁹⁸ Ibid

²⁹⁹ My personal experience in assisting in the drafting of such letters during my internship at the African Commission.

³⁰⁰ 'Intersession Report of The Mechanism of The Special Rapporteur on Human Rights Defenders' as presented at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights Yamoussoukro - Côte d'Ivoire, 9 - 22 October 2012 Page 11

The Special Rapporteur states that only 2% of these communications were the subject of responses from States to whom the communications were addressed.

Urgent appeals The Commission as well as its subsidiary mechanisms are allowed to take any appropriate action, to address emergencies including urgent appeals.³⁰¹ Generally these are used to communicate information about time-sensitive violations which involve loss of life, life-threatening situations or imminent or on-going damage of a grave nature that require urgent intervention to cease the violation.³⁰² The intention is to ensure that the appropriate State authorities are informed as quickly as possible to end or prevent a human rights violation.³⁰³

In both types of letters, the mandate holder asks the Government concerned to take all appropriate action to investigate and address the alleged events and to communicate the results of its investigation and actions. Depending on the response received, the Commissioner may decide to inquire further or make recommendations.

As with letters of Allegation the Commission faces a challenge by the failure of States to respond to the requests from the Commission for a confirmation whether the allegations are in fact true and if they are true, for an indication of the measures taken by the Government to rectify the situation.³⁰⁴ This failure to respond hinders the process by which the Commission is able to verify whether the alleged violations did in fact occur to enable them take the suitable actions to remedy the situations.³⁰⁵

³⁰¹ Rules of Procedure of the African Commission Rule 80(2)

³⁰² Office of the United Nations High Commissioner for Human Rights Information Brochure special procedures of the Human Rights Council Urgent appeals and letters of allegation on human rights violations page 1

³⁰³ Office of the United Nations High Commissioner for Human Rights Information Brochure special procedures of the Human Rights Council Urgent appeals and letters of allegation on human rights violations page 1

³⁰⁴ See the Activity Reports of the African Commission, a trend of failing to respond can be mapped, for instance the Researcher can cite the 30TH Activity Report of the Commission (page 43-47), in the report of the Special Rapporteur about Human Rights Defenders in Africa of all the letters reported as dispatched, the Special Rapporteur reported they were yet to receive responses from any the States parties.

³⁰⁵ Intersession Report of The Mechanism of The Special Rapporteur on Freedom of Expression' presented at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights Yamoussoukro - Côte d'Ivoire, 9 - 22 October 2012 Page 25

4.3.4 Communications Procedure.

The protection mandate of the Commission is outlined in Article 45 (2) of the Charter, which provides that, the function of the Commission is to ensure the protection of human and peoples' rights under conditions laid down by the present Charter. Osterdahl³⁰⁶ avers that this means, the Commission using the tools provided by the Charter, is to call attention to any violations of the Charter and try to stop the violations.³⁰⁷ She adds that, phrases like “*ensure the protection of human rights*” in the context of human rights treaties normally refer to a procedure for handling complaints from states, individual citizens or both.³⁰⁸ In this light, the Communications procedure is an important tool under the African Charter's protective ambit. Evans and Murray agree with this, affirming that the Communications Procedure is one of the main mechanisms used by the Commission to monitor state compliance with their Charter obligations and to address human rights issues within Africa.³⁰⁹

The Commission has decided a number of communications over the last 25 years and the Communications Procedure has come to be regarded by pertinent stakeholders as the most accessible human rights mechanism on the continent for victims of human rights violations.³¹⁰ The Procedure is ranked highly among the mechanisms of the Commission and has come to be considered the African Charter's protective ambit.³¹¹ This could be so because in comparison with the other mechanisms of the Commission, it is considered to have clearer procedures and has the capacity to issue firm recommendations where violations occur.³¹²

Under the Procedure states, organizations and individuals may take a complaint to the Commission alleging that a State Party to the Charter has violated one or more of the rights

³⁰⁶ I Osterdahl, *Implementing Human Rights in Africa: The African Commission on Human and Peoples' Rights and Individual Communications*, (2002) 22

³⁰⁷ Osterdahl, (n 21 above) 22

³⁰⁸ *Ibid* page 22

³⁰⁹ Evans and Murray, R (eds) *The African Charter on Human and Peoples Rights: The System in Practice* (2008) 49

³¹⁰ Per findings of a group of civil society organizations during the 51st Ordinary Session of the African Commission working (also) as litigants before the African Commission who formed a Group of litigants for Strengthening the Protective Mandate of the African Commission to discuss and exchange on current challenges and experiences made in litigating before the African Commission. See 'Filing a Communication before the African Commission on Human and Peoples' Rights a Complainant's Manual' (2013) The Egyptian Initiative for Personal Rights and others

³¹¹ F Viljoen *Communications under the African Charter Procedure and Admissibility* page 76

³¹² *Ibid* page 30

contained in the Charter.³¹³ The Charter provides for two kinds of communications to the Commission, ‘*communications from States*’³¹⁴, where a State party to the Charter may present a communication to the Commission where it has good reason to believe that another State party to the Charter has violated the provisions of the Charter. The Commission also receives ‘*other communications*’ which are communications other than those from state parties to the Charter.³¹⁵ Following consideration of the communications,³¹⁶ the Commission then makes recommendations and transmits the decision to the Parties after its Activity Report has been adopted by the AU Policy Organs.³¹⁷

The Commission currently has about 194 communications pending before it at different stages.³¹⁸ Between 2014 and 2015 the Commission seized forty-two Communications and was only able to finalize seven on Merits.³¹⁹

The Commission faces numerous challenges in respect to its Communication Procedure, which hinder the efficacy of its protective mandate.³²⁰ Some specific challenges include: inordinate delays in the various stages of the Communication Procedure; lack of implementation; inconsistent application of the Rules of Procedure by the Commission; and failure to cater for all the working languages of the African Union.³²¹

Despite its shortcomings, the Communication Procedure is the most frequently used mechanism by which individuals and states can have their human rights grievances addressed³²². It has been

³¹³ n 2 above 24 and 25

³¹⁴ under Articles 47 of the African Charter

³¹⁵ under Article 55 of the African Charter

³¹⁶ The Communications Procedure is outlined in the following chapter where among other things its different stages are highlighted and the time frames for making submissions are specified.

³¹⁷ Inter-Session Activity Report of the Chairperson of the Working Group on Communications Presented to the 57th Ordinary Session of the African Commission (May 2015 – October 2015)

³¹⁸ “40th Activity Report of The African Commission on Human and Peoples’ Rights” <http://www.achpr.org/activity-reports/40/> (accessed 12/01/2016)

³¹⁹ Inter-Session Activity Report of the Chairperson of the Working Group on Communications Presented to the 56th Ordinary Session of the African Commission paragraph 24 page 5

http://www.achpr.org/files/sessions/56th/inter-act-reps/224/56th_session_wgc_report_comm_asuagbor_en.pdf

³²⁰ These challenges are discussed in detail with illustrations in chapter five of this dissertation

³²¹ These Challenges will be discussed in detail in the following chapter and recommendations of how to address them proposed in the final chapter.

³²² Consider number of complaints received by the Commission every year in comparison to the annual activities of other mechanisms (see www.achpr.org), it appears the Complaints procedure is the most active due to many reasons such as accessibility, complainants have a direct access to the Commission at any time unlike other

shown above that the Procedure is regarded by pertinent stakeholders as the most accessible human rights mechanism on the continent for victims of human rights violations. Viljoen avers that the Communications Procedure provides the clearest possibility of holding States accountable to their commitments under the Charter.³²³ Evans and Murray subscribe to this school of thought adding that the Communications Procedure is one of the two main mechanisms used by the Commission to monitor state compliance with the African Charter obligations and to address human rights issues in Africa³²⁴

4.4 Conclusion

The African Charter establishes a system for the protection of human rights on the Continent. From the provisions of the African Charter discussed, it appears there is almost no limit to the freedom of the Commission in choosing which human rights instruments and/or practices to invoke as it considers its options in determining the solution to employ to resolve the problem before it. As it has been shown above, the pertinent structures mandated to address violations of human rights issues are in place and appear to be functional. Through these mechanisms states parties to the African Charter and its Protocols are obliged to fulfil their duties arising under the same. Against this backdrop, the questions which now need to be addressed are how effective these mechanisms are, and how successful they have been in bringing their respective mandates to fruition to make the application of human rights a reality for all Africans. To briefly answer this question, I tried to discuss some of the factors hindering the efficacy of the Commission in its work. In furtherance to this, in the following Chapter I will continue answering these questions in more detail, by narrowing down to the Communications procedure.

The Procedure, having been distinguished as one of the well-established mechanisms of the Commission, will be analysed to assess how well the Commission is doing to fulfil its mandate, by utilizing the mechanisms established under the African Charter to help it.

mechanisms such as country visits and the reporting procedure where countries can only be visited every so often and periodic reports are not presented on time

³²³ Frans Viljoen 319

³²⁴The state reporting procedure is the other main procedure. The African Charter on Human and Peoples' Rights, The State Reporting Mechanism of the African Charter, M Evans and R Murray 49 pdf 29/90

CHAPTER FIVE

The Communications Procedure of the African Commission on Human and Peoples' Rights.

5.1 Introduction

In this chapter, I will consider the Communications Procedure. To be discussed are some of the specific challenges experienced during the engagement of the Procedure that prevent the Commission from achieving its goals. These considerations shall be carried out with the view of coming up with recommendations in the final chapter, which should enable the Commission to improve its human rights protection mandate.

The chapter begins by giving an overview of the Communications Procedure in practice also taking into consideration the application of the Rules of Procedure. From this breakdown, I will identify gaps in the Rules of Procedure of the Commission. The implications these gaps have on the Protective Mandate of the Commission are then critically analysed with a comparative perspective. This perspective seeks to reconcile the different approaches to regional human rights protection. In this regard, I will consider The Inter-American and the European Systems. The African Court on Human and Peoples' Rights is also considered highlighting some of its practices which, if well utilised, could enhance the efficacy of the Communications Procedure.

