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AN APPRAISAL OF THE RIGHTS IN THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS AND NOTABLE INSTITUTIONS FOR THEIR ENFORCEMENT

OSUNTOGUN ABIODUN JACOB⁺

Abstract

This paper discusses human rights in the African Charter on Human and Peoples' Rights (ACHPR) and notable institutions established to protect and enforce them. It aims to interrogate how the Africa Union (AU) protects human rights in the continent and the impacts of that protection. It does not address some 'self-standing charters' in the AU that have evolved and developed as separate charters on their own.¹ In addition, since the focus of this paper is to examine the regional protection mechanism alone, it does not cover the issue of domestication of the ACHPR by states which is a major topic on its own. It is divided into five sections. Section one is an introduction which discusses how the Organization of the African Unity (OAU) was formed. Section two appraises the rights in the ACHPR. The subsequent sections three and four examine the role of notable institutions established to protect and enforce human rights in the continent, while the sixth section concludes.

1. Introduction

Before the establishment of the Organization of the African Unity (OAU) in 1963, two important trends emerged in the political scene of the continent: a move to unite all the independent states together within the same 'colonial boundaries' and a Pan African group desiring to bring the willing states or groups together for a specific or general purpose.² Although the strategy and mechanism to attain the vision of the continental organization differed,³ yet the two groups shared a similar

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¹ Examples of this type of Charters is African Charter on the Rights and Welfare of the Child which was adopted by the 26th ordinary session of the Assembly of Heads of State and Government of the Organization of African Unity (OAU Assembly) on 11 July 1990 in Addis Ababa, Ethiopia and entered into force on 29 November 1999.

² Berhanyku, A., *The OAU and the UN: Relations between the OAU and the United Nations* (Africana, New York, 1976) 9.

³ Those states that belong to 'Monrovia' bloc desired a loose form of association. But, other states in the Casablanca bloc' desired an immediate political unification of Africa.

view of a people yearning for a common bond, under the same umbrella. A common purpose for such a continental organization was succinctly enunciated at the sixteen session of the General Assembly when Ethiopia declared that it would be a forum 'where-by problems which arise on the continent and which are of primary interest to the region could' firstly be dealt with by Africans, "in an African forum, free from outside influence and pressure".⁴

The major problems besetting the region at the time revolved around the issue of political sovereignty. There was a need to help those states under the bondage of colonialism to secure their independence. At the same time, those countries that had secured their independence were apprehensive of external interference and therefore sought to consolidate their new found freedom.⁵ In that state of uncertainty and apprehension faced by the newly independent states counterbalanced by the need to love their neighbors as themselves by helping other African states to secure their independence from colonial tutelage,⁶ the OAU was established on the 25th May, 1963 as an intergovernmental organization.⁷

Admittedly, the OAU was a child of its history as it resolved in its preamble "to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neocolonialism in all its forms'. In the same vein, it acknowledges its responsibility to explore 'the natural and human resources' in Africa for the development of the people in every facet of life.⁸ However, its failure to consider and elevate the protection of human rights to one of its major objectives is a setback to the attainment of its overall goals at its inception. The act of exploring human and natural resources do often lead to human rights violations of the people by the government in complicity with corporations⁹ and the absence of a mechanism to protect same is a deplorable missing link in the charter of the OAU.

A quick look at its structures shows an institution committed to a spirit of fraternity and camaraderie between states without recourse to checks and balances of the excesses and abuse of those governments. Through the Assembly of Heads of

⁴ See, General Assembly Official Records (GAOR) 16th session (A/PV.1020) 1020th Plenary Meeting (2nd October, 1961) 177.

⁵ Naldi, G. J., 'Future trends in human rights in Africa: The increased role of the OAU' in Malcolm, D. E., & Rachel, M. (eds) *The African Charter on Human and Peoples' Rights The system in Practice 1986-2000* (Hart Publishing, U.K, 2008) 1 & 2.

⁶ See, Mweti Munya, P., "The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation" (1999) 19(2) *Boston College Third World Law Journal* 537-592 at 542

⁷ Viljoen, F., *International Human Rights Law in Africa* (Oxford, U.K., 2012) 155.

⁸ See the Preamble to the African Charter on Human and Peoples Rights' Done June 27, 1981, entered into force on 21 October 1986 and ratified by all member states of the African Union.

⁹ See Oruonye, E. D., "Multinational Oil Corporations in Sub Sahara Africa: An Assessment of the Impacts of Globalization" (2012) 2(4) *International Journal of Humanities and Social Science* 152-161 at 154.

State and Government (AHSG), the OAU had the power to deliberate on general issues of interest to member states and take decisions that would harmonize the 'general policy of the organization'.¹⁰ The Council of Ministers, which was the second in its hierarchy prepared conferences and executed decisions of the Assembly.¹¹ The General Secretary controlled the affairs of the secretariat¹² while the fourth organ which was the Commission of Mediation, Conciliation and Arbitration dealt with resolution of disputes.¹³

In 1979, AHSG took a different approach to address the issue of human rights violations in the continent by setting up a committee of experts which eventually drafted the African Charter.¹⁴ The African Charter on Human and Peoples' Rights (ACHPR) protects first, second and third generations of human rights such as civil and political rights, the Economic Social and Cultural Rights, the right to development and the right of indigenous people. The problem with the ACHPR since its adoption is the problem of enforcement. Yet, the ACHPR provides for its enforcement through the African Commission on Human and Peoples Rights (ACHPR). In 1998 and 1999, two significant occurrences had positive impacts on the enforcement and promotion of human rights in the continent. First, on the 9th of June, 1998 in Burkina Faso, the Protocol establishing the African Court on Human and Peoples' Rights (ACTHPR) was adopted. Second, in 1999, the AHSG took a decision, at its extraordinary session, in the Sirte (Libya) to change its name from the OAU to the Africa Union (AU).

The benefits of change of name and establishment of a court in addressing the issue of human rights violations in the continent cannot be over-emphasized. Enforcing human rights in the continent without a regional court is difficult, if not impossible. Furthermore, the admonition of the Holy Bible is significant in understanding the benefit of change of name. To this effect, Jesus the Christ counsels that "no one pours new wine into old wineskins. Otherwise, the wine will burst the skins, and both the wine and the wineskins will be ruined."¹⁵ The implication of that wise statement in relation with the AU is that a change of name from the OAU to the AU is not a mere change of nomenclature but an attempt to turn around the moribund organization in the right direction. In fact, it is a symbol that the organization is making a radical departure from the human rights violations of the past. Names are important. As a result, institutions and people don't change

¹⁰ See African Charter *supra* note 8, Article VIII.

