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## I. HISTORICAL BACKGROUND

Like the Inter-American system, the history of African Commission on Human and Peoples' Rights,<sup>1</sup> passed through series of process before it was finally established. Even though there was lack of a Commission on Human Rights at its inception, the Organization of African Unity undertook "to promote international co-operation with regard to the UN Charter and Universal Declaration of Human Rights."<sup>2</sup> Even prior to 1963, the International Commission of Jurists,

Geneva, in January 1961, had organized a Conference in Lagos on the Rule of Law. The Conference, which was attended by one hundred and ninety-four African Jurists,<sup>3</sup> addressed several human rights issues within the context of rule of law. "The Law of Lagos,"<sup>4</sup> which was the outcome of the Conference's resolution, invited African Governments to, among other things, study the possibility of establishing international machinery for the protection of human rights in Africa. The Jurists, however, noted that this would not be easy to achieve; but the target would give impetus to "positive action by the Commission's national sections in Africa"<sup>5</sup>; and it would "open a crucial chapter in human rights movements in Africa."<sup>6</sup>

Although, African leaders rejected a draft Charter that provided for a Court of Mediation, Conciliation and Arbitration to be set up by means of separate treaty, they created, without hesitation, the "Commission of Mediation, Conciliation and Arbitration"; an *ad hoc* mechanism for the peaceful settlement of disputes among the OAU Member States, to accomplish the purpose of the Charter.<sup>7</sup> A Protocol to the Charter adopted in 1964, did not only define the duties and powers of the Commission, but also made the Commission became an integral part of the OAU Charter.<sup>8</sup>

Aside the International Commission of Jurists, the pivotal role of the United Nations Commission on Human Rights (UNCHR) in the process of the establishment of African Commission cannot be undermined. After the Lagos Conference, the UN Commission, with a view to establishing an African Commission on Human Rights, organized seminars in

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<sup>1</sup> Established under Part II of the African Charter on Human & Peoples' Rights 1981 (See Article 30-62) (hereinafter African Commission or Commission).

<sup>2</sup> Organization of African Unity (OAU) Charter, May 25, 1963, 479 U.N.T.S. 69, 74 (hereinafter O.A.U Charter), Art.4 (1)(e).

<sup>3</sup> Comprising of practicing lawyers and teachers of law, from 23 African Nations as well as 9 countries of other Continents. See T. O., Elias, *New Horizons in International Law* (2<sup>nd</sup> edn., 1992, at 95; C. D. Dakas, 'The Lessons of History', *Journal of Public and Private Law*, Uni.-Jos: Faculty of Law, 2003, at 74.

<sup>4</sup> See Law of Lagos, Jan.7, 1961, para.4 reprinted in 3 *International Commission of Jurists Journal*, Vol.III, Nos.1-2, Spring (1961) – Winter (1961).

<sup>5</sup> *Id.*, at 6.

<sup>6</sup> C. D. Dakas, *supra* note 3.

<sup>7</sup> See Organisation of African Unity, May 25, 1963, 479 U. N. T. S. 39, I.L.M.766 (hereinafter African Charter, Arts. XXIX, VII (4).

<sup>8</sup> *Protocol of the Commission of Mediation, Conciliation and Arbitration*, 3 I.L.M. 1116, 1964, Art.32.



different African States. The seminar on "Human Rights in Developing Countries", held in Dakar, Senegal in 1966, was concerned with gaining support within the OAU for the creation of a regional Commission on human rights for Africa.<sup>9</sup> Participants at the Cairo Conference unanimously reached consensus to, *inter alia*: "Appeal to all Government of Member States of the OAU to give their support and co-operation in establishing a regional Commission on human rights in Africa."<sup>10</sup>

The Economic Commission for Africa (ECA) Conference on "Legal Process and the individual," held in Addis Ababa, 1971, did not only welcome the recommendations made at the Cairo Conference, entrusting the OAU with the establishment of Human Rights Commission for Africa, but also recommended that the OAU should hasten the implementation of the said recommendations. But the functions of the Commission, which the ECA recommended, were that of promotion rather than interpretation of human rights.<sup>11</sup> It will be pointed out in this article that this was incorporated in the African Charter as the promotional mandate of the African Commission.<sup>12</sup> Other several seminars organized in various African States also gave supports to the establishment of both African Convention and African Commission.<sup>13</sup> It will also be recommended in this article that African human rights should have a rethink and adopt this recommendation in the long-run.

Also, in pursuance of the recommendations of the African Jurists at the Lagos Conference, the International Commission of Jurists, in collaboration with the Senegalese Association of Legal Studies and Research, organized a colloquium in Dakar, Senegal in 1978. The participants recommend the establishment of a Human Rights Commission to tackle the problem of flagrant violation of human rights in Africa. They also set up a Committee to ensure that their recommendations were carried out.<sup>14</sup> All these efforts were aimed at

prodding the OAU towards the creation of a system for the protection of human rights in Africa. By 1979, the sustained campaigns mounted by the UNCHR and International Commission of Jurists as well as other Non-Governmental Organizations (NGOs), coupled with the international condemnation of the atrocities perpetrated by some African leaders,<sup>15</sup> had laid a strong foundation which culminated in the directive given by the Assembly of Heads of State and Government of the OAU to the Secretary-General of the OAU to organize without delay a meeting of highly qualified experts to prepare a preliminary draft of an African Charter which should provide, *inter alia*, for the establishment of mechanisms to promote and protect human rights.<sup>16</sup>

This nearly coincided with the seminar organized by the UNCHR on the "Establishment of Regional Commission on Human Rights, with Special Reference to Africa", also in Monrovia, Liberia. The seminar favoured the establishment of African Human Rights Commission, with the mandate of promotion and protection of human rights in Africa.<sup>17</sup> All these arrangements ultimately culminated in the adoption of the African Charter on Human and People's Rights in 1981.<sup>18</sup> The Charter makes adequate provisions for the establishment and mandate of African Commission.<sup>19</sup> The Commission was, however, constituted in 1987 after election of its Members, pursuant to Article 64(1) of the African Charter.<sup>20</sup>

## II. RE-EVALUATING THE FUNCTIONS, FAILURES AND PROSPECTS OF THE AFRICAN COMMISSION

Article 30 of the African Charter provides to the effect that African Commission is established to promote human and peoples' rights and to ensure their

<sup>9</sup> K. Quashigah, 'African Charter on Human and Peoples' Rights: Towards a More Effective Reporting Mechanism', available at [www.chr.up.ac.za/publication/occ\\_pages/ocl/3html](http://www.chr.up.ac.za/publication/occ_pages/ocl/3html) (accessed 04/03/2006).

<sup>10</sup> UN, Seminar on the "Establishment of Regional Commission on Human Rights with Special Reference to Africa, Cairo Egypt, 12-15 Sept.1969". UN Doc.ST/TAO/HR/38.

<sup>11</sup> E. Osita ., *Human Rights in Africa: Selected Problems*, 1984, at 202-203.

<sup>12</sup> See *African Charter*, Arts. 17-25.

<sup>13</sup> For example, Dar-Es-Salaam Seminar, *alias*, UN 'Seminar on the Study of New Ways and Means for promoting Human Rights with Special Reference to the Problems and Needs of Africa, Tanzania Oct.23 Nov5 1973', UN Doc/ST/TAO/HR/48.

<sup>14</sup> The setting up of the Committee tagged "The Follow up Committee", was headed by Judge K. Mbaye. As traced, "The Committee visited several African States considered supportive of human rights. It was in the course of one of such visits that President Senghor of Senegal agreed to present a proposal for the establishment of an African Human Rights Commission at the next Session of the OAU". See C.D. Dakas, *supra* note 3 at 16.

<sup>15</sup> These included leaders such as Idi-Amin of Uganda, Marçais Nguema of Gabon, Mengistu Haile, Mariam of Ethiopia, Bokassa of the Central African Republic, Mobutu Sese Seko of Zaire (now DR Congo). See K. Quashigah, *supra* note 9, stating that: "These were leaders whose human rights records were and will remain a dark spot of shame in the records of African history". Cf. Makay W.M., 'The African Human Rights System Perspectives,' *Revision of African Commisin on Human and Peoples' Rights* ( 1993), at 359, where he stated, *inter alia*, that "the atrocities and abominations of Idi-Amin of Uganda, Bokassa of the Central African Empire and Nguema of Equitorial Guinea, were viewed internationally as paradigmatic of the African leaders".

<sup>16</sup> Assembly of Heads of State and Government, 6<sup>th</sup> Ord. Sess., OAU Res.AHJ/Dec.115 (XVI), 1979.

<sup>17</sup> U.N :Seminar on the Establishemnt of Regional Commission on Human Rights with Special Reference to Africa, Monrovia, Liberia, 10-21 September 1979". UN.Doc/ST/HR/SER.A/4.