5.2 The Communication Procedure.

The Communication Procedure was identified as one of the well-established mechanisms of the Commission in the previous Chapters. This segment of this chapter discusses the different stages of the Procedure in detail.

5.2.1 Seizure of the Commission.

For the Commission to be seized of a communication, certain minimum requirements need to be met. The Commission's Guidelines for the Submission of Communications ³²⁵, the Commission's website specifically the '*Communications*' and '*documents*' sections and rule 93

³²⁵ http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf accessed 07/15/2016 (incomplete citation)

of the Rules of Procedure of the Commission provide useful insights on how communications under Article 55³²⁶ of the Charter should be submitted.

The Secretariat of the Commission upon receiving a communication, may request for more information if it so requires. Furthermore, the Secretariat may also request the complainant to furnish it with the necessary documents. The communication should satisfy the conditions stipulated for seizure in the Rules of Procedure.³²⁷ To this end, it should indicate, among other things:³²⁸ whether any public authority has taken cognisance of the fact or situation alleged; the name of the state(s) alleged to be responsible for the violation of the Charter; compliance with the period prescribed in the African Charter for submission of the communication³²⁹; and any steps which have been taken to exhaust domestic remedies if any, or (where local remedies have not been exhausted) grounds in support of allegations of the impossibility or unavailability of domestic remedies.

If a prima facie violation of the African Charter is revealed and all the other requirements as stipulated in Rule 93 (2) are also met, the Commission shall be seized of the Communication if a simple majority of the Commissioners agree.³³⁰

5.2.2 Admissibility

On being seized of a communication, the Commission transmits a copy of the seizure decision and complaint to the respondent state. At the same time, it informs the complainant of its

³²⁶ Communications other than those of a state against another state

³²⁷ Rules of Procedure of the African Commission (ROP) Rule 93: Seizure of the Commission

³²⁸ Other details include the name and other specified details of the complainant; whether the complainant wishes that his/her identity be withheld from the respondent state; the address and other details for correspondence purposes with the Commission; the name of the victim where he or she is not the complainant; and an indication that the complaint has not been submitted to another international settlement proceeding.

³²⁹ The African System does not prescribe a definite period save within "a reasonable period from the time local remedies are exhausted" (Rule 93(2) h and Article 56(6) of the African Charter on Human and Peoples' Rights), On the other hand the European Convention on Human Rights (Article 35) specifies that the European Court of Human Rights may deal with matters within a period of six months from the date on which the final decision was taken. The Inter American Commission on Human Rights (the Commission) also considers petitions that are lodged within a six-month period following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies (Article 32 of the Rules of Procedure of the Commission).

³³⁰ The Inter American Commission on Human Rights (the Commission) takes a different approach which is more efficient regarding the logistics of convening a session (where the Commission can be seized of a communication) and reduces the heavy workload of the Commissioners especially from the simpler tasks such as deliberating on a seizure decision. In this system, the Executive Secretariat is responsible for the initial processing of petitions lodged before the Commission (Articles 26 and 29 of the Rules of Procedure)

decision. The Commission requests, the complainant to present evidence and arguments on the admissibility of the communication within two months. Where not seized, a copy of the decision of the Commission is transmitted to the complainant.³³¹

Upon receiving the complainant's evidence and arguments on admissibility, the Secretariat forwards a copy to the respondent state and requests it to submit its arguments and evidence on admissibility within two months of the notification. If the complainant fails to submit their observations on admissibility the communication is eligible for strike out. From the practice of the Commission, it appears that no time frame is set within which the Commission may arrive at a decision to strike out a communication when the complainant fails to make its submissions within the stipulated timeframe. This lacuna apart from creating some uncertainty in the practice of the Commission also results in inordinate delays in the consideration of communication. This will be discussed further, later in this chapter.³³²

Once the Secretariat receives the respondent state's submissions, it is expected to forward the same to the complainant within one week. Once these submissions are received, the complainant may comment on the same within one month of receipt. In the event of the respondent state's failure to make submissions on admissibility, the Commission is entitled to make a default decision on admissibility based on the available information. As with strike out decisions it appears the Commission does not also have a set timeframe within which it decides to enter a default decision. This too has resulted in a haphazard procedure for arriving at a decision to strike out a communication. The implications of this will be discussed more, in this chapter later.³³³

Where the complainant has made comments on the respondent state's submissions, the Secretariat forwards the same to the respondent state. The respondent state is not expected to act on this correspondence as it is for its information only. The Commission can then decide on admissibility in accordance with Article 56 of the Charter, informing the parties of the outcome accordingly. If the Communication is declared admissible, the Commission proceeds to the next stage where the communication is considered on the merits. On the other hand, if a

³³¹ this practice is potentially unjust as no requirement is provided to compel the Commission to disclose reasons for it declining to take up the communication (Rules 93 and 105(1) are silent on this

³³² Discussed in detail in Section 3.3.2 Gaps and inconsistent application of the Rules of Procedure by the Commission page 22

³³³ *ibid*

communication is declared inadmissible, the decision declaring the communication inadmissible is attached to the Activity Report of the Commission.³³⁴ The Practice of the Commission of late however has been to only list the decisions by name in its Activity Report and not attach complete decisions.³³⁵ A communication declared inadmissible could be reviewed later upon the complainant submitting new evidence.

5.2.3 Consideration on the Merits.

Once a communication is declared admissible, the complainant is requested, to submit observations on the merits within sixty days. The Secretariat then forwards these to the respondent state which is also required to make its observations on the merits within 60 days. The respondent state's submissions are then transmitted to the complainant who can make supplementary observations, if any, within 30 days. The Rules of Procedure of the Commission stipulate that this time limit cannot be extended.³³⁶

The Rules of Procedure of the Commission allow the parties to communications to make oral presentations by request to the Commission during its sessions.³³⁷ The rapporteur of the communication, in consultation with the Bureau of the Commission, decides whether to grant such request or not.³³⁸ The Commission may also receive amicus curiae briefs on communications and allow their authors to address the Commission.³³⁹ Furthermore at the request of either of the parties or at its own instance the Commission may offer its offices for an amicable settlement between the parties.³⁴⁰

After deliberation on the submissions of both parties, the Commission adopts a decision on the merits. Often the process by which the Commission arrives at a final decision is protracted, this is a result of different reasons including the continuous deferrals of consideration of communications by the Commission. In other cases, it is because of the failure of the parties to make their submissions in good time. Another reason is the shortage of suitably trained staff to

³³⁴ (ROP) Rule 107 (3)

³³⁵ See most recent Activity Reports available www.achpr.org

³³⁶ (ROP) Rule 108 (2)

³³⁷ (ROP) Rule 99(1)

³³⁸ (ROP) Rule 99(5)

³³⁹ (ROP) Rule 99 (16)

³⁴⁰ (ROP) Rule 109(1)

work on the communications. These challenges will be discussed later in this chapter.³⁴¹ In accordance with the current rules, the decision of the Commission remains confidential. The decision is not transmitted to the parties until its publication is authorised by the Assembly of Heads of State and Government of the African Union (AHOSG/Assembly).³⁴² This provision has also proven to be problematic by unduly prolonging the procedure. The Commission has the power to review its decision on the merits in accordance with its rules.³⁴³

5.2.4 Follow-up on the recommendations of the Commission

After the consideration of the Commissions activity report by the Assembly, the Secretariat notifies the parties within 30 days and the parties are free to disseminate the decision. Where the decision is entered against the state, the Secretariat further requests both parties to inform the Commission in writing within 180 days of the notification, of all measures taken to implement the decision of the Commission.³⁴⁴ The Secretariat on receiving the state's response, may invite the latter to submit further information on the measures taken in response to the merit decision. Where no response is received from the state, the Commission may send a reminder to it, to submit its information on measures taken.³⁴⁵

The Commission includes information on any follow up activities in its activity report. A consideration of the follow up activities in the Commissions activity reports has not been very inspiring. The Reports reflect a disregard of the Commission by the concerned states. They are characterised by persistent requests by the Commission for states to update it on what they have done to implement its decisions, with no feedback being offered by the concerned states. The poor implementation of the Commissions decisions will be discussed, later in this chapter.³⁴⁶

³⁴¹ See section 4.3.1 Inordinate Delays in the various stages of the Communication Procedure page 8 through to section 4.4.1

³⁴² Article 59 of the African Charter and (ROP) Rule 110 (3)

³⁴³ (ROP) Rule 111

³⁴⁴ (ROP) Rule 112(2) if the State is found wanting, it follows normally that the Commission's recommendations apply to the state to correct the wrong, this duty to report on the measures taken to implement the Commission's recommendations, therefore is more applicable to the state concerned

³⁴⁵ (ROP) Rule 112(4)

³⁴⁶ See Section 4.3.2 Lack of implementation page 15

5.3 Challenges to the Communications Procedure which hinder the Efficacy of the Protective Mandate of the Commission.

According to the most recently published Report of the Working Group on Communications, there are currently not less than 171 Communications pending before the Commission. At the time of the Report, 53 of the communications were at seizure stage, 79 were being considered on admissibility whilst one on the merits. One communication was considered under the Amicable Settlement procedure, four awaited additional information from Complainants whilst one was stayed pending further consideration.³⁴⁷ On an average the Commission has only been able to conclude not more than ten decisions at merit stage per year.³⁴⁸

As has been briefly shown in the preceding segment of this chapter, the Commission faces numerous challenges in respect to its Communication Procedure, which hinder the efficacy of its protective mandate.³⁴⁹ The following four recurring challenges experienced by the Commission will be considered below: Inordinate delays in the various stages of the Communication Procedure; Lack of Implementation; Gaps and inconsistent application of the Rules of Procedure by the Commission; and Failure to cater for all the working languages of the African Union

5.3.1 Inordinate delays in the various stages of the Communication Procedure

This is due to many reasons including, the failure of the parties to the communications to make submissions within the stipulated timeframes and understaffing of the Secretariat of the

³⁴⁷ Working Group on Communications Inter-Session Activity Report (May 2015 – October 2015) page 4 http://www.achpr.org/files/sessions/57th/inter-act-reps/245/57os_intersession_report_wgc_eng.pdf accessed 3/7/2016