¹¹ *Ibid*, Article XIII.

¹² *Ibid*, Article XVI.

¹³ *Ibid*, Article XIX.

¹⁴ The AHSG met in Monrovia, Liberia and unanimously requested the Secretary General of the OAU to convene a committee of experts to draft a regional human rights instrument for Africa, similar to the European and Inter-American human rights conventions. On how this was done, see The AU website, 'History of the African Charter' available at <<http://www.achpr.org/instruments/achpr/history/>> (Accessed 20 June 2016); The AU Website 'Extracts of the OAU Assembly's decision' (AHG/Dec.115 (XVI) Rev. 1 1979), *Ibid*.

¹⁵ Mark2:22 New International Version of the *Holy Bible*.

their names for the fun of it. Shakespeare lends credence to this when he notes that he “who steals my purse, steals trash, but he that filches from me my good name robs me of that which not enriches him and makes me poor indeed.”¹⁶

Be that as it may, it is worrisome that from 1981, when the ACHPR was adopted till now (2016), (a time span of four decades and five years), the problem relating to the issue of its enforcement has not been resolved. Since the issue of enforcement is important, this paper considers how the problems relating to the enforcement of human rights in the ACHPR can be enforced. In order to do that, it examines the notable institutions established to enforce them. It is divided in to five sections. Section one is an introduction which discusses how the Organization of the African Unity was formed. Section two appraises the rights in the ACHPR. The subsequent sections three and four examine the role of notable institutions established to protect and enforce human rights in the continent, while the fifth section concludes.

2. African Charter on Human and Peoples’ Rights

Certain notable events were responsible for the OAU’s change of attitude to human rights protection. To mention some of them, the support from the UN, the NGOs’ campaigns and the view of some African leaders within the organization, that the issue of human rights in the states should fall within the dealings of the organization catapulted the initial lackadaisical attitude of members in to a flaming zeal to adopt ACHPR, 1981.¹⁷ The ACHPR is uniquely drafted as it combines African historical, cultural and philosophical perspectives with western notions of Human Rights. Udombana describes it as ‘a synthesis of universal and African elements’.¹⁸ In fact, the uniqueness of the ACHPR lies in the fact that it represents the African perception of rights.¹⁹ Its entry in to force in 1986, marked the beginning of human rights protection in the OAU, even if at then, it was in skeletal form, because of the principle of non interference in the internal affairs of the member states.²⁰ In what appears then, to be a deliberate and strategic ploy to isolate the works on human rights from the works of other organs of the organization, the head quarter of the Commission was taken to Gambia in Banjul.²¹

The adoption of ACHPR under the OAU fails to usher in a significant protection of human rights in Africa due to notable failure on the path of the organization to enforce the rights it protected.²² As a result, many scholars have criticized the

¹⁶ Shakespeare W., *Othello* (Oxford, UK) Act 3, Scene 3 at 8.

¹⁷ Murray, R., *Human Rights in Africa from the OAU to the African Union* (Cambridge University Press, New York, 2004) 22.

¹⁸ See Nsongurua J. U., ‘Between Promise and Performance: Revisiting States’ Obligations under the African Human Rights Charter’ (2004) 40 *Stanford Journal of International Law* 105-142 at 110.

¹⁹ Onje Gye- Wado “A Comparative Analysis of the Institutional Framework for the Enforcement of Human Rights in Africa and Western Europe” (1990) 2(2) *African Journal of International and Comparative Law* 187- 201 at 191.

²⁰ See Murray *op cit* 22.

²¹ *Ibid*, the headquarter of other organs were in Addis Ababa.

²² Clapham, C., *Africa and the International System: The Politics of State Survival* (Cambridge University Press, New York, 1996)191.

ACHPR. In fact, Umozurike initially compared it to a dog that could not bite and argues that its enforcement might lie solely in the court of public opinion.²³ Gittleman notes that the ACHPR is 'incapable of supplying even a scintilla of external restraint upon a government's power to create laws contrary to the spirit of the rights granted'.²⁴ Despite the critical comments actuated by the lackadaisical attitude of the OAU to enforce the ACHPR it midwives, the positive legacy of the ACHPR is legendary. The ACHPR is broad in its recognition of human rights. It recognizes the first, second and third generation of human rights. It lists them together on the same pedestal as if they are on equal status; a method though Umozurike argues is deceptive and prone to ambiguity²⁵ is nonetheless a mark of distinction between ACHPR and other Human Rights instruments. In fact, it is a signpost illustrating the path that Africa wishes to take, with respect to enforcement of those rights.²⁶ Indeed, seven years after the adoption of the ACHPR, the African approach received universal acceptance at the Vienna Declaration on Human Rights.²⁷ There, the whole world acknowledged equal treatment of human rights by the ACHPR as the correct approach and denounced an approach by which human rights are categorized; in to hierarchical status as nauseating and unacceptable because all human rights are the same and they should be accorded equal treatment.²⁸ As noted earlier, the uniqueness of ACHPR is unquestionable; its focus is not only on human rights and the duties of the states, but goes beyond the ambit of western law to reflect the duties of the individuals in the family which Africa holds sacrosanct. Again, most scholars have commented on the broad requirements of the ACHPR with regard to *locus standi* as one of the most positive attributes that could throw the door of litigation open to the individuals and NGOs, other than the actual victims of the human rights violations.²⁹ There is no doubt that the OAU by its adoption of the ACHPR has given Africa an indigenous framework by which human right violations can be curtailed and a springboard by which the foundation of equity, justice and development can be built. Thus, some scholars argue that it

²³ Umozurike, O., 'The Protection of Human rights under the Banjul (African) Charter on Human and Peoples' Rights' (1988) 1 *African Journal of International Law* 65-83 at 82-83.

²⁴ Gittleman, R., 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 *Virginia Journal of International Law* 667-714 at 694.

²⁵ Umozurike, O., *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff, The Hague, 1997) 45- 49, 51-61.

²⁶ Heyns, C. & Killander, M., The African Regional Human Rights system in Gómez, F. I. & Koen de, F., (eds) *International Protection of Human Rights: Achievements and Challenges* (University of Deusto, Bilbao, 2006) 507, 514-515. They noted that the Charter combines civil and political rights with social economic and cultural rights to depict the seriousness of developmental issue and the indivisibility of human rights in Africa.

