

A REVIEW OF PROCEDURAL AND JURISDICTIONAL CHALLENGES IN ENFORCING INTERNATIONAL HUMAN RIGHTS LAW UNDER THE AFRICAN CHARTER REGIME

MORRIS KIWINDA MBONDENYI*

NIXON SIFUNA**

ABSTRACT

The interpretation and enforcement of international human rights law has tremendously evolved since the adoption of the African Charter on Human and Peoples' Rights. The Charter introduced procedural and jurisdictional paradigms that have moulded this branch of law to resonate Africa's context and values, by for instance, evolving concepts and approaches distinct from those of the other regions. While striving to achieve this, the Charter has also had to grapple with an avalanche of procedural and jurisdictional challenges. This Article highlights these challenges and proposes ways in which they can be surmounted. It proceeds on the premise that contrary to the usual and indeed mistaken presumption that the flaws in Africa's regional human rights regime are irreparable, certain reforms could still be initiated and compromises made as a way of surmounting some of these challenges.

I INTRODUCTION

International human rights law is now recognised as a distinct branch of law with its own jurisprudence and norms. It has registered a tremendous positive impact on the legal systems throughout the world.¹ The true dimensions of this evolving legal situation could hardly be foretold half a century ago.² Umozurike correctly observes that human rights appeared to enjoy low esteem during the 1970s, particularly in Africa.³ His observations are based on the passiveness the former Organisation of African Unity (OAU) maintained in suppressing human rights in a number of independent African states by 'unduly emphasising the principle of non-interference

*LLD Candidate, University of South Africa (UNISA). mbondenyi@yahoo.com

**PhD Candidate University of the Witwatersrand School of Law and a Lecturer in Law at Moi University, Kenya. sifunan@clm.pg.wits.ac.za.

¹ See generally the arguments advanced in D Titus, *The applicability of the International Human Rights norms to the South African legal system* (1993) 2-3. Titus acknowledges that it is not until as recently as 1946 when the impact and importance of International Human Rights law began to be felt, particularly in Africa, but more so, in South Africa.

² See M Kirby, 'The role of the judge in Advancing Human Rights by reference to international Human Rights Norms', *Australian LJ* (1988) 62, 514, 530.

³U Umozurike, 'The African Charter on human and people's rights', *American J of Intl L* (1983) 77, 902.

in the internal affairs of member state'.⁴ The massacres of thousands of Hutus in Burundi, as well as the despotic regimes of dictators Idi Amin of Uganda, Marcias Nguema of Equatorial Guinea and Jean-Bedel Bokassa of the Central African Republic seem to have escaped the rather blind eye of the then OAU.⁵

Indeed even events in the international circles at the time were less conducive to the thriving of a robust human rights culture. International law emphasised the doctrine of sovereignty of states which in a way created focus on the consolidation of political power rather than the protection and promotion of human rights. In pursuit of sovereignty, independent states were constantly in conflict amongst themselves while the non-independent states pursued their independence. There was therefore an upsurge of violence and by extension, violation of human rights. As a result of the need to contain this state of chaos and stem the egregious violation of human rights and the culture of impunity, numerous treaties were concluded at both the global and regional levels creating mechanisms to address this situation.

At the global level, the United Nations created, for example, reporting mechanisms in the Convention on the Elimination of All Forms of Racial Discrimination⁶; the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR); the Convention Against Torture⁷; and more recently, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.⁸ At regional levels complaints are allowed under the European Convention on Human Rights and Fundamental Freedoms⁹; the American

⁴Ibid. Umozurike expresses his disapproval of the OAU's inability to end the culture of impunity in the continent by quoting President Se'kou Toure's assertion that the unity was not 'a tribunal which could sit in judgement on any member state's internal affairs.' He sees this attitude as a self-imposed inhibition by the OAU members, 'not so much to protect their legitimate states', as to fend off international concern for gross abuses of Human rights in some African states.'

⁵ Ibid.

⁶ CERD, Art 14. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965; entry into force 4 January 1969, in accordance with article 19

⁷ CAT, Art 22. The procedures stipulated under this Convention are similar in a number of ways to those provided for under the CERD.

⁸ The United Nations General Assembly adopted the Optional Protocol in October 1999 (A/res/54/4). The Optional Protocol entered into force on 22 Dec 2000, after ten states had become party thereto.

⁹ Art 25-34, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.

According to this Convention, complaints could be made either through the Commission or the European Court for human rights. Both the Court and the Commission have their own procedures that at some point are distinct from each other.

Convention on Human Rights¹⁰; and the African Charter on Human and Peoples' Rights.¹¹ Some mixed-model approaches have also been initiated to complement the weaknesses of both the international and national justice systems.¹²

Whereas the universal system of human rights played a vital role in the enforcement of international human rights law immediately after the Second World War, its wide *ratione loci* undermined its efficacy.¹³ Other factors such as lack of adequate resources to accommodate the increasing numbers of violations, the effects of the cold war and the issue of veto powers made it even harder for international justice to be pursued from that level. This meant that the practical way to addressing international human rights issues was through regional efforts. These efforts led to the emergence of regional human rights systems, namely, the European, Inter-America and African systems. On the African plane, the establishment of institutions such as the African Commission on Human and Peoples' Rights (ACHPR)¹⁴, and more recently the African Court on Human and Peoples' Rights¹⁵, was therefore a timely innovation that somehow encouraged the perpetuation of the culture of human rights in the continent.

However, no sooner had the African Commission been incepted than a series of setbacks and hurdles set in. The African human rights regime generally, and the

¹⁰See, Art 44, American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American system, OEA/Ser.L. V/II.82 doc.6 rev.1 at 25 (1992). This Article provides that 'Any person or group of persons, or any nongovernmental entity legally recognised in one or more member state of the organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a state party.'

¹¹ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986; See art 55. Arts 56 to 59 of the Charter provide further directions on how the Commission is to deal with the Communications presented to it.

¹²Following a civil war that rocked Sierra Leone, the UN Security Council adopted Resolution 1315 on 14 August 2000 requesting the UN Secretary General to start negotiations to create a Special Court to prosecute 'those most responsible for committing human rights violations' in the country during that period. On 16 January 2002, an agreement establishing the court was signed between the government of Sierra Leone and the UN. This court has adopted a statute that prosecutes both international and national crimes.

¹³ During this period the UN was the key (if not the only) enforcer of human rights globally, making it practically impossible for it to effectively address all concerns on human rights violations.

¹⁴ This Commission was created in accordance with Article 30 of the African Charter on Human and Peoples' Rights.

¹⁵ See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Adopted on 8 June 1998.' Reprinted in *Human Rights LJ* (1999) 20/4-6, 269-271.

