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# **Institutional Structure of African Union Human Rights System: An Appraisal**

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## **ABSTRACT**

The Institutional Structure of the African Union Human Rights System has to do with the bodies or organs created by AU Human Rights Treaties, Charters and Conventions saddled with the responsibility to implement and enforce the provisions of the AU Charter on Human and People's Rights, AU Charter on the Rights and Welfare of the Child, Protocol to the Charter on the Rights of Women in Africa, Protocol on the Statute of the African Court of Justice and Human Rights and other international human rights treaties that state parties to the AU have ratified. They include: the African Commission on Human Rights, Committee of Experts on the Rights and Welfare of the Child, the African Court of Justice and Human Rights and so on. The aim of this paper was to critically appraise the institutional structure of African Union Human Rights System. Its major objectives were-to identify and appraise the institutional structure of African Union Human Rights System and make recommendations. The doctrinal research methodology was adopted. The paper revealed that the African Commission on Human and Peoples' Rights, the Committee of Experts on the Rights and Welfare of the Child and the African Court of Justice and Human Rights are the three fundamental institutions on human rights in Africa. It was also revealed that the African Commission only makes concluding observations and recommendation on human rights issues brought before it; and its decisions lack binding force as it is just a quasi-judicial body. It was further revealed that individuals from states parties which have not complied with the provisions of Article 8(3) of the Protocol on the Statute of the African Court of Justice and Human Rights cannot bring matters before the court. It was concluded that the findings, concluding observations and recommendations of the African Commission lack binding force; and that the powers implicit in state sovereignty work against the enforcement mechanism of some of the AU human rights institutions. The paper recommends that Article 8(3) of the Protocol on Statute of the African Court of Justice and Human Rights be expunged to give way for individuals whose rights have been violated and have exhausted local remedies and still dissatisfied to access the court for redress.

**Keywords:** Institution, Structure, Institutional Structure, African Union, Human Rights, System

## **1 INTRODUCTION**

The African Charter on Human and Peoples' Rights<sup>1</sup> is an African Union Human Rights Charter containing normative and institutional structures aimed to promote and protect human and peoples' rights in the African Continent. The Charter was adopted by the Assembly of Heads of States and Governments in 1981 and entered into force in 1986.<sup>2</sup> It has been ratified by fifty four (54) countries

<sup>1</sup>African Charter on Human and Peoples' Right 1981.

<sup>2</sup>C Heyns and M Killandaer, "The African Human Rights System in FG Isa and K De Fayter (eds), *International Human Right Law in a Global Context* (Bibao: University of Deciste 2009), 859.

out of the 55 member states of the African Union<sup>3</sup> except Morocco. The Sole Supervisory institution or body created by the African Charter is the African Commission on Human and Peoples' Rights (African Commission)<sup>4</sup>. The Commission is charged with the responsibility to promote human and peoples' rights and ensure their protection in Africa.<sup>5</sup> The African Commission was constituted and met for the first time in 1987<sup>6</sup>. The Commission has adopted its own rules and procedure (amended in 1995)<sup>7</sup>. There are two protocols to the African Charter, namely: the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Human Rights Protocol)<sup>8</sup>. The African Human Rights Protocol was adopted in 1988 and entered into force in January 2004,<sup>9</sup> currently, the Human Rights Courts as been merged with the African Court of Justice. The second protocol that has supplemented the African Charter is the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003 and entered into force in November, 2005.<sup>10</sup>

The following instruments also play a strategic roles in the African Human Rights System: the African Union Convention Governing Specific Aspects of Refugee Problems in African<sup>11</sup>, entered into force in 1974. The Convention has been ratified by forty six (46) member States of the African Union. The African Charter on the Rights and Welfare of the Child (African Children Charter)<sup>12</sup>. The African Children Charter entered into force on 29<sup>th</sup> November, 1999<sup>13</sup>. The African Children Charter has been ratified by fifty three Member States of the African Union<sup>14</sup>. A special monitoring body for the African Children's Charter, the African Committee on the Rights and Welfare of the Child was established by the Charter.<sup>15</sup> The Cultural Charter for Africa<sup>16</sup> was adopted by the Organization of African Unity (OAU) now African Union (AU) in 1976 and came into force in 1990. Another treaty pertinent to human rights in African is the Convention on Prevention and Combating Corruption,<sup>17</sup> adopted by the Assembly of Heads of States and Government of the Organization of African Unity (OAU), now African Union in 2003, which entered into force in 2006; the Convention on Elimination of Mercenaries in Africa, was adopted in 1977 and entered into force in 1985;<sup>18</sup> the OAU (now AU) Convention on the Prevention and Combating of Terrorism was adopted in 1999 and entered into force in 2002.<sup>19</sup> The African convention on the Conservation of Nature and Natural Resources was adopted by the Assembly of Head of States and Government of the African Union on the 15<sup>th</sup> day of September, 2003 and entered into force on June 16, 2016. This work will critically examine institutional structure of African Human Rights System.

## **2 Institutional Structure of African Human Rights System**

The institutions mid-wifed by the African Union Human Rights Instruments include: the African Commission on Human and Peoples Rights,<sup>20</sup> African Court of Justice and Human Rights,<sup>21</sup> the African Committee on the Rights and Welfare of the Child,<sup>22</sup> the African Peer Review Mechanism.<sup>23</sup>

<sup>3</sup>African Commission in Human and Peoples Rights 'State parties to the African Charter' <<https://achpr.au.int/en/states>>accessed 24<sup>th</sup> October, 2023.