²⁷ See, United Nations Human Rights, Office of the High Commissioner 'Vienna Declaration and Programme of Action' adopted by the World Conference on Human Rights in Vienna on 25 June 1993 available at <http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf> (Accessed 20 June, 2016).

²⁸ *Ibid.*

²⁹ See Umozurike *op cit*; Naldi *op cit*.

is the most reliable and innovative document of all human rights Charters in the regions³⁰ and that it is imbued with the capacity to truncate the worldwide notion of universality of international law concepts.³¹ If indeed the ACHPR reflects Africa and it is interpreted in that way by those that will enforce them, then, there could be no better and suitable epithet.

2.1. Civil and Political Rights

This sub-section examines civil and political rights that are protected by the ACHPR. Africa recognizes the rights of the individuals and peoples' to the enjoyment of civil and political rights and sought to protect same in its Charter. Civil and political rights are considered of paramount importance in the genre of human rights classification.³² Dealing with rights that protect every individual against the tyranny and arbitrary power of the state, they are protected by the International Covenant on Civil and Political Rights (ICCPR)³³ and the Universal Declaration of Human Rights (UDHR)³⁴.

Article 2 of the ACHPR which is in par material with Article 2 of the ICCPR, prohibits discrimination of any form to any individual, in 'the enjoyment of the rights and freedoms' contained in the Charter. Other provisions in the ACHPR, for example Articles 3 and 19 which make provision for equality of every individual in the eye of the law irrespective of their state of origin also prohibits discriminatory acts for the same purpose. Therefore, what is captured by the word non-discrimination in term of prohibition is very wide, more so, when the ACHPR deliberately fails to distinguish between a fair and unfair form of discrimination.³⁵ For example, while considering the effects of Articles 2, 3, 13 and 19 of the Charter on the domestic law of Zambia, the African Commission³⁶ found that the Republic of Zambia had violated

³⁰ Benedek, W., 'Peoples' Rights and Individuals' Duties as Special Features of the African Charter on Human and Peoples' Rights' in Kunig, P., Benedek, W., & Mahalu, C.R., (eds) *Regional Protection of Human Rights in International Law: The Emerging African System* (Nomos, Virginia, 1985) 61.

³¹ Murray, R., *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing, Oxford, 2000) 11.

³² All rights are the same in Charter see Vienna Declaration *op cit*.

³³ The ICCPR is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and entered into force on 23 March 1976. See, United Nations Human Rights, Office of the High Commissioner, 'International Covenant on Civil and Political Rights', available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>> (Accessed 25 June, 2016).

³⁴ The UDHR was "proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217(III) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected". See, the United Nations 'Universal Declaration of Human Rights' available at <<http://www.un.org/en/universal-declaration-human-rights/index.html>> (Accessed 20 June, 2016).

³⁵ See Heyns, *op cit*.

³⁶ 211/98 - *Legal Resources Foundation v Zambia*. For similar decision, see also, 212/98 - *Amnesty International v Zambia*.

the provisions of Articles 2, 3(1) and 13 of the ACHPR, regarding the issue of non-discrimination by amending its Constitution to include discriminatory provisions in Articles 34 and 35 which sought to disqualify and disenfranchise some 35% of the people from contesting election in to the office of the president of Zambia. Right to respect sanctity of human life and integrity of human person is provided for in Article 4. It prohibits arbitrary deprivation of life. A breach of Article 4 will occur, with or without a loss of life, if the act complained of is capable of causing injury that may eventually lead to the death of the victims³⁷ or expose him or her to any form of indignity, including those occasioned by incessant detentions³⁸. Article 5 proceeds further to protect the dignity of human person and prohibits any form of indignities such as slavery, torture and slave trade. Punishments, even if lawful, must not be degrading or dehumanizing. More likely than not, it may be considered as a violation of this article. Thus, for example, the Commission decided that keeping Ken Saro-Wiwa in dirty cells under inhuman and degrading conditions without access to his family amounted to a violation of Article 5.³⁹ The right to liberty and security of every individual is guaranteed and infraction to that right is not allowed except as provided for by law. Thus, no one shall be deprived of his or her right to liberty and security.⁴⁰

Article 7 deals with varied rights relating to dispensation of justice at national level with a view to ensuring fair trial and speedy justice in an atmosphere devoid of partiality, error of miscarriage of justice and arbitrary power. It makes provision against conviction or arrest of a wrong person which is rampant in Africa.⁴¹ Consequently it prohibits a system of criminal justice by which a person can be punished for the offence committed by another person, mainly on account of his or her relationship with the offender, particularly on the ground of marriage or consanguinity. It also prohibits conviction of individual for bogus offences that are not known to law of the land⁴² but provides that individuals can only be punished for the breach of a 'legally punishable offence at the time it was committed'.⁴³ The same Article also includes other rights like the right to be heard

³⁷ See, Communication 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organization v. Nigeria*, Twelfth Activity Report (1998-1999) Annex V(Documents of the African Commission, 729 para 104.

³⁸ See Communication 205/97, *Kazeem Aminu v. Nigeria* para 18, the Commission notes that the article protects the type of 'constant fear and /or threats' which the complainant in the case experienced.

³⁹ *Ibid.*

⁴⁰ See African Charter *op cit*, Article 6.

⁴¹ The case of arrest of wrong person is common in Africa. Even in South Africa the sum of R350 000.00 was awarded against the police for unlawful detention of the plaintiff, see the judgement of D.Chetty J in *Mzimkulu Eric Manziya v. Minister of Police* Case No: 2233/2011.

⁴² See the African Charter *op cit*, Article 7(2).

⁴³ *Ibid.* Article 7(2).

