

Championing Human Rights: Normative Insights into the African Charter on Human and Peoples' Rights

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Abstract

The African Charter on Human and Peoples' Rights, also known as the Banjul Charter, is a seminal instrument in the field of international human rights, uniquely emphasizing both individual and collective rights. This article offers a comprehensive analysis of the Charter, highlighting the African Commission's tripartite mandate of promoting, protecting, and interpreting human rights within the African context. The Charter's holistic approach, encompassing economic, social, cultural, civil, and political rights as well as peoples' rights is essential for addressing the complex challenges faced by African societies. However, its effectiveness is often constrained by limited resources, political pressures, and non-binding enforcement mechanisms. To enhance the Charter's impact, there is a need for strengthening enforcement mechanisms, increasing resource allocation, fostering political commitment, improving public awareness, enhancing collaboration with civil society, expediting judicial processes, and developing a robust follow-up mechanism. The implementation of these strategies can significantly bolster the Charter's role in promoting and protecting human rights across Africa, ensuring a more just and equitable society. The collective efforts of the African Union, member states, civil society, and international partners are crucial in realizing the Charter's full potential.

Keywords

African Charter, African Commission, Enforcement Mechanisms, Promotion and Protection of Human Rights, Evolution of Human Rights

1. Introduction

Although human rights have been part of the broader agenda of the Pan African

Congresses in the anti-colonial struggle prior to independence, the Organization of African Unity (OAU) in its establishment Charter has largely omitted any mention of human rights, emphasizing decolonization, state sovereignty and development instead. It was only in the late 1960s that proposals for an African human rights instrument began to be put forward that ultimately resulted in the adoption of the African Charter on Human and peoples' Rights (African Charter) in 1981 (Bantekas & Oette, 2020: p. 535).

In Africa, the road to the promotion and protection of human rights has been long, twisting, and frequently difficult (Ojigho, 2016: p. 6). Since the fight to end colonial rule in Africa to the present day, Africa has struggled to ensure a system of human rights that meets the aspirations of its people (Ibid). Despite this fact, the African human rights system was founded with the adoption of the African Charter in 1981, which makes it to be the most recent regional human rights system among the three major regional human rights systems¹. The adoption of this Charter is a major step forward in the advancement of human rights in Africa. In fact, the member states of the African Charter have demonstrated their commitments to collectively secure the promotion and protection of human rights on the continent. This commitment is evident in the content of instruments adopted and efforts directed at creating and enhancing institutions that would implement them both at the continental and sub-regional levels².

This article is devoted to deal with the system of human rights protection established by the African Charter. It specifically addresses the evolution, nature and distinctive features of the African Charter. The protected rights in the African Charter, which includes civil and political rights, economic, social and cultural rights and peoples' rights, the individual duties and States obligations under the African Charter, are also discussed in this article. The article also covered the institutional frameworks put in place and the oversight procedures designed to track the proper application of the African Charter. The African Charter's limitations, which can preclude its effective implementation, are also examined in this article.

2. Evolution of the African Charter

The African human rights system has been developed under the auspices of the OAU. At the start, the OAU's focus was on the eradication of colonialism, the struggle against apartheid in South Africa, and the maintenance of regional peace and stability than the promotion and protection of human rights. The legacy of colonialism was responsible for this lack of interest in promoting and protecting human rights; because due to the racism ingrained in colonialism and the denial of Africans' right to self-determination, which resulted in the denial of

¹The other major regional human rights systems, the Inter-American and the European human rights systems, are founded in 1950 and 1948, respectively.

²African Union Commission, Human Rights Strategy for Africa, para. 17, <https://au.int/sites/default/files/documents/30179-doc-hrsa-final-table_en3.pdf> accessed on 21 May 2024.

their capacity to manage their own economic, social, cultural, and political affairs, African governments were forced to accord the highest priority only for some human rights at the international level (Eze, 1984: p. 169; Kannyo, 1984: p. 159). However, this limited attention to human rights at the start of the OAU was changed gradually and resulted for the adoption of the African Charter in 1981, which is the main legal document of the African regional human rights system. This development has given birth for the African regional human rights system.

In the post-colonial Africa, there were excessive human rights violations committed by several authoritarian leaders including Idi Amin Dada of Uganda, Jean Bedel Bokasa of the Republic of Central Africa and Macias Nguema of Equatorial Guinea (Kannyo, 1984: p. 157; Keetharuth, 2009: p. 167). Despite the blatant human rights violations, the OAU remained silent justifying its inaction on the principle of non-interference in the internal affairs of member states by considering human rights as domestic matters (Kannyo, 1984: p. 167). This however shows the double standard it employed towards condemning human rights violations in the continent; because while it condemns apartheid and colonialism, it overlooked the human rights atrocities committed within the states that secured their independence. Such disregard for human rights and the blatant ignorance of these tyrannical governments with complete impunity demonstrates the unquestionable need for a continental human rights instrument to safeguard the human dignity and value of Africans under the OAU (Acheampong, 2001: p. 185). One of the motivations behind the adoption of the African Charter is thus the exposure of massive violations of human rights in the continent.

The idea for the adoption of a human rights treaty for Africa was first discussed at the Congress of African Jurists held in 1961 in Lagos, Nigeria. However, it did not become the agenda of the OAU until 1979. At the Sixteenth Ordinary Session convened in Monrovia, Liberia from 17 to 20 July 1979, the Assembly of Heads of State and Government of the OAU decided for the preparation of a preliminary draft of an “African Charter on Human and Peoples’ Rights” providing for the establishment of organs and for the promotion and protection of human and peoples’ rights (OAU, 1981a: p. 1; African Charter, 1981: Preamble, para. 1). Accordingly, African legal experts held a meeting in Dakar, Senegal from November 28 to December 8, 1979 for the preparation of a preliminary draft of the African Charter on Human and Peoples’ Rights (African Charter, 1981: Preamble, para. 1). The next meeting, a Ministerial Conference comprised mainly of African Ministers of Justice and other legal experts, was held in Banjul, the Gambia from June 9-15, 1980 to discuss on the draft Charter. In the Conference, thirty-eight member States of the OAU has participated and discussed on eleven articles of the draft Charter (OAU, 1981a: p. 2).

At its Thirty-fifth Session held in Freetown, Sierra-Leone, from 18 to 28 June 1980, the OAU Council of Ministers requested the second session of the Minis-

terial meeting on Human and Peoples' Rights to complete the consideration of the Draft Charter so as to submit the final draft to the Eighteenth Session of the Assembly of Heads of State and Government. Accordingly, the second session of the OAU Ministerial Conference took place in Banjul, the Gambia from January 7-19, 1981, where forty member states of the OAU were participated (OAU, 1981b: para. 49). The participants considered the provisions of the Charter which were not fully dealt with at the previous session and completed the review of the Draft Charter. Thus, in two sessions, the OAU Ministerial Meeting adopted the Draft African Charter on Human and Peoples' Rights in Banjul on 19 January 1981 (Ibid, para. 133).

After completing its task, the Ministerial Conference forwarded the draft Charter to the Council of Ministers for further deliberation. The Report of the Secretary-General on the African Charter on Human and Peoples' Rights was then presented, by the OAU Secretary-General on 10 June 1981, to the Plenary of the Council of Ministers. However, the Council of Ministers submitted the draft Charter to the Assembly of Heads of State and Government for consideration without amendments (Gittleman, 1982: p. 669). The African Charter was finally adopted at the eighteenth summit meeting of the Heads of State and Government of the OAU, which was held in 1981 in Nairobi, Kenya. Despite the sluggish initial rate of ratification, the African Charter came into force on October 21, 1986, after receiving the necessary number of ratifications in accordance with its article 63 (3). With the exception of Morocco, which rejoined the AU in 2017, all the rest member states (54) of the AU have ratified the African Charter³.

The African Charter has a preamble and a total of 68 articles. It is broadly divided into three parts and six chapters. The first part, which covers from Articles 1 to Article 29, contains two chapters. While the first chapter includes the list of human and peoples' rights (Article 1-26), the second chapter lists the individual duties (Article 27-29). The second part covers from Article 30 to Article 63 and includes four chapters: the first chapter, which covers from Article 30 to Article 44, addresses the establishment and organization of the African Commission on Human and Peoples' Rights; the second chapter, which covers only Article 45, deals with the mandate of the African Commission on Human and Peoples' Rights; the third chapter, which covers from Article 46 to Article 59, includes the procedures that the African Commission on Human and Peoples' Rights would follow in dealing with inter-state as well as other communications; and the fourth chapter that covered from Article 60 to Article 63 shows the applicable principles of the African Charter. The last part, which covers from Article 64 to Article 68, contains general provisions.

³The latest AU Member State that becomes a party to the African Charter is the Republic of South Sudan, which ratified the Charter on 23 October 2013. On this point and regarding the member States see

<https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf> accessed on 02 September 2022.

The content of the African Charter implicates how it was deeply influenced by Africa's colonial history. Colonial rule in Africa was marked by the exploitation, oppression, and denial of fundamental rights to Africans. This history shaped the Charter's emphasis on both individual and collective rights, reflecting a desire to rectify the injustices of the past. The Charter places significant importance on self-determination, economic development, and the preservation of cultural heritage, which are seen as essential for overcoming the legacy of colonialism. Besides, the inclusion of peoples' rights alongside individual rights underscores a commitment to addressing the socio-economic disparities and political fragmentation left by colonial rule (Murray, 2004: p. 10). Moreover, the African Charter incorporated both the universal and regional perspectives of human rights. While the inspiration it takes from the African tradition and legal philosophy shows the regional perspective, the majority of the individual rights and freedoms outlined in the African Charter and the phrase "fundamental human rights stem from the attributes of human beings" included in paragraph 5 of the preamble demonstrated the universality perspective envisaged by the African Charter (Uwazuruike, 2020: pp. 21-22).