<sup>4</sup>African Charter en Human and peoples' rights (n<sup>1</sup>), art 30.

<sup>5</sup>*Ibid.*

<sup>6</sup>C Heyns and m Kellander (n<sup>2</sup>).

<sup>7</sup>*Ibid.*

<sup>8</sup>*Ibid.*

<sup>9</sup>*Ibid.*

<sup>10</sup>*Ibid.*

<sup>11</sup>Convention Governing the Specific Aspect of Refugee problem in Africa 1969, Arts 1-15.

<sup>12</sup>African Charter on the Rights and Welfare of the Child 1990.

<sup>13</sup>African Charter on the Rights and Welfare of the child" <<https://au.int/sites/default/files/treaties/36804-treaty-african-charter-on-rights>> accessed 24<sup>th</sup> October, 2023.

<sup>14</sup>African Network for the Prevention and Protection Against Child Abuse and Neglect of the Rights and Welfare of the Child (ACRWC)' <<https://www.anppcan.org/the-african-charter-on-the-rights-and-welfare-of-the-child>>accessed 24<sup>th</sup>, 2023.

<sup>15</sup>ACRWC (n<sup>12</sup>), art 32.

<sup>16</sup>Cultural Charter for Africa 1979.

<sup>17</sup>Convention on Preventing and Combating Corruption 2003.

<sup>18</sup>Convention on Elimination of Mercenarism 1977.

<sup>19</sup>AU Convention on Prevention and Combating of Terrorism 1999.

<sup>20</sup>African Charter (n<sup>1</sup>), art 30.

<sup>21</sup>Protocol to the Statute of the African Court of Justice and Human Rights 2008, art 2.

<sup>22</sup>African Charter on the Rights and Welfare of the child (n<sup>12</sup>) art 32.

The main organs of the African Union such as the Assembly of Heads of States and Government, the Executive Council, the Permanent Representative Committee, the Pan African Parliament, the African Union Commission, Specialized Technical Committees, the Economic, Social and Cultural Council, Financial Institutions and the Peace and Security Council<sup>24</sup> play active roles in the promotion and protection of human and peoples' rights within the African Continent.

### **2.1 The African Commission on Human and Peoples' Rights**

The African Charter in its article 30 provides for the creation of the African Commission on Human and Peoples' Rights.<sup>25</sup> The Charter only creates a Commission on Human Rights, without a Court on Human Rights compared to other two regional human rights systems in the world-Europe and the Americas. The African Commission on Human and Peoples' Rights, as stipulated by the Charter shall be made of eleven (11) members emanating from African Countries.<sup>26</sup> The Commissioners shall be people of worthy character and exemplary leaders with implicit and explicit traits of honesty, accountability and spirit of harmony.<sup>27</sup> The Commission shall not include more than one national of the same state.<sup>28</sup> Members of the commission shall serve in their personal capacities.<sup>29</sup> Election of members of the commission is by secret ballot, by the Assembly of Heads of State and Government from a list of persons nominated by the state parties to the charter.<sup>30</sup> It is the responsibility of the Secretary-General of the AU to invite state parties to the charter at least four months before the election to nominate candidates<sup>31</sup> and each state is entitled to one candidate, and where the state nominates two candidates, one of them may not be a national of that state.<sup>32</sup> The secretary also has a duty to make a list of aspirant in a sequential order to the Head of State and Government of the AU at least one month before the election.<sup>33</sup> The Members of the Commission shall be elected for a six years period and shall be eligible for re-election. However, the term of office of four members elected at the first election shall terminate after two years and the term of office of three others at the end of four years.<sup>34</sup> It is the responsibility of the Chairman of the Assembly of Heads of State and Government of the AU to draw lots to choose the members that will cease to hold office.<sup>35</sup> The elected members of the commission are obligated to make solemn declaration to discharge their duties impartially and faithfully.<sup>36</sup> If vacancy emanates of any post due to resignation, death, unforeseen circumstances or where a member fails to carryout his assigned duties, in any of the cases, the chairman of the commission shall immediately inform the Secretary General of the African Union who shall declare the seat vacant from the date the circumstance rendering the seat vacant occurs.<sup>37</sup> It is the duty of the Assembly of Heads of State and Government to replace the member whose seat became vacant and such member shall enjoy the remaining period of the term of office of whose term became vacant.<sup>38</sup> Every member of the commission shall hold office until the date his successor takes office.<sup>39</sup> It is the responsibility of the Secretary General of the African Union to appoint the secretary of the commission and shall also provide the staff and services necessary for effective discharge of the duties of the commission.<sup>40</sup>

The African Union shall bear the cost of staff and services.<sup>41</sup> It is the responsibility of members of the commission to elect amongst themselves a Chairman and a Vice Chairman for a two year period.<sup>42</sup>

<sup>23</sup> African Union Declaration on Democracy, Political, Economic and Corporate Governance 2002, Section 28.

<sup>24</sup> African Union Constitutive Act, art 5.

<sup>25</sup> African Charter (n<sup>1</sup>), art 30.