<sup>18</sup> *African Charter on Human and Peoples' Rights*, June 27 1981, Doc.OAU/CAB/LEG/67/3/Rev.5. 21 ILM 52, (' 982) (hereinafter African Charter or Charter).

<sup>19</sup> *Id.*, Arts.30 and 45.

<sup>20</sup> Art.64(1) of the African Charter provides that: "After the coming into force of the present Charter, Members of the Commission shall be elected in accordance with the relevant Articles of the Charter".



protection in Africa. Chapter II of part II of the Charter provides detailed mandate of the Commission. The main provisions of the Charter that deal exhaustively with the functions or mandate of the Commission are embodied in Article 45. Under these provisions, the functions of the Commission are tripartite or threefold in nature. The Commission promotes human rights; it ensures its protection; and it interprets the African Charter. The Commission, therefore, has educational, advisory and *quasi*-judicial roles respectively.<sup>21</sup> There is, in addition, the *omnibus* clause to perform any other functions assigned to the Commission by the Assembly of Heads of State and Government of the AU.<sup>22</sup> It is the threefold mandate of the African Commission that this sub-topic considers in turn.

#### a) Promotional Functions

It is crucial to reiterate that the Cairo seminar, 1969 and the Addis Ababa seminar, 1971, recommended that African Commission should essentially be a body saddled with promotional functions in the field of human rights. Recommendation of the delegates was incorporated in Article 45(1)(a) of the African Charter as the promotional mandate of African Commission. In the discharge of its primary functions under these provisions, African Commission is required:

...to collect documents, undertake studies and researches on African problems in the field of human rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights; ...and give its views or make recommendations to Government;...(to) co-operate with other African and international institutions concerned with the promotion and protection of human and people's rights.

In addition, the Commission has the responsibility of laying down rules and principles for the solution of problems and for legislation on human rights issues. Considering the promotional functions of the Commission, one is inclined to agree that: "The Charter gives pre-eminence to the promotion of human rights and vests a wide range of responsibility on the Commission..." that are not explicitly vested on the defunct European Commission and Inter-American Commission.<sup>23</sup>

Although, the functions of African Commission are tripartite with *omnibus* provisions, its promotional functions are considered as primary before others. According to a writer, this is predicated on the fact that the Commission has no capacity to compel State

Parties to abide by its decisions independently.<sup>24</sup> Onje Gye-Wado had expressed similar view where he saw the promotional functions of the Commission as its primary responsibility because it is incapable of enforcing its decisions. As a result, it is easier, if not more convenient, to popularize the rights guaranteed by African Charter, so that their infringement can be minimized "requiring little or no enforcement action."<sup>25</sup>

It has also been noted that in a continent rife with egregious abuses of human rights, the primary functions of the Commission is promotional and not, as would be expected, protective, through giving publicity to violation or even acting in a *quasi*-judicial way.<sup>26</sup> The promotional functions of the Commission under the Charter are a device to raise popular awareness of the Charter and to increase human rights education.<sup>27</sup>

At the early stage of its establishment, it was advised that, to give effect to the provision of the Charter which requires the Commission to "give its views or make recommendations to the Government with regard to the promotion of human and peoples' rights", the African Commission should recommend to State Parties to translate the Charter into readable local languages, so that the message of the Charter can be understood by everybody. This is important as the degree of illiteracy in Africa is so high.<sup>28</sup>

In a similar way, in the discharge of its mandate to "disseminate information", the Commission has been advised to work closely with relevant NGOs operating in rural areas. The legal services, it is advised, should include pamphlets in the dialects explaining the rights, obligations and the roles of African Commission under the African Charter. This recommendation was based on the reasoning that until the people in the rural areas of Africa understand the provisions of African Charter in their local languages and dialects the Charter would become an ineffective legal instrument.<sup>29</sup> It is submitted that though this is a sound recommendation for the Commission, it is a difficult task to achieve considering the fact that Africa has uncountable local languages and

<sup>24</sup> M. O. U., Gasiokwu M.O.U, *Human Rights- History, Ideology and Law* (JOS-Nig.: FAB, 2003), at 188.

<sup>25</sup> O. Gye-Wado, "A Comparative Analysis of the Institutional Framework for the Enforcement of Human Rights in Africa and Western Europe" 23 *Afric. Journal of Inter'l and Comp. Law*, 1990 at 189, where he added: "if States are sufficiently aware of their obligations under the African Charter, it is hoped that they will be seen to carry out such obligations in good faith".

<sup>26</sup> W. M. Makay W.M., 'The African Human Rights System in Perspective,' *Rev. of African Human Rights Commission on Hum. & Peoples' Rights*, (1993), at 9.

<sup>27</sup> B. Emmanuel, 'The Mandate of the African Commission on Human and Peoples' Rights- Article 45 Mandate of the Commission,' *Afric. Journal of Inter'l Law*, Vol. 1, No.1 1, Summer (1998) at 76.

<sup>28</sup> *Id.*, at 34.

<sup>29</sup> A. Philip, 'The African Charter on Human and Peoples' Rights – An Effective Weapon for Human Rights', 4 *Afric. Journal of Inter'l Comp. Law*, (1992), at 230.

<sup>21</sup> A. Saffari, 'The Enforcement of Human Rights in Africa with Reference to Tanzania,' 8 *Rev. of the Afric. Comm. on Hum. & Peoples' Rights*, (1999) at 301.

<sup>22</sup> African Charter Art. 45(4).

<sup>23</sup> U.O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague Martinus Nijhoff Publishers, 1997) at 66 at 381.



dialects. Moreover, in view of the high rate of illiteracy in Africa, it is doubtful if this device can work successfully.

It has also been criticized that Member States of African Charter have not assisted African Commission to achieve its promotional mandate. This is due to the specific reason that State Parties to the Charter have no interest in the recommendation of the Commission on the establishment of human rights Committee at the national level; the consequence of which no significant effort has been made in passing information down to local populations of State Parties.<sup>30</sup>

Scholars have also criticized that African Commission has failed or been reluctant to take advantage of its promotional powers to effectively and aggressively promote human rights consciousness; the Commission has held only few conferences; it has not undertaken many studies as required by Article 45(1)(a) of the African Charter.<sup>31</sup> On the *contra*, the Inter-American Commission has utilized its promotional power to conduct country studies and On-site investigations after which it published its findings with the aim to putting pressure on the Government involved.

Also, in the area of dissemination of information including the awareness by many people in Africa of the existence and work of the African Commission, the expectation that people need to be enlightened of the activities of the Commission, through radio and television programmes, newspapers, magazines and other means of communication, is still a vain hope.<sup>32</sup>

However, it is difficult to accept that the African Commission has failed completely in achieving its promotional functions. The Commission in its Fifth Session had resolved that State Parties should incorporate in their educational *curricula*, the teaching of human rights at all levels; integrate the provisions of the African Charter into National Laws of Members and establish Committees on Human Rights at national, sub-national and regional levels to ensure respect for the protection of human rights.<sup>33</sup> Today, all these have been achieved to certain level.

Some African countries have incorporated the provisions of African Charter into their domestic Law. Nigeria, for example, incorporated the African Charter through the African Charter (Ratification and Enforcement) Act.<sup>34</sup> In fact, it has been held that "the

Charter possesses 'a greater vigour and strength than any domestic Statute' of Africa.<sup>35</sup>

The Commission, during its Second Extra-Ordinary Session in Kampala, Uganda, from December 18-19, 1995, condemned human rights abuses of the past Nigerian Military regime of Late General Sani Abacha, and requested that the Government should prevent harm to the Ogoni detainees. Although, the Military Government went ahead with the trial, despite the directive given by the African Commission that it should hold on (which culminated to the execution of the Ogoni leaders including Ken Saro Wiwa),<sup>36</sup> the effort of the Commission gave a glimmer of hope, at least, that it was serious to promote and protect human rights in Africa.

Also, in an effort to assist the African Commission to achieve its promotional mandate, Nigeria, like other African countries, establishes the National Human Rights Commission,<sup>37</sup> with the aim to, *inter alia*, "facilitate Nigeria's implementation of its various treaty obligations in the area of human and peoples' rights and (to) provide a forum for public enlightenment and dialogue on human rights...".<sup>38</sup> The main function of the Commission, under section 5(a) of the National Human Rights Act, is to deal with all matters relating to the protection of human rights as provided for by the Constitution of the Federal Republic of Nigeria and the African Charter, UN Charter and the UDHR as well as other international treaties on human rights to which Nigeria is a State Party. It is gratifyingly interested that the National Commission, like other National Commissions or Committees of other African States, Parties to the Protocol and Statute of the African Court of Justice and Human Rights, among other parties have direct access to the African Court of Justice and Human Rights, which may replace the Court.<sup>39</sup>

It is also noteworthy that the African Commission has, in collaboration with national and international institutions, sponsored a number of

<sup>30</sup> M.O.U. Gasiokwu, *supra* note 23, at 190-191.