African Commission in particular, have been found wanting in a number of areas.¹⁶ As a result, the Commission has gradually lost the favour and unique status of being the only human rights watchdog in the region which it initially enjoyed. Currently, Africa's human rights regime is not only the least developed but also the least effective as compared with its American and European counterparts.¹⁷ This is rather strange especially since the African Charter is the most widely ratified regional human rights instrument in the world. Despite the unilateral ratification of the African Charter, human rights have continued to be relentlessly violated in the continent, with impunity.¹⁸ Baimu observes that 'the fact that conflicts, and the associated massive human rights violations, have continued to engulf the continent when most of the African states are bound by the provisions of the Charter, indicates that the African Charter is still not taken seriously by many African states.'¹⁹

To address this anomaly, this paper highlights the procedural as well as jurisdictional challenges encountered in the interpretation and enforcement of international human rights law in Africa since the inception of the Charter. It commences with a brief historical background of Africa's human and peoples' rights regime, followed by a summary of the normative framework. It urges that while, with certain reforms, Africa's regime could end up yielding the much-anticipated results, this will demand a high level of political will and commitment from the states parties to the Charter; including a considerable degree of compromise of socio-cultural and political preferences and inclinations.

II HISTORICAL BACKGROUND OF AFRICA'S HUMAN RIGHTS REGIME

The African human rights regime is a product of prolonged negotiations both within and outside the continent. Besides the African Charter, the regime is inspired by several multilateral treaties such as the OAU Convention Governing Aspects of Refugee Problems;²⁰ the African Convention on the Conservation of Natural Resources of 1968; the Bamako Convention on the Ban of the Import into Africa and

¹⁶ J Mubangizi 'Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and the Gains' (2006) 6 *AHRLJ* 147

¹⁷ *Ibid*, 148.

¹⁸ K Hopkins, 'A New Human Rights Era Dawns on Africa?' (2003) 18 *SAPR/PL* 360.

¹⁹ E Baimu, 'Commission and the Court', *Conflict Trends* No 3/2001, 19.

²⁰ Adopted on 10 September 1969; entered into force on 20 June 1974. OAU Doc CAB/LEG 24.3.

the Control of Trans-boundary Movement and Management of Hazardous Wastes Within Africa;²¹ the OAU Convention on the Prevention and Combating of Terrorism;²² and the African Charter on the Rights and Welfare of the Child.²³ Notably, even though some aspects of these instruments have a direct bearing on several rights recognised in the African Charter, the provisions relating to interpretation and application of the Charter only mandate the African Commission to ‘draw inspiration’²⁴ or ‘take into consideration’²⁵ international law in respect of human and Peoples’ rights.²⁶ The Charter does not provide for their direct interpretation or enforcement by the Commission.

Africa’s regional human rights regime was an aftermath of a series of events that instigated the rise and fall of the Organisation of African Unity (OAU). The OAU was established²⁷ to encourage a unified African front.²⁸ It was within the remit of the OAU that the independence of the African states should be safeguarded and all forms of colonialism and racism, especially as manifested in Southern Africa, be ended.²⁹ What therefore gave impetus to the formation of the Organisation was as Kannyo says ‘the strong and unanimous desire to complete the process of decolonisation and dismantle the system of apartheid in South Africa.’³⁰ However, the OAU Charter did not intimate the protection and promotion of human rights as one of its principal goals. Instead, its objectives simply mentioned the eradication of ‘all forms of colonialism’ from Africa.³¹

Dlamini comments that besides the issues of apartheid and decolonisation, the only sense in which the OAU could be considered as an Organisation for the

²¹ Adopted at Bamako, Mali, 29 June 1991, reprinted in (1991) 30 *International Legal Materials* 773.

²² Adopted by the 35th Ordinary Session of the Assembly of Heads of State and Government, Algiers, Algeria, 14 July 1999.

²³ Adopted in July 1990; entered into force on 29 November 1999, OAU Doc CAB/LEG 153/REV. See C Heyns (Ed.) *Human Rights Law in Africa 1997* (1999) 38; Hopkins (note 18 above).

²⁴ Art 60.

²⁵ Art 61.

²⁶ S Gutto, ‘The Reform and Renewal of the African Regional Human and Peoples’ Rights System’, (2001) 2 *AHRLJ* 177.

²⁷ In May 1963

²⁸ C Dlamini, ‘The OAU and the protection of human Rights in Africa’ (1991) *Obiter*, 68.

²⁹ Art 21(1) of the Charter of the OAU.

³⁰ E Kannyo *Human Rights in Africa: Problems and Prospects* (1980) 15; D Venter ‘Black Africa and the Apartheid issue: A South African Response?’ (1981) *Journal of Contemporary African studies* 84; C Dlamini (note 28 above).

³¹ Note 29 above.

promotion of human rights was in relation to its general goal of ‘total advancement of our peoples in spheres of human endeavours.’³² Kannyo attributes the absence of human rights provisions in the Charter to the purpose for which the organisation was established, that is the termination of foreign dominion.³³ Perhaps one of OAU’s major failures was its lack of a human rights Charter; which could have been the reason why some of its member states lacked comprehensive Bills of Rights in their Independence Constitutions. Member states were expected to ascribe to the human rights fundamentals entrenched in the Universal Declaration of human rights.³⁴

The OAU leadership, for political expediency, resisted agitation by non-state actors for a proactive human rights regime. The incumbent OAU leaders were reluctant to embrace a human rights regime that would strictly define benchmarks for compliance.³⁵ Given the alarming levels of violations and the attendant impunity, there was so much agitation that resistance by the OAU could no longer hold back reforms. Notably the wave of change had by then got the eye of the international community. Other contributing factors were socio-economic crises of the late 1970s and the early 1980s that engendered a crisis of political legitimacy in a number of states.³⁶ These socio-political crises precipitated international response by powerful nations such as the US calling for a proactive human rights dispensation. As Umozurike puts it:

Chief among these was the emphasis that President Carter placed on human rights in the international relations of the United States. The Helsinki Final Act of 1975, signed by the United States, Canada, and 33 European countries, emphasised respect for human rights. Watch committees were subsequently set up to monitor observance and this kept the issue alive in international politics.... Though unsuccessful, an attempt was made to include human rights in the renewed EEC-A-C-P pact, the Lome II Convention. The stage was thus set both internally and externally for the debut of the African Charter on Human and Peoples’ Rights.³⁷

The search for a new human rights dispensation in Africa goes back to as early as 1961 when African jurists met in Lagos, Nigeria, under the auspices of the International Commission of Jurists (ICJ) and proposed the promulgation of a Human

³² Preamble of the Charter; Dlamini (note 28 above) 69.

³³ Kannyo (note 30 above) 17.

³⁴ See H Othman, ‘Africa and the protection of Rights’, (1995) *6/1 African L Rev*, 51-55.