(*Audi Alteram Partem*),⁴⁴ the right that every accused is presumed innocent until the contrary is proved by the judgment of a competent court or tribunal,⁴⁵ the right to a speedy trial by a competent, as well as an impartial court or tribunal⁴⁶ and the right of individual to defend himself to the extent of securing a counsel of his choice.⁴⁷ Other rights protected by the ACHPR are the right to freedom of conscience, the profession and free practice of religion,⁴⁸ the right to obtain information and freedom of expression⁴⁹ the right to associate subject to compliance with the law by the beneficiary,⁵⁰ right of Assembly with others⁵¹ and the right of residence in any state as well as the right of egress and ingress within a particular territory provided the beneficiary of such right in another country complies with the law of that particular territory.⁵² Similarly, article 13 deals with political right; every citizen has the right to take part in the government of his or her country, either by standing as candidate for election or by exercising his right of franchise in electing those who will govern them. The same Article⁵³ also accorded all citizens equal right of access to public service of the country. Most of the rights recognized by the ACHPR are not absolute; they are statutorily limited by claw-back clauses in the Charter itself.⁵⁴

2.2. The Economic Social and cultural rights

Economic Social and Cultural Rights (ESC) are interwoven with civil and political rights; to separate them, when it comes to protection and enforcement, is an impossible enterprise comparable to a situation that could arise when one engages in a frivolous attempt to separate smoke from fire. Consequently, the protection of Right to development and ESC are very important to the ACHPR to the extent that they are regarded as sine qua non in the Charter. ACHPR states that their protection must be guaranteed, if other rights, like civil and political rights must be enjoyed⁵⁵. Additionally, some rights categorized as civil and political rights are actually 'cross-cutting rights' because they provide access for the enjoyment of social economic rights⁵⁶. An example of such rights is the right to human dignity. In *Bandhua*

⁴⁴ *Ibid.* Article 7(1).

⁴⁵ *Ibid.* Article (7) 1b.

⁴⁶ *Ibid.* Article (1d).

⁴⁷ *Ibid.* Article (1c).

⁴⁸ *Ibid.* Article 8.

⁴⁹ *Ibid.* Article 9.

⁵⁰ *Ibid.* Article 10.

⁵¹ *Ibid.* Article 11

⁵² *Ibid.* Article 12.

⁵³ *Ibid.* Article 13.

⁵⁴ *Ibid.* They make the enjoyment of most of the rights depend on or susceptible to the application of domestic law.

⁵⁵ *Ibid.* Preamble to the African Charter. Para. 8.

⁵⁶ See Odinkalu *op cit.*

*Mukti Morcha v. Union of India and others*⁵⁷ the Supreme Court of India held that the right to human dignity must carry with it, the 'protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief'.

The ACHPR guarantees the right to property with a claw-back clause⁵⁸ that the right can be jettisoned, if the public interest of the community requires it or the property is required for public need. In whatever case, the claw-back clause must be exercised in compliance with the national law. It subjects the issue of confiscation of property to the national law and accords overriding interest of the community. It fails to mention the issue of compensation because it assumes that a domestic law of any country in Africa should have provided for such. It is contended that the failure to add the issue of compensation is a great omission; most states even at the time the ACHPR was made were under a military rule, which usually suspends the entire Constitution or the chapter dealing with human rights. In such a situation, to leave the issue of confiscation of property to national law without mentioning the issue of compensation is to remove the efficacy and the potency of the right protected. The ACHPR also protects the right of every individual to work 'under equitable and satisfactory conditions', the right to 'receive equal pay for equal work',⁵⁹ the right to 'enjoy the best attainable state of physical and mental health',⁶⁰ the right to education,⁶¹ and freedom to 'take part in cultural life of the community'.⁶² One notable flaw in the ESC provisions is the sterile manner the provisions were drafted without attention to detail. The rights are couched in phrases like 'right to education', right to 'equitable and satisfactory conditions', 'equal pay for equal work', 'the best attainable state of physical and mental health', 'take part in cultural life of the community'. The implication of these austere provisions, according to Ssenyonjo, is that it will 'require interpretation in the light of the present day conditions to enable the state parties to understand their obligations under the African Charter'.⁶³ On the other hand, it is also arguable that the lack of specificity, in the ACHPR, may constitute a great advantage to enforce ESC rights since its flexibility will pave way for broader interpretation that may give room for importation of cross-cutting rights that are not expressly mentioned in the Charter. Thus in *SERAC and CESR v. Government of Nigeria*⁶⁴ the African Commission

⁵⁷ (1984) 2 SCR 67).

⁵⁸ See African Charter *supra* note 8, Article 14.

⁵⁹ Ibid Article 15.

⁶⁰ Ibid Article 16.

⁶¹ Ibid Article 17(1).

⁶² Ibid Article 17(2). Note that other provisions that deal with cultural rights include Articles 17(3), 18(1&2) and 61.

⁶³ Ssenyonjo, M., "Analyzing the Economics Social and Cultural Rights Jurisprudence of the African Commission" (2011)29(3) *Netherlands Quarterly of Human Rights*358-397at363.

⁶⁴ See Communication 155/96.

inferred the protection of the right to food from other rights that are expressly enunciated in the charter like the right to life, right to dignity, right to health and the right to Economics, Social and Cultural development from the Charter.⁶⁵ Similarly, the Commission also inferred the right to housing or shelter from the provisions in the charter relating to health, property, and family⁶⁶. Furthermore, in Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) ⁶⁷the Commission inferred the right to water⁶⁸, social security and sanitation⁶⁹ from the ACHPR.

2.3. The Right to Development

The ACHPR recognizes the right of 'all peoples to "their economic, social and cultural development" with respect to their 'freedom and identity and in the equal enjoyment of the common heritage of mankind'⁷⁰ and also confers duty on them individually or collectively to ensure that their right to development (RTD) is protected.⁷¹ The meaning of the word, development can be gleaned from the address of President Senghor of Senegal to the drafting Committee of the African Charter in 1979, when he argues that RTD integrates all other rights whether civil or political rights or ESR and that it means 'first and foremost a change of quality of life and not only an economic growth required at all cost, particularly in the blind repression of individuals and peoples'.⁷² This right is a collective right 'endowed on a people'. Therefore understanding the meaning of 'a people' is essential to enjoyment of the right. Unfortunately, "a 'people' is not defined in the Act but the Commission has defined it as the characteristics like culture, dialect, religion, language, 'common history, ethno - anthropological factors', etc by which people identify themselves or others as people⁷³. The enforcement of the RTD and the critiques of the scholars as to the extent of its protection shall be discussed under the section dealing with the obligations of the states and under the African Commission.

2.4. The Right of Indigenous People

Indigenous communities have been victims of corporate human rights violations by states with complicity of MNCs. Most often they are displaced unlawfully, by

⁶⁵ See African Charter *supra* note 8, Articles 4,5,16, & 22.

⁶⁶ *Ibid.* Articles 13, 16 & 18.