<sup>31</sup> W. M. Makay, *supra* note 26. See also Gye-Wado O., *supra* note 22., stating that "... the Commission has failed in the area of popularizing the African Charter and its activities. Other than activities by workers and researchers in the area of human rights, very little is done to pass information down to the local population".

<sup>32</sup> U. Essien, "The African Commission on Human and Peoples' Rights: Eleven Years After", *Buffalo Human Rights Law Review*, Vol. 6 (2000), at 97.

<sup>33</sup> U.O. Umozurike U.O., *supra* note, 23, at 381.

<sup>34</sup> Cap.10 Laws of the Federation (LFN), 1990 (now Cap.A9 2004).

<sup>35</sup> *Per* Ogundare JSC in *Abacha v. Fawehinmi* (2000) 2 SCNQR 496. However, the learned Justice added: "but that is not to say that the Charter is superior to the Constitution..." See also *Oshevere v. British Caledonian Air ways Ltd.* (1990) 7 NWLR 507, *UAC of Nigeria v. Global Transporte Oceanico SA* (1996) 5 NWLR 291, *Constitutional Rights Project v. President Ibrahim Babangida & 2 Ors.*, Suit M/102/93, *Chima Ubani v. Director of State Security Services & Attorney-General* (1999) 11 NWLR 129 (Court of Appeal). For detailed comments on these cases, see Obiora C.A., *The African Human Rights System – Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007), at 110-114.

<sup>36</sup> See *International Pen (on behalf of Ken Saro-Wiwa Jr), v. Nigeria*, *supra*.

<sup>37</sup> National Human Rights Commission was established by Decree 22 of 27<sup>th</sup> September 1995, (now National Human Rights Commission Act, CAP 244 LFN 1990, now CAP.N46 LFN 2004 (hereinafter National Commission)).

<sup>38</sup> *Ibid.*, 2<sup>nd</sup> para. to to preamble.

<sup>39</sup> Statute of the African Court of Justice and Human Rights, *infra*, note 177, Art. 30(e).



seminars and international conferences. These institutions include, *inter alia*, UNESCO, UN Center for Human Rights, International Commission of Jurists, European and Inter-American Commissions, Center for Human Rights and Democracy, Banjul and Freidrick Naumann Foundation, Penal Reform International and International Observatory of Prisons. The Conferences have covered a broad spectrum such as community work, economic, social and cultural rights, HIV/AIDS in African, Prisons, and Women's Rights in Africa and have been held in different African States.<sup>40</sup>

Another significant achievement of the promotional functions of African Commission is its collaborative activities with the NGOs. It has been traced that prior to the establishment of the Commission, African Human Rights NGOs used to work only with NGOs based in Europe and America. Consequently, there was no significant interaction among African NGOs. But with the establishment of the African Commission, there is a change of event. The Commission created a platform for NGOs to meet twice every year to exchange ideas. The contributions and submissions of African NGOs, with Observer Status at the Commission's Sessions had given impetus to the

adoption of additional Protocol to the African Charter,<sup>41</sup> including the Protocol establishing the African Court of Human and Peoples' Rights,<sup>42</sup> and Protocol to the African Charter on the Rights of Women in Africa,<sup>43</sup> and now the Protocol establishing the African Court of Justice and Human Rights.<sup>44</sup> NGOs forum had also convinced African leaders of the crucial need for an African Union.<sup>45</sup>

In general, the number of NGOs, with Observer Status with African Commission, is increasing at the increasing rate, to use the sentiment of the economists. In its 37<sup>th</sup> Ordinary Session alone, the Commission granted Observer Status to 13 NGOs, thereby bringing the total number of NGOs enjoying Observer Status to 332.<sup>46</sup> African Commission itself acknowledged the contributions of NGOs in the promotion of human rights in Africa.<sup>47</sup>

#### b) Protective Functions

The second mandate of the African Commission as contained in Articles 30 and 45(2) is to ensure the protection of human and peoples' rights under the conditions that are provided under the African Charter. It is important to state from the onset that the protective mandate of the Commission consists principally of receiving communications and acting on them in the manner prescribed by the Charter. The Charter provides for the reception of complaints or communications of human rights violations by both State Parties to the Charter and individuals. After a thorough consideration of the complaint, the Commission prepares a report clearly stating the fact and its findings. The report is, thereafter, transmitted to the State concerned; and if reconciliation fails, the Commission may refer the matter to the General Assembly of Heads of State and Government, where the fate of the re to consider any communication from anyone, including NGOs, provided that any of the rights

<sup>40</sup> These include: Seminar on the "National Implementation of the African Charter in the Internal Legal Systems in Africa," Banjul, 26-30 October 1992; Conference on the "Journalist and Human Rights in Africa," Tunis, 31 October – 1 November 1992; Seminar on "State Reporting for English-Speaking Countries," Harare, 23-27 August 1993; Seminar on "State Reporting for Francophone, Arabophone and Lusophone Countries," Tunis, 24-27 May 1994; Seminar on "Refugees and Internally Displaced Persons in Africa," Harare, 16-18 February 1994; Seminar on "Human Rights Education in South Africa," Durban, 24-27 September 1994; Seminar on "Human Rights of the African Women and the African Charter on Human and Peoples' Rights," Lome, 8-9 March 1995; Workshop on "Impunity in Africa," Ouagadougou, 22-23 March 1996; "Brainstorming on Mechanism for Early Warning in Emergency Situations under Article 58 of the African Charter," Nairobi, 23-25 July 1996; Conference on "Prisons in Africa," Kampala, , *et cetera*. See U. Essien, *supra* note 32, at 96-97. See also P. C. Okorie, "The Contribution of the African Commission on Human and Peoples' Rights to the Enforcement of the African Charter," *Human Rights Review-An International Human Rights Journal*, Vol. 2, No. 2, July 2011 at 515, stating that "judged by its four plans of action which are in conformity with the provisions of Article 45(1) of the Charter, the Commission can not be fairly described as having failed to meet its promotional mandate," grouping its promotional achievements into "publications, lectures, and conferences, use of special rapporteurs, use of working group, collaboration with non-Governmental organizations (NGOs), collaboration with National Human Rights Institutions (NHRIs). See also P.C. Okorie, "The Contribution of the african Commission on Human and Peoples' Rights to the Enforcement of the Charter," *Human Rights Review: An International Human Rights Journal*, Vol. 2, No. 2 July 2011, at 515, stating that "judged by its four plans of action which are in conformity with the provisions of Article 45(1) of the Charter, the Commission cannot be fairly described as having woefully failed to meet its promotional mandate," grouping its promotion and achievements into 'publications, lectures, and conferences' 'use of special rapporteur,' 'use of working group,' 'collaborations with National Human Rights Institutions (NHRIs).'

<sup>41</sup> Y. Akinseye-George, 'New Trends in African Human Rights Law: Prospects of an African Court of Human Rights', 10 *University of Miami Inter'l & Comp. Law Review*, (2001-2002), at 169-170.

<sup>42</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/AFCH/PROTIII (entered into force on 25 Jan. 2004), (hereinafter African Human Rights Court Protocol or Protocol).

<sup>43</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2<sup>nd</sup> Ord. Sess. of the Assembly of the African Union (AU), Maputo, 11 July 2003.

<sup>44</sup> Protocol of the Statute of the African Court of Justice and Human Rights, available at [http://www.hurisaorg.za/advocacy/AfricanCourt/Single\\_Legal-Instrumentpdf](http://www.hurisaorg.za/advocacy/AfricanCourt/Single_Legal-Instrumentpdf).

<sup>45</sup> Y. Akinseye-George, *supra* note 41, at 170.

<sup>46</sup> See the final Communique of the 37<sup>th</sup> Ordinary Session of the African Commission, Banjul, the Gambia, from 27 April – May 2005.

<sup>47</sup> U. Umzurike *supra* note 35 at 71; Philip A. *supra* note 29 at 230-231.



enshrined in the African Charter is alleged to have been violated.<sup>48</sup>

The device of "friendly settlement" or "amicable settlement" allowed by the Charter is significant; it ends dispute between the parties as witnessed in *Kalenga v. Zambia*.<sup>49</sup> In that case, the complainant, who had filed a communication alleging port lies.<sup>50</sup> In *Dauda Jawara v. The Gambia*,<sup>51</sup> the Commission declared that it is empowered violation of the right to liberty, was released because a Commissioner adopted a peaceful resolution. Consequently, the communication was struck out without further inquiry into its merits.