³⁴⁸ See last 5 published Activity Reports of the Commission In the combined 32nd and 33rd Activity Reports, a total of communications were considered on the merits see page 8 of the Report http://www.achpr.org/files/activity-reports/32-and-33/achpr5152_actrep32and33_eng.pdf accessed 02/28/15, in the 34th Activity Report, 3 communications were considered on the merits see page 5 of the Report http://www.achpr.org/files/activity-reports/34/achpr53eos13_actrep34_2013_eng.pdf accessed 02/28/15 ,in the 35th Activity Report 6 Communications were considered on the Merits see page 7 of the Report http://www.achpr.org/files/activity-reports/35/achpr54eos14_actrep35_2014_eng.pdf accessed 02/28/15 ,in the 36th Activity Report 2 Communications were considered see page 7 of the Report http://www.achpr.org/files/activity-reports/36/achpr54eos15_actrep36_2014_eng.pdf accessed 02/28/15 ,in the 37th Activity Report 2 communications were again considered on the Merits see page 9 of the Report http://www.achpr.org/files/activity-reports/37/actrep37_2015_eng.pdf accessed 02/28/15, (indicate domain name of the website to show author)

³⁴⁹ These challenges are discussed in detail with illustrations in chapter three of this dissertation

Commission. Another reason for delay is inadequate time for Commissioners to deliberate on the communications during sessions. These and other challenges have resulted in some matters before the Commission only being concluded up to nine years from the time the Commission was seized of a matter.³⁵⁰

Parties Failing to Make Submissions within the Stipulated Times

The African Commission in its 35th Activity Report,³⁵¹ urges states parties to the Charter to ‘respect timeframes with respect to submissions on Admissibility and Merits, in accordance with the Rules of Procedure of the Commission, to enable the Commission dispose of Communications in time’. This recommendation arises from an observation by the Commission of the negative trend where it has become a norm for parties to make their submissions in the Communication Procedure late or not make any submissions at all.

In *Gabriel Shumba v Republic of Zimbabwe*³⁵² submissions on admissibility from both parties were due on 28 February 2005 but the Respondent State delayed making its submissions. The published decision of the Commission shows that no specific reasons for this delay were offered by the parties. After repeated reminders by the Commission requesting the Respondent State to make its submissions, it finally submitted that it had logistical problems in transmitting its submissions.³⁵³ The parties finally made oral submissions to the Commission during its 38th Ordinary Session held from 21 November to 5 December 2005, almost ten months after the date both parties were expected to have made their submissions.

After hearing the oral submissions, the Commission did not promptly decide on Admissibility. The Commission deferred further consideration on the Admissibility at its, 39th and 40th Ordinary Sessions, at the latter Session submitting that the Commissioners needed more time to study the legal arguments closely. The Communication was finally considered and declared admissible at the 41st Ordinary Session of the Commission held in May 2007; one and a half

³⁵⁰ Communication 317 / 2006 – The Nubian Community in Kenya vs. The Republic of Kenya http://www.achpr.org/files/sessions/17th-ao/comunications/317.06/communication_317.06_eng.pdf others have taken up to four years such Communication 400/11 West African Network of Human Rights Defenders (ROADDH-WAHRDN) and another v. Côte d’Ivoire, also Communication 377/09 – Mendukazi Patricia Monakali v. South Africa And Communication 332/06 - CEMIRIDE v. Kenya which were still being considered at admissibility stage per the 37th Activity Report of the Commission

³⁵¹ 35th Activity report of the African Commission page 13 available on www.achpr.org

³⁵² 288/2004 was first brought before the Commission before its Rules of Procedure of 2010 were adopted decision available on the African Commission website www.achpr.org

³⁵³ Paragraph 26 page 2 of the Commission’s decision

years after submissions on admissibility were presented to the Commission. The delay was unjustifiable.

The Rules of Procedure of the Commission³⁵⁴ stipulate that when a deadline is fixed for a submission, either party may apply to the Commission for an extension of the period stipulated. The Commission may only grant an extension which does not exceed one month,³⁵⁵ but this is often not adhered to.

In the Gabriel Shumba Communication, the Commission granted extensions in excess of the one-month period allowed. From this decision, it can also be noted that parties to Communications, can submit out of time upon their request with no reason at all³⁵⁶, and furthermore may even not act on reminders from the Commission, making their submissions only when they are ready.

Almost a year's worth of work was lost in this Communication due to the failure by the Respondent State to make its submissions on time. All the factors discussed above contribute to the backlog of communications. This is as the Commission continues expending its valuable time and resources on matters which are not progressing, while new communications keep pouring in.

The Commission also contributes to this backlog. It keeps on deferring the consideration of Communications as in the matter in hand where it deferred deciding on admissibility three times, resulting in the matter being declared admissible almost two years later.³⁵⁷

In a more recent decision *Jean-Marie Atangana Mebara v. Cameroon*³⁵⁸ similar trends in the delays highlighted above are noted where the Communication could not be processed for almost a year, due to the failure of both parties to adhere to the set time frames, and on the part of the Commission for persistently deferring consideration of the matter.

³⁵⁴ (ROP) Rule 113 of the Rules of Procedure of the Commission

³⁵⁵ A perusal of the Commissions decisions shows that the Commission often does not adhere to this

³⁵⁶ In this same Communication, on 8th March 2005, the Republic of Zimbabwe wrote to the Secretariat of the African Commission requesting the Commission to indulge the State because it had not yet completed preparing its arguments on admissibility on the communication. The State thus sought a postponement of the communication to the 38th Ordinary Session.

³⁵⁷ Though from this decision it is not easy to establish whether this is due to its own fault or circumstances beyond its control.

³⁵⁸ Communication 416/12 *Here* the 2010 rules of procedure of the Commission were applied. Decision available on the African Commission website www.achpr.org

The Commission was seized of this Complaint at its 12th Extraordinary Session held from 30 July to 4 August 2012. The Commission received the final submissions on admissibility from Respondent on 2 August 2013 almost one year after it was seized.

The Commission was only able to deliberate on these Submissions the following year in May 2014, having deferred consideration of the Communication at its 54th Ordinary Session, 15th Extraordinary Session and 16th Extraordinary Session, citing time constraints as the reason, which was not justifiable. The Decision on admissibility was made during its 55th Ordinary Session held from 28 April to 12 May 2014 meaning that after the final submissions on admissibility were made the decision was delayed for a further nine months.

The same delays also characterize the communications being considered by the Commission during the merits stage. In the very same communication, the Complainant made their submissions on the merits on 23 July 2014 which were forwarded to the Respondent State on 3 September 2014. The Respondent State failed to submit its observations within the 60-day period.

At its 17th Extraordinary Session held from 19 to 28 February 2015, the Commission decided to grant the Respondent State a final extension to submit its observations within 30 days. The Commission decided on the merits on the available information during its 18th Extraordinary Session held from 29 July to 8 August 2015, the Respondent State having failed to make submissions within the period of the final extension.

Like in the previous Communication, no justification is given as to why the extensions were granted and whether these extensions were granted upon the requests of the parties. What is of most concern is the time lost as the Commission waits on the parties to make their submission out of the prescribed timeframes.

The Inter-American Commission on Human Rights takes a different approach from the African Commission which among other things saves on time and therefore is cost effective. Its rules of Procedure directly place limits for extensions for the time in which parties to a communication can make their submissions and requires the parties to give a reason justifying such a request.³⁵⁹ The rules provide that the respondent states shall submit their responses at the admissibility stage

³⁵⁹ Procedure of the Inter-American Commission Articles 30(3) and 37 (2) of the Rules

within three months from the date such requests are transmitted.³⁶⁰ Where there is a request for an extension of this period, the Executive Secretariat,³⁶¹ shall evaluate to establish whether they are duly founded. The Executive Secretariat shall not grant extensions that exceed four months from the date of transmission of the first request for information sent to the state.³⁶² Unlike the African Commission, the Inter American Commission sets out defined periods within which extensions must be made and categorically stipulates that such requests *must*³⁶³ be duly founded. The same applies to communications being considered on the merits where the Inter-American Commission specifically provides that “it shall not grant extensions that exceed six months from the date the initial request for observations was sent to each party.”³⁶⁴ Furthermore the Inter American Commission delegates this power to give extensions to its Secretariat, which saves on time.

It is not only important for the Commission to stick to the set time frames to save on the time spent considering Communications, it is also imperative for the procedures of the Commission to have certainty if it is to have any credibility. The Inter American Court of Human Rights (Inter American Court) takes such a stand. The Inter American Court in an effort to provide some legal certainty for applicants and states parties insists on compliance with procedural requirements of the Convention.³⁶⁵ The Court is critical of delays in processing cases by the Commission.³⁶⁶ It takes a hard-line approach against delays as was illustrated by its dismissal of *Cayara v. Peru*³⁶⁷ where the Commission submitted beyond the time limit provided by the Convention.³⁶⁸ The Inter-American Court's demonstrated concern for procedural regularity appears to be well received³⁶⁹ as it is considered to be a means to improve the handling of cases by the Inter-

³⁶⁰ Rules of Procedure of the Inter- American Commission Article 30(3)

³⁶¹ Unlike the African System, where it takes an entire sitting of the Commission to make such a decision

³⁶² Ibid

³⁶³ My emphasis

³⁶⁴ Rules of Procedure of the Inter- American Commission Article 30(3)

³⁶⁵ D Shelton ‘The Jurisprudence of the Inter-American Court of Human Rights’ (1994) 10 American University International Law Review 343 available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1422&context=auilr> accessed 07/20/2016

³⁶⁶ Ibid page 343

³⁶⁷ *Cayara v. Peru*, Preliminary Objections, Judgment of February 3, 1993, Inter-American Court of Human Rights, OEAJSer. L/V/III. 29, doc. 4, Ann. 1993 Rep. Inter-Am. Ct. Hum. Rts. 25 (1994).

³⁶⁸ Ibid pages 336,343-345 in these texts it is discussed that, the Court found that the case of *Cayara v. Peru* was brought by the Commission outside the time established by Article 51(1) of the Convention.