⁶⁷ 279/03-296/05: *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* available at <http://www.achpr.org/files/sessions/45th/communications/279.03-296.05/achpr45_279.03_296.05_eng.pdf> (Accessed 20 June 2016).

⁶⁸ This is implied from consideration of Articles 4,5,6,15,16 and 18 of the Charter see *supra* note 8.

⁶⁹ *Ibid.* This too was implied from a consideration of articles 4, 5,15,16,22 and 24 of the African Charter.

⁷⁰ *Ibid.* Article 22.1.

⁷¹ *Ibid.* Article 22.2.

⁷² Address of 28th November 1979 to meeting of experts preparing the draft African Charter, OAU Doc. CAB/LEG/67/5 P.5.

⁷³ See Sudan Human Rights case *supra* note 67.

the governments from their ancestral lands, in order to give rooms for the operation of the MNCs' businesses. Any attempt made by them to resist the unlawful eviction, leads to escalated violation of their human rights by the governments in concerted efforts with the MNCs. This sub-section of the paper examines whether the African human rights system protects the vulnerable groups. The inquiry was necessary in view of the critical stance taken by the African countries to the negotiations of the UN Declaration on the Rights of Indigenous Peoples (DRIP), before it was adopted by UN General Assembly Resolution 61/295 in 2007⁷⁴. Indeed, the Assembly had to defer the consideration of the text in 2006 because of the objections raised by the African countries to the text,⁷⁵ on a number of issues relating to the questions of self determination, land ownership in a sovereign state, exploitation of resources, the establishment of distinct political and economic institutions, definition of 'indigenous' people and the issue of national and territorial integrity through an aide-memoir dated 9th November 2006.⁷⁶ Grappling with these contentious issues and encouraged by the favorable response to the DRIP, the African Commission on Human and Peoples Right (the Commission) set up a working group on Indigenous Population/Communities (WGIP) to 'examine the issue of Indigenous Populations and advise it accordingly'.⁷⁷ The report of WGIP was debated at its 41st ordinary session, in Accra Ghana between 16th to 30 May 2007 and a resolution was passed to the effect that there had been an extended study and debate on the issue of indigenous population in the continent leading to the adoption of a report by the Commission in November 2003 at its 34th ordinary session.⁷⁸ In fact as early as 2000, there was a 'Resolution on the Rights of Indigenous Populations/Communities in Africa' which the Commission adopted at its 28th Ordinary Session-held in Cotonou, Benin, in October 2000.⁷⁹ At the 34th ordinary session of the Commission held on 6th to 20th November 2003, the working group of experts on Indigenous Populations/Communities in Africa presented its report, to the Commission based on the resolution that was adopted at its 28th ordinary session. The Report revealed gross violations of human rights

⁷⁴ See UN United Nations Declaration on the Rights of Indigenous Peoples (DRIPS) Resolution adopted by the General Assembly (without reference to a Main Committee (A/61/L.67 and Add.1) available at <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> (Accessed 20 May 2016).

⁷⁵ See, UN 'General Assembly adopts declarations on the rights of the indigenous peoples' GA/10612, Sixty-first General Assembly Plenary available at <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>> (Accessed 20 May 2016).

⁷⁶ See The Commission 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples' (2007) available at <<http://www.achpr.org/mechanisms/indigenous-populations/un-advisory-opinion/>> (Accessed 20 May 2016).

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ See, ACHPR 'Resolution on the Adoption of the "Report of The African Commission's Working Group on Indigenous Populations/Communities' (2003) available at <<http://www1.umn.edu/humanrts/africa/resolutions/rec70.html>> (Accessed 20 June 2014).

perpetuated against indigenous peoples in Africa. It notes that, 'dispossession of land and natural resources is a major human rights problem for indigenous peoples' and gave a pathetic examples of many who were driven out of their ancestral homes to satisfy the 'economic interests of other more dominant groups and large-scale development initiatives' in an ignominious way that impoverish the lives of indigenous peoples and torn their cultures apart.⁸⁰

Even though, the report of the working group was adopted, another resolution was passed which again established a working group of experts for the first term of two years with the mandate to promote and protect the right of the vulnerable populations / communities in Africa⁸¹ due to the fact that there was no institution at the AU mandated to protect the rights of indigenous peoples. The summary of the report titled Indigenous populations/Communities in Africa was part of the activities that the Commission included in its 17th Annual Activity report⁸² which was approved and endorsed for publication by the 4th Ordinary session of the Authority of the Heads of States and Government (AHSG) of the AU⁸³. The revelation of gross violation of human rights against indigenous peoples, the unquenchable zeal of the UN to see the logical end of its Declaration which eventually sailed through when it was adopted in 2007 and the discovery that there had been positive moves in the past to protect the indigenous people of Africa made the Commission to throw an open arm to the UN Declaration. At its 42nd Ordinary Session⁸⁴, it notes that: 'The UN Declaration on the Rights of Indigenous Peoples is in line with the position and work of the African Commission on indigenous peoples' rights as expressed in the various reports, resolutions and legal opinion on the subject matter. The Commission is confident that the Declaration will become a very valuable tool and a point of reference for its efforts to ensure the promotion and protection of indigenous peoples' rights on the African continent'.⁸⁵

⁸⁰ ACHPR & International Work Group for Indigenous Affairs (IWGIA) Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005)20 available at <http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf>(Accessed 3 January 2016).

⁸¹ *Ibid.*

⁸² ACHPR 'Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights' (2003 – 2004) available at <http://www.achpr.org/files/activity-reports/17/achpr34and35_actrep17_20032004_eng.pdf>;<http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf> (Accessed 10 June 2016).

⁸³ See Advisory opinion supra note 76.

⁸⁴ Held from 15 - 28 November 2007, in Brazzaville, Republic of Congo where the ACHPR adopted a resolution.

⁸⁵ See, ACHPR '121: Resolution on the United Nations Declaration on the Rights of Indigenous Peoples' (2007) available at<<http://www.achpr.org/sessions/42nd/resolutions/121/>> (Accessed 20 May 2016).