Similarly, under the former European system, any person, NGOs or group of persons, who claimed to be victim of violation of the European Convention by Contracting Party, might petition the Commission. But the Commission would entertain the petition only on condition that the Contracting Party against whom the petition had been lodged had deposited a Declaration with the Secretary-General of the Council of Europe stating that it had recognized the competence of the Commission to deal with such petition(s).<sup>52</sup> To that extent, the defunct European Commission system, unlike African Commission, could be compared with the procedure under the Second Protocol to the ICCPR<sup>53</sup> and the African Human Rights Court Protocol.<sup>54</sup> In contrast, the requirement of a State lodging a declaration recognizing the competence of the Commission to deal with petition(s) does not exist under the Inter-American system.<sup>55</sup>

African Commission also ensures the protection of human and peoples' rights under the condition provided by the African Charter. Strictly speaking, this depicts that the Commission is not allowed to act beyond the provisions of African Charter. However,

Article 46 of the Charter allows the Commission to "resort to any appropriate method of investigation; it may hear from the Secretary-General of the AU or any other person capable of enlightening it." This provision gives African Commission power to employ other methods than those categorically stated under African Charter to promote and protect human rights. Since 1995, the Commission has embarked on a number of missions to African States, Parties to the Charter. For example, between 1996 and 1997, the Commission conducted missions to four African States: Senegal, Mauritania, Sudan and Nigeria. It undertook similar missions to Togo, Zimbabwe, Mali, Lesotho and Botswana in April 1999. This was a turning point because attempts made by the Commission to embark on fact-finding in Zaire and Malawi prior to 1999 proved abortive.<sup>56</sup>

The mission to Nigeria, particularly to Ogoni land between 7<sup>th</sup> – 14<sup>th</sup> March, 1997, was as a result of the communication filed by the *Social and Economic Action Rights Center (SERAC)* and Others alleging, *inter alia*, violations of the rights to health, clean environment, life and housing. The Commission during its on-site visit witnessed the deplorable situation in Ogoni land, including the environmental degradation.<sup>57</sup>

Similarly, the purpose of the visit to Mauritania by African Commission was prompted by the Communication submitted to it revealing "disturbing violations of human rights"; in particular the massacres and expulsions of Black Mauritians and violations of their rights to speak their own language; incidents of torture and deaths in detention.<sup>58</sup>

At the 37<sup>th</sup> Ordinary Session of the Commission in Banjul, Gambia, between 27<sup>th</sup> April and 11<sup>th</sup> May 2005, it adopted the Report on the missions to Angola (now DR Congo), Nigeria, Sierra-Leone and Sudan. On human rights violations in Darfur, the Commission called on the Government of Sudan to comply with its obligations under the Constitutive Act of the AU and the relevant instruments to which Sudan is a State Party.<sup>59</sup>

Also, the role of African Commission in democratic process in Africa cannot be underscored. For example, the Commission had pointed out that the presidential election in Togo before the one held in March, 2010, which brought Faure Gnassingbe to power was characterized by violence culminating in the outflow of internally displaced persons (IDPs) and of refugees

<sup>48</sup> See also A. E. Anthony A.E., 'Beyond the Paper Tiger: The Challenge of Human Rights in Africa,' Summer 1997, *Texas Inter'l Law Journal*, Univ. of Texas School of Law Pub., available at [www.africancourtcoalition.org/content\\_files/Beyondthe\\_Tiger.doc](http://www.africancourtcoalition.org/content_files/Beyondthe_Tiger.doc), where he stated that the Commission has powers comparable to those granted to its regional counterparts in Europe and Latin America.

<sup>49</sup> Comm. No.11/88.

<sup>50</sup> See *African Charter*, Arts. 47, 48, 55 and *Rules of Procedure of the African Commission 1987* (as amended), Section II of Chapter XVI.

<sup>51</sup> Comms

<sup>52</sup> European Convention, Art.25; See L. R. Adebisi L.R., "The Mandate of the Enforcement of Human Rights," *Brainfield Law Journal (BLJ)*, Vol. 2, No. 2, Sept. (2004), at534.

<sup>53</sup> *Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty*, adopted by the UNGA Res.44/128 of 15 Dec.1989 (entered into force on 11 July 1991), Art.5 (Individual Complaints) with respect to the States Parties to the First Optional to the ICCPR adopted on 16 Dec. 1966.

<sup>54</sup> *African Human Rights Court Protocol*, Arts.5(3) and 34(6). Cf. *Protocol of the merge Court*, Art. 8; *Statute of the merged Court*, 30(f).

<sup>55</sup> *Inter-American Convention*, Art.44. The Article, however, states to the effect that any person or group of persons, or any NGO may lodge petition with the Commission containing complaints of violation of the Convention by a State Party.

<sup>56</sup> H. J. Steiner . & P. ton ., *International Human Rights in Context: Law, Politics, Morals*; 2<sup>nd</sup> edn., at 927.

<sup>57</sup> See *SERAC & Anor v. Nigeria*, available at <http://www.wjp.at.za/humanrts/africa/comcases/155-96.html>

<sup>58</sup> Murray R., "On-Site Visits by the African Commission of Human and Peoples Rights: A Case Study and Comparison with the Inter-American Commission on Human Rights", *11 African Society of Inter'l and Comp. Law Proc.* 10<sup>th</sup> Annual Conf. (1998), at 461.

<sup>59</sup> See Final *Communiqué* of the 37<sup>th</sup> Ordinary Session of the African Commission.



into neighbouring States, and that there was cases of violation of fundamental rights of individuals in Togo. The Commission had called on Faure Gnassingbe to form a Government of national unity as agreed in Abuja on 25 April 2005.

The Commission has also passed plethora of resolutions expressing its views and recommendations to Governments and for the purpose of solving legal problems relating to human and peoples' rights.<sup>60</sup> The Commission had earlier during its Sixteenth Session condemned the military take-over of the Government of the Gambia on 22 July 1994, regarding it as "a flagrant and grave violation of the rights of the Gambian people to freely choose their Government."<sup>61</sup> Similar resolutions were adopted with regard to other more recent military take-over of Governments in other States, including Mauritania.<sup>62</sup>

The African Commission has also utilized its powers under the provision of Article 46 of the African Charter to appoint thematic rapporteurs including, Special Rapporteur on Extra Judicial, Summary or Arbitrary Executions; Special Rapporteur on Prisons and Conditions of Detention; and Special Rapporteurs on Women's Rights.<sup>63</sup>

### c) Interpretational Functions

Apart from the promotional and protective functions of African Commission, the Commission also has a *quasi*-judicial power to interpret provisions of the African Charter whenever it is so requested by a State Party, an institution of the AU, or an African Organization recognized by the AU to do so.<sup>64</sup> This is the competence of African Commission to give an advisory opinion on any legal question. To that extent, the interpretational powers of African Commission can be compared with the power of International Court of Justice to offer

advisory opinion at the request of whatever body might be authorized by or in accordance with the UN Charter to take such a request.<sup>65</sup>

In the exercise of its interpretational powers, the African Commission is required, under Article 60 and 61 of the African Charter, to draw inspiration from international law on human and peoples' rights including those enshrined in the UN Charter, the AU Constitutive Act, the UDHR, ICCPR, ICESCR and other specialized Conventions ratified by State Parties. The very reason that these international human rights instruments are sources of law of African Commission means that the Commission, in discharging its interpretational power, should be bold to reconcile some conflicting provisions of the African Charter with those international human rights provisions. These include those provisions dealing with *claw-back* clauses and absence of derogation clause; socio-economic rights, group or peoples' rights; and duties of individuals,<sup>66</sup> and others.<sup>67</sup>

In all fairness, it has been pointed that in recent years, the Commission's functioning has been revamped; it has interpreted the relevant provisions of the Charter in such a manner as to provide for a right to submit individual complaints; it has often ignored confidentiality provisions; and it has interpreted the so-called '*claw-back* clauses' restively. In *Amnesty International (on behalf of Benda and Chinida) v. Zambia*,<sup>68</sup> the African Commission ruled that recourse to *claw-back* clauses should not be used as a means of giving credence to violations of the express provisions of the African Charter. It will, however, be shown latter in this article that there is ample evidence establishing that confidentiality clause is still one of the problems of African Commission.

<sup>60</sup>These include: Recommendation on Periodic Report, Recommendation on Some Modalities for Promoting Human and Peoples' Rights; Resolution on the Situation in Rwanda, Resolution on The Gambia, Resolutions on Nigeria, Resolution on the Establishment of Committees on Human Rights or other Similar Organs at National, Regional or Sub-Regional Levels; Resolution on the Integration of the Provisions of the African Charter on Human and Peoples into National Laws of the States, *et cetera*. U. Eien, *supra* note 32.

<sup>61</sup> See ACHPR/RPT/8<sup>th</sup> Annex VII Rev.1, adopted on 3 Nov. 1994. Similarly, the Commission regretted and condemned the annulment of the June 12, 1993, which "had been adjusted free and fair by national and international observers". See also Y. Akinseye-George., *supra* note 41 at 167 and *Dauda Jawara v. The Gambia*, Comm. 147/96 and 149/96 (consolidated).