<sup>26</sup> African Charter (n<sup>1</sup>), art 32.

<sup>27</sup> *Ibid*, art 31.

<sup>28</sup> *Ibid*, art 32(1).

<sup>29</sup> *Ibid*, art 31(1).

<sup>30</sup> *Ibid*, art 33.

<sup>31</sup> *Ibid*, art 35(1).

<sup>32</sup> *Ibid*, art 34.

<sup>33</sup> *Ibid*, art 36(2)

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*, art 37.

<sup>36</sup> *Ibid*, art 38.

<sup>37</sup> *Ibid*, art 39(1) & (2).

<sup>38</sup> *Ibid*, art 39(3).

<sup>39</sup> *Ibid*, art 40.

<sup>40</sup> *Ibid*, art 41.

<sup>41</sup> *Ibid*.

The procedures guiding the business of the commission is produced by it in the meeting of the commission; seven members present shall form a quorum and in the case of equality of votes, the chairman shall have a casting vote.<sup>43</sup> Members of the commission enjoy diplomatic immunities in the discharge of their duties.<sup>44</sup> Emoluments and allowances of members of the commission is being provided for in the General Budget of the African Union.<sup>45</sup>

The functions of the commission are as follows:

- i. to collect documents, undertakes studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendation to governments.<sup>46</sup>
- ii. to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.<sup>47</sup>
- iii. cooperate with Africa and International Institutions concerned with the promotion of human and people's rights.<sup>48</sup>
- iv. interpret all the provisions of the charter at the request of state party and institution of AU or an African Organization recognized by the AU.<sup>49</sup>
- v. Ensure the protection of human and peoples' rights.<sup>50</sup>

### **2.1.1 Main Enforcement Mechanisms Employed by ACmHPR for the Fulfillment of Charter Norms.**

The main mechanism adopted by the African Commission on Human and Peoples' Rights to fulfill its objective of supervising compliance with the African Charter on Human and Peoples' Rights 1981 norms by the state parties are chronicled and explained below:

#### **A) Complaint Procedure: States and Individuals Communications**

Both States and Individuals may bring complaints to the African Commission on Human and Peoples' Rights alleging infractions of provisions of the African Charter on Human and Peoples' Rights by State parties. If any state party to the Charter has good reasons to believe that another state party to the charter has contravened charter provisions, it may draw, by written communication, the attention of the state to the matter;<sup>51</sup> the communication shall also be addressed to the Secretary General of the AU<sup>52</sup> and to the Chairman of the Commission; within three months of receipt of communication, the State to which the communication is addressed shall give the enquiring state written explanation or statement elucidating the matter,<sup>53</sup> this should include as much as possible, relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.<sup>54</sup>

It is instructive to note that by the succinct intendment of art 48 of the Charter, if within three months from the date on which the original communication is received, by the state to which it is addressed, the issue is not addressed or settled to the satisfaction of the two states involved through bilateral negotiation or by other peaceful procedure, either state shall have the right to submit the matter to the commission through the chairman and shall notify the other state concerned.<sup>55</sup>

The procedure aforesaid could be skipped by a state party who has good reason to believe that another state party has violated the provisions of the charter, by referring the matter of the violations directly to the commission, by addressing a communication to the chairman, the Secretary General of

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<sup>42</sup> *Ibid*, art 42(1).

<sup>43</sup> *Ibid*, art .

<sup>44</sup> *Ibid*, art 43.

<sup>45</sup> *Ibid*, art 44.

<sup>46</sup> *Ibid*, art 45(1).

<sup>47</sup> *Ibid*, art 45(2).

<sup>48</sup> African Charter (n<sup>1</sup>), art 45(3).

<sup>49</sup> *Ibid*, art 45(3).

<sup>50</sup> *Ibid*, art 4(2).

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*, art 48.

the African Union and the state involved.<sup>56</sup> The Commission can only adjudicate on matter brought before it when it is satisfied that all local remedies, if they exist, have been exhausted, unless it is conspicuous to the commission that the steps to accomplish in achieving these remedies would be unduly prolonged.<sup>57</sup>

The Commission may after receipt of communication from enquiring state, ask the state concerned to provide it with all relevant information,<sup>58</sup> it may also obtain from states concerned and from other sources all the information it deemed necessary.<sup>59</sup> When the commission is considering the matter, states concerned may be represented before it and submit written or oral presentation.<sup>60</sup> The Commission shall after receiving all necessary information regarding the matter before it, prepare within a reasonable period of time from the notification referred to in Article 48, a report to the states concerned, and communicates to the Assembly of Heads of State and Government.<sup>61</sup> While transmitting the report, the Commission may make to the Assembly of Heads of State and Government such recommendations it deems appropriate in the circumstance.<sup>62</sup>

The complaint system of the African Charter creates certain admissibility criteria before the commission; they include:

1. The states concern should have exhausted all available local remedies unless it is obvious to the commission that the procedure of attaining the remedies would be unduly prolonged.<sup>63</sup> It therefore means that a case may not be admissible by the commission if there are local remedies except there are clear chances that reliance in local remedies shall be unduly prolonged and without success. In *Purohit and Another v the Gambia*,<sup>64</sup> a case concerning detention in a mental health institution, the Commission gave an insightful decision on the exhaustion of local remedies when it held that:

The category of people being represented in the present communication are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the constitution are realistic remedies for them in the absence of legal aid services.<sup>65</sup>

2. the communication must not be written in disparaging or insulting language, directed against the state concerned and its institution or to the African Union,<sup>66</sup> the Commission applied this provision in *Ligue Camrounaise des Droits de l'Homme v Cameroon*.<sup>67</sup>
3. the communication must not be based exclusively on news disseminated through the social media.<sup>68</sup>
4. the communication is required to be submitted within a reasonable period from the time local remedies are exhausted from the date the commission is seized with the matter.<sup>69</sup>
5. The case for which the communication is made, would not have been settled by those states involved, in accordance with the principles of the Charter of the United Nations, or the Charter of the African Union or the provisions of the African Charter on Human and Peoples' Right.<sup>70</sup>

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<sup>56</sup> *Ibid*, art 49.

<sup>57</sup> *Ibid*, art 50.

<sup>58</sup> *Ibid*, art 51(1).

<sup>59</sup> *Ibid*, art 52.

<sup>60</sup> *Ibid*, art 51(2).

<sup>61</sup> African Charter (n<sup>1</sup>), art 52.

<sup>62</sup> *Ibid*, art 53.

<sup>63</sup> *Ibid*, art 50.

<sup>64</sup> (2003) AHRLR 96.

<sup>65</sup> *ibid*, para 37.

<sup>66</sup> African Charter (n<sup>1</sup>), art 56(3).

<sup>67</sup> (2000) AHRLR 61 (ACHPR 1997).

<sup>68</sup> African Charter (n<sup>1</sup>), art 56(41).

<sup>69</sup> *Ibid*, art 56(6).

<sup>70</sup> *Ibid*, art 56(7).

It is instructive to note that where the violations are serious or massive, it triggers the applicability of Article 58 of the Charter, where the Commission shall draw the attention of the Assembly of Heads of State and Government to the special cases.<sup>71</sup>

The procedure by which state brings a complain about an alleged human rights violation by another state is not often adopted.<sup>72</sup> One of the few instance where states complaint procedure was adopted, was in the case brought by *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*.<sup>73</sup> The so-called individual procedure is not conspicuously provided for in the African Charter, however, in practice, the commission accepts individuals as well as NGO's communication. The case law of the commission reveals that the complainant does not need to be a victim or a family member of the victim.<sup>74</sup> The Commission in the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, expressed its happiness and thanks to: the two human right NGOs which brought the matter under its purview ... this a demonstration of the usefulness to the Commission and individuals of *action populais*, which is wisely allowed under the African Charter.<sup>75</sup> The individual complaints procedure is frequently used than the interstate mechanism of the African Charter.<sup>76</sup>

### **B) Consideration of State Reports**

Each state party is duty bound to submit a report every two years on its efforts to comply with the African Charter.<sup>77</sup> The State Parties report will contain efforts made by them on legislative or other measures regarding giving effects to the rights and freedoms recognized and guaranteed by the African Charter. The African Charter in its Article 62 is silent as to who has the right to receive the states' report, however, the African Commission on Human and Peoples' Rights recommended to the Assembly of Heads of State and Government that the Commission be given the mandate to consider the reports; the Assembly has approved or endorsed this recommendation. NGOs are allowed to submit shadow or alternative reports but the effect of this procedure is reduced by the lack of access of NGOs to the state reports to which they are supposed to react. Reporting by states parties must be in consonance with the guidelines adopted by the Commission. Presently, there are two types of guideline; the one adopted in 1988 is elaborate and complex and the other, adopted in 1998, is clearly simple and brief.

The aim of reporting under the African Charter by State parties is both introspection and inspection. Introspection refers to the process where the state, in writing its report, measures itself against the provisions of the African Charter. Inspection refers to the process where the Commission measures performance of state parties against charter provision.<sup>78</sup> The focus is to encourage a constructive dialogue between the commission and states.<sup>79</sup> Though, states parties have been responding to their obligation to report, six states parties as at 2<sup>nd</sup> day of August, 2023 have not yet submitted their initial reports on the implementation of the provisions of the Charter, some of which are more than thirty-five (35) years overdue as expressed by the commission in its resolution.<sup>80</sup> The Commission considers the reports in public session and make concluding observation and recommendation.

### **C) Special Rapporteurs and Working Groups**

The African Charter does not have a clear provision authorizing the appointment of Special Rapporteurs; the Commission has appointed a number of Special Rapporteurs. The Commission has appointed a number of special Rapporteurs, with different level of success.<sup>81</sup> It has been described as another innovation from the Commission, however, it has been argued that the legal basis for the engagement of Special Rapporteurs is to be found in Article 46, which allows for any<sup>82</sup> appropriate method of investigation. Examples are special Rapporteurs on Extrajudicial, Summary or Arbitrary

<sup>71</sup> *Ibid.*, art 58.

<sup>72</sup> *Ibid.*, art 47 – 54.

<sup>73</sup> (2004) AHRLR 19 (ACHPR 2003).

<sup>74</sup> *Malawi African Association and others v Mauritania* (2000) AHRLR 78 (AC HPR 2000).

<sup>75</sup> (2001) AHRLR 49 (ACHPR 2001).

<sup>76</sup> African Charter (n<sup>1</sup>), art 62).