³⁶⁹ n 34 above 343

American Commission.³⁷⁰ On the basis of the *Cayara case*, the strict adherence to the set procedures helps to maintain equilibrium between justice and legal certainty, on which the juridical security of the parties depends.³⁷¹

It is also important to note that it is necessary to avoid over-reliance on rigid formalism.³⁷² A healthy balance must be struck between “the protection of human rights, the aim of the system, and legal certainty and procedural equality which assure the stability of the international process and are indispensable to the authority and credibility of international supervisory organs.”³⁷³ Therefore seeing that the aim of the Commission is to deliver justice, its procedures should not be considered as a fetter to the process but instead should facilitate the process. Where extensions are given there should be a reason justifying such a decision and such extensions should not be at the expense of justice being done.

Understaffing of the Secretariat of the Commission The work of the Commission is also slowed down by the problem of understaffing at the Secretariat. The Commission in its Activity Reports³⁷⁴ confirms that “*The staffing situation at the Commission’s Secretariat continues to be a great cause for concern; especially since recruitment exercise (sic) has not been expedited enough to bring on board the critically needed staff.*”

The African Union Commission made efforts to curb this problem by recruiting some legal officers in 2014;³⁷⁵ however the Commission continues to face institutional constraints, including inadequate human resources. The 2015 -2019 Strategic Plan of the Commission³⁷⁶ affirms that the small number of permanent staff at its Secretariat has a negative impact on its effectiveness. The Strategic Plan indicates that the staff structure approved by the AU Executive Council in 2009 includes, eleven Legal Officers, but at the adoption of the same Strategic Plan, the

³⁷⁰ Ibid

³⁷¹ Ibid

³⁷² Certain Attributes of the Inter-American Commission on Human Rights (arts.41, 42, 46, 47, **50** and **51** of the American Convention on Human Rights), Advisory Opinion **OC-12/93** of July **16, 1993**, Inter-American Court of Human Rights. 41. http://www.corteidh.or.cr/docs/opiniones/seriea_13_ing.pdf accessed 09/14/2016

³⁷³ Ibid 343-4

³⁷⁴ 35th Activity report of the African Commission page 12 available on www.achpr.org

³⁷⁵ 36th Activity report of the African Commission page 15 available on www.achpr.org

³⁷⁶ African Commission on Human and Peoples’ Rights Strategic Plan 2015-2019, Page 7 where a SWOT analysis was conducted to identify the African Commission’s strengths and opportunities to be fully utilized, weakness that need to be addressed to improve efficiency and effectiveness, as well as, threats for proper actions. Report available at www.achpr.com

Commission only had nine regular legal officers.³⁷⁷ With not less than 171 communications before it, on an average each legal officer should have at least 19 communications to handle, whilst assisting the special mechanisms, which is a lot of work for an officer to handle at a time.

Inadequate Time for Commissioners to Deliberate on the Communications during Sessions.

The part-time nature of the engagement of the Commissioners coupled with the fact that the Commission at the most only holds only four sessions annually³⁷⁸ further slow the work of the Commission³⁷⁹ as there is not enough time to deliberate on its matters. This is reflected in the Communications Procedure which is characterised by delays. For instance, in ***Gabriel Shumba v. Republic of Zimbabwe***,³⁸⁰ the Commission after hearing the oral submissions of the parties failed to promptly decide on admissibility. The Commission deferred further consideration on the admissibility at its 39th and 40th Ordinary Sessions, at the latter Session submitting that the Commissioners needed more time to study the legal arguments closely.

Similarly, in ***Jean-Marie Atangana Mebara v. Cameroon***³⁸¹ the Commission deferred consideration of the Communication at its 54th Ordinary Session, 15th Extraordinary Session and 16th Extraordinary Session, citing time constraints as the reason which was not acceptable. The Commission holds two Ordinary Sessions in a year, and Communications are considered during the private sessions which are normally held in seven days. The Extraordinary sessions which last for up to ten days are also held twice year, and looking at the communications recorded as considered in the activity reports, not much time is dedicated to the consideration of communications. Though the Bureau can make decisions on issues such as the granting of provisional measures during the intersession period,³⁸² this is like a drop in the ocean considering the number of active files before the Commission, whose consideration is deferred from session to session due to time constraints.

³⁷⁷ According to the most recently published Report of the Working Group on Communications, there are currently not less than 171 Communications pending before the Commission. At the time of the Report, 53 of the communications were at seizure stage, 79 were being considered on admissibility whilst one on the merits

³⁷⁸ The Commissioners meet four times a year - twice in Ordinary Sessions and twice in Extra-Ordinary Sessions. Page 15 The 2015 -2019 Strategic Plan of the Commission

³⁷⁹ Ibid page 15

³⁸⁰ Communication 288/2004 available on the African Commission website www.achpr.org

³⁸¹ Communication 416/12 *on* the African Commission website www.achpr.org

³⁸² ROP Rule 98(2)

5.3.2 Lack of implementation

When the Commission enters a decision against a state party, both parties must inform the Commission within 180 days of notification of the decision “of all measures, if any, taken or being taken by the state party to implement the decision of the Commission.”³⁸³

To ensure the implementation of its recommendations, the Commission may invite the state to submit further information on the measures it has taken in response to the Commission’s decision.³⁸⁴

The rapporteur for the communication, or any other member of the Commission designated for this purpose, have the responsibility to monitor the measures taken by the state party to give effect to the Commission’s recommendations on each Communication.³⁸⁵ The Commissioner is given the authority to take such action as may be appropriate to fulfil their assignment including recommendations for further action by the Commission as may be necessary.³⁸⁶ When the Commission carries out further activities in following-up on the implementation of its recommendations, it provides this information in its activity report.³⁸⁷

Where the parties to a communication fail to comply with the decision of the Commission, the Commission may draw this to the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union. However, the rules give no further information on how these two institutions may go about addressing the situation of non-compliance by respondent states.³⁸⁸

The Constitutive Act of the African Union provides³⁸⁹ that any member state that fails to comply with the decisions of the Union may be subjected to sanctions, such as the denial of transport and

³⁸³ ROP Rule 112 (2) if the State is found wanting, it follows that the Commission’s recommendations apply to the state to correct the wrong, this reporting duty therefore lies more on the state

³⁸⁴ ROP Rule 112(3), (4)

³⁸⁵ ROP Rule 112(5).

³⁸⁶ ROP Rule 112(6)

³⁸⁷ ROP Ibid Rule 112(9)

³⁸⁸ See Rule 112(8) of the African Commission Rules of Procedure. Ultimately the duty to implement rests on the on the attorney general of the state party, implementation of international decisions is a matter of the constitutional law of the affected state party. Therefore the parties responsible for implementation in the state party concerned should have minimum understanding of international law and how it binds their state to best supervise implementation of such international decision as though they were local decisions.

³⁸⁹ Article 23(2)

communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly.

As can be seen above, the Commission in its rules elaborates a system to ensure the implementation of its decisions. This system can only yield fruits when there is compliance by the states parties which requires their political will.

The decisions of the Commission are an important means by which the Commission can fulfil its protective mandate. Compliance with these decisions translates into an effective African human rights system in which all Africans could have confidence and from which they would enjoy the highest level of protection of human and peoples' rights.

On numerous occasions, states have failed to furnish the Commission with information of measures taken to implement its decisions in line with its Rules of Procedure even after consistent reminders.³⁹⁰ In some extreme cases some states have outrightly refused to recognize the Commission and its decisions as was with the refusal of the Republic of Botswana to implement the Commission's Decision in Communication 313/05 – **Kenneth Good v. Botswana**.³⁹¹ The Republic of Botswana unequivocally stated the following: “the Government has made its position clear; that it is not bound by the decision of the Commission.” This decision was referenced in the 28th Activity Report of the Commission which was authorized for publication.³⁹² As indicated in its submission, Botswana did not intend on implementing this decision and indeed has not implemented this decision, even after the Commission following up on the status of implementation.³⁹³

An empirical study was conducted of 44 communications³⁹⁴ in which violations of the Charter were found between 1987 and mid-2003. From this sample, there was 14% full compliance with

³⁹⁰ 39th Activity Report Page 19.

³⁹¹ Through Diplomatic Note Ref: 10/12 BEA5/21 C VIII (4) AMB of 23 March 2012

³⁹² By the Executive Council through Decision EX.CL/600(XVII) Combined 32nd And 33rd Activity Report of The African Commission on Human and Peoples' Rights EX.CL/782(XXII) page 9 available on the African Commission website www.achpr.org

³⁹³ Combined 32nd And 33rd Activity Report of The African Commission on Human and Peoples' Rights paragraph 24 reporting on implementation of the Commission's recommendations, the Commission stated that “Through Diplomatic Note **Ref: 10/12 BEA5/21 C VIII (4) AMB** of 23 March 2012, the Republic of Botswana unequivocally stated the following: “the Government has made its position clear; that it is not bound by the decision of the Commission”

³⁹⁴ Unpublished: L Louw ' An Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights' unpublished PhD thesis Chapter 2

the Commission's decisions, meaning 86% of the communications recorded partial or non-compliance. This means that on an average almost 80% of Communications concluded by the Commission end up not being fully implemented by the respondent states. The study also affirmed that the most important variables responsible for compliance are political rather than legal. From the response of the Government of Botswana to the Commission in *Kenneth Good v. Botswana*, it can be seen that the Activity Reports are political instruments that depending on the will of the affected state, may or may not be effective in ensuring that states effect the recommendations of the Commission.