<sup>62</sup> On Wednesday, Aug., 2008, Military putsch in Mauritania ousted its first elected President, Sidi Ould Cheikh Abdallah. The Military ran into global opprobrium; the AU, United States and European Union rejected the coup. See *The Guardian*, Thursday Aug.7, 2008, at 1 & 2.

<sup>63</sup> F. o. Wara, "Bibliographical pathfinder: African System for the Protection and Promotion of Human Rights), 2002, Univ. Minnesota, Human Rights Library, available at [www.umn.edu/human/bibliog/africanpathfindier.html](http://www.umn.edu/human/bibliog/africanpathfindier.html). For detailed discussion on the Special Rapporteur, see .UEssien, *supra* note 32 at 100-102.

<sup>64</sup> *African Charter*, Art. 45(3).

<sup>65</sup> *UN Charter*, Art. 96. See T. O. Elias, *United Nations Charter and the World Court*, (Lagos: Nig. Institute of Advanced Legal Studies, 1989), at 124-127.

<sup>66</sup> For detailed discussion, see T. F.Yerima, "African Charter on Human and Peoples' Rights in Comparison with other International and Regional Human Rights Instruments", in I. Ibadabo- Obe .and T.F. Yerima. (eds.), *International Law, Human Rights and Development*, Uni-Ado Ekiti: Fac. of Law, 2004)at 60-79; J. Machowski, 'Peoples' Rights as a New Form of Human Rights', in G. B.Emmanuel and B. A. Bola (eds.), *Contemporary International Law and Human Rights*, Vol.1, (1991) at 3.

<sup>67</sup> N. J. Udombana, "Towards the African Court on Human and Peoples' Rights: Better Late than Never," Chapter three in *Human Rights and Contemporary Issues in Africa* (Lagos: Malthouse Press Ltd, 2003), at 125 footnote 108. *cf.* *Yale Human Rights and Devt. Law Journal*, 2000 at 45, where he stated: "this interpretational mandate is an important, albeit severely underused, power of the Commission giving the ambiguity of so many of the Charter's provisions – particularly regarding the legal scope of provisions related to group rights, duties, and economic, social and cultural rights forum".

<sup>68</sup> (No.212/98, 2000 AHR LR 325(ACHPR 1999). See also *Dauda Jawara v. The Gambia*- 147/96 and 149/96 (consolidated); Scott.L, "The African Court on Human and Peoples Rights", *The American Society of Inter'l Law*, Sept.19 (2006), Vol.10, Issue 24, available at <http://www.asil.org/insight000910.cfm>.



It is also no longer tenable to argue that African Commission has not had any opportunity to interpret the socio-economic rights as well as group rights provisions of the African Charter. The Commission has, in fact, interpreted the provisions regarding these rights and duties of States to respect, protect and promote these rights. In *SERAC v. Nigeria*,<sup>69</sup> in deciding the allegation in the communications by the complainants that Nigeria Government had violated the right to health and right to clean environment as recognized under Article 16 and 24 of the African Charter respectively by failing to fulfill the minimum duties required by these rights, African Commission relied on the provisions of Article 12 of the ICESCR, which Nigeria is a party to buttress that the provisions require Government to take necessary steps for the improvement of all aspects of environmental and industrial hygiene.

In interpreting the provision of Article 21 of the Charter dealing with the right of "all peoples to freely dispose of their wealth and natural resources", the Commission relied on the decision of the Inter-American and European Courts.<sup>70</sup> Accordingly, the Commission declared that the Government of Nigeria did not only have a duty to protect its citizens through both appropriate legislation and effective enforcement but also from damaging acts that might be perpetrated by private Parties. "This duty", the Commission concluded, "calls for positive action on the part of Governments in fulfilling their obligation under human rights instruments."<sup>71</sup>

Concerning the right to education, the African Commission held that the failure of Government to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage of medicines in the country constitute a violation of the right to the best attainable State of physical and mental health guaranteed under Article 16 of the African Charter.<sup>72</sup>

### III. IMPEDIMENTS TO THE EFFECTIVE PERFORMANCE OF THE COMMISSION

While some writers have admitted that at least African Commission has made giant strides in the area of promotion and protection of human rights,<sup>73</sup> others have regarded it as a total disgrace to Africa and to Africans, relegating it to a *toothless bulldog* that can *bark* but has no ability to *bite*, arguing that after all it was

not created to bite;<sup>74</sup> it was rather intended to be a *paper tiger* and it actually turned out to be a *paper tiger*.<sup>75</sup>

The African Commission has also been vilified as a "façade, a yoke that African leaders have put around our necks", and so there is need to "cast it off and reconstruct a system that we can proudly proclaim as ours."<sup>76</sup> Based on the tripartite mandate vested on the Commission by the African Charter, a renowned scholar has not only considered it to be "more rhetoric than effective", but also reduced it to "a research center"; adding that if the mandate of the Commission is functionally rhetoric, then the procedure to be followed by the Commission is worse or in his words, "more contagious."<sup>77</sup>

The question that comes to the fore for consideration is: what are the factors that hamper the effective performance of African Commission? Views of scholars over the performance of the Commission reveal that the factors have been differently classified into "procedural, substantive and administrative";<sup>78</sup> "structural and normative",<sup>79</sup> and "organizational and procedural" problems.<sup>80</sup>

#### a) Lack of Effective Access to the Commission by Individuals

This is a serious problem! Victims of human rights violations in Africa often do not find their ways to the Commission. This is predicated on many reasons. First, the work of the Commission is unknown to majority of Africans, many of whom are illiterates. Even most of the people who are aware of the Commission's existence are not in the financial position to access it. Illiteracy, ignorance and poverty have been pointed out as impediments to the realization and enjoyment of fundamental rights in Africa. An individual who is indigent or ignorant of his rights cannot exhaust domestic remedies; even though it is a mandatory general requirement which a complainant must fulfill before the African Commission could admit his communications. The individual needs the service of a counsel to pursue and prosecute his case before the Commission. African Charter, which is the primary source of African Commission, only provides for the right to counsel.<sup>81</sup> Unlike African Human Rights Court

<sup>70</sup> These are *Valesquez Rodriguez v. Honduras*, (1988) Series C, No.4 and *X and Y v. Netherlands*, 91 ECHR (1985) at 32, respectively.

<sup>71</sup> *SERAC v. Nigeria*, *supra*, note 57.

<sup>72</sup> See *Union Inter- Africaine des Driots deL ' Homme v. Zaire*, Comm 100/93

<sup>73</sup> Y. Dankofa, 'Towards an Effective Safeguard for the Enforcement of Human Rights in Africa – The Need for an African Court', *Ahmadu Bello Univ. Law Journal*, Vol.21-22, (2004), at 83.

<sup>74</sup> *Id.* See also N. J. Udombana, *supra* note 67 at 125.

<sup>75</sup> V. D. M. Anne Pieter, 'The New African Court on Human and Peoples' Rights: Towards an Effective Protection Mechanism for Africa?' Vol. 18, No. 1, *Leiden Journal of Inter'l Law*, March (2005), at 117. See also Anthony A.E., *supra* note 48.

<sup>76</sup> W. M. Makay, *supra* note 15 at 11.

<sup>77</sup> E. Kayode, "An Anatomy of the African Charter for the Human and Peoples' Rights: Is it of Hope *vil-non*?" in J. A. Yakubu (ed.), *Administration of Justice in Nigeria* (Ibadan: Malthouse Press 200), at 174.

<sup>78</sup> A. Saffari, *supra* note 21, at 303.

<sup>79</sup> N. J. Udombana, *supra* note 67 at 128, 133.

<sup>80</sup> A. Philip, *supra* note 29 at 233, 235.

<sup>81</sup> African Charter, Art.7(c).



Protocol, the Charter has no provision on *free legal representation*.<sup>82</sup> This omission is not mind-boggling because even if the drafters of the Charter had included provision on free legal representation, it would have been an exercise in futility as it would have been extremely difficult, if not virtually impossible for the Commission to implement it in view of the financial constraint and lack of resources which the commission has been facing since it was constituted.

