

ADDIS ABABA UNIVERSITY  
SCHOOL OF GRADUATE STUDIES

A COMPARATIVE STUDY OF THE AFRICAN AND THE EUROPEAN  
REGIONAL SYSTEMS FOR PROTECTION OF HUMAN RIGHTS:  
LESSONS FOR AFRICA

BY  
BEFEKADU BOGALE BIRU

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## Acronyms

<b>AChHPR</b>	African Charter on Human and Peoples' Rights
<b>ACoHPR</b>	African Commission on Human and Peoples' Rights
<b>ACtHPR</b>	African Court on Human and Peoples' Rights
<b>ACtJHR</b>	African Court of Justice and Human Rights
<b>APRM</b>	African Peer Review Mechanism
<b>AU</b>	African Union
<b>CoE</b>	Council of Europe
<b>DRC</b>	Democratic Republic of Congo
<b>ECHRa</b>	European Convention on Human Rights (as adopted in 1950)
<b>ECHRb</b>	European Convention on Human Rights (as amended by the 14 <sup>th</sup> Protocol)
<b>ECOWAS</b>	Economic Community of West African States
<b>ECoHR</b>	European Commission on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ESCC</b>	Economic, Social and Cultural Council/ of the AU
<b>EU</b>	European Union
<b>ICCNI</b>	International Coordinating Committee of National Institutions
<b>NEPAD</b>	New Partnership for Africa's Development
<b>NGOs</b>	Non-Governmental Organizations
<b>NHRIs</b>	National Human Rights Institutions
<b>OAS</b>	Organization of the American States
<b>OAU</b>	Organization of African Unity
<b>SADC</b>	Southern Africa Development Community
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>USD</b>	United State's Dollar

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## ***Abstract***

*African and European human rights systems are usually described as young-ineffective and old-effective respectively. Though plenty of scholarly works exists about the two systems, there is lack of comparative studies which tries to elicit similarities and differences between the two systems. Other than providing a descriptive account of the African system and categorizing it as young and ineffective, the existing literatures particularly failed to point-out lessons which can be drawn from experiences of the categorically effective European system. Therefore, by employing the Most Similar Systems Design of the comparative approach under the general qualitative framework, utilizing descriptive and exploratory techniques and based on documentary sources of information, this study examined the similarities and differences between the European and African human rights systems. The intention of the comparison was eliciting lessons which can be drawn from experiences of the European system to its African counterpart.*

*Experience of the European system clearly shows that conducive socio-economic and political conditions, enhanced participation of the Non-Governmental Organizations (NGOs) and the National Human Rights Institutions (NHRIs), vibrant role of the regional organizations, refined legal instruments and well structured and resourced regional human rights institutions all are vital for the functional efficacy of a regional human rights scheme. Therefore, for functional efficacy of the African human rights system to be enhanced, improvement in the socio-economic and political conditions at the continental level is a fundamental necessity. Secondly, the role of NGOs and NHRIs needs to be strengthened. Thirdly, the African Union (AU) bears, in similar mantra to the Council of Europe (CoE) and the European Union (EU), the responsibility of fathering the African system. Fourthly, legal regime of the African system, which basically revolves around the African Charter on Human and Peoples' Rights (AChHPR), needs to be refined in due consideration of the loopholes such as the claw-back clauses and the ill-defined and/or sidelined rights. Lastly, the mandate, composition, funding, staffing, physical infrastructures and enforcement of the decisions of the African Commission on Human and Peoples' Rights (ACoHPR) and the African Court on Human and Peoples' Rights (ACtHPR) requires major overhauling. All in all, the experience of the European system provides important lessons which may help to enhance functional efficacy of the African human rights system.*

***Key Words:*** *Regional Human Rights Systems, African Regional Human Rights System, European Regional Human Rights System*

# CHAPTER ONE: INTRODUCTION

## 1.1 Background of the Study

The issue of human rights has traditionally remained within the preempted province of the state. Thus, the manner in which a state treated its own nationals and the people within its borders remained outside the realm of International law (Burgenthal, 1995: 3). But, this was gradually changed after the Second World War as evidenced by the signing of the United Nations (UN) Charter and the Universal Declaration of Human Rights (UDHR). Therefore, the modern international human rights law<sup>1</sup>, by implication the international protection of human rights, is a twentieth century development and closely associated to the adoption of the UN Charter in 1945.