³⁵ W Reisman, ‘Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs’, (1987) *72 Iowa L Rev*. 392.

³⁶ H Othman (note 34 above) 53.

³⁷ U Umozurike (note 3 above) 904; See also Young-Anawaty, ‘Human rights and the ACP-EEC Lome. II Convention’, (1980) *13 N.Y.U.J. Intl’L & POL* 63.

Rights Charter for Africa.³⁸ Later in 1967, jurists from Francophone African states meeting in Dakar, Senegal, reiterated this call.³⁹ In the same year, Nigeria proposed to the UN Commission on Human Rights (UNCHR) the establishment of regional Human Rights Commissions where none existed.⁴⁰ Though their importance could hardly be overemphasised at that moment, it was common cause that regional commissions would be meaningful if set up by the members of the regions themselves and not imposed from outside. The UNCHR then advised the UN Secretary-General ‘to organise seminars in those regions where no human rights commissions existed with a view to discussing the need for them.’⁴¹

In 1969, a UN seminar was held in Cairo, Egypt, at the close of which the participants, including 19 African states, requested the UN Secretary-General to, *inter alia*, communicate the report and its recommendations to the OAU Secretary-General and members. One of the recommendations was the setting up of a regional commission in Africa that would be fully supported by the OAU member states.⁴² The Cairo seminar opened the floodgate for other seminars, meetings and conferences in various parts of Africa. These were held in Lusaka, Zambia in 1970⁴³; Addis Ababa, Ethiopia in 1971⁴⁴; Yaounde, Cameroon in 1971⁴⁵; Libreville, Gabon in 1971⁴⁶; and Dar-es-salaam, Tanzania in 1973.⁴⁷ Most of these meetings echoed the urgent need for an African human rights commission or some other human rights protection

³⁸ Umozurike (note 3 above) 903. The OAU had its own Commission of jurists, which emanated from the meetings of African jurists held in August 1963 and January 1964 in Lagos Nigeria. However, when the OAU in 1969 opted to re-organise and reduce the number of specialised commissions, the commission of jurists was one of those that were wound-up. Until that time the OAU specialised Commissions included: the Economic and Social commission; the Education and cultural commission; the Health, Sanitation and Nutrition commission; the Defence commission, and the Scientific, Technical and Research commission. See also E Kannyo (note 30 above) 17-18.

³⁹ W Seriti, ‘The African Charter on Human Rights’ (1995) 6/1 *African L Rev* 13.

⁴⁰ See UN Doc. E/ CN. 4/966 (1968) paras. 41-44.

⁴¹ Umozurike (note 3 above) 904.

⁴² *Ibid.*

⁴³ Seminar on the Realisation of Economic and Social Rights with particular reference to the Developing countries’ Lusaka, Zambia 23 June- 4 July 1970.

⁴⁴ Conference of African jurists on (the) African legal process and the individual’ Addis Ababa, Ethiopia 19-23 April 1971.

⁴⁵ Seminar on measures to be taken on National Level for the implementation of the United Nations Instrument Aimed at Combating and Eliminating Racial Discrimination and for the Promotion of Harmonious Race Relations’ Yaounde, Cameroon 16-29 June 1971.

⁴⁶ Seminar on the Participation of Women in Economic Life, Libreville, Gabon 27-29 August 1971.

⁴⁷ Seminar on the study of New Ways and Means for Promoting Human Rights with special Attention to the Problems and Needs of Africa” Dar-es-salaam, Tanzania 23 October- 5 November 1973.

mechanism.⁴⁸ Unable to bear the intense pressure, both internally and externally, the OAU caved in to the demands.

At a Summit conference held in Monrovia in July 1979, the OAU resolved to commence the process of establishing a commission on human rights.⁴⁹ Later in the same year the UN convened another seminar to discuss the possibility of establishing an African Human rights Commission. The outcome of this seminar was the establishment of a working group to draft concrete proposals for the creation of an African Commission on Human Rights.⁵⁰ After a series of meetings held in Dakar, Senegal, in 1979 and Banjul, the Gambia, in 1980 and January 1981, the preliminary draft for the African Charter on Human and Peoples' Rights was finally adopted by the OAU Council of Ministers, with some modifications. The 18th Assembly of Heads of State and Government (AHSOG) adopted the Charter in its session held in Nairobi, Kenya.⁵¹ The African Charter on Human and Peoples' Rights entered in force on 21 October 1986.⁵²

The adoption of the Charter paved way for the institutionalisation of the African Commission on Human and Peoples' Rights. This Commission was formally initiated in November 2, 1987 and its Banjul Headquarters were established in the middle of 1989. The time span between the initiation of the Commission and the establishment of its headquarters in Banjul speaks volumes about the 'cold reception' it got from its political principal, the OAU.

⁴⁸ C Dlamini, 'Towards a Regional Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights', (1991) *XXIV CILSA* 189.

⁴⁹ This conference was preceded by a symposium organised by the OAU Secretariat in Monrovia, Liberia, from 12-16 February 1979, to discuss the theme, "What kind of Africa by the year 2000?" Experts in various fields attended the symposium.

⁵⁰ UN seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Monrovia, 10-21 September 1979, UN Doc. ST/HR/SER.A/4 (1979); See also Kannyo (note 30 above) 28.

⁵¹ This was on the 26 of June 1981.

⁵² For a detailed exposition of the Charter see R D'Sa, 'Human and Peoples' Rights: Distinctive features of the African Charter' (1985) *J of African Law* 73; R Gittleman, 'The Banjul Charter on Human and Peoples' Rights: A legal analysis' in C Welch Jr and R Meltzer (eds) *Human Rights and Development in Africa* (1984) 152.

III THE REGIME UNDER THE CHARTER

Currently, Africa has the largest regional human rights regime in the world courtesy of the unilateral ratification of its Charter by all states parties thereto.⁵³ The regime comprises of the African Charter together with all the protection and promotional mechanisms, rules and procedures created under it. The Charter has three major parts. The first catalogues the rights and duties imposed by the Charter⁵⁴; the second contains measures and safeguards for realising its two-fold purpose of promoting and protecting human rights; the third sets out general provisions on the ratification of the Charter, the special protocols and amendments.⁵⁵ A detailed examination of these subdivisions is beyond the scope of this article and is discussed in another article under consideration elsewhere. Since much has been written elsewhere on the substantive provisions of the Charter, this paper examines two important aspects of the Charter, namely, the uniqueness of the Charter regime and the enforcement of rights under it.