Individual access to the Commission is further restricted by the provision of Article 56 of the African Charter, which allows the Commission to hear individual complaint only if such complaint is not "written in disparaging or insulting language" against the State concerned, its institutions or the AU; it is not incompatible with the African Charter and the communication was not disseminated through mass media in the first instance. We concur with the submissions of some scholars that the African Assembly of Heads of State and Government has complete discretionary power in determining the validity of complaints submitted under the Charter,<sup>83</sup> and that the requirements are not only too rigid, but also tend to defeat the very basis of African Charter.<sup>84</sup>

The sad effect of the strict rules of procedure of the Commission cannot be underscored. Sometimes communications take two or more than two years, before they are determined. This is so notwithstanding the Commission's Rule of Procedure, which states that it "shall decide as early as possible ...whether or not the communication shall be admissible under the Charter."<sup>85</sup> One typical case, that buttresses this point, is *SERAC v. Nigeria*,<sup>86</sup> where the Commission received communications in the case in March 1996, but did not examine them until 27<sup>th</sup> October 2001 (a period of more than five years). In fact, mere letters from the Commission to the complainants, acknowledging receipt of the communications or complaints took the Commission six months. No doubt, incurable harm might have been done before the communications were finally determined.<sup>87</sup>

Article 58 of the African Charter, *alias*, "emergency" provision, which seems to be an exception to the exhaustion of domestic remedies clause,<sup>88</sup> turns out to compound the problem of individual access to the Commission. Under this provision, where it appears to the Commission that one or more communications of

special cases reveals the existence of series of serious or massive violations of human and peoples' rights, the Commission must draw the attention of the Assembly of Heads of State and Government to such cases, after which the Assembly may request the Commission to undertake an in-dept study of the special cases, make a factual report, findings and recommendations. If the case is one of emergency, the Commission must submit it to the Chairman of the Assembly "who may request an in-dept study."

The provision of Article 58 has been frustrating African Commission from carrying out investigations on egregious violations of human rights. It is also not clear whether the phrase "drawing the attention of...", used by the provision is synonymous with "reporting to..."<sup>89</sup> Article 58 also uses the words "special cases", but does not define these words; nor does it state who determines whether a particular violation of human rights is a special case. One may also wonder whether there is really any difference between "special cases, which reveal the existence of a series of serious or massive violations of human rights" and "a case (or cases) of emergency."

Notwithstanding these ambiguities, we accept the observation that Article 58 deals with cases of urgency. It, therefore, restricts and deprives individual access to the Commission in urgent cases. One cannot dispute the submission that the procedure is not only cumbersome, but also subjects the work of African Commission to the approval of the AU General Assembly, comprising of African Heads of State and Government.<sup>90</sup> This is a serious problem in Africa where commitment to human rights is yet to be ingrained into the psyche of African Governments.<sup>91</sup> Indeed, the procedure is a serious flaw in the Charter's effectiveness as a weapon for human rights because it undermines the independence of Members of African Commission. We agree with the submission that there can be no independence of Members of the Commission, if they cannot be permitted to examine complaints submitted to the Commission.<sup>92</sup>

Article 58 of the Charter states further that cases of emergency must be submitted by the Commission to the Chairman of the Assembly who may request an in-

<sup>82</sup> African Charter, Art.10(2).

<sup>83</sup> E. Anthony ., *supra* note 48.

<sup>84</sup> D. Yakubu , 'Rules of Admissibility under the African Charter on Human and Peoples' Right', *Journal of Comparative Law*, Vol.1, No.1 (2007). at 50.

<sup>85</sup> *Rules of Procedure of the African Commission on Human and Peoples' Rights*, Rule 113.

<sup>86</sup> *Supra* note 57.

<sup>87</sup> *Ibid*.

<sup>88</sup> F. O. Wara, *supra* note 63.

<sup>89</sup> U. O. Umozurike, *supra* note 47 at 76-77.

<sup>90</sup> E. Ankumah ., 'The Emergency provision of the African Charter on Human and Peoples' Rights', 4 *Revision of African Commission on Human & Peoples' Rights* (1994), at 49.

<sup>91</sup> K. Quashigah, *supra* note 9. See also M. O. U., Gasiokwu, *supra* 24 at 198 ("publicity is a major weapon against human rights breaches and provisions that have the tendency"); Idubor R., *Principles of Human Rights – Introduction*, Vol.2 (Benin: Newera Pubs., 2000), at 79 ("a particularly effective means of putting pressure on government") U. O., Umozurike., "The Significance of the African Charter on Human and Peoples' Rights," U. K. Awa and Y. Osinbajo (eds.), *Perspectives on Human Rights, Federal Ministry of Justice Law Review Rev. Series*, Vol. 12 at 51.

<sup>92</sup> E. Anthony , *supra* note 48.



dept study, but it does not state what happens if the Chairman fails to request an in-dept study. The negative effect of such omission occurred in 1991 and 1994, when the Commission received communications alleging serious violations of human rights in Sudan, Rwanda and Burundi, and it communicated them to the Chairman of the OAU in compliance with Article 58(3) of the African Charter. To no avail; there was no any response from the Chairman. This is not surprising most especially that Article 58(3) uses the word "may" as opposed to "shall" thereby giving the Chairman a discretionary power to request (or not to request) an in-dept study.

It has, however, been suggested that to avoid the cumbersome procedure in Article 58 and its embarrassing consequences, African Commission should, in cases of urgency "resort to any appropriate method of investigation" or "any other person capable of enlightening it", as allowed by Article 46 of the Charter.<sup>93</sup> This submission is predicated on the observation that Article 46, being a general provision, provides better protection than Article 58; and it is "a provision specifically intended to respond to special and urgent cases" without subjecting the investigative power of the Commission to the approval of the AU General Assembly.<sup>94</sup>

#### b) Confidentiality of the Commission's Work

Another clause in the African Charter, which inhibits the African Commission's effectiveness with regard to its protective mandate, is the confidentiality clause. The African Charter declares to the effect that all measures taken within the provisions of Chapter Three, regarding procedure of the Commission, remain confidential until such time the Assembly of Heads of State and Government decide otherwise.<sup>95</sup> The Chairman of the Commission, however, publishes report of the Commission or activities of the Commission on the decision or after consideration by the Assembly.<sup>96</sup> Article 58 of the Charter, considered in the preceding sub-topic, read together with Article 59, would mean that not only must a report of the Commission's finding be submitted to the General Assembly, but also that any actions undertaken by the Commission concerning alleged human rights violations are to remain confidential unless otherwise decided by the Assembly, which decision (if at all is given) may be to the detriment of the Commission.

Numerous problems have emanated from the confidentiality clause. As pointed out by a scholar, it

renders "an assessment of the role of the African Commission in the development of the jurisprudence of human and peoples' rights ...a 'Herculean task'".<sup>97</sup> The clause does not state what are authorized and what are not authorized to be published. Consequently, the hands of the Commission are tied, compelling it to adopt strict approach towards the issue of confidentiality. The Commission, for example, has decided not to publish vital information such as the names of States against which complaints on violation of human rights have been leveled.<sup>98</sup>

While the confidentiality clause is incorporated in the African Charter purposely to protect (and indeed it protects) State Parties from being exposed of their egregious violations of human rights, it also exposes "the Commission to charges of ineffectiveness and lack of certainty about the end result of its work".<sup>99</sup> The consequence of this is that it undermines the confidence, which the general public had on the effectiveness and relevance of the Commission. Little wonder, therefore, that the decisions of African Commission, unlike those of the Inter-American Commission and the defunct European Commission, are not popular because they are confidential. This loophole in the Commission's procedure is compounded by the fact that even if the Commission's reports are ultimately authorized by the General Assembly, "they are not detailed (and) the full reasoning of the Commission is often not reflected".<sup>100</sup>

#### c) Lack of Enforcement Power and Remedial Provisions

In spite of the broad areas of mandate of the African Commission, its power of implementation and investigation is weak. The decisions of the Commission are not binding, but mere recommendations, which the State against which the decisions are given is not bound to obey. After its findings, the Commission can only make recommendations to the African Heads of State who have the final say.<sup>101</sup> This procedure is against fair trial; in particular the rule against bias, known as *nemo iudex in causa sua*,<sup>102</sup> which is one of the pillars of natural justice.<sup>103</sup>

It is predicated on this lack of enforcement power of the African Commission that it has been tagged with various embarrassing words and phrases, such as *toothless bulldog*, *looks helpless and*

<sup>97</sup> C. D. Dakas, *supra* note 3, at 25.

<sup>98</sup> A. Philip, *supra* note 29, at 237-238.

<sup>99</sup> *Ibid.*, at 236; See also B. O. Nwabueze, *Constitutional Democracy in Africa*, Vol. 2, (2003), at 84.

<sup>100</sup> C. D. Dakas, *supra* note 3, at 25.

<sup>101</sup> African Charter, Art.58 (2).

<sup>102</sup> See D. A. Ijalaye, 'The Relationship between the Rule of Law and the Rule of God', *Ado-Ekiti Law Review*, 1999, at 35; *R v. Chancellor of the Univ. of Cambridge (dr. Bentley's case)*, 1723 1 Stra.557.

<sup>103</sup> A. Saffari, *supra* note 21, at 302.

<sup>93</sup> U. O. Umozurike, *supra* note 47 at 77; E. Ankumah, *supra* note 90 at 49.

<sup>94</sup> E. Ankumah, *supra*, *id.*

<sup>95</sup> See *African Charter*, Article 59(1).