3. Nature of the African Charter

An important aspect of a human rights document is its legal effect. The African Charter is a multilateral treaty and as a treaty it is legally binding. This has been affirmed by the African Commission on numerous occasions. For instance, in the *Kenneth Good v. Republic of Botswana* case, the African Commission affirmed that the respondent state is bound by the Charter and hence is expected to comply with its provisions⁴. A similar affirmation was made in the case of *International Pen and Others v. Nigeria*. In this case the African Commission said that "the African Charter was drafted and acceded to voluntarily by African States wishing to ensure the respect of human rights on this continent. Once ratified, States Parties to the Charter are legally bound to its provisions. A state not wishing to abide by the African Charter might have refrained from ratification. Once legally bound, however, a state must abide by the law in the same way an individual must"⁵.

4. Distinctive Characters of the African Charter

The African Charter, as shown underneath, incorporates both individual and collective rights as well as imposes certain duties on the individual to empower him live a meaningful life and contribute to the society in a valuable way. While the African Charter was inspired by numerous regional and international human rights instruments and incorporated provisions indicative of this fact, it has also many features that make it distinct from the others. In other words, the African

⁴*Kenneth Good v. Republic of Botswana*, Communication No. 313/2005 (African Commission on Human and Peoples' Rights, 26 May 2010), para. 231.

⁵*International Pen and Others v. Nigeria*, Communication Nos. 137/94, 139/94, 154/96 and 161/97, (African Commission on Human and Peoples' Rights, 31 October 1998), para. 116.

Charter shows a considerable departure from international and regional human rights instruments preceding it, making the African Charter unique. This uniqueness was resulted from, among others, the Charter's inspiration in the African conception of human rights⁶. This latter fact is expressly mentioned in the preamble of the African Charter, which states that OAU member States "take into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights" (African Charter, 1981: Preamble, para. 4).

The first distinctive feature of the African Charter is the incorporation of "peoples' rights" alongside individual rights. As Viljoen aptly described, the African Charter is autochthonous in its inclusion of the concept of "peoples" (Viljoen, 2019: pp. 204-205). Unlike the western conception of human rights that focuses on an autonomous and independent individual, the African Charter considers a human being both as an individual and as a member of a collective. The recognition of the family as the natural unit and basis of society and the rights guaranteed to "peoples" alongside the treatment of every individual as a bearer of rights in the African Charter is a good indication of such facts. In other words, while the individual aspect is acknowledged under the African Charter through the treatment of "every individual" as a bearer of rights, the collective aspect is emphasized in the rights guaranteed to "peoples" and in the recognition of the family as the "natural unit and basis of society" (Ibid, p. 205). The African Charter specifically recognizes the right of peoples to existence, the right to self-determination, the right to development, the right to international peace and security, and the right to a generally satisfactory environment. In fact, as De Schutter noted, all these rights are not unique to the African Charter. For instance, the right to self-determination is recognized in the United Nations Charter, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR), while the United Nations General Assembly's 1986 Declaration on the Right to Development includes the right to development. What distinguishes the African Charter in this regard is thus these rights are treated on an equal footing with civil and political as well as economic, social and cultural rights (De Schutter, 2010: p. 29).

The other unique feature that differentiates the African Charter from its other counterparts is the placing of all generation of rights in a single document. It places first generation rights on par with second and third generation rights. It does not offer any basis for a distinction in the implementation of various categories of rights. The Preamble further consolidated the Charter's resolve by stating that "civil and political rights cannot be dissociated from economic, social and cultural rights". This is in contrast to other human rights treaties. In

⁶The Banjul Charter and Universal Human Rights: A Comparative Analysis, p. 2, <https://www.jurisafrica.org/wp-content/uploads/2021/07/pdf_banjul-charter-and-universal-human-rights.pdf> accessed on 20 August 2022.

fact, the adoption of the Universal Declaration of Human Rights as a non-binding document and the subsequent creation of two separate covenants for civil and political rights and socio-economic rights were justified among others by the western opposition to implementing second generation rights in the same way as first-generation rights. Similar standing is reflected in most international and regional human rights treaties as well as domestic human rights regimes (Viljoen, 2019: p. 205). Besides, the African Charter does not make any distinction among the rights included therein regarding their justiciability. It provided equal prominence to all the rights it proclaims.

The explicit inclusion of individual duties in addition to the recognition of collective rights enabled the African Charter to be regarded as having a genuine African feature. In other words, the other unique feature of the African Charter is the inclusion of corresponding duties on individuals. This is one of the signs that the African Charter was influenced by the traditional African understanding of rights, in which the concept of duty is intricately intertwined with rights (Mutua, 2002: pp. 82-92). In fact, there are some who argue that the notion of duties is not unique to the African Charter. For instance, Beyani argues that the idea of duties is not unique to the African Charter and has roots in both the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man, both of which stated that “everyone has duties to the community in which alone the free and full development of his personality is possible” (Beyani, 2012: p. 179). However, although these documents cryptically state that “everyone has duties to the community,” the African Charter is unique in that it lists specific duties, such as the harmonious development of the family and the duty of individuals not to discriminate against one another, thereby recognizing the fundamentally communitarian nature of the African society (Haas, 2014: p. 450). Besides, as De Schutter correctly noted, practically the “duties” component means that state parties should take measures to guarantee that individuals are subjected to obligations that allow the rights of others to be effectively enjoyed. While the wording may differ, the substance is not really distinct from what follows from the obligation to protect human rights imposed on state parties to other international human rights instruments (De Schutter, 2010: p. 29).

Another aspect of the African Charter is the presence of claw-back clauses. A number of its provisions has included limitations containing phrases like “within the law”, “in accordance with the law”, “laid down by law”, “subject to law”, “abides by the law”, or “provided for by the law”, which are commonly known as claw-back clauses. Such limitation clauses appear to recognize the relevant right only to the extent that it is not limited by domestic law (Heyns & Killander, 2006: p. 519). In other words, it would give States a wide range of discretion to exclude the enjoyment of the rights and permit States to justify limitations on the rights by reference to its own domestic laws (Rehman, 2010: p. 312). An extensive use of it would therefore make the enforcement of the rights and free-

doms enshrined in the African Charter dependent upon domestic law or at the discretion of the national authorities. It would make the Charter meaningless and would go against the main objective of having regional human rights system, which is providing effective protection to right holders. The African Commission, however, has the view that national laws cannot override the rights enshrined in the African Charter and thus too easy resort to the limitation clauses in the African Charter does not absolve the State from its human rights obligations. For instance, the African Commission in the *Media Rights Agenda* case stated that:

According to Article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter⁷.

Absence of derogation clause is another distinctive feature of the African Charter. Unlike other international and regional human rights treaties, the African Charter does not contain any derogation provision (Heyns, 2001: p. 161). The African Commission has consistently interpreted this to mean that States are not permitted to deviate from their human rights obligations under the African Charter even in time of emergencies. This has been affirmed, for instance, in the *Media Rights Agenda* as well as in the *Sudan Human Rights Organization and Centre on Housing Rights and Evictions v. Sudan* cases⁸.

The other feature of the African Charter, which relates to the personal jurisdiction of the African Commission, is concerning the *locus standi* requirement in individual communications procedures. The African Charter allowed individuals and organizations other than victims to lodge complaints before the African Commission, thus recognized public interest litigation or *actio popularis*. In other words, individuals, regardless of their victim status, are allowed to file a complaint against a state party regarding the violation of rights and freedoms enshrined in the African Charter (De Schutter, 2010: p. 950).

5. Protected Rights in the African Charter

The African Charter has provided protection both for civil and political rights and economic, social, and cultural rights, which are outlined in the Universal

⁷*Media Rights Agenda and Others v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96, (African Commission on Human and Peoples' Rights, 1998), para. 66. This case was concerned about the banning of a number of magazines critical of the Nigerian regime's annulment of the results of the 1993 elections.

⁸*Media Rights Agenda and Others v. Nigeria*, para. 67; *Sudan Human Rights Organization and Centre for Housing Rights and Evictions v. Sudan*, Communication No. 279/03-296/05, (African Commission on Human and Peoples' Rights, 27 May 2009), para. 165.

Declaration of Human Rights, the ICCPR, and the ICESCR. Its protection is also extended to peoples' rights. The African Charter, as a general human rights document, does not specifically emphasize the rights of any particular vulnerable group, such as women and children, as a separate category within its provisions. Rather, it addresses human rights in a comprehensive manner, covering all individuals regardless of their vulnerability. The following subsections thus deals with the rights included in the African Charter.

5.1. Civil and Political Rights

The civil and political rights included in the African Charter are mostly similar to that of the other international and regional human rights instruments. The first of these rights is the right to equality and non-discrimination, which are recognized under Articles 2 and 3 of the African Charter. While Article 2 of the African Charter incorporated the non-discrimination clause by stating that "every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status", Article 3 of the African Charter included the equality clause by guaranteeing everyone the right to equality before the law and equal protection of the law.

The right to life and integrity of the person is the other civil and political rights recognized under Article 4 of the African Charter. Although not being as comprehensive as what is stated in Article 2 of the European Convention on Human Rights and Article 4 of the American Convention on Human Rights, the African Commission in the *Forum of Conscience v Sierra Leone* case stated that the right to life is the fulcrum of all other rights and the fountain through which other rights flow. Any violation of this right without due process amounts to an arbitrary deprivation of life⁹.

The other right recognized in the African Charter is the right to the respect of dignity and the recognition of his or her legal status, which are included under Article 5. This right encompasses the prohibition of all forms of exploitation and degradation including slavery, slave trade, torture, cruel, inhumane or degrading punishment and treatment. As the African Commission in the *Sudan Human Rights Organization and Centre for Housing Rights and Evictions v Sudan* case indicated, this provision aims at the protection of both the dignity of the human person, and the physical and mental integrity of the individual¹⁰. Like the other provisions, the African Charter does not provide a definition for what constitutes torture or degrading treatment and punishment. Such general terms however are explained in the jurisprudence of the African Commission. It, for instance, used the United Nations Convention against Torture definition of tor-

⁹*Forum of Conscience v. Sierra Leone*, Communication No. 223/98, (African Commission on Human and Peoples' Rights, 6 November 2006), para. 19.