3. African Commission on Human and Peoples Rights

Article 30⁸⁶ of the Charter establishes the African Commission on Human and Peoples Rights (hereinafter the Commission) to protect and promote human rights in Africa. To perform this primary task effectively, Article 45 assigns specific duties to it that are incidental to the attainment of the main goal. They are the promotion of human rights through sensitization of the public and institutions by organizing conferences, seminars and by offering advice and recommendations to the governments,⁸⁷ setting of standards, principles and rules aimed at solving contemporary legal problems relating to human rights and freedoms of the peoples upon which the states may rely to enact their own domestic law,⁸⁸ cooperating with other similar institutions in Africa and at the global level who have the same objective to pursue attainment of human rights,⁸⁹ interpreting the provisions of the Charter and performing any other further duties or tasks that may be given to it by the AHSG.⁹⁰

The major instrument of protection by the Commission is the consideration of communications that are brought by states and non-state entities and its decisions or recommendations are presented along with other matters in a report to be submitted to the Assembly of the AU annually and the whole report shall remain confidential until such time that it has been considered and authorized for publication by the Assembly.⁹¹ It is expected that through the exercise of that power, the Commission should be able monitor states to ensure that they enforce human rights in their territories. However, most states are unwilling to submit their reports promptly to the Commission for scrutiny, thus scuttling a viable opportunity to enhance 'the protection and promotion of human rights through the examination of state reports'.⁹² Unfortunately, the ACHPR itself fails to provide penalty for such disobedience.⁹³ Similarly, observations or recommendations emanating from report are of no 'significant impact on those who finally submitted the report'⁹⁴ and the possibility of exerting pressure on them to comply through publicity is hindered by the said confidential provision of the Charter which reserves the right to authorise publication of such recommendations and observations to the Assembly of Heads of State and Government.⁹⁵ The implication of that provision, according to

⁸⁶ See, African Charter, *supra* note 8, Article 45(1) and (2).

⁸⁷ *Ibid* Article 45(1a).

⁸⁸ *Ibid* Article (1b).

⁸⁹ *Ibid* Article (1c).

⁹⁰ *Ibid* Article 45(4).

⁹¹ *Ibid* Articles 47 to 59.

⁹² See, Isanga, J.M., "The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?" 11(2013) *Santa Clara Journal of International Law* 267 at 280.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*; see also Article 59(1) of the African Charter *supra* note 8.

Udombana is that 'the decision on whether to publicize a human rights violation on the part of an African State is reserved to the discretion of her sister States'.⁹⁶ Furthermore, the Commission also has special power in line with the direction of the AHSG to conduct a thorough investigation to cases in which in its view reveal the existence of gross or massive violation of human rights.⁹⁷ Such cases would include violation of different types of rights or gross violation of a single right.⁹⁸ In interpreting the provisions of the Charter, the Commission is enjoined to be guided by the inspiration of international law dealing with human and people's rights from human rights instruments adopted by the United Nations and African countries.⁹⁹ In addition, 'as subsidiary measures, the Commission is also authorized to consider to determine the principles of law', other general or particular international conventions, rules and African practices and doctrines compatible with international norms on human and people's rights, customary law, general principles of law, legal doctrines and precedents recognized by African states.¹⁰⁰ Indeed, the Commission may decide to conduct its investigation in any manner it chooses. It can seek to be enlightened from the Secretary General of the OAU or from any other expert in the area of its investigation.¹⁰¹ It monitors compliance of the states to the ACHPR by examining the report submitted to it by the states in every two years from the effective date of the Charter on the laws enacted by the states in order to protect the rights enshrined in the Charter.¹⁰² The Commission consists of eleven African personalities of the highest reputation, who are acknowledged 'for their high morality, integrity, impartiality and competence in matters of human and peoples' rights' with special consideration being given to those having legal experience.¹⁰³ Once elected by the AHSG, they served part time in their individual capacity for a term of six years.¹⁰⁴ The quorum is formed when seven members are present and when there is a tied vote, the Chairman has a casting vote.¹⁰⁵ With regard to performance of its primary duty as guardian of the charter and the watchdog of human rights in Africa, scholars have rated the Commission poorly. To refer to a few of such critical comments, Mohammed argues that 'the African Commission has been apparently weak in promoting, protecting and implementing

⁹⁶Udombana, *op cit.*

⁹⁷*Ibid.* Article 58.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* Article 60.

¹⁰⁰ *Ibid.* Article 61.

¹⁰¹ *Ibid.* Article 46.

¹⁰² *Ibid.* Article 62.

¹⁰³ *Ibid.* Article 31 (1).

¹⁰⁴ *Ibid.* Articles 31(2), 33 & 36.

¹⁰⁵ *Ibid.* Article 42(2) (3) & (4).

the Charter provisions'.¹⁰⁶ Similarly, Onyango agreed with the view when he notes that the works of the Commission 'do not even marginally affect the status quo' of human rights violations in Africa and that the so-called state reportage 'which is supposed to be the bedrock of the system has proven a dismal failure'.¹⁰⁷ Ndobana, who has been consistent in making critical comments against the African human rights system, argues that the Commission has proved to be incapable of safeguarding the 'basic human rights of Africans'.¹⁰⁸ As exemplified in the critical comments by those scholars, there is no way the Commission can be exonerated from the blame game, indeed, the Commission has not been able to put an end to human rights violations in Africa neither has it been able to interpret the ACHPR in a unique manner that depart from the state based approach to international law but nonetheless, one must note that the Commission has been able to attain some measures of protection, even if minimal.

For example, with regard to 'claw back' clauses in the ACHPR, which many as noted earlier have regarded as instrument that could be used to subvert human rights protection, the Commission has frustrated such loophole by engaging in an holistic interpretation of the Charter that ensures that domestic laws are not used by states to subvert or limit their obligations under the charter.¹⁰⁹ Similarly, in SERAC case¹¹⁰, the Commission interpreted the ACHPR to include the rights to food, shelter and housing which are not expressly available in the Charter. As Olowu questions, it is not certain, at present to see how the Commission will apply this decision to African countries who are not parties to ICESCR, but in spite of that uncertainty, there is no doubt as he himself admits that the decision is likely to become the *locus classicus* for implementation of economic, social and cultural rights in the African regional system for a long time to come.¹¹¹

In sum, the understanding of difficult terrain under which the Commission is performing its task will justify the assertion of some liberal scholars¹¹² that the

¹⁰⁶ See, Abdelsalam A. R., 'Article 58 of the African Charter of on Human and Peoples Rights A legal analysis and how it can be put in to more practical use' a paper delivered at the (1996) *Annual Conference of African Society of International and comparative law* 290-309.