The lack of political will by some member states to implement the decisions of the Commission, is not the only concern of the Commission, it is also concerned by the failure of the responsible states to comply with the provisional measures it issues.³⁹⁵

The Commission may adopt provisional measures at any time before the determination of a Communication on the merits to prevent irreparable harm to the victim or victims of the alleged violation.³⁹⁶ The state party concerned is expected to report on the implementation of these provisional measures.³⁹⁷

Many a time the Commission does not receive feedback on the status of implementation from states to which such requests have been made. For instance, the Commission did not receive any response to the provisional measures it issued regarding Communications involving Egypt and The Sudan.³⁹⁸

Also, responses, when received, have not been favourable.³⁹⁹ The Commission did receive a response from Ethiopia regarding the provisional measures issued with respect to *Andargachew*

<http://repository.up.ac.za/dspace/bitstream/handle/2263/29798/Complete.pdf?sequence=5&isAllowed=y>

accessed 09/15/2016 and F Viljoen, 'International Human Rights Law in Africa' (2007) page 357

³⁹⁵ 35th Activity Report of the African Commission page 10 available on www.achpr.org, this concern has been alluded to in numerous of the Commissions Activity Reports concern also raised in the 2015 -2019 Strategic Plan of the page 11

³⁹⁶ Rule 98(2) Rules of Procedure of the African Commission

³⁹⁷ Rule 98(4) Such information shall be submitted within fifteen days of the receipt of the request for Provisional Measures

³⁹⁸ 38th Activity Report 2015 page 9 in In Communication 512/15: Mahmoud Hassan Ramadan Abdel-Naby and 57 Others v. Egypt, the Commission had issued provisional measures requesting the State to stay the execution of Mahmoud Hassan Abdel-Naby, the authorities went on to execute him despite the matter still being active before the Commission

³⁹⁹ 38th Activity Report 2015 page 9

*Tsegeand Yemsrach Hailemariam (Represented by Reprive and REDRESS) v. Ethiopia.*⁴⁰⁰

but, the response did not indicate the measures taken to implement the provisional measures; but rather contested the issuance of the provisional measures.

The Activity Reports of the Commission further show that the Commissioners responsible for following up on the implementation of the Commissions decisions have not made innovative use of the provision of its Rules of Procedure allowing it to “*take such action as may be appropriate to fulfil their assignment*”.⁴⁰¹ The Commission could explore other means by which it can ensure the implementation of its decisions,⁴⁰² as opposed to sending repeated reminders to member states to comply with the decisions of the Commission, from the looks of things the respondent states often do not respond to these reminders.⁴⁰³

The Inter-American Commission on the other hand has taken some innovative steps to ensure the implementation of its recommendations. The Commission invites its member states “*to adopt legal mechanisms for the execution of the recommendations of the Commission in the domestic sphere*”⁴⁰⁴ This has yielded some results and many American states have established special mechanisms or laws to facilitate the implementation of Commission recommendations and Court decisions.⁴⁰⁵ The European system has also taken innovative steps where the Committee of Ministers supervises the execution of the final judgment of the Court.⁴⁰⁶ This is deemed proper as the execution of the judgment is left to a body with political powers to sanction the concerned state party.⁴⁰⁷

The Inter-American Commission in its Rules of Procedure further employs other techniques to ensure the implementation of its recommendations. When the Inter-American Commission receives a communication it investigates the facts, conducts hearings, and reports its findings

⁴⁰⁰ Communication 507/15

⁴⁰¹ Rule 112(6)

⁴⁰² See final chapter (5) for recommendations

⁴⁰³ For example, the 36th Activity Report of the Commission page 18 also see the 34th Activity Report, page 14

⁴⁰⁴ J. L. Cavallarot & E.J. Schaffer ‘ Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas’

<http://law.stanford.edu/wpcontent/uploads/sites/default/files/publication/259797/doc/slspublic/Less%20As%20More%20Cavallaro%2056HastingsLJ217.pdf> page 231 Accessed 6/17/2016

⁴⁰⁵ Ibid page 231-233 the Article cites several examples highlighted in a report by the Center for Justice and International Law.

⁴⁰⁶ Article 46(2) of the European Convention

⁴⁰⁷ Unpublished: L Louw ‘An Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights’ unpublished PhD thesis Chapter 6-page 260 section 6.2.3

and, where appropriate, recommends measures for the state to remedy the violation. If these measures are not implemented, where the country involved has accepted the compulsory jurisdiction of the Inter-American Court, the Commission may submit the case to the Inter-American Court.⁴⁰⁸ The decisions of the Court are final and binding on the parties to the dispute.⁴⁰⁹

The Rules of Procedure of the African Commission also has a provision for referral of its cases to the African Court on Human and Peoples' Rights (the African Court). From the wording of its Rules, the Commission 'may' ⁴¹⁰ submit a Communication to the African Court, where it has taken a decision and considers that the state has not complied or is unwilling to comply with its recommendations in respect of the communication within the stipulated period.⁴¹¹ With the Inter-American Commission on the other hand, where a state has not complied with the Commission's Report,⁴¹² 'a rebuttal presumption of referral to the Inter- American Court kicks in'⁴¹³ This seems to be an ingenious way of ensuring that the decisions of the Inter American Commission are ultimately implemented.

Though the African Commission has written procedures on how to follow up on the implementation of its decisions it has no established institutions to ensure the actual implementation.⁴¹⁴ The African Court therefore, provides a useful means for the implementation of the decisions of the Commission. The African Court unfortunately has not received many referrals from the Commission; neither has it passed many judgments since it became operational. As it develops its methods of implementation the Commission may be able to benefit from this in the long run. More so as it appears the African Court has more of an

⁴⁰⁸ Article 45 of the Rules of the American Convention unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary. Also see 'Overview of the Inter-American Commission on Human Rights' <http://www.msubillings.edu/cas/NAMS/Taliman/1%2014%20Overview%20Inter-American%20Commission%20on%20Human%20Rights.pdf> accessed 06/17/2016. It is also important to note that once the Report of the Commission is adopted and the Petitioner so notified, the Petitioner is given one month to present his or her position as to whether the case should be submitted to the Court. Article 44(3) of the Rules of the Commission.

⁴⁰⁹ n 34 338

⁴¹⁰ Rule 118 (1) Rules of Procedure of the African Commission

⁴¹¹ Per Rule 112(2), within 180 days of being informed of the decision

⁴¹² Final report adopted by the Inter-American Commission 3 months after a State which has been found wanting has been requested to comply with the findings of the Commission

⁴¹³ F Viljoen, 'International Human Rights Law in Africa' (2007) 441

⁴¹⁴ "African Union Handbook: A Guide for Those Working with And Within the African Union" Page 74 available at <http://www.un.org/en/africa/osaa/pdf/au/au-handbook-2014.pdf> (accessed 11/28/2016)

authoritative stand in comparison to the Commission, Article 30 of the Court Protocol categorically stipulates that the states parties shall comply with the judgment in any case to which they are parties within the time stipulated by the Court and guarantee its execution whilst the Commission's mandate is deemed to be quasi-judicial and, as such, its final recommendations are perceived by some parties as not legally binding and furthermore there is no mechanism that can compel states to abide by its recommendations.⁴¹⁵

It is important to point out that there have also been some successful cases in the implementation of the Decisions of the Commission, for instance *Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois Welfare Council) v. Kenya*⁴¹⁶ where the Republic of Kenya went to the extent of establishing a Taskforce to implement the Commission's decision.

A positive development was also recorded in Cameroon's implementation of the Commission's decision in *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon*,⁴¹⁷ where the victims were compensated for the prejudice they suffered during the post-electoral violence of 1992 in the North-West Region.

5.3.3 Gaps and inconsistent application of the Rules of Procedure by the Commission

It is worth noting that the Commission has taken different directions in trying to resolve similar issues considered during different sessions. An example is the way the Commission determines whether a matter merits to be struck out or not due to lack of diligent prosecution. In some matters a party may be allowed a little more time to make their submissions, whilst in other matters the Commission proceeds to strike out as soon as a certain time frame elapses. From an outside observer, it would appear some complainants are treated more favourably compared to others due to such inconsistencies. The African Charter on Human and Peoples' Rights and its Rules of Procedure do not directly address the issue of striking-out Communications. As was earlier noted the Rules of Procedure of the Commission however stipulate that,⁴¹⁸ when a deadline is fixed for a particular submission, either party may apply to the Commission for

⁴¹⁵ Ibid

⁴¹⁶ Communication 276/03 available at www.achpr.org

⁴¹⁷ Communication 272/03 available www.achpr.org

⁴¹⁸ ROP Rule 113

extension of the period specified. The Rules specifically provide that such an extension must not exceed one month.

In *AFTRADEMOP and Global Welfare Association (on behalf of the Moko-oh Indigenous Peoples of Cameroon) v. Cameroon*⁴¹⁹ the Complainants were requested to submit their observations on the merits by February 2012 but they however failed to make the submissions in the 60-day timeframe. At its 13th Extraordinary Session held from 19 to 25 February 2013, the Commission decided to strike out the Communication due to lack of diligent prosecution. In this case the Commission received no submissions for up to a year before it finally decided to strike out the Communication.

On the other hand, in *Artur Margaryan and Artur Sargsyan v. the Republic of Kenya*⁴²⁰ also considered during the 13th Extraordinary Session, the Commission took almost one year three months to arrive at a decision to strike out the Communication because of want of diligent prosecution by the Complainant. In this case giving the Complainant an extra three months in which they could have made their submissions.

In neither of the two Communications above was the one-month limit allowed for extensions observed. The situation was aggravated in the latter Communication by the fact that from the time the Complainants submitted their original Complaint, they made no further submissions to the Commission, but the Commission went on, to keep the Communication active for over a year.

The published decisions of the Commission give no information justifying such prolonged extensions. One could therefore safely arrive at the conclusion that the Commission has not defined the conditions under which it will give an extension of time to make submissions to the parties to a Communication. It appears it would suffice for a party to request for an extension without putting forward any reason for such request.⁴²¹ This make the Procedure susceptible to abuse of process and the backlog created compounded with the shortage of staff slows the processing of other Communications in which the Complainants are diligently seeking justice.

⁴¹⁹ Communication 336/07 available at <http://www.ihrda.org/>

⁴²⁰ Communication 407/11 at <http://www.ihrda.org/>

⁴²¹ In Communications 407/11 and 336/07 no reasons were given in the Commissions decisions to justify requests by the parties for time extensions nor did the Commission explain on what basis the extensions were given

As discussed above an attendant problem from the lack of a firm position by the Commission on how to address the issue of striking out communications is the accumulation of cases which are not active so to say but which the Commission has to continuously update.⁴²² Such a situation increases the workload of the already under staffed Secretariat of the Commission, in turn creating a backlog of cases, because with no provision for striking out cases, and parties failing to diligently follow up on their communications, the Commission becomes inundated with files on which no work is being done even as they receive more communications.