Another major development in the twentieth century regarding human rights is the evolution of the regional human rights systems. Regional human rights systems are schemes for promotion and protection of human rights within certain geopolitical region. Among the regional systems<sup>2</sup>, European system is the oldest one and the Council of Europe (CoE)<sup>3</sup> is the first regional organization to enlist human rights as one of its foundational principles. And in 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly called the European Convention, ECHRa) was adopted by the member states of the CoE. The document enumerated, in the preamble, protection of human rights as the basis of unity in Europe.

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<sup>1</sup> International Human Rights Law is the subset of the International Law and comprises legal instruments adopted at the international and regional levels specifically focusing on human rights. See, among others, Doebller (2006); Steiner, Alston and Goodman (2007); Shaw (2008).

<sup>2</sup> Europe, Americas and Africa are the three 'regions' which have the functioning regional human rights systems to this date. Middle East has the so-called The Arab Charter, though not put into practice, and the Asia-Pacific has no regional human rights arrangement so far.

<sup>3</sup> The CoE was established in 1949 by the ten (10) European countries (Belgium, Denmark, France, Ireland, Italy, Luxemburg, The Netherlands, Norway, Sweden and the United Kingdom) as a platform to facilitate the intergovernmental and inter parliamentary co-operation. Currently it encompasses forty seven (47) states. See Williams (2000); Shaw (2008) for details about the role of CoE with regards to human rights.

In the Americas, the Organization of American States (OAS)<sup>4</sup> played major role in establishing the Inter-American human rights system. Under its auspices, the American Declaration of the Rights and Duties of Man was endorsed in 1948; the Inter-American Commission on Human Rights was established in 1959 and a binding regional treaty called the American Convention on Human Rights was adopted in 1969. In similar manner to the CoE and the OAS, foundation of the African human rights system was laid by the Organization of African Unity (OAU). Cornerstone of the African system is the African Charter on Human and Peoples' Rights (AChHPR), commonly called the Banjul Charter<sup>5</sup>, which was adopted by the OAU in 1981 and entered into force in 1986.

## **1.2 Statement of the Problem**

There exists greater consensus among the writers in the field of human rights that the regional human rights systems are functionally effective, or at least have the greater potential to be effective, than the global scheme for protection of human rights (Claude, 1971; Forsythe, 2000; Heyns, Padilla and Zwaak, 2006; Rhona, 2010; Peterson, 2011). For instance, according to Rhona (2010) the relative functional efficacy of the regional systems is attributable to the three factors.

First, it is easier to adopt human rights instruments at the regional level given the relative linguistic and cultural homogeneity (Rhona, 2010: 85). Secondly, regional systems are more accessible due to their geographic location and have also linguistic advantage since the legal documents and communications are made using the major languages of that particular region (*ibid*: 85-86). Lastly, enforcing human rights treaties is easier at the regional level given the states' strong compliance to the regional schemes due to direct impact of the possible diplomatic pressure from the nearby states (*ibid*: 86). So, compliance to the regional instruments becomes an issue of "more immediate concern" and noncompliance is source of a real threat (*ibid*).

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<sup>4</sup> The OAS was established in 1948 by twenty one (21) states from the Northern, Central and Southern America as a regional organization to promote cooperation in areas of common interest. Mendez (2000) provides detailed account about the role of OAS with regards to human rights in the region and Pasqualucci (2003) provides comprehensively about the Inter-American Court of Human Rights.

<sup>5</sup> The name comes after the capital city of The Gambia, Banjul, where the Charter was adopted by foreign ministers of the OAU member states for the final adoption by the Assembly of the Organization.

In contradiction to such a widely accepted conception and also in spite of the corresponding legal instruments and institutions, the European and the African human rights systems exhibit incomparable practical achievement. Now a day, the European system is identified as the most effective regional human rights system while the African system is characterized as the weakest one. Even though the system is in practice for decades, human rights violations continue across Africa showing not only marginal but also slow improvement at the continental level. Still armed conflicts, corruption, unconstitutional change of government and poverty continue as the characteristic features of the continent (Jallow, 2006; Joiner, 2006; CHRs, 2011).