<sup>96</sup> *Ibid.*, Art.59(2)(3); Also under Rule 106 of its procedure, the African Commission may issue a press release on its private activities without the details of pointing accusing fingers.



abandoned,<sup>104</sup> *paper tiger, et cetera*<sup>105</sup> though it has also been argued that some of the criticism have been over-exaggerated. "While most of these statements regarding the specific weakness of the Commission are generally factual," according to C. A. Obiora, "the seriousness of the deficiencies is all too- often over stated."<sup>106</sup> The African Commission itself had confessed in *Malawi African Association v. Mauritania*,<sup>107</sup> that it has no power to enforce its decisions but merely to pronounce on allegation of violations of the human rights protected by African Charter. The Commission's lack of power to make authoritative determination(s) of specific human and peoples' rights abuses is a fundamental flaw, which renders its decisions worthless and ineffective.<sup>108</sup> Thus, decisions of the Commission attract little, if any, compliance from Governments of Member States. A typical case that buttresses this point is *International Pen (on behalf of Ken Saro-Wiwa Jr. & Ors) v. Nigeria*,<sup>109</sup> where in disregard of the Commission's order for stay of execution, the Federal Military Government of Nigeria, under Late General Sani Abacha, went ahead to execute Ken Saro-Wiwa and others. The Act of Nigeria's Government rendered all the Commission's efforts to prevent irreparable damage caused to the complainants worthless. In a situation like this, the Commission is helpless; it cannot do more than expressing its grievances.<sup>110</sup>

In a similar vein, lack of remedies for violations of the rights enshrined in the Charter is one of the African Commission's substantive and structural impediments. The Commission itself had reminded that due to lack of provisions on compensation for human rights violations in the African Charter, victims find themselves without remedy.<sup>111</sup> With lack of remedies for violations of the rights under the Charter, individuals may definitely be reluctant to petition the Commission even if they are in financial position to pursue their cases

before the Commission after exhaustion of local remedies. This is because rights and remedies cannot exist in vacuum.

#### d) *Inadequate Funding and Resources*

Another major problem of the Commission is inadequate funding and resources. These problems, which are bluntly tagged "lack of money," "lack of funds" and lack of "financial means and staff," are endemic.<sup>112</sup> Consequently, African Commission is not capable of performing most of its tasks. That the Commission faces problem of funding is not mind-blowing, "given the depressed state of African economies."<sup>113</sup>

It will, however, be unrealistic, frankly speaking, to argue that this is the sole reason for this impediment. The financial predicament of the African Commission is also connected with the fact that African States were in the habit of defaulting their financial obligations to the OAU and now to the AU.<sup>114</sup>

Similarly, the Commission has structural shortage of staff. That over two decades of its existence, the Commission has not built its permanent site; but still operates in a rented apartment in Banjul, the Gambia, is enough cogent evidence establishing its lack of resources,<sup>115</sup> or inadequate resources. The problem of inadequate resources is also connected with the sheer size of African continent.

In order to achieve its promotional mandate, the Commission, with only eleven Commissioners, divided Africa into regions with each Commissioner promoting human rights in three to five countries. But in view of the size of African continent and financial predicament, attempts by the Commissioners to cover these countries allocated to them have not been fruitful.<sup>116</sup> In a similar vein, a commentator has pointed out that the problems of inadequate funding and resources have affected the Commission's "communications and interaction with NGOs, dissemination of documents, and responses to requests for information of decisions".<sup>117</sup>

The African Commission, at its various Sessions, had brought to the fore the effect of these problems. For example, in its Interim Report to the Sixty-Seventh Ordinary Session and the OAU Council of Ministers in February 1998, the Commission revealed in *extenso* that it was incapable of carrying out some of its activities despite their importance because of lack of financial, human and material resources it needed to

<sup>104</sup> Y. Dankofa, *supra* note 73.

<sup>105</sup> V. D. M. Anne Pieter, *supra* note 75; Anthony A., *supra* note 48; N.J. Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Late than Never' Chapter Three in *Human Rights and Contemporary Issues in Africa*, at 125, at 125.

<sup>106</sup> C. A. Obiora, *supra* note 35.

<sup>107</sup> Comm. Nos.54/91, 98/93, 164/97,210/981 1999-2000.

<sup>108</sup> Odinkalu C. A., 'The Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary Assessment,' 8 *Transnat'l Contempt. Probs.* 359, 1998 at 365, *quoted in Steiner & Alston*, *supra* note 56, at 929, where he asked: "one question... is whether the decisions of the Commission are effective... Any temptation to dismiss the Commission as a worthless institution today must be regarded as premature, ill-informed or both".

<sup>109</sup> *Supra* note 36.

<sup>110</sup> Saro-Wiwa's case *id.*, para 114-115. In Saro-Wiwa's case, the Commission lamented: "This blot on the legal system of Nigeria... will not be easy to erase. To have carried out the execution in the face of pleas to the contrary by the Commission and world opinion is something, which we pray will never happen again. That it is a violation of the Charter is an understatement".

<sup>111</sup> Eleventh Annual Activity Report (1997-1998), PAU DOC./OS/43 (XXIII).

<sup>112</sup> C. A. Odinkalu, *supra* note 108.

<sup>113</sup> M. O. U., Gasiokwu, *supra* note 24, at 190.

<sup>114</sup> The Council of Ministers of the OAU (now Executive Council of AU) had expressed its "serious concern about the increasing areas of contributions, thus undermining the capacity of the secretariat to carry out approved programmes and activities". See N. J. Udombana N.J., *supra*, note 131 at 862.

<sup>115</sup> *Ibid.*

<sup>116</sup> A. Phipp, *supra* note 29 at 233.

<sup>117</sup> *Ibid.*



ensure smooth running.<sup>118</sup> The report of the Commission further revealed that there was no provision for human rights protection and promotion activities, which constitute the *cornerstone* of the Commission's mandate in the budgetary appropriation for the Commission.<sup>119</sup>

In an effort to overcome this obstacle, the Commission decided at the Session to operate a separate account into which voluntary donations might be paid, for the purpose of achieving its promotional mandate. The Commission has also resorted to seeking helps in acquiring facilities it needs for effective performance.<sup>120</sup> The report of the Commission has also shown that it has received donations and financial supports from institutions such as European Union (EU), Wallenberg Institute of Human and Humanitarian Law, the UNCHR and others.<sup>121</sup> It is our submission that this method cannot sustain a dual human rights enforcement mechanism in Africa.

*e) Lack of Compliance with Periodic Reporting Obligation by State Parties*

One of the obligations, which a state may undertake to the international community, is the reporting obligation. Under international human rights law, reporting is a device used in ensuring a government's accountability of human rights to its own people on one side and to the international community on the other side.<sup>122</sup>

Various reporting mechanisms exist under the UN human rights instruments ranging from the CERD, ICCPR, ICESCR, CEDAW, CAT and CRC. Reporting under each of these instruments is done to a Committee the instrument has established; and in all cases, the State Parties are required to submit reports on measures they have taken to implement the particular Convention to the Secretary-General of the UN, who in turn makes them available to the particular Committee. The Committee examines the reports and makes suggestions and general recommendations, which are taken to the General Assembly.<sup>123</sup>

At the regional level, Article 57 of the Revised European Convention provides to the effect that the Secretary-General of the Council of Europe has the right to request from any High Contracting Party any explanation of the manner in which its internal law issues the effective implementation of any of the provisions of the European Convention.<sup>124</sup> Under this system, the

Secretary-General has the responsibility of making such request and there is a corresponding obligation on the State Party to furnish the report.

State Parties to the Inter- American Convention under take to furnish the Inter- American Commission with such information, which the Commission might request from them with regard to the manner their domestic law ensures the effective application of any provisions of the Convention. Also, under this system, once the request is made by the Commission, the State Party must furnish it.<sup>125</sup>

On the contrary, Article 62 of the African Charter, which is the reporting obligation provision, merely states:

Each State Party shall undertake to submit in every two years, from the date the present Charter comes into force, a report on legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

Although, it has been stated that reporting procedure is the backbone of the mission of the African Commission,<sup>126</sup> irregular submissions of reports or outright non-submission, is a problem that African Commission has always complain about.<sup>127</sup> That quite a number of State Parties do not submit their periodic reports as required by the African Charter makes it difficult for the Commission to make assessment of human rights situations in those States.<sup>128</sup>

Even though the African Commission was constituted in 1987, the first State Report was submitted to it by Libya in January 1990 and two years later only additional eight State Parties submitted their initial reports.<sup>129</sup> In acknowledging this problem, the General-Assembly of the OAU at its 29<sup>th</sup> Ordinary Session in Cairo from 28-30, 1992, adopted the resolution of the Commission on "Over Due Reports," which, *inter alia*, urged State Parties to the African Charter, which had not yet submitted their reports to submit them without delay and requested that States should report not only on the legislative or other measures taken to give effect to each of the rights and freedoms recognized and guaranteed by the African Charter but also on the problems encountered in giving effect to these rights and freedoms. But this effort rested on futility. State reporting under the African Charter system has not been revamped. Thirteen years after the coming into existence of the Commission, 24 States out of 53 States

<sup>118</sup> See Eleventh Annual Activity Report (1997-1998), PAU Doc. DOC/OS/43 (XXIII).