<sup>77</sup> *Ibid.*

<sup>78</sup> AHG/Res 176 (XXIV), printed in Human Rights Law in Africa (1999).

<sup>79</sup> C Heyns and M Killander (n<sup>2</sup>) 880.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> ACHPR/Res. 566 (LX XVI) 2003.

Executions, Conditions of Detention<sup>83</sup> and Rights of Women in the mid 1990s. Also, in recent past, the Commission has appointed Special Rapporteurs on Freedom of Expression and Access to Information; Refugees and Internally Displaced Persons, Human Rights Defenders and the rights of Older persons.<sup>84</sup>

The activities of the Special Rapporteurs appointed by the Commission has contributed immensely in the Commission's quest to constantly perform its duties or functions as contained in the African Charter.

### **2.1.2 Intercourse with AU Political Bodies**

The Annual Activity Reports of the Commission usually contained the Commission's decisions, resolutions and other acts. It is submitted each year for approval to publish in the meetings of the Assembly of Heads of State and Government of the AU in compliance with Article 59 of the Charter. The Assembly has not delegated the authority to discuss the Activity 204<sup>85</sup> Report to the Executive Council, nevertheless, the Activity Report is still formally adopted by the Assembly as required by the protocol to the African Courts on Human and Peoples' Rights.<sup>86</sup>

Several reasons have been given why a commission, and not a court was provided for in the African Charter in 1981 as the institution charged with the responsibility for monitoring compliance of states parties with the charter; it has been asserted that the traditional way of resolving disputes in Africa, which is through mediation and conciliation, and not adversarial may have informed the non-inclusion of a court on human rights in the African Charter.<sup>87</sup> Similarly, there is the view that member states of the OAU (now African Union) were jealous of their newly found sovereignty.<sup>88</sup> The idea of a human rights court for Africa was made by the OAU thirteen years after the adoption of the African Charter, when in 1994 the Assembly adopted resolution requesting the Secretary-General of the OAU to convene meeting of experts to consider the establishment of an African Court on Human and Peoples' Rights.<sup>89</sup>

### **3 African Committee on the Rights and Welfare of the Child.**

The African Charter on the Rights and Welfare of the Child was adopted in 1990 and entered into force in November 1999. The Charter established the African Committee of Experts on the Rights and Welfare of the Child to promote and protect the right and welfare of the child. The Committee has 11 members of high moral standing, integrity, impartiality and competence in matters of rights and welfare of the child.<sup>90</sup> The Charter established the African Committee of Experts on the Rights and Welfare of the child to promote and protect the rights and welfare of the child.<sup>91</sup> Members of the Committee serves in their personal capacity;<sup>92</sup> and the Committee shall not include more than one national of the same state.<sup>93</sup> The Committee held its first meeting in 2002.<sup>94</sup> The Committee has adopted rules of procedure and guidelines for state reports in consonance with Article 38 of the African children charter.

The Members of the Committee are be elected for a term of 5 years and may not be re-elected, however, the term of four members elected at the first election shall expire after two years and the term of six others after four years.<sup>95</sup> The African Committee of Experts on the Rights and Welfare of the Child has four fundamental functions: They include:

I. to promote and protect the rights enshrined in the charter and in particular to:

<sup>83</sup> F Viloen, *International Human Rights Law in Africa* (Oxford: Oxford University Press 2007) 392 – 299.

<sup>84</sup> J Harrington, 'Special Rapporteurs of African Commission on Human and Peoples' Right (2001)(1) *African Human Rights Journal*, 247.

<sup>85</sup> C Heynes and Killander (n) 861.

<sup>86</sup> *Ibid.*

<sup>87</sup> African Charter (n<sup>1</sup>), art 59(3).

<sup>88</sup> J Harrington (n...) 306.

<sup>89</sup> AGH/Res 230 (xxx) 1994 Reprinted in *Human Rights Law in African* (1999).

<sup>90</sup> African Charter on the Rights and Welfare of the Rights and Welfare of the Child 1990, art 32.

<sup>91</sup> *Ibid*, art 33(1).

<sup>92</sup> *Ibid*, art 33(2).

<sup>93</sup> *Ibid*, art 33(3).

<sup>94</sup> C Heyns and M Kellander (n...), 880.

<sup>95</sup> African Charter on the Rights (n<sup>221</sup>), art 37(1).

- a) collect and document information, commission interdisciplinary assessment of situations on African problems in the field of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and take recommendations to governments;<sup>96</sup>
  - b) formulate and lay down principles and rules aimed at protecting the rights and welfare for the child;<sup>97</sup>
  - c) cooperate with other African International and Regional Institutions and Organizations concerned with the promotion and protection of the Rights and Welfare of the child;<sup>98</sup>
- II. to monitor the implementation and ensure protection of the rights enshrined in the charter.<sup>99</sup>
  - III. to interpret the provisions of the African children charter at the request of a state party, an institution of the AU or any other person or institution of the AU or any other person or institution recognized by the AU, or any state party; and<sup>100</sup>
  - IV. perform such other tasks as may be entrusted to it by the Assembly of Heads of State and Governments, Secretary-General of the AU and any other organs of the AU, or the United Nations.<sup>101</sup>