In opposite, Europe, a continent which witnessed massive human rights violations such as the Holocaust and the religious and ethnic persecution (particularly in the Central and Eastern part), managed to become an icon of the human rights promotion and protection. The most important question which needs to be raised at this point is; What explains the existing functional discrepancy between the two systems? In order to sufficiently answer the question, comparatively examining the two systems becomes necessary.

As a result, this study attempts to compare the European and African human rights systems. Thus, questions like What are the common domains of the African and European systems?; In what areas the two systems diverge?; Why the European system became more effective than its African counterpart? and What lessons can be drawn from its experiences for the African system? are examined in this study.

Here comes a logical question; what does the existing literature say about the similarities and differences between the regional systems in general and that of the African and European systems in particular? There are some literatures in this regard. These include Okere (1984); Forsythe (2000); Banning et al. (2004); Fekadeselassie (2006); Heyns, Padilla and Zwaak (2006); Shaw (2008); Shelton (2008); Gatitu (2010) and Killander (2010).

Okere (1984) provides a classic comparison of the three regional human rights systems. The comparison heavily relied on the legal instruments (in case of the African system only the African Charter was considered) and practical issues under the systems were not considered. In addition, there is time gap which helps this study take into consideration the major developments for the last three decades. Thus, evaluating efficacy of the systems and drawing lessons for the African system are merits of this study. Furthermore, the cases considered in this study are the African and the European systems only.

Forsythe (2000) has got a section on the regional systems, under the title “Regional Application of Human Rights Norms”, though the European system took lion’s share of the discussion and the African system is very briefly looked at. The systems were not comparatively examined and no attempt was made to scavenge lessons from one system to another. Nevertheless, it was rightly underlined that effectiveness of a particular regional system has to do more with the socio-economic and political realities on the ground than mere adoption of the legal instruments (p.121). In this vein, this study focuses not only on the legal instruments but also considers the practical issues related to human rights promotion and protection in Europe and Africa. And after comparison, drawing lessons for the African system is the major task of the study.

In Banning *et al.* (2004) attendant issues related to the three systems were descriptively presented. Thus, the systems were not comparatively examined and differences as well as similarities between them were not appreciated. A bit worthy, in Fekadeselassie (2006) the three regional systems were compared focusing on the complaint procedure (both individual and inter-state) and the state and country reporting system. Though the systems were comparatively examined using these themes and the recommendations were set for each system, the study fails to give significant attention to the role of regional organizations and the human rights bodies. Most importantly, the study failed to examine the impact of the setting of the systems on their functional efficacy. Thus, this study compares the European and African human rights systems with due attention to the setting in which the systems operate and also to the role of regional human rights organizations.

In Heyns, Padilla and Zwaak (2006) number of criteria were used to expose similarities and differences between the three regional systems. Though their approach is holistic in terms of the criteria used, it fails to clearly spell out weaknesses and strengths of the systems and, as a result, lessons from one to the other. For example, their study doesn't provide answer to the question what are the strengths of the CoE and the European Union (EU) as the guardians of the European system? Rather, the African Union (AU) for Africa, OAS for the Americas and the CoE and EU for Europe were simply listed as the regional organizations to which the respective regional human rights systems form a part.

Shaw (2008) provides a successive discussion of the European, Inter-American and the African human rights systems. The discussion of the three systems is much more focused on treaties and the issues related to practice on the ground received marginal attention. In addition, all the three systems were examined in their own right and no attempt was made to discern similarities and differences between the systems.

Shelton (2008) gives detailed account of issues related to the regional human rights systems such as interpretation and application of treaties, state obligations and complaint procedures. But what is important with regard to this study is a section in the book entitled "Comparing the Contents: Selected Issues" where the writer attempted to compare the three regional systems. Nevertheless, the comparison only included very specific issues like the right to life and the socio-economic and political rights.

Gatitu (2010) attempted to compare the three regional systems focusing on the complaint procedure. The intention was to look for lessons from the other systems for improvement of the complaint procedure of the African system (p.ii). Likewise, this study attempts to compare the regional systems, but only the African and European systems, focusing on the wide ranging issues.

Killander (2010) examines both legal and practical issues related to the African system. It was rightly put that the African system is the youngest regional system and the limitations related to the regional human rights institutions, national judicial bodies, state

reporting, the role of non-state stakeholders and follow-up by the AU were discussed. But how these challenges can be dealt with in general and what lessons can be drawn from other well developed regional systems in particular left unexamined.