The African Commission, having no certain Procedure for Striking out Communications can reinforce its current framework by borrowing from the European Court which has established a system for striking out communications. The European Convention stipulates that the European Court at any stage of the proceedings may decide to strike out an application from its list of cases, under stipulated conditions where the circumstances lead to the conclusion that⁴²³ *the applicant does not intend to pursue his application; or the matter has been resolved; or for any other reason established by the Court, it is no longer justified to continue the examination of the application.*

If the African Commission had a set list of factors to guide it when deciding whether to strike out a communication as above, it would be able to quickly identify communications to which these factors apply and dispose the cases in good time, thereby saving on the Commission's much needed resources.

As already discussed above, with a certain process, set procedures would help to maintain an equilibrium, on which the juridical security of the parties to a communication depends.

5.3.4 Failure to cater for all the working languages of the African Union

The Working Languages of the Commission and all its subsidiary mechanisms are those of the African Union.⁴²⁴ The failure of the Commission to cater for all the working languages of the African Union is one of the challenges which hinder the efficacy of the protective mandate of the commission.

⁴²²The Commission at each session presents a report (Report of the Working Group on Communication) reflecting the status of Communications

⁴²³ Article 37 (1) (2) of the European Convention of Human Rights

⁴²⁴ Rules of Procedure of the African Commission Rule 36 (1)

The African Union currently has four working languages Arabic, English, French and Portuguese.⁴²⁵ The Rules of the Commission stipulate that when a person is addressing the Commission in a language other than one of its Working Languages, the person must ensure the interpretation into one of the Working Languages of the Commission.⁴²⁶ Therefore complainants must present their communications to the Commission in any one of its Working languages. Where a complainant is not able to do so they should ensure the Communication is translated into one of the Working Languages of the Commission.

The African Commission experiences a shortage of staff particularly Arabic –speaking and Portuguese – speaking legal officers.⁴²⁷ As a result of the Arab spring, of late the Commission has experienced a sharp increase in in Arabic cases,⁴²⁸ though the Secretariat lacks legal officers with a mastery of the Arabic language.⁴²⁹ In spite this, the Commission continues to receive Communications in Arabic, for instance in its 39th Activity Report the Commission is recorded to have received 24 Communications from Egypt in Arabic.⁴³⁰ Arabic is one of the working languages of the Commission, therefore the Commission is obliged to accept and process Communications submitted in Arabic. Due to the shortage of staff with proficiency in the Arabic language, when the Commission receives Communications in Arabic, the deliberations on them are bound to take longer than usual. The situation is not helped by the nature of the Communications received by the Commission lately against Egypt where some of the Complainants face the death penalty such cases cannot afford any delays and need to be quickly disposed of.⁴³¹

5.4 Conclusion

The Communications Procedure was modelled after those of the Inter- American Commission and European System. The African System having been established later had the privilege of

⁴²⁵ n 78 above 54. Under article 11 of the Protocol to the AU Constitutive Act, the official languages of the AU and all its institutions are Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language. The AU's working languages are Arabic, English, French and Portuguese. See <http://www.au.int/en/history/oau-and-au> accessed 07/21/2016

⁴²⁶ Rule 36(3)

⁴²⁷ 39th Activity Report of the African Commission Page 10

⁴²⁸ Ibid page 10

⁴²⁹ Ibid page 10

⁴³⁰ Ibid page 8

⁴³¹ Ibid, where provisional measures were issued

having the option to pick the best practices from the earlier established systems. The African System therefore had the opportunity to merge their good practices to come up with a system to cater for the specific African needs. It can be seen from this chapter that the Communications Procedure has developed a solid framework and has concluded many communications, but some challenges have been identified which prevent the Commission from providing better protection. The challenges discussed in this chapter include: inordinate delays in the various stages of the Communications Procedure; lack of implementation of the recommendations of the Commission; gaps and in inconsistent application of the rules of procedure of the Commission; and a failure to cater for all the working languages of the African Union. The chapter shows that a lot of work still needs to be done, but all hope is not lost as the Commission can still borrow from The Inter-American and European systems to further improve its protection mechanism. In this regard, the chapter to follow makes some recommendations on how the efficacy of the African Commissions Communications Procedure can be improved.

CHAPTER SIX

Conclusions and Recommendations

6.1 Summary and Conclusions

This study was carried out to show how the African human rights system (system) provides protection to its people, while trying to assess how effective the said system is. It is necessary to continually monitor and evaluate the system to ensure that it fulfils its purpose in a consistent and satisfactory manner. The study highlights irregularities and shows good practices. It attempts to show the relevance of the system as an African home-grown system in the realm of international human rights protection today.

Chapter two sets out the African Union's (AU) mandate on human rights. I gave a basic outline of the institutional and normative framework for the protection of human rights by the AU, locating the relevant organs and institutions responsible for fulfilling its human rights mandate. In Chapter three I gave the normative framework of the African Charter. In Chapter four, I gave an overview of the framework for human rights protection under the African Commission on Human and Peoples' Rights (Commission). It was shown that the human rights protective mandate of the Commission is mainly drawn from the African Charter on Human and Peoples' Rights (African Charter). The special protocols expanding the protective mandate of the Commission were also discussed. In the same Chapter I averred that the Commission may resort to any appropriate method of investigation in considering contentious issues concerning human rights brought before it. The Communications Procedure, the special mechanisms of the Commission and other mechanisms such as urgent appeals and letters of allegations were identified as important for addressing the different human rights issues affecting the African continent. The Communications Procedure was established to be the most prominent of the Commissions human rights mechanisms.

In Chapter four I further revealed that by means of these mechanisms, the Commission can ascertain whether states parties to the African Charter and its protocols are satisfactorily fulfilling their obligations and duties arising under the same. From this I found that the questions which now need to be addressed are how effective these mechanisms are, and how successful

they have been in bringing their respective mandates to fruition to make the application of human rights a reality for all Africans.

In Chapter five, to answer the questions above, the Communications Procedure having been distinguished as one of the well-established mechanisms of the Commission was analysed to assess how the Commission is faring in fulfilling its protective mandate. I identified some specific challenges experienced during the engagement of the Procedure that prevent the Commission from achieving its goals. Some of the challenges I identified were the: inconsistent application of the Rules of Procedure by the Commission; inordinate delays in the various stages of the Communication Procedure; lack of implementation; and failure to cater for all the working languages of the African Union. The main findings of the study relate to the aforementioned challenges.

Having given a comprehensive overview of human rights protection under the African human rights system, more work needs to be done on the system for it to be able to operate efficiently. It has been shown in the study that the African system can borrow good practices from other systems, furthermore the system can also develop its own good practices to replace those which are seen to not be working. To this end in this Chapter in conclusion, I link the findings of the study to the establishments which can play an important role in addressing the challenges to enhance the efficacy of the Communications Procedure. In this light, the recommendations below are directed to the Assembly of Heads of State and Government, the African Union Commission, States Parties to the African Charter and the African Commission.

6.2 Recommendations

The recommendations below target different bodies whose activities have an impact on the efficacy of the protective mandate of the Commission.

6.2.1 Recommendations for the Assembly of Heads of State and Government.

- Ensure that the members of the Commission who are selected serve in their personal capacity. For this to happen, practices such as horse-trading must be done away with completely as this works only to the advantage of stronger countries whose preferred candidates end up being selected. Unfortunately, candidates picked in such a fashion may not necessarily be the best qualified. Furthermore, it can be argued that by choosing such

candidates, the nationality link is contrary to standard conceptions of independence and impartiality. To address this, the Rules of the Commission must be amended to clearly outline the criteria for the selection of commissioners and this should, aim at promoting independence and impartiality of the commissioners. Important considerations in this selection procedure would be representation and holding of the requisite human rights credentials.⁴³² The Commission as whole should be representative of all sections of society. The commissioners individually should have the relevant experience of the needs of the different groupings forming society, and have sound working knowledge of human rights to guide them in their work. To ensure this, for one to qualify for appointment as Commissioner, one must satisfy some minimum qualifications in human rights. If such rules were strictly adhered to, the independence, efficiency and impartiality of the Commissioners would be certain.

- The political will to implement the decisions of the Commission by the individual members of the Assembly is vital, if the Communications Procedure is to be useful in the fulfilment of its protection mandate. The full cooperation of the state's parties to the Charter guarantees the implementation of the decisions of the Commission. The members of the Assembly therefore need to renew their commitment to their responsibilities under the Charter. Furthermore, the states have a duty to keep each other in check especially where they observe that a state is slackening in the protection of human rights, they should be able to call each other out by adopting the recommendations of the Commission and not shielding states which have been found in violation of human rights by the Commission. If not, the entire system for the protection of human rights of the Commission would be deemed to be an empty shell with a system that is not functional.
- Prioritise raising funds for the Union through increased allocations for contributions from members towards the AU Budget. These contributory allocations could be reviewed periodically taking into consideration such factors as a rise in the ability of a state to contribute as its economy improves. In this way, financial support to the Commission would be increased. The Commission would then have the means to address its shortage of staff and be able to employ staff with a mastery of the other languages of the African

⁴³² B Burdekin, 'National Human Rights Institutions in the Asia Pacific Region' (2006) 48-50

Union apart from French and English. Furthermore, with more finances, the Commission would be able to explore other means of ensuring the implementation of its protective mandate. The Commission would be able to conduct its missions for long periods and engage all important stakeholders and to extend the time for which its Sessions hold and have more time to deliberate on Communications.

- Consider appointing Commissioners on a full-time basis rather than part time appointment. This would ensure full commitment and undivided attention to the work of the Commission. Furthermore, such appointment would give the Commissioners ample time to address all issues presented to it and enable the Commission to be effective.