¹⁰*Sudan Human Rights Organization and Centre for Housing Rights and Evictions v. Sudan*, para. 155.

ture in identifying the constituent elements of torture in the *Sudan Human Rights Organization and Centre for Housing Rights and Evictions v Sudan case*¹¹. Besides, the inclusion of the recognition of his or her legal status as a right enabled the African Charter's monitoring bodies to apply the concept of dignity broadly. The African Commission, for instance, explicitly showed the link between the right to legal status and the concept of dignity in the *Open Society Justice Initiative v. Côte d'Ivoire* case. In this case, the African Commission affirmed the fundamentally interdependence nature of the right to legal status and dignity¹². As the African Commission in the *Nubian Community in Kenya v The Republic of Kenya* case also stated, the recognition of one's legal status is an indispensable requirement for the enjoyment of the rights enshrined in the Charter because it grants an individual recognition before the law¹³.

The right to liberty and security of the person is recognized under Article 6 of the African Charter. It guarantees everyone the right not to be deprived of his/her freedom. However, this prohibition is only with regard to arbitrary arrest or detention. This right is thus not absolute and allows for the making of restrictions for reasons and conditions previously laid down by law. This has been affirmed by the African Commission in the *Abdel Hadi, Ali Radi & Others v Republic of Sudan* case, where it stated that "the right to liberty as enshrined in the Charter does not grant complete freedom from arrest or detention, given that deprivation of liberty is one of the legitimate forms of state control over persons within its jurisdiction. However, any arrest or detention must be carried out in accordance with the procedure established by domestic law; otherwise, such arrest would be considered to be arbitrary."¹⁴. Nevertheless, as the African Commission revealed, the phrase "except for reasons and conditions previously laid down by law" in Article 6 of the African Charter does not mean that any domestic law could justify the deprivation of the right to liberty. The state parties could not also avoid its responsibilities by recourse to such claw-back clauses, unless the domestic law that purports to limit the right to liberty conforms to established international norms and standards¹⁵.

A related right to the right to liberty recognized in the African Charter is the right to fair trial, which is incorporated under Article 7. It provides everyone the right to have his/her cause heard including the right to an appeal, the right to be

¹¹*Sudan Human Rights Organization and Centre for Housing Rights and Evictions v. Sudan*, para. 155. The African Commission followed a similar approach in *Abdel Hadi, Ali Radi & Others v Republic of Sudan* case. On this point see *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, Communication 368/09, (African Commission on Human and Peoples' Rights, 5 November 2013), para. 70.

¹²*Open Society Justice Initiative v. Côte d'Ivoire*, Communication 318/06, (African Commission on Human and Peoples' Rights, 19-28 February 2015), paras. 140-141.

¹³*The Nubian Community in Kenya v The Republic of Kenya*, Communication 317/2006, (African Commission on Human and Peoples' Rights, 19-28 February 2015), para. 138.

¹⁴*Abdel Hadi, Ali Radi & Others v Republic of Sudan*, para. 79. See also *Purohit and Moore v. The Gambia*, Communication No. 241/2001, (African Commission on Human and Peoples' Rights, 15-29 May 2003), paras. 64-65.

¹⁵*Purohit and Moore v. The Gambia*, para. 64.

presumed innocent until proved guilty, right to defense and right to be tried within a reasonable time by an impartial court or tribunal. It also guarantees both the personal nature of punishment for offenders and the exclusion of retroactive application of criminal law. This provision omits some of the contents of the right to fair trial included in other international and regional human rights instruments¹⁶ like the right to fair and public hearing, the right to be informed of the reasons for his arrest or any charges against him, the right to have adequate time and facilities for the preparation of his defense, the right to obtain legal assistance and the right to get an interpreter if he cannot understand or speak the language used in court. However, the African Commission tried to include these contents in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted in 2003. There were also instances where the African Commission used this document in making decisions on cases brought before it. For instance, in *Abdel Hadi, Ali Radi & Others v Republic of Sudan* case, the African Commission referred this guideline to hold Sudan in violation of Article 7 of the African Charter¹⁷. The African Court on its part extended the application of the right to fair trial to include the right to free legal aid, which is not specifically provided in the African Charter, in the *Alex Thomas v. United Republic of Tanzania* case. In this case the court argued that free legal aid is a right intrinsic to the right to a fair trial, particularly the right to defense guaranteed in Article 7 (1c) of the African Charter¹⁸. A similar approach was followed in the *Gozbert Henerico v. United Republic of Tanzania* case concerning the right to be provided with an interpreter, which is not explicitly recognized in the African Charter¹⁹.

Among the civil and political rights included in the African Charter are also freedom of religion, freedom of expression, freedom of association, and freedom of assembly, which are covered by Articles 8, 9, 10, and 11 of the charter, respectively. While the limitation that could be imposed on the exercise of freedom of religion, expression and association is open to domestic law, the limitations that could be imposed by law on the exercise of freedom of assembly is required to have a legitimate objective consisting of national security, the safety, health, ethics and rights and freedoms of others. Although the former situation is commonly referred as claw-back clauses and criticized for giving states parties loophole to justify violations of the rights enshrined in the African Charter, the African Charter's monitoring bodies consistently stated that the domestic law that purports to limit the rights and freedoms enshrined in the African Charter should conform to established international norms and standards. This was, for

¹⁶See, for instance, the International Covenant on Civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976, Article 9; European Convention on Human Rights, adopted on 4 November 1950 and entered into force on 3 September 1953, Article 6.

¹⁷*Abdel Hadi, Ali Radi & Others v Republic of Sudan*, para. 87.

¹⁸*Alex Thomas v. United Republic of Tanzania*, Application No. 005/2013, Judgment, (African Court on Human and Peoples' Rights, 20 November 2015), para. 114.

¹⁹*Gozbert Henerico v. United Republic of Tanzania*, Application No. 056/2016, Judgment on Merits and Reparations, (African Court on Human and Peoples' Rights, 10 January 2022), para. 126.

instance, affirmed by the African Commission in *Purohit and Moore* case²⁰. Similarly the African Court in the *Konate* case stated that “for a restriction to be acceptable, it must serve a legitimate purpose and must be proportionate to and absolutely necessary for the benefits to be gained”²¹.

Article 12 of the African Charter included a couple of civil and political rights. The first is freedom of movement and residence. Everyone’s right to freedom of movement and residence within the borders of a state is guaranteed under Article 12(1). This freedom extends to the right of leaving any country including his own, and to return to his country, which is addressed under Article 12(2). While the first aspect of freedom of movement (freedom of movement and residence within the borders of a state) is required to be exercised by abiding with the law, the second aspect of freedom of movement (the right to leave any country including his own, and to return to his country) is subject to legal limitations put in place to safeguard public morality, public health, law and order or national security. The other right recognized under Article 12(3) is the right to asylum, which entitles every individual, who is persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. The last right included in this Article is the right not to be expelled in mass or without due process, which is dealt with 12(4) of the African Charter.

The right to participate freely in the government of his country is the other civil and political right that got place in the African Charter. It is recognized under Article 13 and entitles everyone to directly or indirectly take part in the conduct of public affairs and to have access to public services and property without discrimination of any kind. It is however required to be exercised ‘in accordance with the provisions of the law’. Despite worries that this will be misused to unjustly restrict rights, the African Commission in the *Mouvement ivoirien des droits humains (MIDH)* case held that, “the restrictions which can be imposed on the enjoyment of the rights prescribed by the African Charter should only be applied, where the need arises, in the spirit of the conditions provided for by the Charter. It further states that the governments should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law.”²².

5.2. Economic, Social and Cultural Rights

The preamble of the African Charter clearly indicates the indivisibility, interdependence and interrelatedness of all human rights by stating that “civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, so-

²⁰*Purohit and Moore v. The Gambia*, paras. 64-69.

²¹*Lohe Issa Konate v. Burkina Faso*, Application No. 004/2013, Judgment, (African Court on Human and Peoples’ Rights, 5 December 2014), paras, 132 and 133.

²²*Mouvement ivoirien des droits humains (MIDH) v Côte d’Ivoire*, Communication No. 246/02, (African Commission on Human and Peoples’ Rights, 29 July 2008), paras. 72-73.

cial and cultural rights is a guarantee for the enjoyment of civil and political rights” (African Charter, 1981: Preamble, para. 7). Although not as exhaustive as the civil and political rights, the African Charter thus included economic, social and cultural rights in the substantive part. This modest coverage of economic, social, and cultural rights in the African Charter, according to the drafting committee, was motivated by the desire to save young states from having to shoulder too many but significant commitments (OAU, 1981b: para. 13). As a result, the African Charter explicitly included only a limited number of economic, social and cultural rights. However, these rights are formulated in broadly worded terms, giving the treaty monitoring bodies an opportunity to widen their protection.

The first economic, social, and cultural right that has got explicit recognition under the African Charter is the right to property. Article 14 of the African Charter states that, “the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”. This provision simply recognized the right to property without making any reference as to the specific scope or normative content of this right as well as its beneficiaries. However, the African Commission and the African Court have tried to show the contents of this right on various cases brought before them. For instance, the African Commission in the *Interights v. Mauritania case* indicated that the right to property under Article 14 of the African Charter comprises two principles. The first, which is general, is the recognition of the principle of ownership and peaceful enjoyment of property; and the second principle provides for the possibility, and conditions of deprivation of the right to property²³. In the *Media Rights Agenda case*, the African Commission also stated that right to property includes a right to have access to property of one’s own and the right not for one’s property to be removed²⁴. The African Court in its judgment on the *African Commission on Human and Peoples’ Rights v. Republic of Kenya case* on its part indicated that the right to property enshrined in Article 14 of the African Charter is applicable for both an individual and groups²⁵. Besides, it also acknowledged the classical conception of the right to property, which consists of three elements including the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit thereof (*fructus*) and the right to dispose of the thing, that is, the right to transfer it (*abusus*)²⁶. Moreover, the African Court identified the conditions necessary for the restriction of the right to property by requiring the restriction made to be in the public interest, necessary and proportional²⁷.