Generally, this study has twin objectives of comparing the European and African human rights systems and drawing lessons from experiences of the former to the latter. In first place, similarities and differences between the two systems are assessed as to identify explanatory factors for the functional efficacy of the European system. Then, the study presents lessons for the African system from experiences of the European system.

### **1.3 Objectives of the Study**

#### **1.3.1 General Objective**

The general objective of this study is to examine the similarities and differences between the European and African human rights systems in pursuit of lessons from the former to the latter.

#### **1.3.2 Specific Objectives**

The specific objectives of this study are:

- ✓ Identifying similarities between the African and European human rights systems;
- ✓ Appraising differences between the two systems and
- ✓ Exploring lessons for the African system from experiences of the European system.

### **1.4 Research Questions**

#### **1.4.1 General Research Question**

The central question this study attempts to answer is that: What lessons can be drawn for the African human rights system from the experiences of the European system in light of the similarities and differences between the two systems?

#### **1.4.2 Specific Research Questions**

The study attempts to address the following specific research questions:

- ✓ What are the areas of similarity between the African and European systems?
- ✓ How the two regional systems differ from one another?
- ✓ How the African system be improved via lessons from its European counterpart?

## **1.5 Central Argument of the Study**

The central argument of this study is that success history of the European system, which is byproduct of its distinct features as compared to the African system, provides a lot of lessons for the African system.

## **1.6 Methodological Issues**

### **1.6.1 Methodology**

In terms of methodology, the study adopts qualitative approach by which “...findings are not arrived at by...means of quantification” (Strauss and Corbin in Snape and Spencer, 2003: 3). That is qualitative approach involves use of non-statistical methods of data gathering and analysis. Therefore, the major data collection methods in this approach are observation, personal interview, focus group discussion and document analysis (*ibid*: 4). As result, the selection of the qualitative approach for this study is due to its easy applicability to the research problem and suitability of the data collection methods.

Under the general qualitative framework, the study is descriptive and exploratory. Descriptive studies attempt to describe certain phenomena or event as it exists or unfolds whereas the exploratory studies are intended to explore relatively new issues related to a research problem with the intention of, among others, developing new insights and priorities for future studies (Mouton and Marais, 1996: 43-44). This study is descriptive in that it attempts to narrate about the regional human rights systems and the legal instruments and institutional components of the European and African human rights systems. The research is exploratory in that it attempts to explicate similarities and differences between the two systems, identify explanatory factors for the potency of the European system and also discern out possible lessons for the African system from the experiences of the European system.

### **1.6.2 Research Design**

Regarding research design, this study adopts Most Similar Systems Design of the comparative approach. Comparative approach is a research design which helps the researcher to identify similarities as well as differences between the cases (Hague and

Harrop, 2004: 69). Comparative approach has two types: Most Similar Systems Design and the Most Different Systems Design. In Most Similar Systems Design cases that share certain common grounds are compared in order to identify differences between them while in the Most Different Systems Design the researcher attempts to discern similarities between the cases which significantly differ from one another (*ibid*: 83). Thus, in Most Similar Systems Design the focus is on the differences between the cases that have similarities whereas in the Most Different Systems Design the focus is on the similarities between the cases which differ from one another on many grounds.

Given this, the study tries to compare the European and African systems as to draw lessons for the latter. So, first the two systems are comparatively examined and the areas of differences between the two systems are appreciated. And then, attempts are made to draw lessons for the African system from the experiences of the European system.

### **1.6.3 Case Selection**

The cases selected for comparative examination in this study are the European and the African regional human rights systems. The *raison d'être* for this selection is the existence of range of similarities between the two systems that makes comparative analysis feasible and valid. First, the two systems are schemes for promotion and protection of human rights within a geopolitical region. That is both are the regional human rights schemes. Second, the two systems operate within region wide political organizations. Said in other words, both systems form part of the region wide organizations: African system has the AU while the European system has CoE and the EU. Third, the two systems have human rights instruments and the regional institutions responsible for promotion and protection of human rights. Fourth and lastly, the African and the European human rights systems are usually designated as weak and strong respectively. Thus, there exists a possibility that lessons can be drawn from experiences of the stronger to the younger and weaker one. And the ultimate objective of this study is eliciting lessons for the African system from experiences of the European system.