(A) THE UNIQUE ASPECTS OF THE REGIME ESTABLISHED BY THE CHARTER

The Charter ushered in a rather unique human rights regime that distinctively deviates from those in other regional human rights regimes that preceded it. First, because of the ‘claw-back’ clauses the enjoyment of some rights is subject to the domestic laws of the states parties.⁵⁶ These rights include the right to liberty,⁵⁷ freedom of expression,⁵⁸ freedom of association,⁵⁹ freedom of assembly and movement,⁶⁰ right to property, as well as the right to participate in the government of one’s country.⁶¹ The negative effects of these clauses are highlighted later in this article. It is notable however, that besides these ‘claw-back’ clauses, the Charter conspicuously lacks a derogation clause. This in effect means that no emergency or special circumstances

⁵³ R Kiwanuka, ‘The Meaning of “People” in the African Charter on Human and Peoples’ Rights’, (1988) 82 *American J of Intl’L*, 81.

⁵⁴ This part consists of 29 Articles.

⁵⁵ For an appraisal of the Charter see P Takirambudde, ‘Six Years of the African Charter on Human and Peoples’ Rights: An Assessment’ (1991) 7/2 *Lesotho LJ* 41; C Welch Jr. & R Meltzer (Eds), *Human Rights and Development in Africa* (1984) 128-51; See also Dlamini (note 48 above).

⁵⁶ ‘Claw-back’ clauses are provisions in the Charter that condition the enjoyment or implementation of rights on national legislation.

⁵⁷ Art 6, which prohibits deprivation of freedom, ‘except for reasons and conditions previously laid down by law.’

⁵⁸ Art 8 states that ‘no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms’.

⁵⁹ Art 10.

⁶⁰ Arts 11 and 12, respectively.

⁶¹ Arts 13 and 14, respectively.

can justifiably suspend the rights and freedoms enshrined in the Charter.⁶² The Charter only underscores the need for individuals to exercise their rights ‘with due regard to the rights of others, collective security, morality and common interest.’⁶³ The notable absence of a derogation clause in the regime has been criticised by various scholars and commentators.⁶⁴

The second notable unique attribute of the Charter relates to its Socio-economic rights.⁶⁵ Presumably, the intention of incorporating this genre of rights was to give effect to the International Covenant on Economic, Social and Cultural Rights at the regional level.⁶⁶ This approach, however, differs from that of the Covenant on the one hand, and the European system, on the other. While these rights may progressively be realised under the Covenant and are provided for in a separate European instrument- the European Social Charter- the African Charter not only provides for the unconditional realisation of these rights but also interweaves them with the civil and political rights.⁶⁷ Because realisation of Socio-economic rights in the Charter is not subjected to availability of resources, some critics dismiss the Charter as overly ambitious and unrealistic.⁶⁸

Thirdly, the regime’s invention of ‘Peoples rights’ introduces a unique concept in the international human rights law arena. These rights include equality of all Peoples,⁶⁹ right to existence and self-determination,⁷⁰ right to sovereignty over group

⁶² In *Media Rights Agenda and Constitutional Rights Project V Nigeria communication Nos 105/93, 130/94 and 152/96* the African Commission stated *inter alia* that Governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law. See also *Amnesty international v Zambia Communication No 212/98 (2000) 7 IHRR*. 286; G Naldi ‘Limitation of rights under the African Charter on Human and Peoples’ Rights: The contribution of the African Commission on Human and Peoples’ Rights’ (2001) 17 *SAJHR* 113-114.

⁶³ Art 27(2).

⁶⁴ See generally, R Gittleman ‘The African Charter on Human and Peoples’ Rights: A Legal analysis’ (1982) 22 *Virginia J of Intl L* 667; E Ankumah ‘The African Commission on Human and Peoples’ Rights (1996) 176; P Kunig ‘The Protection of Human Rights by International Law in Africa’ (1982) 25 *German Yearbook of Intl L* 138.

⁶⁵ The Charter entrenches: the right to work under equitable and satisfactory conditions including equal pay (Art 15); the right to well being both physical and mental (Art 16) and the right to enlightenment (Art 17).

⁶⁶ Adopted and opened for signature, Accession and ratification by General Assembly resolution 2200 A (XXI) of 16 December 1966; entered into force 3 January 1976, in accordance with Article 27.

⁶⁷ See U Umzurike, ‘The African Charter on Human and Peoples’ rights-An introduction,’ (1991) 1 *Review of the African Commission on human and Peoples’ Rights*, 5-6.

⁶⁸ *Ibid.*

⁶⁹ Art 19.

⁷⁰ Art 20.

wealth and natural resources (including the right to dispose of the same),⁷¹ right to development,⁷² right to national and international peace and security, and the right to a general satisfactory environment favourable to development.⁷³ Even though the Charter recurrently refers to ‘peoples’, the concept is not defined anywhere in its provisions hence creating uncertainty and unnecessary speculation on the true import of the term.

Another unique feature of the Charter is that unlike other regimes, it imposes duties upon states and even individuals. Duties of states are contained in Arts 20(3), 21(5), 22(2), 25 and 26.⁷⁴ Arts 27-29 impose duties on individuals. These include the following: duties to the family, society, state, other legally recognised communities and the international community⁷⁵; duty to respect fellow human beings⁷⁶; duty to preserve the harmonious development of the family, strengthen African cultural values and to preserve national security as well as promote African unity.⁷⁷

However, unlike the American Convention on Human Rights and the European Convention on Human Rights and Fundamental Freedoms, the African Charter does not provide for a human rights court. This has largely been attributed, and pretentiously so, to supposed ‘African cultural emphasis on conciliation rather than formal adversarial settlement of disputes.’⁷⁸ Supposedly, the drafters of the Charter were guided by the principle that the instrument ‘should reflect the African conception of human rights and should take as a pattern the African philosophy of law and meet the needs of Africa.’⁷⁹ The absence of an African Court provoked heated debate and controversy, consequently, in 1994, led to commencement of efforts to

⁷¹ Art 21.

⁷² Art 22.

⁷³ Art 24. See also Takirambudde (note 55 above) 43.

⁷⁴ Art 20(3) obliges states to assist the people in the liberation struggle against foreign domination, be it political, economic or cultural; Art 21(5) provides: “states parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies, in order to enable their peoples to benefit fully from any advantages derived from their natural resources”; Art 25 imposes a duty on state parties to promote and ensure through teaching, education and publication, the respect for rights and duties as contained in the Charter. Art 26 imposes a duty on the states parties, the duty of granting the independence of courts. See Seriti,(note 36 above) 13.

⁷⁵ Art 27.

⁷⁶ Art28.

⁷⁷ Art 29.

⁷⁸ Umozurike (above note 3) 909.

⁷⁹See OAU CAB/LEG rev 1 at 1; Seriti (note 39 above) 17.

facilitate the formation of an African human rights Court. This process culminated in the adoption on 9 June 1998 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.⁸⁰ Despite the entry into force of this Protocol, the Court is yet to commence its work.