²³*Interights v. Mauritania*, Communication No. 373/2009, (African Commission on Human and Peoples’ Rights, 3 March 2010), para. 46.

²⁴*Media Rights Agenda and Others v. Nigeria*, para. 77.

²⁵*African Commission on Human and Peoples’ Rights v. Republic of Kenya*, Application No. 006/2012, Judgment, (African Court on Human and Peoples’ Rights, 26 May 2017), para. 123.

²⁶*African Commission on Human and Peoples’ Rights v. Republic of Kenya*, para. 124.

²⁷*African Commission on Human and Peoples’ Rights v. Republic of Kenya*, para. 129.

The other economic, social and cultural right recognized under the African Charter is found in Article 15, which deals with workers' rights. According to Article 15 of the African Charter every individual has the right to work under equitable and satisfactory conditions, and to receive equal pay for equal work. In addition to the ambiguous phrasing of the rights, this provision contains a very limited worker's right. It only explicitly recognized the right to work under equitable and satisfactory conditions, and the right to receive equal pay for equal work. The other normative contents of worker's rights, such as the right to fair remuneration, the right to safe and healthy working conditions, the rights to rest, leisure, reasonable limitation of working hours, and periodic holidays with pay, the right to form and join trade unions, the right to strike, and the right to social security and social insurance, which are explicitly recognized in international human rights instruments are left out of the express inclusion of the African Charter. For instance, these components of the right to work are included in articles 7-9 of the International Covenant on Economic, social and Cultural Rights, which was adopted on 16 December 1966 and entered into force on 3 January 1976. However, the African Commission in its 1989 Guidelines for National Periodic Reports under the African Charter listed these rights as those to be included in the reports regarding economic, social and cultural rights²⁸.

The right to health is the other economic, social and cultural right that got explicit recognition under the African Charter. It is recognized under Article 16 of the African Charter, which entitles everyone the right to enjoy the best attainable state of physical and mental health. To this effect, state parties are required to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. As the ICESCR Committee in its General Comment 14 indicated, the right to health does not mean that the "right to be healthy"²⁹. It is an inclusive right that encompasses both health care and the underlying determinants of health, which include access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions³⁰.

The right to education, which is specified in Article 17(1) of the African Charter, is the other expressly recognized economic, social, and cultural right. This article guaranteed the right to education to everyone. Like most of the socio-economic rights that obtained express guarantee under the African Charter,

²⁸African Commission on Human and Peoples' Rights, Guidelines for National Periodic Reports: General Guidelines regarding the Form and Contents of Reports on Economic and Social Rights, adopted in April 1989, paras. 4-19. See also African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2011, paras. 58-59.

²⁹Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)", (11 August 2000), E/C.12/2000/4, para. 8; Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para 61.

³⁰Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, paras. 61 and 63.

the right to education is formulated in general terms without having detail contents. This has been however elaborated by the African Commission on different occasions. For instance, in its 2011 report on the human rights promotion mission to the Central African Republic, the African Commission recommended the government to “ensure that all children enjoy their right to a free and compulsory primary education”³¹, showing some contents of the right to education.

Individual’s right to freely take part in the cultural life of his community is incorporated under Article 17(2) of the African Charter. Sub-article 3 of this same article imposes an obligation on the state to promote and protect the morals and traditional values recognized by the community. While the former provision deals with the individual aspect of the right to culture, the latter provision addresses the collective component. This has been affirmed by the African Commission in the *Endorois* case, in which it stated that “Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognized by a community”³².

Rights of the family, which is one of the economic, social and cultural rights recognized under the African Charter, is dealt in Article 18. It recognizes the family as the natural unit and basis of society and imposes an obligation on the state to protect and assist the family. It further provides protection to women, children, persons with disabilities and older persons.

5.3. Peoples’ Rights

Although the African Charter’s inclusion of economic, social and cultural rights as enforceable rights on an equal footing with civil and political rights is commended as a distinctive contribution to the corpus of human rights, its most important distinguishing feature vis-à-vis other human rights instruments is its elaboration of peoples’ rights. These rights are included in Articles 19-24 of the African Charter. The express recognition of such rights within the African Charter reflects the African conception of human rights, which is communal and people-oriented (Uwazuruike, 2020: p. 61). In fact, the inclusion “peoples” rights’ in the African Charter was considered as “the embodiment of the African conception and philosophy of a person in society”. As Okere rightly said, in Africa, a person is seen as an integral part of a group that is driven by a sense of solidarity rather than as an isolated and abstract individual (Obinna, 1984: p. 148).

The first collective right recognized in the African Charter is peoples’ right to equality. Article 19 of this Charter states that, “all peoples shall be equal; they

³¹African Commission on Human and Peoples’ Rights, “Report on the Human Rights Promotion Mission to the Central African Republic by Commissioners Bechir Khalfallah and Lucy Asuagbor”, (6-16 June 2011), para. 162(iv).

³²*Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication No. 276/03, (African Commission on Human and Peoples’ Rights, 11-25 November 2009), para. 241.

shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.” There are two major issues relating to this provision: one is concerning the meaning of the term “people” and the other regarding whether it is applicable for internal or external domination or both.

There is lack of a definition of “people” in international law owing to the political implications it has for claims of secession and independence of groups, thereby challenging the territorial integrity of States. As the African Commission in the *Mgwanga Gunme et al. v. Cameroon* case indicated, the drafters of the African Charter deliberately refrained from defining the notion of “people” due to the political connotation it carries³³. The African Court, on its part, has the view that the deliberate omission of definition by the drafters of the African Charter was made so as to permit certain flexibility in the application and subsequent interpretation by future users of the legal instrument.

While neither the African Commission nor the African Court has provided a definition of a people, they have identified certain “characteristics” of a “people”. The African Commission in the *Mgwanga Gunme et al. v. Cameroon* case referred “people” as those that are bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds³⁴. The African Commission and African Court have also applied the term “people” to a variety of different entities at different times. It has been used to refer the entire population of a State, an indigenous people, a specific ethnic group, or various sections of national community (Murray, 2019: pp. 486-487). For instance, the African Court in the *African Commission on Human and Peoples’ Rights v Republic of Kenya* case said that, “‘people’ covers not only the population as the constituent elements of the State, but also the ethnic groups or communities identified as forming part of the said population within a constituted State... provided such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter’s consent”³⁵.

As far as the second issue is concerned, the African Commission and African Court indicated the applicability of right of peoples’ equality not only for cases of external domination but also for cases of internal domination. For instance, the African Commission in the *Sudan Human Rights Organization, Centre on Housing Rights and Evictions v. Sudan* case found a violation of this right and argued that the people of Darfur did not deserve to be dominated by a people of another race in the same state³⁶. This has been reaffirmed in the *Front for the Liberation of the State of Cabinda v. Republic of Angola* case, in which the African Commission stated that “distinct and identifiable groups of ‘peoples’ and communities exist within the State Parties to the African Charter and each set of

³³*Mgwanga Gunme et al. v. Cameroon*, Communication No. 266/2003, Decision, (African Commission on Human and Peoples’ Rights, 13-27 May 2009), para. 169.

³⁴*Mgwanga Gunme et al. v. Cameroon*, para. 171.

³⁵*African Commission on Human and Peoples’ Rights v Republic of Kenya*, para. 168.

³⁶*Sudan Human Rights Organization, Centre on Housing Rights and Evictions v. Sudan*, para. 223.

‘peoples’ and communities is entitled to enjoy internal legal equality vis-à-vis other ‘peoples’ and communities within the same state”³⁷.

The other collective right recognized under the African Charter is the right to self-determination, which is provided in Article 20(1). This article states that “... all peoples shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen...” This right to self-determination has two components, consisting of internal and external self-determination. The African Commission has asserted this on numerous occasions, despite the fact that it maintains the opinion that the external aspect of self-determination should be an exception. For instance, the African Commission in the *Katangese* case identified the ways and conditions in which the right to self-determination may be exercised. Accordingly, it stated that “self-determination may be exercised in the form of independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognizant of other recognized principles such as sovereignty and territorial integrity”³⁸. It has also indicated the possibility where secession may be considered legitimate. It has the view that where there is concrete evidence of violations of human rights to the point that the territorial integrity of the State should be called to question and evidence that the people in question are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the people should be allowed to exercise their external right to self-determination³⁹. The African Commission also affirmed the view that self-determination should be exercised within the inviolable national borders of a State party by taking due account of the sovereignty of the State in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights⁴⁰.

The right of people’s to freely dispose of their wealth and natural resources, another collective right recognized in the African Charter, is incorporated in Article 21 of the African Charter separately, despite the fact that it is a part of the right to internal self-determination. It is required to be exercised for the exclusive interest of the people and no situation would justify its deprivation. This right was addressed in the *Ogoni* case in which the African Commission found violation of, *inter alia*, the right of the *Ogoni* people to freely dispose of their wealth and natural resources by the Nigerian Government⁴¹.

³⁷*Front for the Liberation of the State of Cabinda v Republic of Angola*, Communication 328/06, (African Commission on Human and Peoples’ Rights, 5 November 2013), para. 114.

³⁸*Katangese Peoples’ Congress v. Zaire*, Communication 75/92, (African Commission on Human and Peoples’ Rights, 22 March 1995), para. 4.

³⁹*Katangese Peoples’ Congress v. Zaire*, para. 5.