State parties are obligated to report to the committee within two years from the entry into force of the convention for the state parties concerned and thereafter every three years.<sup>102</sup> The Committee may receive communication from any person, group or non-governmental organization recognized by the African union by a member state or the United Nations related to the matter covered by the charter.<sup>103</sup> The committee shall submit to each ordinary session of the Assembly of Heads of State and Government every two years, a report on its activities and on any communication made; the Committee shall publish its report after it has been considered by the Assembly of Heads of State and Government.<sup>104</sup>

#### **4 African Court of Justice and Human Rights**

The African Court on Human and Peoples Rights established by the protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Right 2003 has been merged with the African Court of Justice in 2008 through the Protocol on the Statute of the African of Court of Justice and Human Rights in its Article 2. Article 2 of the Protocol has this to say:

The African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union established by the Constitutive Act of the African Union are hereby merged into a single court and established as 'The African Court of Justice and Human Rights'<sup>105</sup>

The Protocol in its Article 3 has it that references made to the 'Court of Justice' in the Constitutive Act of the African Union shall be read as references to the 'African Court of Justice and Human Rights'.<sup>106</sup>

The Court is made up of sixteen (16) Judges who are nationals of states parties. However upon recommendation of the Court, the Assembly may review the number of judges.<sup>107</sup> By Article 3(2) of the Statute of the Court, 'the court shall not at any one time, have more than one judge from a single

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<sup>96</sup> *Ibid*, art 42(a)(I).

<sup>97</sup> *Ibid*, art 42(a)(II).

<sup>98</sup> *Ibid*, art 42(a)(III).

<sup>99</sup> *Ibid*, art 42(b).

<sup>100</sup> *Ibid*, art 42(c).

<sup>101</sup> *Ibid*, art 42(d).

<sup>102</sup> *Ibid*, art 43(1)(a)(b).

<sup>103</sup> *Ibid*, art 44(1).

<sup>104</sup> *Ibid*, art 34.

<sup>105</sup> Protocol on the Statute of the African Court of Justice and Human Rights 2008, art 2.

<sup>106</sup> *Ibid*, art 3.

<sup>107</sup> Statute of the African Court of Justice and Human Rights 2008, art 3(1).



member state'.<sup>108</sup> Each geographical region of the continent, as determined by the decisions of the Assembly shall, where possible, be represented by three (3) Judges except the Western Region which shall have four (4) Judges.<sup>109</sup>

The African Court of Justice and Human Rights by virtue of Article 2 of the Statute shall perform the following functions:

1. The African Court of Justice and Human Rights shall be the main judicial organ of the African Union.<sup>110</sup>
2. The Court shall be constituted and function in accordance with the provisions of the present statute.<sup>111</sup>

The Court has jurisdiction over all cases and over all legal disputes submitted to it in accordance with the statute which relates to:

- i. the interpretation and application of the Constitutive Act;<sup>112</sup>
- ii. the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;<sup>113</sup>
- iii. the interpretation and application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African or any other legal instrument, relating to human rights, ratified by state parties concerned;<sup>114</sup>
- iv. any question of international law;<sup>115</sup>
- v. all acts, decisions, regulations and directives of the organs of the Union;<sup>116</sup>
- vi. all matters specifically provided for in any other agreements that states parties may conclude among themselves or with the Union and which confer jurisdiction on the Court;<sup>117</sup>
- vii. the existence of any fact which established would constitute a breach of the obligation owed to a state party or to the Union;<sup>118</sup>
- viii. the nature or extent of the reparation to be made for breach of an international obligation.<sup>119</sup>

Article 29 and 30 provide the list of entities eligible to submit cases to the court. By Article 30, the following entities shall also be entitled to submit cases to the court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by states parties concerned:

- a) state parties to the present protocol;<sup>120</sup>
- b) the African Commission on Human and Peoples' Rights;<sup>121</sup>
- c) the African Committee of Experts on the Rights and Welfare of the Child;<sup>122</sup>
- d) African Inter-Governmental Organizations accredited to the Union or its Organs;<sup>123</sup>
- e) African national Human Rights Institutions;<sup>124</sup>
- f) Individuals or relevant non-governmental organizations accredited to the African Union or to its organs, subject to the provisions of Article 8(3) of the Protocol.<sup>125</sup> Article 8(3) of the Protocol on the Statute of the African court of Justice and Human Rights has it that: 'Any

<sup>108</sup> *Ibid*, art 3(2).

<sup>109</sup> *Ibid*, art 3(3).

<sup>110</sup> Statute of the African Court of Justice and Human Rights (n<sup>913</sup>), art 2(1).

<sup>111</sup> *Ibid*, art 2(2).

<sup>112</sup> *Ibid*, art 28(a).

<sup>113</sup> *Ibid*, art 28(b).

<sup>114</sup> *Ibid*, art 28(c).

<sup>115</sup> *Ibid*, art 28(d).

<sup>116</sup> *Ibid*, art 28(e).

<sup>117</sup> *Ibid*, art 28(f).

<sup>118</sup> *Ibid*, art 28(g).

<sup>119</sup> Statute of the African Court of Justice and Human Rights (n<sup>913</sup>), art 28(h).

<sup>120</sup> *Ibid*, art 30(a).

<sup>121</sup> *Ibid*, art 30(b).

<sup>122</sup> *Ibid*, art 30(c).