(b) ENFORCEMENT OF RIGHTS UNDER THE CHARTER

At inception, the Charter only made provision for the creation of an African Commission on Human and Peoples' Rights as the principal enforcement organ.⁸¹ However, today the African human rights regime boasts of an African Court on Human and Peoples' Rights. It was intended for the Commission to be the key organ for promotion and protection of human and peoples' rights in Africa.⁸² Consisting of eleven Commissioners elected by the Assembly of Heads of State and Government (AHSAG) by secret ballot to serve for a six-year period⁸³, the Commission is, in broad terms, mandated to: promote human and peoples' rights; ensure the protection of human and peoples' rights under conditions laid down by the Charter; at the request of a state party, an institution of the OAU or an African Organization recognized by the OAU, interpret the Charter; and perform any other tasks which may be entrusted to it by the AHSAG.⁸⁴

In its promotional functions, the Commission is expected to, among other things, engage in: information collection; formulation and development of principles relating to human rights to guide legislative actions by African governments; and, collaboration with other African and international institutions concerned with the promotion and protection of human rights.⁸⁵ Periodic reporting by states has also been said to be a promotional function of the Commission because it seeks to evaluate the extent to which states parties have implemented the provisions of the Charter in their

⁸⁰ See note 15 above. See also Mubangizi (note 16 above); M Mutua, 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342.

⁸¹ For the normative basis for the creation of the Commission, see Articles 30-39 of the Charter.

⁸² Art 30.

⁸³ Art 31.

⁸⁴ Art 45.

⁸⁵ Art 45 (1) (a)-(c).

respective jurisdictions. Art 62 obligates states parties to furnish country reports every two years.⁸⁶

The Commission performs its protection functions in terms of Arts 47 to 60 of the Charter. In particular, Arts 47 to 54 make provision for interstate complaints while Arts 55 to 60 establish the machinery for the receipt and handling of individuals' complaints.⁸⁷ Before the substantive consideration of individual complaints however, all communications are brought, by the Chairman of the Commission, to the knowledge of the state concerned. The state is then given three months to respond to the complaint.⁸⁸ When it appears after the Commission's deliberations that one or more communication relates to special cases revealing the existence of a series of serious or massive violations of human and peoples' rights, the Commission draws the attention of the AHSG to these special cases.⁸⁹ The Assembly may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.

Besides the mandate given to the Chairperson of the Commission to publish the reports on its activities after the AHSG has considered them, all measures taken within the provisions of the Charter are supposed to remain confidential unless the Assembly decides otherwise.⁹⁰ As stated earlier in this paper, the monopoly enjoyed by the Commission ended with the adoption of the Protocol Establishing the African Court and the subsequent inauguration of the Court. However, since the Court is not yet fully operational it is difficult to state with certainty the challenges it is bound to face when it finally commences business.

IV JURISDICTIONAL AND PROCEDURAL CHALLENGES

This part discusses the jurisdictional and procedural challenges encountered in the interpretation and enforcement of international human rights law since the inception of the Charter. Jurisdictional challenges include issues such as normative incoherence,

⁸⁶Art 62 states in part: "each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter..."

⁸⁷ Art 56.

⁸⁸ Art 57.

⁸⁹ Art 58.

⁹⁰ Art 59.

ideological differences and political insubordination; while the procedural challenges comprise issues such as promotional impediments and protection flaws.

(A) JURISDICTIONAL CHALLENGES

(i) Normative Incoherence

While many believed the entry into force of the African Charter to have heralded the dawn of new human rights era in Africa, little did such people know what lay in wait for them. Disappointingly, the Charter seems to have ushered in a weaker regional normative regime than was initially anticipated. It essentially lacks mandatory norms as a result of which states parties generally ignore the decision-making and enforcement procedures created by it.⁹¹ Some of the norms are out of tune with municipal legislation in some member states, making its implementation in such jurisdiction difficult and even impossible. Its drafters seem to have fully considered the political and socio-economic diversity and disparities in the continent, which would have played a critical role in formulating norms that can be appreciated, at least by a majority of the states.

While the Charter has indeed been ratified unilaterally, some states do not seem to appreciate some of its importance. No wonder, there is to date very little in terms of transfer of authority from the states parties to the regional level; making some individual states more powerful than the regional system. So far, the region has a ceremonial Charter regime whose presence is inconsequential. The factors that have contributed to this undesirable situation are discussed below.

As noted earlier in this paper, the substantive provisions of the Charter are strewn with 'claw back' clauses that 'seem to make the enforcement of rights overly dependent on municipal law and the utter discretion of national authorities.'⁹² Apparently, these clauses targeted civil and political rights, which generation of rights had generated controversy in a number of states prior to the inception of the Charter.⁹³

⁹¹ See generally, Reisman (note 35 above); Hopkins (note 18 above) 349.

⁹² Naldi (note 62 above) 109; R D'sa 'The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action' (1981/83) 10 *Australian Year Book of Intl L* 107-8; Gittleman (note 64 above).

⁹³ See for example, Articles 6 & 13 of the Charter. See also C Dlamini (note 48 above) where it is argued that the claw-back clauses under Article 6 on the right to liberty leaves open the possibility for

The impropriety of ‘claw-back’ clauses has been underscored by a number of legal scholars. Ankumah, for example, observes that they ‘could render previously granted rights meaningless.’⁹⁴ Kunig also finds them defective in the regime since ‘there are no provisions to ensure that a core of the human rights guarantees prevails against legislative restrictions.’⁹⁵ Hopkins for his part says these clauses have reduced the regime to, ‘...a mixture of international standards...and mere guidelines bordering on vague statements of amorphous collective aspirations.’⁹⁶ While it must be acknowledged that the exclusive use of ‘claw-back’ clauses by the Charter is undesirable, the Commission’s effort to contain their effects through its case law should be acknowledged.⁹⁷

Notably however, the Charter does not contain a derogation clause. It cannot be clearly established why the drafters of the Charter in their wisdom preferred ‘claw-back clauses’ to a derogation clause. There is a fundamental conceptual and functional difference between the two. Derogation clauses generally seek to limit the circumstances under which a state may be said to be backtracking from its obligation to protect and promote certain rights guaranteed to its citizens by the Charter. In the absence of a derogation clause, a state may choose to backtrack from its obligation under the Charter at any time it deems fit, to the detriment of its citizens. Yet under such circumstances, the particular state cannot be legitimately summoned to explain its conduct. A derogation clause therefore prohibits a state from callously breaching obligations whenever it feels like and restricts the suspension of the said rights to certain specified circumstances that may warrant derogation. Whereas a derogation clause could legitimise the suspension of rights granted under the Charter, ‘claw-back clauses’ restrict the affected rights *ab initio*.⁹⁸ Unlike the former, the latter allow states parties massive discretionary power. As Higgins correctly observes:

All the major [human rights] instruments thus contain two types of clauses ...first a clause which stipulates that the instrument itself does not give any state, group or person: ‘any right to engage in any activity or to perform any act aimed at the destruction of any of the human

domestic legislation to provide for preventive detention and the clause under Article 13(1) on right to participate in government accommodates one party and military regimes.