⁴⁰Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, para. 41.

⁴¹*Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/96, (African Commission on Human and Peoples’ Rights, 27 May 2002), para. 58.

Another collective right recognized by the African Charter, and mentioned in Article 22, is the right to development. It entitles all peoples the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. It also imposed an obligation on states to make sure that the right to development is exercised, either individually or collectively (African Charter, 1981: Article 22). This right contains both individual and collective aspects, despite being included as peoples' rights. This has been affirmed by the African Commission in the *Open Society Justice Initiative* case. In this case the African Commission clearly indicates that, the mere mention of the term "peoples" in the provisions of Article 22 of the African Charter cannot make the right to development as being solely and exclusively collective⁴².

The right to peace and security, and the right to general satisfactory environment are the other collective rights recognized under the African Charter. While the former, which guarantee to all peoples the right to national and international peace and security, is incorporated in Article 23, the latter, which ensures all peoples the right to a general satisfactory environment favorable to their development, is covered under Article 24.

6. Individual Duties under the African Charter

It is an accepted idea that rights and duties are inseparable and they are considered as the two sides of the same coin. This idea is affirmed in the African Charter in which the preamble stated that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone. In fact, one of the unique features of the African Charter, as discussed above, is the explicit imposition of duties on individuals. Article 27-29 of the African Charter addresses the individual's duties towards his family and society, the State and other legally recognized communities and the international community. These duties include the duty to respect and consider fellow human beings without discrimination, to preserve the harmonious development of the family, to serve the national community, not to compromise the security of the state, to preserve and strengthen social and national solidarity and to preserve and strengthen national independence and the territorial integrity of one's country.

Most human rights instruments-imposed obligations on states towards individuals. There is little doubt, nevertheless, that rights cannot make sense in a social and political vacuum, devoid of the duties assumed by individuals (*Mutua*, 1995: p. 340). Whether this explicit imposition of duties on individuals really distinguishes the African Charter from another equivalent instrument is thus doubtful. Firstly, there are other human rights instruments such as the Universal Declaration of Human Rights (Article 29), the American Declaration of the Rights and Duties of Man (Articles 29-38) and the American Convention on

⁴²*Open Society Justice Initiative v. Côte d'Ivoire*, Communication No. 318/06, (African Commission on Human and Peoples' Rights, 27 May 2016), para 183.

Human Rights (Article 32) that included individual duties. The ICCPR and the ICESCR have also recognized individual duties towards other individuals and their community in their respective preamble (common paragraph 5). Secondly, in practice, the “duties” component means that state parties should take measures that ensure individuals responsibility to refrain from hindering the effective enjoyment of the rights of others. While the wording may differ, the substance is not truly distinct from what follows from the obligation to protect human rights imposed on state parties in the other human rights instruments (Knox, 2008: p. 18).

7. State Obligations under the African Charter

The general obligations of state parties concerning human rights under the African Charter have been stipulated under its article 1. It provides that “the Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them”. This provision imposes a general obligation to give effect for the rights, duties and freedoms incorporated within the African Charter. To this effect, state parties are required to give recognition for the rights, duties and freedoms; and to take measures necessary for their implementation such as legislative measures or other measures. While the first requirement is the natural consequence of being a party to the African Charter, because when a state ratified a treaty, it is deemed to have been given recognition for the rights, duties and freedoms included therein unless there is permitted reservation with regard to certain provisions of the concerned treaty, the second requirement needs the state parties’ positive action.

Regarding the measures to be taken, state parties are given wide discretion. This makes the obligation imposed on states parties under article 1 of the African Charter an obligation of result. The phrase “...undertake to adopt legislative or other measures” indicates this fact as the adoption of legislative measures specified is not a mandatory one. A similar phrase, “legislative or other measures”, has also been used in Article 62 of the African Charter while requiring the state parties to report the measures taken for implementing the rights and freedoms recognized and guaranteed in the African Charter. This wide discretion in the choice of measures to use to deal with human rights problems granted for the state parties was affirmed by the African Commission in the *Lawyers for Human Rights v. Swaziland case*⁴³.

Article 1 of the African Charter did not expressly list the three typologies of obligations, which consists of the obligation to respect, protect and fulfill. These obligations are internationally accepted human rights obligations and have been identified by various human rights treaty bodies. It is also the same for the Afri-

⁴³*Lawyers for Human Rights v. Swaziland*, Communication No. 251/2002, (African Commission on Human and Peoples’ Rights, 11 May 2005), para. 50.

can Commission. This has been affirmed in the *Kenneth Good v. Republic of Botswana case*, where the African Commission stated that the state has the obligation to respect, protect and fulfil all the provisions of the Charter without any exceptions⁴⁴. However, in some occasions the African Commission added the “obligation to promote” besides the aforementioned three typologies of state obligations. For instance, in the *Abdel Hadi, Ali Radi & Others v. Republic of Sudan case*, the African Commission said that “if a State Party fails to respect, protect, promote or fulfill any of the rights guaranteed in the Charter, this constitutes a violation of Article 1 of African Charter”⁴⁵. The “duty to promote” was also identified as one of the obligation of states in the *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria case*. In this case, the African Commission affirmed that “all rights-both civil and political rights and social and economic-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights”⁴⁶. The Pretoria Declaration on Economic, Social and Cultural Rights in Africa, which was adopted by the African Commission in 2004, has also identified the duty to promote along with the duty to respect, protect and fulfill as the state parties commitment⁴⁷. However, it should be noted that the reading of the duty to promote within the duty to fulfill is not alien to other human rights treaty monitoring bodies too. For instance, the Committee on Economic, Social and Cultural Rights in its General Comment No. 24 stated that “the obligation to fulfil requires States parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and, in certain cases, to directly provide goods and services essential to such enjoyment”⁴⁸.

The duty to respect requires the state to refrain from interfering directly or indirectly with the enjoyment of rights. It focuses on preventing the State from unduly intervening in the enjoyment of particular freedom or entitlement. The obligation to protect requires the state to protect individuals from third-party intervention. The obligation to promote focuses on raising awareness as to the rights and procedures for asserting and protecting the rights. The obligation to fulfill requires States to take appropriate measures towards the full realization of the rights including the provision of the necessary means for the exercise of the rights to the beneficiaries (De Schutter, 2010: pp. 242-253; Murray, 2019: p. 24-29). All of these obligations should be complied by the state parties in order to give effect to the rights, duties, and freedoms enshrined in the African Charter. Failure to comply with any of these obligations would result for the violation

⁴⁴*Kenneth Good v. Republic of Botswana*, para. 231.

⁴⁵*Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, para. 92.

⁴⁶*Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, para. 44.

⁴⁷Pretoria Declaration on Economic, Social and Cultural Rights in Africa’, 2004, Article 2.

⁴⁸Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities’, (10 August 2017), para. 3.

of Article 1 of the African Charter. This idea was confirmed by the African Commission in the *Abdel Hadi, Ali Radi & Others v. Republic of Sudan case*⁴⁹. A similar position was held by the African Court in the *Zongo v. Burkina Faso* case. In this case, the African Court held that “the respondent State’s failure to take the appropriate legal measures to guarantee respect for the rights of Applicants in terms of Article 7 of the Charter leads for the violation of Article 1 of the African Charter”⁵⁰.

Besides Article 1, Article 25 and 26 of the African Charter have also included general obligation clauses by expressly recognizing the obligation of state parties for the promotion and protection of the rights and freedoms guaranteed by the Charter. In addition to these general obligation clauses, there are also specific obligation clauses that are found scattered and are applicable with regard to the specific rights contained in that particular provision of the African Charter. A good illustration for this is Article 22(2) of the African Charter, which states that “states shall have the duty, individually or collectively, to ensure the exercise of the right to development”. The obligation included in this provision is mainly applicable with regard to the right to development.

With regard to the obligation of states, the African Charter’s approach towards economic, social and cultural rights is different from the ICESCR. While the ICESCR subjects these rights to the available resources of a state and their progressive realization, the African Charter does not expressly refer to these principles in the realization of economic, social and cultural rights. Despite this, the African Commission has the view that the concept of progressive realization is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter. A similar position was reflected in the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, which under its article 11(a (iv)) states that “states parties should come up with National Action Plans, which set out benchmark indicators for the progressive realization of social, economic and cultural rights”. The provision of Article 2 of this Declaration also recognized this progressive realization concept by requiring the state parties to use the maximum of their resources to give full effect to the economic, social and cultural rights. As the African Commission stated, this duty of progressive realization is, however, accompanied by a continuing duty to move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights⁵¹.

8. Institutional Architecture for the African Charter’s Implementation

One aspect that most human rights treaties have in common is the institutional

⁴⁹ *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, para. 92.

⁵⁰ *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilibouo & the Burkinabe Human and Peoples’ Rights Movement v. Burkina Faso*, Application No. 013/2011, Judgment, (African Court on Human and Peoples’ Rights, 28 March 2014), para. 199.

⁵¹ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, paras. 13-14.

architecture designed to oversee their implementation. They usually established a treaty monitoring body or bodies to supervise member states compliance with the treaty. Likewise, there are two treaty bodies established to monitor the implementation of the African Charter: the African Commission on Human and Peoples' Rights (the African Commission) and the African Court on Human and Peoples' Rights (the African Court).

8.1. African Commission on Human and Peoples' Rights

As specified in Article 30 of the African Charter, the African Commission shall be established within the OAU to promote human and peoples' rights and ensure their protection in Africa. Accordingly, initially the African Commission was established in 1987 as a sole treaty monitoring body for the African Charter. It has composed of eleven members chosen by the Assembly of Heads of State and Government through a secret ballot amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights. In the selection, persons having legal experience are required to be given particular consideration and those selected are also required to serve in their personal capacity (African Charter, 1981: Articles 31 & 33). Although the African Charter does not outline how the Commission should carry out its duties, rule 27(1) of the 2020 Rules of Procedure of the Commission allows it to have regular and extraordinary sessions in order to satisfactorily carry out its functions in accordance with the African Charter. In this regard, as provided in rules 28(1) and 29(1) of the same Rules of Procedure, the Commission may convene as many extraordinary sessions as necessary in addition to its regular four-times-per-year meetings, the length of which shall be decided by the Commission itself.