#### **1.6.4 Methods of the Study**

As far as methods of the study or sources of data are concerned, this study is based on secondary sources of data. These are books, journal articles, legal documents, unpublished documents, news reports and other internet based sources.

#### **1.7 Significance of the Study**

In spite of the constraints, the study tries to discern similarities and differences between the two regional human rights systems. As result, the study may help interested individuals to have better understanding about the systems and their similarities and differences. Thus, the major contribution of this study is that it may help interested individuals to have holistic understanding about the similarities and differences between the European and African human rights systems and the lessons from experiences of the former to the latter in wide range of issue areas. In addition, this study may instigate further studies on issues such as lessons from the Inter-American System, lessons for Asia and the Middle East.

#### **1.8 Scope of the Study**

The scope of this study is limited seen from five angles. First of all, the outmost focus of the study is exploring lessons which can be drawn from the European system for its African counterpart. So, legal instruments and historical developments are only briefly discussed. Secondly, overall discussion throughout the study is limited to issues at the ‘systems’ level. That is, unless and otherwise it is necessary to discuss the specific cases to substantiate arguments, the study remains limited to examining issues pertinent not at national or state level but at the regional or ‘systems’ level. Thirdly, though various institutions have part in the European system, the study largely focuses on the CoE with only moderate attention to the EU.

Fourthly, though there is other functional regional system this study attempts to compare with and scavenge lessons from the European system. This is primarily because the European system is the most developed and effective regional scheme and also due to the relative availability of literature. Lastly, though there are large number of indexes

published by different institutions focusing on various issues, this study uses four of them only: Democracy Index of the Economic Intelligence Unit, Freedom in the World Index of the Freedom House, Press Freedom Index of the Reporters Without Borders and Corruption Perception Index of the Transparency International. This is because annual reports of the selected institutions encompass nearly all of the countries in the two regions and the reports are well organized in methodology and content, persistently published for years and theme specific with detailed focus on issues which are of greater relevance to better understand the nature of state system in the two regions.

### **1.9 Limitations of the Study**

Scarcity of written materials pertinent to the topic, shortage of finance, inability to access up-to-date scholarly articles due to subscription and other requirements and difficulties related to accessing resourceful individuals were the major challenges on this study.

### **1.10 Organization of the Study**

In terms of organization, this study is structured into five chapters. The first Chapter, entitled Introduction, gives general picture of the whole study through background of the study, statement of the problem, research objectives, central argument and methodology of the study. In Chapter Two, entitled Regional Systems for Protection of Human Rights, issues related to the regional human rights systems are discussed. Thus, the concept of regional human rights protection is examined and the basic issues related to the European and African human rights systems are overviewed.

Chapter Three, called Comparing the Systems on Basis of the Setting, encompasses discussion of the similarities and differences between the two regional systems with regards to the setting under which they operate. The next chapter, Chapter Four which is entitled Comparing the Systems on Basis of the Instruments and Institutions, extends the comparison to the regional human rights instruments and institutions and adds summary of the differences between the two systems. In Chapter Five, which is entitled Lessons for Africa, the study presents lessons for the African system from experiences of the European human rights system. Lastly, concluding remarks of the study are presented.

## **CHAPTER TWO: REGIONAL SYSTEMS FOR PROTECTION OF HUMAN RIGHTS**

This chapter has three sections. The first section discusses conceptual background about the regional human rights systems. The second and third sections provide general account of the European and the African human rights systems respectively.

### **2.1 Understanding the Regional Human Rights Systems**

Regional human rights schemes were not widely accepted until the mid-1960s. For instance, Charter of the UN in Chapter VIII in general and in Article 52 specifically provided for regional arrangements in area of peace and security and failed to lay down the possibility of regional arrangements in the area of human rights. At the time, adherents of the global human rights regime, and the UN as pilot of this regime, were skeptical of the regional human rights arrangements and tended to consider these arrangements as an "...expression of a breakaway movement..." (Steiner, Alston and Goodman, 2007: 926). Thus, those who propagated universality of human rights and the resultant need for a regime applicable across the world conceived such attempts as a threat against universalistic and shared nature of human rights (Heyns, Padilla and Zwaak, 2006: 163). The major argument was that human rights are universal by their very nature and needs to be promoted and protected alike across the world.