⁹⁴ Ankumah (note 64 above).

⁹⁵ Kunig (note 64 above) 155; See also the views advanced by Gittleman (note 52 above) 159..

⁹⁶ Hopkins (note 18 above) 349.

⁹⁷ See, for example, *Media Rights Agenda and Constitutional Rights Project V Nigeria communication Nos 105/93, 130/94 and 152/96; Amnesty international V Zambia Communication No 212/98 (2000) 7 IHRR 286.*

⁹⁸ Hopkins (note 18 above).

rights and freedom set forth therein'; second, a general clause which indicates that limitations upon the exercise of rights may be permitted.⁹⁹

Another factor underlying normative incoherence in the regime is the concept of duties. The problem of duties as contemplated in the Charter is their enforceability, especially, as Amoah observes, 'if a state party raises a counter-claim against an aggrieved individual for failure to fulfil his or her individual duties.'¹⁰⁰ The Commission, or even the African Court, may not be well equipped to interpret the concept of duties in a legalistic sense given that even the framing of these duties in the Charter is pretty superfluous. Duties can be viewed better from a moral perspective rather than a legal perspective. Their incorporation therefore creates an obvious inconsistency in the Charter's provisions. For one, since every right has an accompanying duty, the Charter should have been drafted with this in mind instead of having a separate catalogue of duties whose enforceability is uncertain. Besides, none of these duties has been legislated by any of the states parties to the Charter; which in a way signifies a thinking that such prescriptions do not matter to domestic jurisdictions.

Finally, the unrealistic provisions on Socio-economic rights further weaken the normative effects of the Charter. The Charter does not provide for the progressive realisation of these rights subject to availability of resources, as is the case under the International Covenant on Economic, Social and Cultural Rights and the Bills of rights of some African states. Consequently, this stretches socio-economic rights beyond the enforcement capacity of the regime, reducing them to 'mere paper rights'.¹⁰¹

(ii) Ideological Differences

The jurisdictional challenges besetting Africa's human rights regime pre-date the existence of the African Charter. The aftermath of colonialism together with the weak socio-political foundation laid by the OAU Charter introduced a number of hurdles to the entrenchment of the culture of human rights in the continent. Colonialism and its fascist ideologies had damning effects on Africa which continue to exert considerable

⁹⁹ R Higgins, 'Derogations under Human Rights Treaties' (1976-7) *British Yearbook of IntlL* 283.

¹⁰⁰ P Amoah, 'African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights?' (1992) 4/1 *African J of Intl and Comp L* 227-28.

¹⁰¹ Reisman (note35 above) 393.

influence over the continent's contemporary human rights culture.¹⁰² Western imperialists attempted to supplant Africa's communal heritage with the European ideology of individualism, thus leaving behind confused hybridised socio-political structures at the close of the colonial era.¹⁰³ This ideology culminated to a crisis in cultural, social and political identity much as it fostered the socio-political disparities that were already etched in the continent.¹⁰⁴

It has been contended elsewhere that since African people are community or group oriented, rather than individualistic, human rights are not relevant to Africa.¹⁰⁵ According to Hopkins, 'African culture is still largely understood by African people in a pre-colonial way- when people did not suffer systematic discrimination, despite the lack of human rights law guaranteeing individual rights and freedoms and the lack of legal rules did not necessarily mean that only despotic forms of government existed.'¹⁰⁶ The fact that communalism as practised by the pre-colonial African societies does not rhyme with the Western ideology of individualism explains in no uncertain terms why human rights generally, and international human rights law, in particular, continue to enjoy low esteem in the continent. No doubt, many of these cultural constraints are still evident in the African perception today.¹⁰⁷

Emphatically, the OAU, to its own detriment, ignored the effects of imperialism and chose to focus on decolonisation rather than human rights. It is trite that the main concern of the organisation at the time of its formation was the complete eradication of colonialism from the continent.¹⁰⁸ Sadly, the organisation, deducing from the contents of its Charter, had no time for human rights, to say the least. The organisation, bent to secure the sovereignty of its member-states, chose to switch from the African 'communalism' ideology it was well-acquainted with, to the European 'individualism' ideology, only that 'individualism' this time was to be enjoyed at the

¹⁰² Hopkins (note 18 above) 350.

¹⁰³ Ibid.

¹⁰⁴ M Mutua 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia J of Intl L* 365.

¹⁰⁵ See generally, A Baah, *Human Rights in Africa: The Conflict of Implementation* (2000); T Bennett *Human Rights and African Customary Law* (1995).

¹⁰⁶ Hopkins (note 18 above) 350.

¹⁰⁷ Ibid. 354.

¹⁰⁸ For a detailed analysis of the OAU, see Z Cervenka, *The Organisation of African Unity and its Charter* (1968) 6-29.

state level. States were to be sovereign (individualistic) and their independence secured from any form of external interference (non-communal). The sudden change in ideological approaches led to the over-glorification of the two concepts that eventually consigned the OAU to its political oblivion. These concepts are: sovereign and territorial integrity and non-interference in the internal affairs of member states.

The rights to sovereign integrity and to non-interference in their internal affairs became prominent shields among the OAU member states whenever they were called upon either to stop or account for violations within their domestic jurisdictions.¹⁰⁹ Some International human rights lawyers opine that although these two concepts have garnered unilateral acceptance under International law, their relevance is completely at odds with international human rights discourse which is premised on the presumption that states are subordinate to supra-national regimes and can be compelled to regulate their municipal laws to conform with the tenets of a supra-national legal order.¹¹⁰ This ideological tension has contributed massively to the dismal human rights record in the continent. Ironically, even upon the demise of the OAU, the AU still adopted the two concepts through its Constitutive Act.¹¹¹

The negative effects of ideological differences have also been felt where individual states have been compelled by socio-cultural or political circumstances to develop jurisprudence contrary to that of the African regional system. Some states have been forced to do so owing to their religious indoctrination. For example, states that profess Islam inevitably develop jurisprudence in tandem with Islamic laws which in a number of occasions have clashed with the universally acknowledged human rights doctrines. African customary law has also been involved in this kind of clash more than once particularly on the issue of gender. Thus, ideological differences

¹⁰⁹ Art III of the OAU Charter states *inter alia*:

The Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles:

1. The sovereign equality of all Member States.
2. Non-interference in the internal affairs of States.
3. Respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence...

¹¹⁰ Hopkins (note 18 above) 355.