The African Commission has three broad mandates in relation to the realization of human rights in Africa. As provided in Article 45(1) of the African Charter, the first mandate of the African Commission is promoting human and peoples' rights. The main objective of this mandate is to educate the public and spread knowledge about human and peoples' rights in Africa. To this end, the African Commission is empowered to engage in three types of activity. The first of such activity is specified under Article 45(1a), which consists of collecting documents, undertaking studies and researches on African problems in the field of human and peoples' rights, organizing seminars, symposia and conferences, disseminating information, encouraging national and local institutions concerned with human and peoples' rights, and should the case arise, giving its views or making recommendations to governments. Secondly, the African Commission, as indicated in Article 45(1b) of the African Charter, has the authority 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 legislations. Lastly, Article 45(1c) of the African Charter allows the African Commission to cooperate with other Af-

frican and international institutions concerned with the promotion and protection of human and peoples' rights. The consideration of states parties' reports, the study of human rights issues and country-specific situations, including by means of fact-finding missions, and a system of special rapporteurs and working groups thus falls in this mandate of the African Commission (Viljoen, 2012: pp. 289-390).

The second mandate of the African Commission, which is provided in Article 45(2) of the African Charter, is ensuring the protection of human and peoples' rights. This mandate requires the Commission to take measure to ensure that the right-holders enjoy the rights contained in the Charter. This involves making sure that the States do not violate these rights and, if they do, that the victims have their rights restored. To this end, the African Commission is empowered to consider individual and inter-state communications⁵², which are covered in more detail in the following section.

The third mandate of the African Commission is an interpretative function. It has given a broad interpretive mandate that resembles the advisory opinion jurisdiction of some human rights treaty monitoring bodies. As provided in Article 45(3) of the African Charter, it has the power to interpret all the provisions of the African Charter. However, its personal interpretive jurisdiction is limited as it would only interpret the Charter's provisions upon the request of a state party, an institution of the AU or an African organization recognized by AU.

Besides the aforementioned mandates, Article 45(4) of the African Charter stipulates that the African Commission has the responsibility to perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

8.2. African Court on Human and Peoples' Rights

The other institutional framework established to monitor the implementation of the African Charter is the African Court on Human and Peoples' Rights. It was established in response to complaints about the weak protective mandate of the African Commission. Accordingly, its establishment protocol under Article 2 indicates that the African Court was established to complement the protective mandate of the African Commission. Consequently, it has granted the power to exercise advisory, conciliatory, and contentious jurisdiction over issues pertaining to human rights.

9. Supervision Mechanisms under the African Charter

There are three supervision mechanisms recognized under the African Charter for monitoring state compliance with their Charter obligations and to address human rights issues within Africa. These are: state reporting, inter-state communications and other communications.

⁵²African Commission on Human and Peoples' Rights, History, <<https://achpr.au.int/en/about/history>> accessed on 02 September 2022.

9.1. State Reporting Procedure

State reporting is one of the monitoring mechanisms included in the African Charter. This is indicated in Article 62 of the African Charter, which provided that “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 recognized and guaranteed by the present Charter”. Unlike most international human rights instruments that adopted state reporting as a mechanism that require initial and periodic reports from the concerned state parties (for example article 40 of the ICCPR), the African Charter only imposed a periodic reporting obligation on state parties. Accordingly, each state party is mainly required to report biennially.

State reporting is found in all the principal UN human rights treaties and, indeed, is the only procedure that is compulsory in all instruments. However, at the regional level, neither the European Convention on Human Rights nor the American Convention on Human Rights included state reporting as a monitoring mechanism. This makes the African Charter to be the only main regional human rights instrument that used state reporting procedure as a monitoring mechanism. Besides, in treaties that adopted state reporting as supervision mechanism, the treaty monitoring bodies are expressly empowered to receive and consider the reports submitted by States Parties. It is therefore natural to assume that the African Commission has the mandate to receive and consider reports submitted in accordance with Article 62 of the African Charter. However, Article 62 is completely silent about who is responsible to receive and review the state reports submitted (Evans & Murry, 2008: p. 52). As a result, the African Commission at its 3rd Ordinary Session held in Libreville, Gabon, from 18 to 28 April, 1988 recommended to the Assembly of Heads of State and Government to specifically assign it with the mandate to enable it to consider and indicate the general orientation as regards the form and substance of periodic reports and the OAU Secretary General with the mandate to receive and forward state reports to the Commission⁵³. Accordingly, the Assembly of Heads of State and Government endorsed this recommendation at its twenty-fourth ordinary session held from 25-28 May 1989 in Addis Ababa, Ethiopia and entrusted the Commission with the task of examining periodic reports submitted by States Parties pursuant to Article 62 of the African Charter (*The Assembly of Heads of State and Government of the OAU, 1988: para. 5(c)*).

With regard to the content of the periodic reports of states parties, Article 62 of the African Charter requires the inclusion of measures taken for the implementation of the rights and freedoms recognized and guaranteed by the African Charter, whether legislative or others. However, the African Commission in its

⁵³African Commission on Human and Peoples' Rights, Recommendation on Periodic Reports: First Annual Activity Report of the African Commission on Human and Peoples' Rights Covering the Period from November 1987 through April 1988, (28 April 1988), Annex IX.

Guidelines for National Periodic Reports indicates that the states parties are expected to include in their report not only the measures taken but also the progress made in achieving the objectives of the Charter and the factors and difficulties affecting the degree of fulfillment of their obligations under the African Charter⁵⁴.

One of the major problems with this supervision mechanism is lack of reporting and overdue reporting by state parties. The record of state parties to the African Charter in this regard is very depressing. As of 5 December 2021, only two states are listed as fully compliant with their article 62 obligation and six States have yet to submit any report at all. The rest have at least one overdue report: twenty-three States have more than three overdue reports, seven States have three outstanding reports, seven States have two outstanding reports and nine States are late with one report⁵⁵.

9.2. Inter-State Communications Procedure

This procedure is provided for in Article 47-54 of the African Charter. The procedure allows a state party to lodge a complaint against another state party before the African Commission when the latter violates the provisions of the African Charter. It is a mandatory procedure as there is no need for a special declaration to be made by states as conditions for the admissibility of such complaints. The African Charter sets out two possible ways by which the inter-state communication procedure could function.

The first option is exchange of written communications between the concerned states concerning violations of provisions of the African Charter, which the Commission referred as communications negotiations in its rules of procedure. This way is provided in Article 47-48 of the African Charter. According to Article 47 of the African Charter, if a state party has good reasons to believe that another State party has violated the provisions of the African Charter, it may draw the attention of that State to the matter through written communication. The receiving state must provide a written explanation or clarification of the matter which includes the laws and rules of procedure applied and applicable, and the redress already given or course of action available to the querying State within three months of receiving the communication. If the matter is not resolved to the satisfaction of the two States involved through bilateral negotiation

⁵⁴Guidelines for National Periodic Reports, Introduction, para. 2.

⁵⁵The two States that fully complied with the reporting obligation are Eswatini and Kenya; the six States that are yet to submit a report are Comoro Islands, Guinea Bissau, Equatorial Guinea, Sao Tomé and Príncipe, Somalia and South Sudan; the States that have more than three overdue reports are Burkina, Burundi, Cabo Verde, CAR, Congo, Djibouti, Ethiopia, Gabon, Ghana, Guinea, Liberia, Libya, Madagascar, Mali, Mozambique, SADR, Senegal, Sierra Leone, Sudan, Tanzania, Tunisia, Uganda and Zambia; the States that have three outstanding reports are Algeria, Botswana, Chad, Cote d'Ivoire, DRC, Mauritania and South Africa; the States that have two outstanding reports are Angola, Egypt, Eritrea, Lesotho, Nigeria, Rwanda and Togo; and the States that have one overdue report are Benin, Cameroon, The Gambia, Malawi, Mauritius, Namibia, Niger, Seychelles and Zimbabwe. On this point see African Commission on Human and Peoples' Rights, 50th and 51st Combined Activity Reports of the African Commission on Human and Peoples' Rights, para. 31.

or by any other peaceful procedure within three months of the date on which the original communication is received by the State to which it is addressed, either State have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved (African Charter, 1981: Article 48). The second possibility is directly approaching the African Commission without engaging in a friendly settlement procedure, which the Commission referred as communications complaints in its rules of procedure. This possibility allows a State Party to refer a matter directly to the African Commission under Article 49 of the African Charter if it believes that another State Party has violated the provisions of the Charter.

It is up to the state either to engage in the friendly settlement procedure or to directly approach the African Commission. It is thus not a prerequisite for the admissibility of an inter-state communication. However, the communication to be considered must fulfill the admissibility criteria stated in Article 50 of the African Charter, which talks about the exhaustion of local remedies unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged. This exhaustion of domestic remedies requirement is interpreted by the African Commission as those regional or international procedures of settlement or good office than that of the domestic mechanisms required for individual communications (Ibid, Article 52). Once the admissibility requirements have been met, the African Commission will proceed to consider the merit of the case. However, as indicated in rule 112(1) of the Rules of Procedure of the Commission, it will first make its good offices available for the states to assist them in reaching an amicable settlement. If this amicable settlement procedure fails to give fruits, the Commission will proceed to hear the case and decide on the merit, on the basis of which reports outlining the facts and findings will be prepared and submitted to the state concerned and the AU Assembly of heads of states and governments (Ibid, Article 52).