<sup>123</sup> *Ibid*, art 30(d).

<sup>124</sup> *Ibid*, art 30(e).

<sup>125</sup> *Ibid*, art 30(f).

member state may, at the time of signature or when depositing its instrument of ratification or accession or any time thereafter, make a declaration accepting the competence of the court to receive cases under Article 30(f) involving a state which has not made such a declaration’.

Also, the following entities by Article 29 are entitled to submit cases to the court on any issue or disputes provided for in Article 28 of the Statute:

- i. State parties to the present protocol;<sup>126</sup>
- ii. The Assembly, the Parliament, and other organs of the Union authorized by the Assembly;<sup>127</sup>
- iii. A staff member of the African Union on Appeal, in a dispute and within the limits and under the terms and conditions laid down in the staff rules and regulations of the Union;<sup>128</sup>

The Court is not open to states, which are not members of the Union. The Court also does not have jurisdiction to deal with a dispute involving a member state that has not ratified the protocol.<sup>129</sup>

The decisions of the Court have binding force on the parties;<sup>130</sup> its decision is final.<sup>131</sup> The parties are obligated by virtue of Article 46(3) to comply with the Judgment made by the Court in any dispute which the parties within the time stipulated by the court and guarantee its execution.<sup>132</sup> In an event a party has failed to comply with the judgment of the Court, the court shall refer the matter to the Assembly which shall decide upon measures to be taken to give effect to that judgment.<sup>133</sup> The Commission may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act.<sup>134</sup>

It is instructive to note that the judges of the court are elected for a period of six (6) years and may be reelected only once; however, the term of office of eight (8) judges, four (4) from each section, elected during the first election will end after four (4) years.<sup>135</sup>

## 5 Impediments to the African Union Institutional Structure on Human and Peoples’ Rights

Appraisal of institutional structure of African Human Rights System. This segment of the work will state in synopsis the weaknesses, lapses or obstacles fighting against effective and efficient protection and promotion of human and people’s rights by the African Union Human Rights institutions. The human rights institutions created by the African Charter on Human and Peoples’ Right 1981, Protocol on the Statute of the African Court of Justice and Human Rights 2008, the African Charter on the Rights and Welfare of the Child 1990 are African Commission on Human and Peoples Rights, the African Court of Justice and Human Rights and the African Committee of Experts on the Rights and Welfare of the Child. Let me critically appraise them *seriatim*.

### a. African Commission on Human and Peoples’ Rights

The powers inherent in state sovereignty appear to be working against the enforcement of recommendations of the African Commission on States parties as evidence abound where states have refused to implement the recommendations of the Commission. According to a study on the compliance of states with findings of the Commission, there has been full state compliance in six of forty four (44) cases where the Commission found states parties in contravention of the African Charter. The study found that there has been non-compliance in thirteen (13) cases, partial compliance in fourteen (14) cases, seven (7) cases of situational compliance (through changes of government) and unclear compliance of four (4) cases.<sup>136</sup>

The principles implicit in state sovereignty, that is, the principles on non-interference in the domestic affairs of sovereign states by another state or body, territorial integrity and supremacy make it difficult for the Commission to ensure that its decisions against state parties are enforced.

<sup>126</sup> *Ibid*, art 29(1)(a).

<sup>127</sup> *Ibid*, art 29(1)(b).

<sup>128</sup> Statute of the African Court of Justice and Human Rights (n<sup>913</sup>), art 29(1)(c).

<sup>129</sup> *Ibid*, art 29(2).

<sup>130</sup> *Ibid*, art 48(1).

<sup>131</sup> *Ibid*, art 48(2).

<sup>132</sup> *Ibid*, art 48(3).

<sup>133</sup> *Ibid*, art 48(4).

<sup>134</sup> *Ibid*, art 48(5).

<sup>135</sup> *Ibid*, art 8(1).

<sup>136</sup> F Vilcon and L Louw, ‘State Compliance with the recommendations of the African Commission on Human and People’s Right (2007)(101). The American Journal of International Law, 1.

The African Human Rights Commission is limited to making recommendations to the General Assembly of Heads of State and Government and report to state concerned,<sup>137</sup> thus, it does not have any credible enforcement mechanism; the Commission is not a judicial body; it only performs quasi-judicial functions.

**b. African Court of Justice and Human Rights**

Though the Court (human rights segment) decisions are binding on states parties, the restriction on jurisdiction to entertain individual communications possess, in my considered opinion, a grave disadvantage to individuals whose human and peoples' rights have been infringed. Article 8(3) of the Protocol on the statute of the African Court of Justice and Human Rights states as follows: "Any member state may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Art 30(f)..."<sup>138</sup>

The direct implication of Article 8(3) is that individuals who are from States Parties to protocol but have not made the requisite declaration will lack the *locu standi* to institute an action before the African Court of Justice and Human Rights. In African, States and their agents are the major culprits of human rights infractions, accordingly, the tendency of many states parties to ratify and make the declaration required under Article 8(3) is minimal No doubt, only about eight countries out of the thirty four (34) countries which have ratified the African Court protocol have filed or deposited the special declaration conferring jurisdiction on the court to receive and entertain NGO's and individual applications.<sup>139</sup> These countries include: Burkina Faso, Gambia, Ghana, Guinea Bissau, Mali, Malawi, Nigeria and Tunisia. The devastating effects of Article 8(3) of the Protocol was felt in the case of *Femi Falana v Africa Union*,<sup>140</sup> the applicant sought to have Article 34(6) of the African Court on Human and People's rights (now Art 8(3) of the Protocol) annulled for violating the provisions of Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples' Rights; the court held that its lacked the requisite jurisdiction to try the case. It appears the court declined jurisdiction because, Femi Falana as a Nigerian and Nigeria has not made the declaration stated under Articles 34(6) (art 8(3)) to confer competence on the court to receive and entertain cases from individual and NGOs from Nigeria.