¹¹¹ See Arts 3 (b) and 3 (h) of the Constitutive Act of the African Union; Adopted by the OAU Assembly of Heads of State and Government in Lome, Togo, in July 2000; entered into force in 26th April 2001.

of this magnitude are extrapolated into a conflict between the municipal laws and the international human rights obligations of the states concerned.

The complexity of ideological differences reaches its extremes when the interpretation of a particular right given by a municipal court is not in tandem with the jurisprudence evolved by the regional mechanisms. Given such circumstances, which one of the two competing jurisdictions (or ideologies) ought to prevail? The magnitude of this problem is so vast that it calls for states to compromise some aspects of their social, political and religious inclinations to redress certain ideological conflicts. This is not an easy concession for a number of states, thus explaining why the interpretation and enforcement of international human rights law in Africa has not been a child's play.

(iii) Political Insubordination

Africa, unlike the United Nations and other regions, has a mere declaratory regime. Events leading to the formation of the OAU in 1963 and even the African Charter decades later militated against the formation of a stronger regional human rights regime. Leaders of the then independent African states were not keen to forfeit their 'hard earned' sovereignty to a supra-national body for fear of 'reincarnating' the colonial epoch. This resulted to a superficial moral commitment, an emphasis of ideological differences and ultimately an attitude of indifference towards human rights violations in the continent.

Unfortunately, the Organization emphasised state cooperation, sovereignty of states and non-interference in the domestic affairs of member states.¹¹² This explains why the organisation turned a blind eye to human rights violations that took place especially in the 1970s and 1980s. It for instance remained silent when Ghana expelled West African aliens *en masse*; in Rwanda, the minority Tutsi ethnic group massacred the Hutu between 1972 and 1973; and Idi Amin expelled Asians from Uganda, albeit he was later elected the OAU chairman in 1974 at its summit meeting.¹¹³ In this regard, Wiseberg observes:

¹¹² See Arts II and III of the OAU Charter.

¹¹³ See Dlamini (note 28 above) 75.

By and large, [African] governments have proclaimed humanitarian standards, and have been prepared to act to uphold or further human rights only where it has been in their political and/or economic interest to do so. They have not been prepared to speak out or to take action where political costs would be entailed—where they might embarrass an ally, where protest might harm their relations with another sovereign, or where economic investments might be jeopardised. Additionally, there is a tendency towards inertia and indifference if there is nothing to be gained by challenging a government transgressing against human rights, even if there is nothing tangible to lose.¹¹⁴

The subordination of the African Commission to the AHSR clearly elaborates the above sentiments. The Commission is not politically, let alone judicially, independent. The African Charter provides for the establishment of the Commission ‘within the OAU’.¹¹⁵ Besides, its Commissioners are political appointees¹¹⁶ and the Rules of Procedure stipulate that the power to make decisions, including the publication of measures taken lies with the AHSR.¹¹⁷ Indeed the Commission cannot make binding decisions against state parties but only recommendations to the AHSR.¹¹⁸ This is in stark contrast with the European Convention on Human Rights and Fundamental Freedoms for instance, which has provision for mechanisms with jurisdiction to make binding decisions against contracting states.¹¹⁹ The subordination of the Commission to the AHSR has made it impossible for it to effectively remedy human rights violations because states, the main perpetrators of violations, have the last word in the Commission’s work. This has further led to a crisis of credibility, confidence and legitimacy on the part of the Commission.¹²⁰

(B) PROCEDURAL CHALLENGES

(i) Promotional Impediments

Examination of reports compiled by member states is one of the Commission’s key promotional activities. The Charter obliges states parties to submit, every second year, ‘a report on the legislative or other measures taken with a view to giving effect to the

¹¹⁴L. Wiseberg, ‘Human Rights in Africa: Towards a definition of a problem of Double standards’ (Paper presented at the Eighteenth Annual Meeting of the African Studies Association, San Francisco, October 29–November 1 1975 (1975) 4–6 (Unpublished).

¹¹⁵ Art 30.

¹¹⁶ Art 33.

¹¹⁷ See the Rules of Procedure of the African Commission on Human and Peoples’ Rights adopted on October 6 1995.

¹¹⁸ Art 58.

¹¹⁹ See Art 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms (note 9 above).

¹²⁰ Dlamini (note 28 above).

rights and freedoms recognised and guaranteed...’ by it.¹²¹ For various reasons, the state reporting mechanism has not been fruitful. The Charter has failed to address a number of procedural uncertainties pertaining to state reporting. For example, it fails to specify to whom the reports should be addressed, by whom they should be examined, if at all, and what actions should be taken as an outcome of such examination.¹²² This lacuna would have prevailed had the Commission not adopted a resolution at its third session, recommending that the Secretary General of the OAU be mandated by the AHSG to receive state-reports and communicate them to the Commission without delay.¹²³ The Commission also recommended that the AHSG entrust it with the task of examining the periodic reports submitted by the states parties pursuant to Article 62 and other relevant provisions of the African Charter, as well as authorise it to draft general guidelines on the form and content of the said periodic reports.¹²⁴ The Commission was later entrusted with this task and soon thereafter adopted guidelines for state reporting.¹²⁵

It is however clear that states have not been complying with their duty to report. Statistics indicate that up to the 26th session, only 24 of the 53 states parties had reported.¹²⁶ Those states that report fail to comply with the reporting guidelines. The information provided has been incomplete, scanty, biased and devoid of self-reflection. During examination of the reports, government representatives are seldom present to participate in, or back up, the process.¹²⁷ States have therefore frustrated the Commission’s endeavours to promote human rights in the continent. This is aggravated by the Commission’s inability to take any draconian measures against states that fail to comply with their reporting obligations. As a result impunity has taken toll without any hope of immediate restraint.

¹²¹ Art 62.

¹²² F Viljoen, ‘State reporting under the African Charter on Human and Peoples’ Rights: A boost from the South’, 44/1 (2000) *JAL* 110.

¹²³ The recommendations were adopted in Libreville, Gabon, in April 1988. See Annex IV of the African Commission’s First Annual Activity Report.

¹²⁴ Viljoen (note 122 above).

¹²⁵ See the African Commission’s Second Annual Activity Report, Para 20. For the guidelines on state reporting see the Commission’s Second Annual Activity Report, as annex XI “*Guidelines for National Periodic Reports.*”

¹²⁶ See F Viljoen, ‘Review of the African Commission on Human and Peoples’ Rights: 21 October 1986 to 1 January 1997’, in C Heyns (Eds), *Human Rights in Africa 1997*, (1999) 47 at 93-94; F Gaer, ‘First fruits: Reporting by States under the African Charter on Human and Peoples’ Rights’, (1992) 10 *Netherlands Quarterly of Human Rights* 29.

¹²⁷ F Viljoen (note 121 above) 111.