Although states are not particularly interested in using the interstate complaint mechanism when they disagree with the human rights situations in another state, it can be utilized to protect human and peoples' rights. Due to their belief that informal diplomatic methods are more effective, they frequently prefer them than the formal ones. It is also true that initiating legal action under a human rights instrument requires careful planning, which can be costly and require skilled personnel that might not be readily available within the government agency that would have to take on such a task (Tomuschat, 2008: p. 194).

9.3. Other Communications

Individual communication procedure is an important monitoring mechanism that enables victims of human rights violations to uphold their rights without needing approval from the government. Although it was established as a quasi-judicial body, the African Commission was not given explicit mandate to consider individual communications. As provided in Article 55 of the African

Charter, the Secretary of the Commission is required to submit the list of communications other than those of States parties to the Commission, who determines by simple majority of its members the communications to be considered. This article simply referred to “communications other than those of States parties” without indicating what these communications are. Such expression is not familiar in other international and regional human rights treaties as they refer to inter-state communications and “individual communications”. Good illustrations for this could be the express recognition of individual communications in Article 1 of the Optional Protocol to the ICCPR, Article 2 of the Optional Protocol to the ICESCR, Article 34 of the European Convention on Human Rights and Article 44 of the American Convention on Human Rights.

The lack of explicit mandate to consider individual communications forced the African Commission to justify its capacity to deal with such communications on various occasions. For instance, the Nigerian government has objected to comply with the decision of the African Commission at various occasions arguing that it lacked the judicial capacity to decide on individual communications. The African Commission, however, responded by explaining its quasi-judicial power, stating that the communications procedure provided in Article 55 of the African Charter is quasi-judicial one (DOC. II/ES/ACHPR/4 as cited in [Viljoen & Louw, 2004: p. 3](#)). An objection over the scope of its jurisdiction regarding individual communications has also been raised by the Gambian government in the *Jawara* case. In this case, the Gambian government argued that the power of the African Commission under the Charter is limited only to cases which reveal a series of serious or massive violations of human rights⁵⁶. The African Commission, however, refuted this assertion and asserted by referring to Article 55 of the African Charter that, it has the authority to consider communications even if they do not reveal a series of serious or massive violations⁵⁷. It is thus sound to argue that the competence of the African Commission to consider individual communications has been institutionalized through an extensive interpretation of the “other communications” clause provided for in Article 55 of the African Charter. This article allows individuals, regardless of their victim status, to file a complaint against a state party regarding the violation of rights and freedoms enshrined in the African Charter. It can be filed not only by the direct victims of a violation, but also by any individual or organization, without it being necessary to demonstrate that the victims directly affected are unable to file the complaint themselves ([De Schutter, 2010: p. 950](#)).

As indicated above, the Secretary of the Commission is required to list communications other than those of States parties and transmit them to the members of the Commission. The commissioners concerned, as provided in Article 55(2) of the African Charter, should then decide by simple majority vote of its members that which communications should be considered by the Commission.

⁵⁶*Jawara v. The Gambia*, para. 41.

⁵⁷*Ibid*, para. 42.

This process is referred in rule 115 of the Commission's Rules of Procedure as seizure. After the communication is seized, the African Commission will proceed in determining the admissibility of such communication. Communications other than states parties to be considered by the African Commission are thus required to fulfill the admissibility conditions outlined in Article 56 of the African Charter. The admissibility conditions include the requirements that the authors should not be anonymous; the communications should be compatible with the African Charter and the Charter of the OAU; the communications should not be written in disparaging or insulting language directed against the State concerned and its institutions or to the OAU; the communications should not be based exclusively on news disseminated through the mass media; the communications should be submitted after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged; the communications should be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and the communications should 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 OAU or the provisions of the African Charter (African Charter, 1981: Article 56). If a communication meets these admissibility requirements, it will be declared admissible and the African Commission will proceed to consider its merits. This procedure is a screening or filtering mechanism between national and international institutions (Viljoen, 2008: p. 88).

Sometimes the African Commission is required to bring a matter to the attention of the Assembly of Heads of State and Government. This is the case when a communication apparently relates to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights (African Charter, 1981: Article 58). In such cases, the requirement to meet some of the aforementioned admissibility conditions will be waived. This has been affirmed by the African Commission in the *World Organization against Torture, Lawyers' Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v. Zaire* case. In this case, the African Commission waived the exhaustion of local remedies admissibility requirement arguing that the requirement of exhaustion of local remedies is based on the principle that a government should be made aware of a human rights violation so that it can take steps to remedy such violation before being called before an international body, and the government has had ample notice of the violation⁵⁸.

As indicated in rule 120(1) of the Rules of Procedure of the African Commission, the Commission shall, after deliberation on the submissions of both parties, adopt a decision on the merits of the communication. The African Charter contains no provisions on the implementation of the findings of the African Commission. This is further compounded by the fact that the African Commis-

⁵⁸ *World Organization against Torture, Lawyers' Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v. Zaire*, Communication No. 25/89, 47/90, 56/91, 100/93, (African Commission on Human and Peoples' Rights, March 1996), para. 36.

sion examines communications in private sessions and no information about the Commission's treatment of them may be made public before its annual report of activities is presented to AU Assembly of State and Government. Only after such presentation is the report published, so that at this point the procedure loses its confidential characteristics (Ibid, Article 59). It is thus rightly said as the weak aspect of the protective mandate of the Commission. In order to rectify such problem, the African Commission practically requests states found to be in violation of the African Charter to provide information in their next periodic report, required to be submitted accordance with Article 62 of the African Charter, on the measures taken to comply with the decisions rendered against them. The 2020 Rules of Procedure of the African Commission also imposes an obligation on the State Parties to inform the Commission in writing, within one hundred and eighty (180) days from the date when the decision was transmitted to them, of all action taken or being taken to implement the decisions. If the African Commission finds that the State Party's conduct may raise issues of non-compliance with its decision, it may refer the matter to the attention of the competent policy organs of the African Union. The African Commission, as provided in rule 125 of the Rules of Procedure of the African Commission, is also required to indicate in its Activity Report the status of implementation of its decisions, including by highlighting any issues of possible non-compliance by a State Party.

10. Limitations of the African Charter

10.1. Incomprehensiveness of the African Charter

The African Charter is praised for including both civil and political rights, and economic, social and cultural rights as well as peoples' rights and individual duties in a single document and without making any kind of distinction. However, there are a number of factors affecting its comprehensiveness in dealing with human rights.

The African Charter's narrow description of some of the rights it included is one of its fundamental flaws. For instance, as indicated above, one of the socio-economic rights included in the African Charter is the right to work. However, as provided in Article 15 of the African Charter, the description of this right is restricted to the right to work under equitable and satisfactory conditions and the right to receive equal pay for equal work. The other components of the right to work, which includes, among others, the right to fair wages, the right to safe and healthy working condition, the right to rest, leisure and reasonable limitation of working hours and periodic holidays with pay, and the right to form and to join trade unions including the right to strike, are not included in the African Charter.

Besides the narrow description of some of the rights, the African Charter left some rights out of the list of the rights it covered. In other words, there are rights that have been left out of the express provisions of the African Charter. Good

examples of this, among others, are the right to privacy, the right to housing, the right to food, the right to water, the right to social security, and the right to adequate standard of living. Although these rights are part of the normative framework of international and regional human rights instruments, they are not expressly included in the African Charter. This shows that the African Charter is incomplete in its coverage of human rights, making it incomprehensive. The African Commission has tried to provide protection to those unlisted rights through the various approaches it develops in its jurisprudence. For instance, concerning the right to social security, the African Commission has the view that although the right to social security has not found express mention in the African Charter, it can be derived from a joint reading of a number of rights guaranteed under the Charter including (but not limited to) the rights to life, dignity, liberty, work, health, food, protection of the family and the right to the protection of the aged and the disabled⁵⁹.

Although the African Charter contains almost all internationally recognized rights, the formulation of the provisions dealing with the rights remains flawed. Besides allowing the limitation of rights by claw-back clauses, the normative contents of most of the rights included in the African Charter are very restricted. This restrictive approach could hinder the incorporation of international standards and innovative practices that address contemporary global challenges such as digital privacy, climate change, and transnational migration. This lack of adaptability may limit the Charter's effectiveness in promoting and protecting human rights within the dynamic and interconnected global context, potentially leaving African states less equipped to address the evolving needs and rights of their citizens.

10.2. Claw-Back Clauses

Although the African Charter contains no specific provision entitling a State to temporarily suspend a right guaranteed under the Charter (to derogate from its obligations), many of the provisions contain "claw-back" clauses that entitle a State to restrict the granted rights to the extent permitted by domestic law (Gittleman, 1982: p. 691). Claw-back clauses are not the same as derogation clauses and they do not offer the same level of protection for the individual as derogation clauses found in other human rights treaties. For instance, the derogation clause included in the ICCPR requires the state to satisfy certain conditions in order to temporarily suspend the recognized rights, in effect limiting the circumstances in which derogation may occur. The conditions include existence of exceptional threat endangering the life of the nation; the action must be strictly necessary to avert the exigencies of the situation; the action must be consistent with the state party's other obligations under international law; the action taken must not be discriminatory; the action taken must not affect the

⁵⁹Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para. 81.

non-derogable obligations of the state; and the state party must inform the taking of the action or the termination of such derogation to the other states parties through the Secretary-General of the United Nations⁶⁰. These conditions have the result of constraining how states behave in emergency situations, which is when they are most likely to violate human rights. Claw-back clauses, on the other hand, give domestic law the option of defining the conditions under which a restriction on the exercise of rights may be permitted (Higgins, 2009: p. 458).