6.2.2 Recommendations for the African Union Commission

- Provide operational support for Commission.⁴³³ In particular, facilitate the engagement of more staff for the Commission to address the shortage of staff. Furthermore, ensure that staff working in Arabic and Portuguese are also recruited. This will allow for matters to be presented to the Commission in any of the working languages of the AU with the assurance that officers of the Commission will be available to attend to the matter in the language it is presented.
- Facilitate an increase in the allocation of resources from the AU budget towards the operations of the African Commission, particularly regarding staffing and promotion and protection activities. The African Union Commission (AUC) manages the AU budget and, under the Commissioner for Political Affairs, handles the financial Affairs of the African Commission. It is therefore well placed to ensure that the Commission receives adequate financing to efficiently carry out all its activities.⁴³⁴

⁴³³ African Union Commission and New Zealand Crown Copyright *African Union Handbook* (2014)46

⁴³⁴ African Union Commission and New Zealand Crown Copyright *African Union Handbook* (2014)46 and F Viljoen, 'International Human Rights Law in Africa' (2007)204

6.2.3 Recommendations for the States Parties to the African Charter

- The States have a duty to establish mechanisms to ensure the implementation of the decisions of the Commission, having undertaken to recognize the rights, duties and freedoms enshrined in the Charter. Additionally, they have a duty to adopt legislative or other measures to give effect to the rights in the Charter. To do this the States must create specific departments or offices, with a clearly outlined mandate to ensure the implementation of decisions against them. The same offices could also be responsible for ensuring that the respective States fulfil their obligations under the African Charter and other human rights instruments ratified.
- To adhere to the stipulated time frames under the Communications Procedure and make their submissions on time and inform the Commission of the measures being taken to implement the decisions of the Commission in their respective cases.
- The States parties must facilitate country visits. Through these visits the Commission would be able to directly monitor the implementation of the African Charter. The visits also provide a great opportunity to follow up on the implementation of communication decisions. The success of these visits depends largely on the goodwill of the host State. The States are therefore encouraged to respond promptly and favourably to the Commission's requests for country visits.
- The States have a duty to promptly respond to the Commission's urgent appeals as these are typically used to communicate information about time-sensitive violations: the quick action of the state concerned is important to end or prevent human rights violations.
- Make a specific provision under the national budget, for the State's contribution to the AU budget. This provision should be maintained in all budgets and be revised favourably in the event of an economic windfall for the State. If this is maintained as a practice, there would be an increase in the resources of the AU and, in turn, of the Commission to enable it to fulfil its human rights mandate.

6.2.4 Recommendations for the African Commission

- That the Commission amends its Rules of Procedure to set a specific list of factors to guide it when deciding whether to strike out a communication or not. This could entail setting specific time frames within which the Commission may arrive at decision to strike out a communication when the complainant fails to make its submissions within the stipulated timeframe. This would enable the Commission to quickly identify and dispense of communications which merit to be struck out, to save on time and the Commission's scarce resources. Furthermore, there would be consistency in the way strike out decisions are handled, which would reflect well on the Commission as its processes would be certain and not haphazard.
- Amend its rules to provide specific timeframes for granting extensions of time to make submissions by the parties to communications. The Rules should also provide that such extensions shall be granted where the requests fulfil certain conditions justifying such a grant. The Commission must evaluate such requests to establish whether the request is duly founded and set limits for the periods of extension.
- Consolidate and utilize its relationship with African Court to facilitate the implementation of its decisions. This would be by means of referral of communications by the Commission to the Court. The Court Protocol provides that states parties shall comply with the judgment in any case to which they are parties within the time stipulated by the Court and guarantee its execution. In comparison to the Commission's Procedure, this would be a faster means of ensuring the implementation of the Commission's decisions, without going through the lengthy processes of the Commission to secure the implementation of its decisions.
- Increase time allocation for the consideration of communications. The Commission could introduce sessions specifically for the Working Group on Communications or, alternatively, extend the number of days dedicated to the consideration of communications during its sessions. This is a sure means of reducing the backlog of work of the Commission.
- Allow the Secretariat to make certain types of decisions to reduce on the issues to be tabled before the Commission during sessions and to utilize the time in between sittings

of the Commission, rather than wait for the Commission, the intersession period could be utilized. Specifically, the Rules of the Commission should be amended to allow the Secretariat to consider requests from parties to communications for extensions for time in which to make their submissions. This would work well where the Commission in its rules would stipulate the conditions under which such an extension would be granted. The role of the Secretariat would be simply procedural to establish whether these conditions under the Rules would have been fulfilled. In such cases, the Secretariat would not be allowed to delve into substantive issues, leaving such considerations for the Commission only.

- Cooperate with states parties to the Charter on the establishment of mechanisms and institutions for the implementation of its decisions. It has been shown in the previous chapters that though the African Commission has written procedures on how to follow up on the implementation of its decisions it does not have established institutions to ensure the actual implementation. The Commission after years of struggling with states to implement its decisions knows exactly what issues need to be addressed for its decisions to be implemented. Using this information, it can create solid institutions to follow up on implementation. This would also entail partnerships with civil society, to focus on activities promoting the implementation of the decisions of the Commission.
- The Activity Report of the Commission should be better utilized to highlight the failure of states to implement the decisions of the Commission rather than repeatedly requesting states to update the Commission on the measures adopted to implement its decisions. This would work very well where the states parties to the charter have the necessary political will and peer pressure would be channelled through this forum to ensure that the parties comply with all their duties and obligations under the African Charter. Even where the political will of the States is lacking, the Commission would have been able to make a firm stand on their position regarding the implementation of its decisions irrespective of whether such Report would be adopted or not. Furthermore, the failure to adopt such a decision would bring negative attention to the AU which the AU does not want.

BIBLIOGRAPHY

Books

Alfredsson, G; Grimheden, J; Ramchandran, BG and de Zays A (2001), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jacob Th. Moller*, Martinus Nijhoff Printers

Bösl, A and Diescho, J (eds) (2009) *Human Rights in Africa Legal Perspectives on their Protection and Promotion* MacmillanN:Namibia

Burdekin (2006) *National Human Rights Institutions in the Asia Pacific Region*: Martinus Nijhoff Publishers

Chowdhury AR & Bhuiyan JH (eds) (2010) *An Introduction to International Human Rights Law* Leiden:Martinus Nijhoff Publishers

Christou, TA and Starmer, K (2005) *Human Rights Manual and Source Book for Africa*, British Institute of International and Comparative Law

Evans and Murray, R (eds) (2008) *The African Charter on Human and Peoples Rights: The System in Practice 1986- 2006* 2nd ed Cambridge: Cambridge University Press

Henry, JS (2000) *International Human Rights Law in Context: Law, Politic and Morals*, 2nd Ed Oxford: Oxford University Press

Henry, JS et al (2007) *International Human Rights Law in Context: Law, Politic and Morals: Text and Materials* , 3rd Ed New York: Oxford University Press

Macmillan, JS (2013) *Zambia Justice Sector& the Rule of the Rule of Law (2013)* Johannesburg: The Open Society Initiative for Southern Africa

Martin F, Schnably SJ, Wilson RJ, Simon JS , Tushnet MV (2006) *International Human Rights and Humanitarian Law :Treaties, Cases and Analysis* New York: Cambridge University Press

Murray, R (2000) *The African Commission on Human and Peoples' Rights and International Law* Oxford: Hart Publishing Ltd

Olowu, D (2009) *An integrative rights-based approach to human development in Africa*: Pretoria University Law Press (PULP)

Osterdahl, I (2002) *Implementing Human Rights in Africa: The African Commission on Human and Peoples' Rights and Individual Communications* Volume 15 Uppsala: Uppsala University Swedish Institute of International Law Iustus Forlag

Shaw, MN (2008) *International Law* New York: Cambridge University Press

Shelton, DL (2008) *Regional Protection of Human Rights* Oxford: Oxford University Press

Viljoen, F (2007) *International Human Rights Law in Africa* New York: Oxford University Press

Journal Articles

Gittleman, R 'Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22.4 *Virginia Journal of International Law*

Gumedze, S 'The African Union and the Responsibility to Protect' (2010)10 *AHRLJ*

Gumedze, S, 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *AHRLJ*

Ibrahim, AM 'Evaluating a Decade of the African Union's Protection of Human Rights and Democracy: A Post Tahrir Assessment' (2012)12 *AHRLJ*

Killander, M and Adam, A 'Human Rights Developments in the African Union during 2010 and 2011' (2012)12 *AHRLJ*

Mujuzi, JD 'The Rule of Law: Approaches of the African Commission on Human and Peoples' Rights and Selected African States' (2012) 12 *AHRLJ*

Shelton, D 'The Jurisprudence of the Inter-American Court of Human Rights' (1994) 10 *American University International Law Review*

van der Linde, M and Louw, L ‘Considering the Interpretation and Implementation of article 24 of the African Charter on Human and Peoples’ Rights in Light of the SERAC Communication’ (2003) 3 *AHRLJ*

Viljoen, F ‘Promising profiles: An interview with the four new members of the African Commission on Human and Peoples’ Rights’ (2006) 1 *AHRLJ*

Papers and Articles

“Ethiopia/AU: AU Summit asked to declare 2016 African Human Rights Year” available at: <http://www.panapress.com/Ethiopia-AU--AU-Summit-asked-to-declare-2016-African-Human-Rights-Year--12-895369-20-lang2-index.html>

“Concept Paper on the Declaration of 2016 as Africa Year of Human Rights on” available at http://www.achpr.org/files/news/2016/07/d246/concept_note_project2016_eng.pdf

Heyns, C (2004) “The African Regional Human Rights System: The African Charter” Penn State Law Review

“Human Rights Strategy for Africa: Department of Political Affairs African Union Commission” available at [http://au.int/en/sites/default/files/HRSA-Final-table%20EN\)%5B3%5D.pdf](http://au.int/en/sites/default/files/HRSA-Final-table%20EN)%5B3%5D.pdf)

“Overview of the Inter-American Commission on Human Rights” <http://www.msubillings.edu/cas/NAMS/Taliman/1%2014%20Overview%20Inter-American%20Commission%20on%20Human%20Rights.pdf>

“SADC Tribunal Petition” <http://www.southernafricalitigationcentre.org/2015/05/11/sadc-tribunal-petition/>