¹⁰⁷ Oloka-Onyango, J., "Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?" (2000)6 *Buffalo Human Rights Law Review* 39 at 71.

¹⁰⁸ Nsongurua J. U., 'Towards the African Court on Human and Peoples' Rights: Better Late Than Never' (2000) 3 *Yale Human Rights and Development Law Review* 45-111 at 73.

¹⁰⁹ *Media Rights Agenda and Others v Nigeria* (2000) African Human Rights Law Report 200.

¹¹⁰ See *Supra* note 64.

¹¹¹ As a result of uncertainty he advocates a new approach that can be used to enforce the new rights. See Olowu, D., *An Integrative Rights- Based Approach to Human Development in Africa* (Pretoria University Law Press, Pretoria, 2009) 154.

¹¹² See, Nmehielle, V., "Development of the African Human Rights System in the Last Decade" (2004) 11(3) *Human Rights Brief* 1 at 6-11. He notes 'The protective mandate of the Commission has progressively developed to some degree, to the point where it has arguably entrenched itself as an institutional supervisory mechanism'.

Commission in spite of its constrain has established itself as a supervisory institution in Africa. Even though, the Commission may not have performed to our expectation, a reflection back to its humble beginning and a liberal look at its initial problem of attaining independence within the institutional structure of the AU would show that with its efforts so far the Commission has indeed established itself as a regional supervisory organ protecting human rights in Africa.

4. African Regional Courts

Most critics of African human rights system are of the view that a court rather than a Commission should have been saddled with the responsibility of protecting human rights in the continent as it is the case with other similar regional human rights instruments.¹¹³ They, therefore, hold the view that the failure of the ACHPR to establish a court is the major reason behind inability of the Commission to protect human rights effectively in the continent.¹¹⁴ As a result, there was a reverberated clamor for the establishment of a court in Africa.¹¹⁵

4.1. African Court of Human and Peoples' Rights (ACTHPR)

In response to that popular demand, on the 9th of June, 1998 in Burkina Faso, the Protocol establishing the African Court on Human and Peoples' Rights (Protocol)¹¹⁶ was adopted and came into force on 25 January 2004 after more than 15 countries ratified it. The court has jurisdiction to hear disputes and matters brought to it that relate not only to the interpretation and operations of the Charter, but to the Protocol of the court and any other significant Human Rights instrument ratified by the States that brought the disputes.¹¹⁷

Opinion of scholars differs on the utility of this provision. While, Pityana¹¹⁸ notes with misgiving that the provision serves as a limitation on the jurisdiction of the court restricting the categories of cases it can decide to human rights issue. For example, Ndombana¹¹⁹ and Eno¹²⁰ are of the view that the provision will bolster the

¹¹³ For example, European Court of Human Rights (ECHR) a regional court based in Strasbourg was established in 1958.

¹¹⁴ See Ndombana *op cit* 46-47.

¹¹⁵ For example in 1961, 194 judges, lawyers, and scholars from 23 African countries had convened in Lagos, Nigeria under the aegis of the International Commission of Jurists for the African Conference on the Rule of Law to call for the establishment of a court in Africa to protect human rights in the continent. See *Law of Lagos*, Jan. 7, 1961, para. 4, reprinted in 3 *JICJ* 9(1961).

¹¹⁶ See, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol) available at <<http://www.achpr.org/instruments/court-establishment/>> (Accessed 20 June, 2016).

¹¹⁷ *Ibid*. Article 3 (1).

¹¹⁸ See, Barney- Pityana, N., 'Reflections on the African Court on Human and Peoples' Rights available at <www.unisa.ac.za/contents/about/principle/docs/Municipal_Law.doc> (Accessed 20 May 2016).

¹¹⁹ See, Ndombana *op cit*.

¹²⁰ Eno, R. W., "The Jurisdiction of the African Court on Human and Peoples' Rights" (2002) 2 *African Human Rights Law Journal* 223-233 at 226.

protection of the people as the court has a plethora of human rights instruments to maneuver for that purpose. Both views are correct, it must be noted, however, that the protocol establishing the court recognizes the existence of the Commission and consequently, the Commission still exists and must handle some matters. The problems that are meant to be solved with the emergence of a court in Africa are the problem of human rights and not actually general issues like boundary disputes, devoid of human rights. Even, in spite of that assertion, it must be noted that another different court entirely is still envisaged in the Constitutive Act¹²¹ of the AU, so the provision as it is drafted is not fatal to African system of justice.

However, in cases of objections to the jurisdiction of the court, the court is vested with the power to decide if it has jurisdiction or not.¹²² It also has the power to provide advisory opinion, on any legal issues dealing with the Charter and any other appropriate human rights instruments, on condition that the legal issues concerned does not arise from the matters being considered by the Commission.¹²³ That condition prevents abuse of the system, promotes smooth working of the two institutions and avoids conflict of interest between the Commission and the court. Independence of judges¹²⁴ of the court is secured by a secret balloting system of election¹²⁵, security of tenure of office¹²⁶, oath of office committing the judges to be impartial¹²⁷ and a rule dealing with conflict of interest excluding any of them from hearing a matter, in which they are of the same nationality with a party who brought the matter to court.¹²⁸ The court situated in Arusha, Tanzania consists of 11 judges.¹²⁹

The major problem of the court is the restriction of the victims of human rights violations to seek justice in the court. Access of the court is open to two categories of litigants. It is mandatory for the court to hear the cases brought by the first set of the category which consists of the states and African institutions and inter governmental organizations.¹³⁰ The second category of litigants includes victims of human rights violations and NGOs. The jurisdiction of the court to hear them is optional and can only be triggered on two conditions. The first, if the individuals and the NGOs concerned have observer status with the AC. The second if their states have made a declaration acceding to jurisdiction of the court to hear them in

¹²¹ The Act entered in to force on 26th may 2001, available at <www.african-union.org> (Accessed 20 June 2016).

¹²² See, the Protocol *supra* note 116, Article 3(2).

¹²³ *Ibid.* Article 4 (1).

¹²⁴ *Ibid.* Articles 17& 18.

¹²⁵ *Ibid.* Articles 12 to 14.

¹²⁶ *Ibid.* Articles 15 &19.

¹²⁷ *Ibid.* Article 16.

¹²⁸ *Ibid.* Article 22.

¹²⁹ *Ibid.* Article 11(1).