Most of the civil and political rights included in the African Charter have been conditioned by claw-back clauses. This is the case with regard to the right to life (Article 4), the right to liberty (Article 5), the right to freedom of conscience and religion (Article 8), the right to receive information and freedom of expression (Article 9), freedom of association (Article 10) and freedom of movement (Article 12). The state parties are allowed to justify the imposition of limitations on the enjoyment of these rights and freedoms by merely referring to its own domestic law, which could be restrictive as there is no qualification regarding the nature and spirit of such domestic law (D'Sa, 1985: p. 76). However, some of the rights included in the African Charter contain specific circumstances that could guide the state parties in taking restrictive measures on the enjoyment of the specific right. A good illustration for this can be found in Article 11 of the African Charter, which provides protection for the right to assembly. Restriction on this right is permitted only if made by a law that is enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

As can be seen from Article 14, the right to property is the only economic, social and cultural right that explicitly contain specific limitation clause. There is no specific limitation clause for the other recognized rights of this group. This does not however mean that the other economic, social and cultural rights are not subject to limitations. As the African Commission on Human and Peoples' Rights affirmed in various cases, all the rights covered in the African Charter are subject to the general limitations provided for in Article 27(2). For instance, in the *Media Rights Agenda* case, the African Commission states that "the only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2), that is that the rights of the Charter shall be exercised with due regard to the rights of others, collective security, morality and common interest"⁶¹.

The existence of claw-back clauses enables some scholars to argue that the African Charter has provided states a wide possibility to violate the rights guaranteed therein with impunity. This argument however was discredited by the African Commission at various occasions. It for instance argues that the inclusion of clauses such as "subject to the law or within the law" is not meant to allow national laws to override the rights guaranteed in the African Charter. In its inter-

⁶⁰International Covenant on Civil and Political Rights, Article 4. See also European Convention on Human Rights, Article 15; American Convention on Human Rights, Article 27.

⁶¹*Media Rights Agenda and Others v. Nigeria*, para. 68.

pretation of Article 9(2) of the African charter, the Commission stated that “dissemination of opinions may be restricted by law does not mean that national law can set aside the right to express and disseminate one’s opinions; this would make the protection of the right to express one’s opinions ineffective”. To allow national law to have precedent over international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law⁶².

10.3. Derogation Clauses

Derogation is the legally mandated right of a state to suspend its obligations regarding human rights in emergency situations (Aolain, 1995: p. 102). It is recognized in different human rights instruments that there may be periods of emergency threatening the very existence of a nation. In such situations, it may be necessary, in the larger interest of the community, to suspend temporarily the exercise of certain human rights (De Schutter, 2010: p. 513; Jayawickrama, 2002: p. 122).

Unlike other international and regional human rights instruments, such as the ICCPR (Article 4), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 15) and the American Convention on Human Rights (Article 27), the African Charter does not contain any derogation clause. This has been interpreted by the African Commission that derogations from the rights and freedoms enshrined in the African Charter cannot be justified by emergencies or special circumstances. In other words, even public emergency situations cannot legally justify state party’s non-compliance with its obligations with respect to the rights protected under the African Charter. This was affirmed by the African Commission in the *Commission Nationale des Droits de l’Homme et des Liberté v Chad case*. In this case the African Commission stated that “The African Charter, unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter”⁶³. A similar stand was expressed in *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia* case concerning the right to fair trial. In this case the African Commission stated that “no circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial”⁶⁴. A similar position

⁶²Ibid, para. 66.

⁶³*Commission Nationale des Droits de l’Homme et des Liberté v. Chad*, Communication No. 74/92, (African Commission on Human and Peoples’ Rights, 11 October 1995), para. 21.

⁶⁴*Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia*, Communication No. 3001/05, (African Commission on Human and Peoples’ Rights, 09-22 October 2012), para. 138.

was also reflected in various other decisions of the African Commission⁶⁵.

The absence of derogation clause does not mean that the rights enshrined in the African Charter are absolute. As the African Commission in its jurisprudence indicated, it rather means that the only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2). This article incorporated a general limitation clause that is applicable for all rights in the African Charter, thus requiring the enjoyment of the rights with due regard to the rights of others, collective security, morality and common interest. This was affirmed by the African Commission in the *Sudan Human Rights Organization, Centre on Housing Rights and Evictions v. Sudan* case. In this case the African Commission clearly indicated that “the only legitimate reasons for limitation of the rights and freedoms of the African Charter are found in Article 27(2), that is, that the rights of the Charter shall be exercised with due regard to the rights of others, collective security, morality and common interest”⁶⁶. The African Commission took a similar stance in the *Media Rights Agenda* case⁶⁷.

11. Conclusion

The evolution of the African Charter on Human and Peoples’ Rights represents a significant shift in the priorities of the OAU, now AU. Initially, the OAU prioritized the eradication of colonialism, the fight against apartheid, and regional stability over the promotion and protection of human rights. However, the post-colonial era’s rampant human rights violations by authoritarian leaders highlighted the urgent need for a robust human rights framework. The OAU’s initial inaction on these violations, justified by the principle of non-interference, underscored the necessity for a continental human rights instrument to safeguard human rights in Africa. The journey towards adopting the African Charter began in 1961 but gained significant momentum in the late 1970s. The extensive drafting and consultative processes involved African legal experts and ministers, leading to the Charter’s adoption in 1981 and its entry into force in 1986. The African Charter, now ratified by all AU member states except Morocco, is comprehensive, incorporating both universal and regional human rights perspectives. It not only lists individual rights and duties but also establishes the African Commission on Human and Peoples’ Rights to oversee compliance.

The Charter’s legal binding nature has been affirmed by the African Commission in various cases, reinforcing the obligation of state parties to uphold its provisions. This development has cemented the African Charter as a cornerstone of the African human rights system, demonstrating the continent’s commitment to ensuring respect for human rights and providing a framework for addressing violations. As Africa continues to confront new challenges, the African Charter remains a vital instrument for protecting and promoting human rights across

⁶⁵See for instance *Media Rights Agenda and Others v. Nigeria*, para. 67; *Sudan Human Rights Organization, Centre on Housing Rights and Evictions v. Sudan*, para. 165.

⁶⁶*Sudan Human Rights Organization, Centre on Housing Rights and Evictions v. Sudan*, para. 165.

⁶⁷*Media Rights Agenda and Others v. Nigeria*, para. 68.

the continent.

The African Charter distinguishes itself through several unique characteristics. It integrates both individual and collective rights, emphasizing the communitarian aspects of African societies alongside individual freedoms. Unlike many international human rights treaties, it places all generations of rights on equal footing without distinction, affirming that civil and political rights are inseparable from economic, social, and cultural rights as well as peoples' rights. While the Charter's provisions on civil and political rights mirror international norms, its distinctive focus on peoples' rights underscores a communal vision of human rights unique to the African context. By outlining these rights, the African Charter strives to ensure that every individual and community can enjoy fundamental freedoms, participate in governance, and pursue their socio-economic development, thereby fostering a more just and equitable society on the continent. In addition, the Charter includes explicit duties for individuals, reflecting traditional African values where rights are balanced by responsibilities to the community. It also incorporates limitations on rights through "claw-back clauses," though the African Commission has clarified that these cannot override the Charter's protections. Importantly, unlike other treaties, the African Charter lacks derogation clauses, underscoring its stance that human rights obligations cannot be suspended even in emergencies. Moreover, its provisions allow for public interest litigation, enabling individuals and organizations to file complaints before the African Commission, regardless of their direct victimization.

The African Charter is supported by a robust institutional framework aimed at ensuring its effective implementation across member states. Central to this architecture are two key bodies: the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. Established in 1987 under the auspices of the OAU, now the AU, the African Commission serves as the primary monitoring body. Composed of eleven members selected for their integrity and expertise in human rights, the Commission operates through regular and extraordinary sessions to promote, protect, and interpret human and peoples' rights in Africa. The Commission plays a crucial role in promoting awareness, addressing violations, and interpreting the provisions of the Charter. Despite its broad mandate and significant achievements, the Commission faces numerous challenges, including limited resources, political pressures, the non-binding nature of its decisions, lack of binding enforcement mechanisms, inconsistent political will among member states, and limited public awareness about the Charter's provisions and the Commission's work. The slow pace of legal proceedings and the often-inadequate follow-up on the Commission's recommendations weaken the potential of the Charter to bring about significant change. In complement, the African Court, established later to enhance protective measures, exercises advisory, conciliatory, and contentious jurisdiction to address human rights violations effectively.

The African Charter establishes robust mechanisms for monitoring and enforcing state compliance with human rights obligations within Africa. Through

state reporting, inter-state communications, and individual communications procedures, the Charter strives to ensure accountability and protection of rights across its member states. State reporting mandates biennial submissions on measures taken to implement Charter rights, though challenges persist with significant non-compliance. Inter-state communications allow states to address violations directly, either through negotiation or referral to the African Commission, providing a diplomatic avenue for resolution. Meanwhile, individual communications offer a critical recourse for victims, despite initial ambiguities over the Commission's mandate to consider such cases.

However, the Charter is not without limitations. Its comprehensiveness is questioned due to its selective coverage of rights, leaving out key human rights like privacy, housing, and food security. Claw-back clauses further restrict rights by permitting broad state discretion in limiting freedoms under national laws, potentially undermining the Charter's protective intent. Moreover, the absence of a derogation clause limits the Charter's adaptability during emergencies, necessitating a strict adherence to rights even in crisis situations. Despite these challenges, the African Commission's jurisprudence continues to evolve, interpreting Charter provisions expansively to uphold human rights and justice across the continent.

In sum, while the African Charter serves as a pivotal framework for human rights in Africa, addressing its limitations will be crucial for enhancing its effectiveness in safeguarding rights and freedoms across diverse contexts and challenges. To this effect, various key strategies including the allocation of adequate resources, the strengthening of the enforcement mechanisms, increasing political will among member states, improving public awareness through educational programs and media campaigns, enhancing collaboration with civil society, expediting legal proceedings, and developing a comprehensive follow-up mechanism are needed. These measures will make the Charter to be fortified as a robust framework for promoting and protecting human rights throughout Africa, requiring coordinated efforts from the African Union, member states, civil society, and international partners.

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