“The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights (Centre for Reproductive Rights Briefing Paper)” at

Baffour, A “New African Union: From Non-Interference to Non-Indifference” available at <https://www.questia.com/magazine/1G1-160922404/african-union-from-non-interference-to-non-indifference>

De Vos, P “A New Beginning? The Enforcement of Social, Economic and Cultural Rights under the African Charter on Human and Peoples Right’s” available at

Ebrahim –Carstens, M “Gender Representation on the Tribunals of the United Nations Internal Justice System: A Response to Nienke Grossman” available <https://www.asil.org/sites/default/files/EbrahimCarstens%2C%20Gender%20Representation%20on%20the%20Tribunals%20of%20the%20United%20Nations%20Internal%20Justice%20System%20%282%29.pdf>

Grossman, N “Achieving Sex-Representative International Court Benches” <http://www.jstor.org/stable/pdf/10.5305/amerjintelaw.110.1.0082.pdf>
<http://constitutionallyspeaking.co.za/wp-content/uploads/2015/11/A-new-beginning-The-enforcement-of-social-economic-and-cultural-rights-under-the-African-Charter-on-Human-and-Peoples-Rights.pdf>
http://www.reproductiverights.org/sites/default/files/documents/pub_bp_africa.pdf

J. L. Cavallarot, JL and Schaffer, EJ ‘ Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas’ <http://law.stanford.edu/wpcontent/uploads/sites/default/files/publication/259797/doc/slpublic/Less%20As%20More%20Cavallaro%2056HastingsLJ217.pdf>

Mapula, L “Negating the Promotion of Human Rights through ‘Claw-Back’ clauses in the African Charter on Human and Peoples’ Rights” (2016) International Affairs & Global Strategy available www.iiste.org

Oxfam AfriMAP and the Open Society Institute (2009) “Strengthening Popular Participation in the African Union: A Guide to AU Structures and Processes”

PULP “Celebrating the African Charter at 30: A guide to the African human rights system” (Pretoria University Law Press (PULP)2011) available <http://www.achpr.org/>

Singh, S “The Impact of Claw Back Clauses on Human and Peoples’ Rights in Africa” African Security Review 18.4 Institute for Security Studies

The Egyptian Initiative for Personal Rights and others “Filing a Communication before the African Commission on Human and Peoples’ Rights: A complainant’s manual” (2013) document available <http://www.redress.org/downloads/country-reports/1307%20Manual%20to%20the%20African%20Commission.pdf>

Tissi, N and Aggad- Clerx, F “The Road Ahead for the African Governance Architecture: An Overview of Current Challenges and Possible Solutions” available at

<http://www.saiia.org.za/occasional-papers/502-the-road-ahead-for-the-african-governance-architecture-an-overview-of-current-challenges-and-possible-solutions/file>

Transcript of the oral statement delivered by the Anti-Racism Information Service before the 61st session of the UN Commission on Human Rights Oral Submission by Mr. Legborsi Saro Pyagbara, Anti-Racism Information Service available at <http://www.unpo.org/article/2311>

Legislative and Policy Framework

Constitution of Zambia, Chapter 1 of the Laws of Zambia

Public Order Act Chapter 113 of the Laws of Zambia

International Treaties

African Charter on Human and Peoples Rights

African Charter on the Rights and Welfare of the Child

Charter of the Organization of African Unity

Constitutive Act of the African Union

European Convention of Human Rights

Grand Bay Declaration and Plan of Action

Kigali Declaration, 2003

Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The American Convention on Human Rights.

Cases

Communication 336/07, *AFTRADEMOP and Global Welfare Association (on behalf of the Moko-oh Indigenous Peoples of Cameroon) v. Cameroon*, 13th Extra-Ordinary Session

Communication 507/15, *Andargachew Tsegeand Yemsrach Hailemariam (Represented by Reprive and REDRESS) v. Ethiopia*, 38th Activity Report

Communication 407/11, *Artur Margaryan and Artur Sargsyan v. the Republic of Kenya*, 13th Extra-Ordinary Session

Communication 272/03, *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon*, 46th Ordinary Session

Cayara v. Peru IACHR Preliminary Objections, Judgment of February 3, 1993, OEAJSer. L/V/III. 29, doc. 4, Ann. 1993 Rep. Inter-Am. Ct. Hum. Rts. 25 (1994).

Communication 276/03 *Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois Welfare Council) v. Kenya*, 46th Ordinary Session

Communication 286/2004, *Dino Noca vs. Democratic Republic of the Congo*, 52nd Ordinary Session

Communication 313/05 – *Kenneth Good v. Botswana*, 47th Ordinary Session

Communication 75/92, *Katangese Peoples' Congress v Zaire (1995)*, 16th Ordinary Session

Media Rights Agenda and Constitutional Rights Project v Nigeria (2000), AHRLR 200(ACHPR1998)

Communication 288/2004, *Gabriel Shumba v Republic of Zimbabwe*, 51st Ordinary Session

Social and Economic Rights Action Centre (SERAC) and another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

Communication 429/12, *The Ngambela of Barotseland and Others v The Republic of Zambia* 39th Activity Report

Western Sahara ICJ Advisory Opinion of 16 October 1975

Communication 400/11, *West African Network of Human Rights Defenders (ROADDH-WAHRDN) and another v. Côte d'Ivoire*

Communication 377/09, *Mendukazi Patricia Monakali v. South Africa*

Communication 416/12, *Jean-Marie Atangana Mebara v. Cameroon*, 18TH Extra- Ordinary Session

Sir Dawda K. Jawara v Gambia (the) (2000) AHRLR 107 (ACHPR 2000)

Rencontre africaine pour la défense des droits de l'Homme (RADDHO) v. Zambia (2000) AHRLR 321, (ACHPR 1996).

South African Case Law

Government of the Republic of South Africa V Grootboom and others 2001 (1) SA 46 (CC)

Reports

Working Group on Communications Inter-Session Activity Report (May 2015 – October 2015)

http://www.achpr.org/files/sessions/57th/inter-act-reps/245/57os_intersession_report_wgc_eng.pdf accessed 3/7/2016

‘African Commission on Human and Peoples’ Rights “Delivering Better” Strategic Plan, 2015-2019’

AU Human Rights Strategy for Africa

Report of the Joint Human Rights Promotion Mission to the Republic of Chad which was from 11 -19 March 2013 available http://www.achpr.org/files/sessions/54th/mission-reports/chad-promo-2014/misrep_promo_chad_2013_eng.pdf (accessed 7/13/2016)

Report of the Human Rights Promotion Mission to the Gabonese Republic held from 13 -18 January 2014 http://www.achpr.org/files/sessions/54th/mission-reports/gabon-promo-2014/achpr54os_misrep_promo_gabon_2014_eng.pdf (accessed 7/13/2016)

Report of the Joint Human Rights Promotion Mission to the Republic of Uganda held from 25 - 30 August 2013 http://www.achpr.org/files/sessions/14th-eo/mission-reports/uganda-promo-2013/achpr14eos_misrep_promo_uganda_2013_eng.pdf (accessed 7/13/2016)

Intersession Report of The Mechanism of The Special Rapporteur on Human Rights Defenders as presented at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights Yamoussoukro - Côte d'Ivoire, 9 - 22 October 2012

Intersession Report of The Mechanism of The Special Rapporteur on Freedom of Expression' presented at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights Yamoussoukro - Côte d'Ivoire, 9 - 22 October 2012

Inter-Session Activity Report of the Chairperson of the Working Group on Communications presented to the 56th Ordinary Session of the African Commission available at http://www.achpr.org/files/sessions/56th/inter-act-reps/224/56th_session_wgc_report_comm_asuagbor_en.pdf

Inter-Session Activity Report of the Chairperson of the Working Group on Communications presented to the 57th Ordinary Session of the African Commission (May 2015 – October 2015)

“40th Activity Report of The African Commission on Human and Peoples' Rights”
<http://www.achpr.org/activity-reports/40/>

30th Activity Report the Chairperson of the Working Group on the Rights of Indigenous Peoples'

Inter-Session Report by Commissioner Soyata MAIGA Special Rapporteur on the Rights of Women in Africa at the 57th Ordinary Session of the African Commission
http://www.achpr.org/files/sessions/57th/inter-act-reps/234/57os_intersession_report_women_eng.pdf accessed 07/19/2016

Inter-Session Report by Commissioner Lucy Asuagbor Special Rapporteur on the Rights of Women in Africa at the 58th Ordinary paragraph 25 accessed 07/19/2016 Session of the African Commission http://www.achpr.org/files/sessions/58th/inter-act-reps/254/58os_inter_session_report_asuagbor_eng.pdf

Inter-Session Report by Commissioner Jamesina Essie. King Chairperson of the Working Group on Economic, Social and Cultural Rights in Africa at the 58th Ordinary Session of the African Commission http://www.achpr.org/files/sessions/58th/inter-act-reps/248/58os_inter_session_report_king_eng.pdf

Working Group on Communications Inter-Session Activity Report (May 2015 – October 2015) page 4 http://www.achpr.org/files/sessions/57th/inter-act-reps/245/57os_intersession_report_wgc_eng.pdf accessed 3/7/2016

Combined 32nd and 33rd Activity Reports, available at http://www.achpr.org/files/activity-reports/32-and-33/achpr5152_actrep32and33_eng.pdf

34th Activity Report, available at http://www.achpr.org/files/activity-reports/34/achpr53eos13_actrep34_2013

35th Activity Report available at http://www.achpr.org/files/activity-reports/35/achpr54eos14_actrep35_2014_eng.

36th Activity Report available at http://www.achpr.org/files/activity-reports/36/achpr54eos15_actrep36_2014_eng.pdf

37th Activity Report

Theses/Dissertations

Unpublished L Louw ‘An Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights’ unpublished PhD thesis University of Pretoria

Websites

www.au.int

<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1422&context=auilr>

<http://www.achpr.org/>

www.fidh.org/en/africa/african

<http://www.ihrda.org/>

<https://www.lusakatimes.com/2016/07/21/laz-concerned-application-public-order-act>

<http://www.pict-pecti.org/courts/ACHPR.html>