¹³⁰ *Ibid.* Article 5(1).

a declaration made either at the time of ratification or any time thereafter.¹³¹ These conditions have become bottlenecks on the wheels of justice and have shut out many victims from seeking redress in the court.¹³² According to Manisuli, the court has been made to become 'largely a court primarily for those States which have accepted to allow individuals and NGOs direct access to the Court'.¹³³

Aside the problem of conditions and its denial of access to court, another problem with regard to corporate human rights violations, is the principle of state responsibility. The implication of that approach is that only states can be brought to court. Corporate entities can still not be brought to court for violation of human rights. The jurisprudence is still state based. Therefore, the court may not be able to do more, even, if it attempts to, than going beyond the jurisprudence of the Commission in SERAC case on the issue of corporate human rights violations.

4.2. African Court of Justice and Human Rights

The Constitutive Act¹³⁴ of the AU provides for the establishment of the Court of Justice and refers to it appurtenant protocol for the statement of its 'statute, composition and functions'.¹³⁵ The court is positioned to be the major judicial organ of the Union.¹³⁶ It has the jurisdiction to determine all disputes and matters dealing with the Constitutive Act and the court of Justice Protocol.¹³⁷ Specifically, matters relating to interpretation and workings of the Act and Union treaties, the status of Union treaties, other legal instruments adopted within the framework of the Union are within its jurisdiction.¹³⁸ For that purpose, it has power to consider matters arising from any agreements entered in to by States Parties if the agreement confers jurisdiction on the Court.¹³⁹ The purpose of that power is to examine any act by the state party which amounts to a breach of its obligation owed to a State Party or to the

¹³¹ *Ibid.* Article 34(6) & Article 5(3).

¹³² For analysis of these problems, see Eno *op cit*; Dan - Juma, "Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper" (2007)4 (2) *Essex Human Rights Review* 1-21; Zimmermann, A. & Bäumlér, J., 'Current Challenges facing the African Court on Human and Peoples' rights' (2010) 7 *KAS International Report* 38-53.

¹³³ See, Ssenyonjo, M., "Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non-Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008-2012" (2013) 2 *International Human Rights Law Review*, 17-56 at 28.

¹³⁴ The Constitutive Act, see *supra* note 121.

¹³⁵ *Ibid.* Article 18.

¹³⁶ See Article 2(2) of the Protocol of the Court of Justice of the African Union, adopted at the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003 which entered into force in 2009, available at <<http://www.africancourt.org/en/images/documents/Court/Protocol%20Court%20of%20Justice/CoJ%20Protocol.pdf>> (Accessed 20 June, 2016).

¹³⁷ *Ibid.* Article 19(1).

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

Union. Consequently, it can award adequate reparation for such breach.¹⁴⁰ Finally, it has power to determine all disputes emanating from activities of all the organs of the Union and any question of international law.¹⁴¹

When the plan to establish the court of justice was underway, the then chairperson of the Assembly of the AU suggested the idea of merging the two courts together in order to save the cost and reduce the growing rate of institutions under the AU to its manageable capacity.¹⁴² Consequently, at a summit of the AU Assembly in 2008, a protocol merging the two courts together to become African court of justice and human rights was adopted.¹⁴³ The new court will assume the status of African Court of Justice as articulated in the Constitutive Act, to become the main judicial organ of the AU.¹⁴⁴ It is proposed to have three separate chambers, which means, apart from the initial two separate chambers dealing with General Affairs Section and Human Rights Section as envisaged in the statute of the African Court of Justice and Human Rights, another criminal chamber dealing with international criminal law has been added by the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.¹⁴⁵

The initial criticism against the proposed merger of the court has increased intensely with the emergence of another issue of extending the jurisdiction of the court to cover international criminal law.¹⁴⁶ Whether the controversy is justifiable or not is not within the scope of this paper.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² See Coalition for an effective African Court on Human and Peoples' Rights 'The African Court of Justice and Human Rights available at <http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=6:afrcourt-integrate&catid=7:african-union&Itemid=12> (Accessed 20 May 2016).

¹⁴³ See Article 2 of Chapter one of the protocol establishes a single court available at <http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf> (Assessed 20 May 2016).

¹⁴⁴ *Ibid.* Article 3 of Chapter one.

¹⁴⁵ See the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, revised up to the 15th of May 2012 available at <<http://www.peaceau.org/uploads/ex-cl-731-xxi-e.pdf>> (Accessed 20 May 2016).

¹⁴⁶ See for example Viljoen, F., "AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol" (Africa Law, 23 May 2012) available at <<http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>>(Accessed 20 May 2016); See, Abass, A., "The proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects"(2013) 60 *Netherlands International Law Review*, 27-50.

5. Conclusion

The AU has made a great contribution to the human rights corpus through the African Charter. 'Its most notable contributions are the codification of the three "generations" of rights, including the innovative concept of peoples' rights which have been discussed in this paper. The problem however lies with the enforcement mechanism at the regional level. It is submitted that the notable institutions established by the ACHPR and the AU to protect them must be strengthened to ensure efficient human rights system. In sum, for the AC monitoring mechanism to yield its maximum benefits to the continent, it must be strengthened in order to compel prompt and mandatory participation from all members. This can be done if the provisions of the Charter are amended to compel states not only to submit reports promptly but to implement the recommendations in the report and to allow the recommendations and observations to be published without seeking the approval of the AHSG.

With regard to the court, it is the author's view that it is the most notable institution that can adequately protect human rights in the continent. However, for this to be done, the bottlenecks placed at its entry must be removed. Presently, due to retention of the optional clause, cases from about forty seven countries cannot be entertained by the ACJHR.¹⁴⁷ This is a cause for serious concern. Indeed, it is important to remain mindful of the reason behind the establishment of the regional court. The failure of the states to protect human rights in their territories informed the establishment of the court. In light of that, to retain the optional clause is to incapacitate the institution that is designed to protect human rights in the continent. The result of such a retrogressive act is to make justice inaccessible to the majority of the citizens in Africa. That should not be allowed to continue. A situation, according to Samuel Taylor where there is "water, water, everywhere, nor any drop to drink"¹⁴⁸ should be discouraged.

¹⁴⁷ See the case of *Femi Falana v. African Union*, Application No. 001/2011 on this issue of optional clause.

¹⁴⁸ See Coleridge, S.T., "The Rime of the Ancient Mariner" available at <http://www.billmurphy.com/Poetry/Ancient_Mariner.pdf> (Accessed 20 May 2016).