The Commission has also not been efficient in deliberating on state reports. Given that it meets for only a limited period of time during which it is expected to examine a number of reports, the Commission has not been able to discharge this role expeditiously. It requires a quorum in order to take decisions at its sessions. If no quorum exists-as was the case at the meeting in March 1991-then decisions must be postponed until the following session six months later.¹²⁸

(ii) Protection Flaws

The Commission's protective mandate, otherwise known as the complaints procedure, allows it to receive and consider complaints from both individuals and states parties to the Charter. Under this procedure, the Commission is mandated to seek amicable solutions, failing which it can make appropriate recommendations to the AHSG.¹²⁹ However, like the reporting mechanism, this procedure is beset by a number of flaws, prompting Posner to describe it as 'so embryonic that we are basically looking at a blank slate.'¹³⁰ Several factors have contributed to this situation.

From the onset, the procedure is hamstrung by the time taken to process a communication.¹³¹ Communications go through a lengthy, inefficient and bureaucratic system of scrutiny. The Commissioners, who work on part-time basis, have limited time to meritoriously examine within a reasonable time frame all the communications presented before them. In the words of Nguema:

A complaint received by the secretariat cannot be considered by the Commission until its next session which can be as much as six months away, at which point the Commission often determines that crucial information is missing, postponing its full consideration until the following session. In addition, the Commission must notify that complainant and offending authority before it can determine whether or not the Commission has jurisdiction in the matter. The formalities are prohibitively time consuming, especially in light of the fact that the Commission only meets twice a year.¹³²

¹²⁸ I Nguema, 'Legal and infrastructural constraints on the Commission', (1991) in *Conference on the African Commission on Human and Peoples' Rights, The Fund for Peace (N.Y), June 24-26*, 14-15.

¹²⁹ Art 58.

¹³⁰ M Posner, 'Mechanisms for strengthening the complaints procedure', in *Conference on African Commission on Human and Peoples' Rights* (1991) 34.

¹³¹ Takirambudde (note 55 above) 35.

¹³² Nguema (note 128 above) 13.

The procedure is complicated further by the issue of admissibility.¹³³ Whereas it is desirable for a communication to comply with certain minimum requirements, it is worth noting that the African system tends to apply double standards in the sense that communications filed by individuals are subjected to a stricter eligibility test than state communications.¹³⁴ For example, individual communications must pass an admissibility test which includes that their communications: are compatible with the Charter of the Organization of African Unity or with the African Charter; are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity; are not based exclusively on news disseminated through the mass media; are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged; are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the African Charter.¹³⁵

Some of these requirements are not easily tenable especially if the state concerned wants to frustrate a complainant. In cases of gross violations of human rights the criteria is even more demanding, making it almost prohibitive for victims to opt for the procedure.¹³⁶ These requirements are not imposed on states. It is therefore more difficult for an individual, than a state, to get redress from the system.

The procedure is also affected by the infamous ‘confidentiality clause’ of the Charter. All measures taken within the provisions of the Charter are to remain confidential until such time as the AHSG shall otherwise decide.¹³⁷ This provision of the Charter could be abused time and again by states on the premise of the spirit of ‘comradeship’ that prohibits states from antagonizing each other. Making it a prerogative of the states to decide the publication, or otherwise, of the findings and measures taken by the Commission was one of the most flagrant miscalculation made

¹³³For a catalogue of the admissibility requirements, see Article 56 of the Charter.

¹³⁴U Umozurike, ‘History and Mandate of the African Commission’, *Conference on the African Commission on Human and Peoples’ Rights*, (1991) 9.

¹³⁵ Art 56 (1) –(7).

¹³⁶ See Art 58.

¹³⁷ Art 59.

by the drafters of the Charter. At the time of drafting the Charter, it was common knowledge that the OAU members were not prepared to be challenged judicially however grossly they violated human rights. Giving them the final word in the regional process is by no means a motivation for impunity; after all, the Charter allows them to be judges in their own cases.

The regime's competence to grant effective remedies has similarly been on the spotlight. The Commission has no jurisdiction to grant obvious remedies such as monetary compensation. While the Commission can only make non-binding recommendations to the AHSG, the entire process takes pretty long and at times is overtaken by events. A good example is the Ken Saro-Wiwa case involving a Nigerian human rights activist whose recommendation was issued after his execution by the Sani Abacha regime.¹³⁸ It is imperative for any sound judicial system, whether domestic or international, to have adequate mechanisms to grant effective remedies to aggrieved parties. The absence of remedial measures deprives the Commission of an important tool necessary to achieve its purpose of protecting victims of human rights violations in the continent. Consequently, this has compelled them to resort to their respective domestic courts for redress, which courts fail them largely because of state interference and lack of judicial independence.¹³⁹

V CONCLUSION

The article has endeavoured to highlight the jurisdictional and procedural challenges of interpreting and enforcing international human rights law in Africa under the African Charter on Human and Peoples' Rights. While the present regime has come a long way, tearing through a bulwark of political, socio-economic and cultural barriers, there is room for improvement. Some of the challenges for instance political insubordination and incoherence within the normative framework are 'man-made' and can therefore be overcome through the changing of perception. Others such as ideological differences are deeply entrenched in the socio-cultural fabric and may be difficult to surmount, but surmountable all the same.

¹³⁸ J Harrington, 'Special Rapporteurs of the African Commission on Human and Peoples' Rights System', (2001) 1 *AHRLJ* 247.

¹³⁹ See N Enonchong 'The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?' (2002) *JAL*, 197-98.

The failures of the African Charter are not irreparable after all and something can still be done to redeem it. While it was not possible to examine in detail all the challenges it has encountered since inception in a paper of this length, the paper has highlighted some of the hurdles that need to be addressed in order that the gains made so far should not be lost. Like many other systems, the African regime is bound to have its own shortcomings, which at this formative stage can be described as ‘mere teething problems’ that will be overcome with the passage of time. The paper has argued that the Charter could be reformed through the amendment of the provisions and the rules of procedure, that are not in tandem with the norms and fundamental principles of international human rights law.

To surmount some of these challenges, particularly those with a socio-cultural bias, the regime should opt for sub-regional divisions that would concern themselves with violations that are unique to such regions. This will popularise the Charter and make it more acceptable throughout the continent. States should also be encouraged to promote and popularise the regime in the domestic circles, although this has in the past been a hard thing for them to do for reasons best known to them. Finally, states parties to the Charter should encourage unbiased debate on the possible reforms to the African Charter regime, at the domestic level. Whether or not the Charter will withstand the test of time and survive the turbulent tide of political and socio-economic changes sweeping across the globe will depend on the level of commitment and political will of the states parties as well as their willingness to compromise on socio-cultural and political preferences and inclinations.