**6 Jurisdiction of the European Court of Human Rights: Lessons for the African Court of Justice and Human Rights**

The jurisdiction of the European Court of Human Rights covers all issues concerning the interpretation and application of European Convention on Human Rights and the Protocols thereto, which are brought before it by those who have the legal standing. In consonance with Articles 33 and 34 of the Convention, the following can institute actions or file application before the European Court of Human Rights.

- a. Any member state which refers to the court any alleged violation of the provisions of the convention and the protocols thereto, and which, in its opinion can be imputed to another state party.<sup>141</sup>
- b. Any person, non-governmental organization or group of individuals claiming to be the victim of violation of the convention by one of the members states.<sup>142</sup>

It is pertinent to state that, regarding inter-state complaints, any member state, even though, it may not be that of the nationality of the victims of the alleged infractions, can institute a complaint before the court. In the case of individual application, the individual must assert having been a victim of violation of one of the rights protected under the convention or its protocols. As regard individual application, the court may only deal with the matter after all domestic remedies have been exhausted in accordance with generally recognized rules of international law, and within a period of six months

<sup>137</sup> African Charter (n<sup>1</sup>), art 52 & 53.

<sup>138</sup> Protocol on the Statute of the African (n<sup>118</sup>) art 8(3).

<sup>139</sup> African Court on Human and Peoples' Rights, 'basic Information' <<https://www.african.court.org>> accessed 23rd February, 2023.

<sup>140</sup> 001/2011.

<sup>141</sup> European Convention on Human Rights 1950, art 33.

<sup>142</sup> *Ibid*, art 34.

from the date on which the final decision was taken,<sup>143</sup> if the court found that the application submitted under Article 34 is anonymous or is substantially the same as a matter that has already been examined by the court or has already been submitted to another procedure of international investigation or settlement and contain no relevant new information,<sup>144</sup> it may not deal with it.

The court also considers not admissible any complaint or application from an individual that is deemed to be inconsistent with the provisions of the convention or its protocols for any of the following reasons:

- i) it alleges the violation of a right which is not one of those protected under the convention or its protocols,<sup>145</sup>
- ii) it involves a right recognized in a protocol to which the state concerned is not party,<sup>146</sup>
- iii) it refers to events which have happened outside the jurisdiction of the state concerned (incompatibility rational loci),<sup>147</sup>
- iv) it deals with events prior to the ratification of the convention or one of its protocols by state concerned (incompatibility rational temporis).<sup>148</sup>

The court shall reject any application which is considered inadmissible under Article 35 and may do so at any stage of the proceeding.<sup>149</sup>

## 7 CONCLUSION AND RECOMMENDATIONS

The African Commission on Human and Peoples' Rights, the African Court of Justice and Human Rights and the African Committee of Experts on the Rights and Welfare of the Child are the three fundamental human rights treaty bodies or institutions saddled with the responsibility of protecting and promoting human and peoples' rights within the African Continent aside national human rights enforcement mechanisms. These institutions built up what is called the institutional structure of African Union human rights system.

The African Commission on Human and Peoples' Rights only publishes reports of its findings or investigations and make recommendations. Its decision lack binding force, it is not a judicial body but performs quasi-judicial functions. The powers implicit in state sovereignty work against effective enforcement of the decisions of the Africa Commission as there are many instances where the Commission's recommendations were not obeyed by States parties. The African Court of Justice and Human Rights' decisions are binding on state parties to the Protocol and statute stabilizing the court. The Court has jurisdiction to receive both inter-states, individual and NGOs applications. Regarding individual application, the provision of Article 8(3) of the Protocol on the Statute of the African Court of Justice and Human Rights requiring state parties to make declaration of competence of the court to receive individual applications, before it can do so, has worked against the enforcement of the right of individuals whose rights have been infringed but whose states have not fulfilled the requisite declaration of competence of the court, to redress their issues. Article 8(3) of the Protocol on the Statute of the Africa Court of Justice and Rights be expunged.

It is recommended that Article 8(3) of the Protocol on the statute of the African Court of Justice and Human Rights be expunged to give way to individuals who have exhausted local remedies to approach the court for redress.

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<sup>143</sup> *Ibid*, art 35(1).

<sup>144</sup> *Ibid*, art 35(2).

<sup>145</sup> *Ibid*, art 35(3)(a).

<sup>146</sup> J A C Sakedo, *The European Convention on Human Rights in F G and K de Feyter (eds) International Human Rights Law in Global Context (Bibao: University of Deusto 2009)652.*

<sup>147</sup> *Ibid*.

<sup>148</sup> *Ibid*.

<sup>149</sup> European Convention (n<sup>241</sup>), art 35(4).