<sup>119</sup> *Ibid.*

<sup>120</sup> See Third Annual Activity Report (1988-90), African Commission on Human and Peoples' Rights, Annual Activity Report 114 (1998).

<sup>121</sup> N. J. Udombana., *supra* note 57, at 133.

<sup>122</sup> K. Quashigah., *supra* note 9.

<sup>123</sup> See CERD, Arts. 8-10; ICCPR, Arts. 28-33; ICESCR, Arts.16-20; CEDAW, Arts.17-22; CAT, Arts. 17-22; CRC, Arts.43-45.

<sup>124</sup> European Convention, Art.57.

<sup>125</sup> Inter- American Convention, Art.43.

<sup>126</sup> B. El-Sheikh, 'The African Commission on Human and Peoples' Rights', 7 *Netherlands Quarterly of Human Rights*, Vol.31, 1989 at 283.

<sup>127</sup> T. B. Nyanduga, 'The Role of the African Commission on Human and Peoples' Rights in Addressing Internal Displacement', (unpublished), *First Regional Conference on Internal Displacement in West Africa* (2006), Abuja-Nigeria, at 7.

<sup>128</sup> *Id.*

<sup>129</sup> Annual Activity Report (1998) Vol.1, AFCHPR, at 107.



did not submit their reports and only 12 States had no over-due reports. The Commission cannot compel Member States defaulting to comply with obligations because it does not have judicial power to do so.<sup>130</sup>

The problem of non-compliance with State reporting by State Parties is compounded by the fact that even if the reports are submitted, they are normally inadequate due to their brevity.<sup>131</sup> Worse still, even with the brief reports submitted, the Commission hardly have enough time to examine them thoroughly because it sits only twice a year and its agenda in each Session covers protective, promotional and administrative matters, which must be covered within 10 days. Sometimes the Commission is frustrated by the absence of representatives of States, which furnished reports for examination. For example, during its 18<sup>th</sup> Session, the Commission scheduled to examine the reports of four States – Tunisia, Mozambique, Mauritius and Seychelles, but only Tunisia sent representatives. On the same vein, at the 20<sup>th</sup> Ordinary Session of the Commission in Cotonou, Benin from 23<sup>rd</sup> October to 6<sup>th</sup> November 2000, the Commission did not examine the reports submitted by Namibia and Ghana because representatives of these countries did not turn up. At the 21<sup>st</sup> Ordinary Session of the Commission, the State reports of Sudan and Zimbabwe were available only in English version. Consequently, the non-English Commissioners were automatically eliminated from the examination process.<sup>132</sup> This buttresses the lack of political will and commitment of African leaders to the cause of human rights. "If States' adherence to the mandatory reporting is anything to go by," it is noted, "then a lot has to be done to encourage State Parties to undertake this important obligation."<sup>133</sup>

#### IV. OBSERVATIONS

Our efforts in this article centered on the operation and performance of African Commission on Human and Peoples' Rights in 2007, when it was constituted. Having considered the various functions, failures and achievements of the Commission, we observed that some criticisms leveled against it are over-exaggerated. We noted with facts that the Commission has recorded some achievements in both its promotional, protective and interpretational functions. We further pointed out that the problem of non-compliance with the decisions of the Commission has been predicated on the reason that the Commission has no legal standing to issue authoritative and binding decisions; and this has seriously undermined the Commission as an effective and meaningful human rights enforcement mechanism in Africa.

In identifying both the substantive and procedural problems of the African Commission in this article, we observed that while such problems as confidentiality of the Commission's work, lack of enforcement power and remedial provisions can be tackled by amendment of the African Charter; others such as obligations of State Parties, including financial and State reporting obligations cannot be cured by amendment of the Charter only because they require political will on the part of State Parties.

It is also our observation that since its inception, African Commission has resorted to seeking donations from various institutions in acquiring facilities it needs for effective performance; and this is because most African States do not comply with their financial obligation. We declared that with the establishment of African Human Rights Court, in addition to the African Commission, this method cannot sustain a dual human rights enforcement mechanism in Africa.

#### V. RECOMMENDATIONS

There is need to review and amend of the African Charter. Some deficiencies of African Commission such as confidentiality of the Commission's work, lack of enforcement powers and remedial provisions, claw-back clauses and absence of derogation clauses, can only be effectively overcome if there is a substantial amendment of the African Charter. This is very important because the Charter is the primary source of African Commission and African Human Rights Court/ the Human Rights Section of the African Court of Justice and Human Rights. This step would have been taken before the establishment of African Human Rights Court. But it is never too late; there is need for immediate reformulation of the Charter; better sooner than later.

Although, the interpretation of socio-economic and peoples' rights enshrined in the African Charter is an onerous task, the African Commission should take bold step in the interpretation of these rights taking examples from its decisions in the cases of *SERAC v. Nigeria*.<sup>134</sup> To achieve this, the Commission should engage in a vibrant, holistic and creative interpretation of the African Charter; and fill gaps where necessary and reconcile what scholars thought are irreconcilable under the African Charter for the interest of justice.

It is also importantly recommended that Members of the AU should endeavour to provide essential and adequate resources to the African Commission to enable it carry out more effective functions. The current practice under which the Commission relies on donations from other international organizations should be discouraged.

<sup>130</sup> K. Quashigah, *supra* note 9.

<sup>131</sup> A. Saffari, *supra* note 21, at 301.

<sup>132</sup> K. Quashigah, *supra* note 9.

<sup>133</sup> A. Philip, *supra* note 29 at 237.

<sup>134</sup> *Supra* note 57.



To overcome the problem of ignorance of the activities of African Commission and the existence of African Human Rights Court, it is strongly recommended that African Commission should carry out elaborate public awareness campaign of its mandate. The contentious jurisdiction of African Human Rights Court and the nature of the Court as a mechanism with binding enforcement powers should be brought to the knowledge of the public through the mediums of television, radio, newspapers, magazines and public lectures. The Commission should not concentrate its public awareness campaign in urban areas alone but also in rural areas.

Similarly, there is need for sustained continuing legal education through seminars, conferences, symposia, *et cetera* on international human rights in general and African human rights system in particular. To achieve human rights awareness campaign, there is also need for African Commission to work in collaboration with the various human rights Commissions or Committees established by various African States. The contribution of bodies charged with continuing legal education in domestic forum should not be ignored. In Nigeria, for example, the National Judicial Institute in charge of continuing legal education for judges should be effectively utilized.

To avoid conflict of interpretational jurisdiction of the African Commission and African Human Rights Court, it is recommended that the African Commission should concentrate on its promotional mandate, leaving the interpretational functions to African Human Rights Court or the merged Court. In the long run, African human rights system should concentrate on African Human Rights Court as the only human rights enforcement mechanism and abolish the African Commission, following the present European system, where a single human rights enforcement mechanism helps in speedy trials and avoids delay in the administration of justice.

In the African human rights system, the abolition of the Commission will not only aid in quick dispensation of justice but also, to some extent, help in relieving the system of its financial predicament which it has plunged into since it was constituted in 1987. But this step can only be possible if individuals and NGOs are given direct access to the African Human Rights Court and later the African Court of Justice and Human Rights. So, the immediate measure is to make the Commission more effective by tackling its present predicaments. This is very significant because if the Commission is left to stand on ramshackle foundation, the African Human Rights Court can never realize its potential and purpose. The African Human Rights Court and African Commission should, therefore, not see themselves as rivals but partners in progress in the African human rights movement.

State Parties to the African Charter should also be upright in nominating Commissioners to the African Commission. This should be based purely on merit devoid of political, religious or tribal sentiments. Although, knowledge of international law is not a requirement for appointment of a judge and a Commissioner of the Court and the Commission respectively, we suggest that this should be a condition *sine qua non* for both nomination and appointment of Commissioners.

## VI. CONCLUSION

In the light of the plethora of problems that besieged the African Commission, it is obvious that African human rights system was built on a shaky foundation; and unless it is anchored on strong and solid foundation, the efforts made so far to revamp African human rights system would be an exercise in futility. "A jurisdiction that is built on sand," a scholar said, "is obviously not anchored on a concrete foundation..."<sup>135</sup> On the whole, there is a lot to be done to make the African Human Rights Commission more effective. With the establishment of African Human Rights Judicial bodies it is hoped that if these recommendations are followed, the African Commission, as a human rights institution Africa, will give meaning and positive effect to the African Charter and other international, regional and sub-regional human rights instruments ratified by African States.

<sup>135</sup> D. C. J. Dakas, 'Activism, Ignorance or Playing to the Gallery? Untying the knots of the Jurisprudence of Nigerian Courts on the Domestic Application of International Human Rights Norms', Gabriel I.I. (ed.), *New Vistas in Law*, Vol. 1, at 447-448.