In addition, it was also argued that establishment of the regional systems may duplicate activities of the global human rights bodies with the possibility of contradicting policies and procedures and increased financial burden on the states (Steiner, Alston and Goodman, 2007: 930). Furthermore, critics' aluded that the regional systems may serve as shields against the global instruments and institutions for the states and individuals that violate human rights (*ibid*: 930-931).

However, functioning human rights systems flourished in Europe and the Americas during the early years of the post war period. Even the UN General Assembly adopted a

resolution<sup>6</sup> which calls states not involved in regional human rights arrangements to conclude agreements and establish regional framework for protection of human rights. This change came out of the understanding of comparative advantages of the regional human rights arrangements.

First, relatively higher socio-economic and cultural homogeneity at regional level, though not for granted, facilitates conclusion of agreements with consensus over the scope and content of rights to be protected and contributes for development and use of the regionally familiar systems of redress (Weston and Hnatt in Lillich, 1991: 641; Rhona, 2010: 85). Thus, regional schemes have greater potential to enhance protection of human rights as compared to the global system because of the perceived common cultural, linguistic and religious heritages at the regional level.

Second, geographic proximity between and among the countries of a region can lead to, *ceteris paribus*, intraregional interdependence which in turn means greater chance for the formation of alliance based not on power balance and conflict but on shared interests and cooperation (Claude, 1971: 105). Given their inclusive and expanded membership, which lowers internal and functional cohesion, global organizations are best suited to deal with conflictual aspects of interstate relations (*ibid*). Therefore, alliance of cooperation, which is highly likely at the regional level, evidently facilitates proliferation of cooperative schemes such as setting of the human rights institutions and the adoption and implementation of human rights instruments.

In addition, geographic location and use of languages of the region by regional human rights bodies enhances accessibility of the human rights institutions, instruments, decisions and sessions to all the concerned parties (Rhona, 2010: 85-86). Furthermore, it is important to note that the regional human rights systems are operate under the umbrella of the region-wide political arrangements, namely AU for Africa, CoE and the EU for Europe and the OAS for the Americas, which are outcome of political commitment of the member states and also expression of sense of regional solidarity and shared vision.

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<sup>6</sup> General Assembly Resolution Number 32/127, adopted in December 1977.

Third, the aforementioned socio-economic and geographic proximity at the regional level makes the monitoring of human rights situation, investigation and redressing of the human rights violations relatively easier (Weston and Hnatt in Lillich, 1991: 641). Therefore, regional human rights systems possess the greater potential to successfully use the diplomatic, economic and other set of sanctions for the purpose of enhancing human rights promotion and protection (*ibid*; Rhona, 2010: 86).

Lastly, regional human rights arrangements are and should be perceived as complementary, but not as incompatible, to the global human rights system and the obligations states undertaken while adopting and ratifying global human rights instruments (Peterson, 2011: 184). The global and the regional human rights systems are complementary to one another and are not mutually exclusive as, for instance, “[t]he global instrument would contain the minimum normative standard, whereas the regional instrument might go further, add further rights, [and] refine some rights...” (Steiner, Alston and Goodman, 2007: 930).

Given the above conceptual notion about the regional human rights systems, the European and the African systems are discussed in the succeeding two sections in relatively comprehensive manner as they are the cases on which the whole study is based on. The discussion encompasses descriptive account about the evolution of the two regional systems, the role of regional organizations in promotion and protection of human rights in Europe and Africa, and the major human rights instruments and institutions of the European and African human rights systems.

## **2.2 European Regional System for Protection of Human Rights**

This section constitutes descriptive account of the European human rights system focusing on its evolution, the role of CoE and EU, major human rights instruments of the regional system and the regional human rights organizations of the system.

### **2.2.1 Evolution of the System**

As far as setting up a regional body focusing on human rights is concerned, Europe assumed the pioneering role. Immediately after the end of Second World War, Nuremberg tribunal<sup>7</sup> was installed to redress crimes and widespread human rights violations committed before and during the war. To further the entrenchment of rule of law and protection of human rights, European states established the CoE in 1949.

As spelt out in Article 1 of the Statue of the Council<sup>8</sup>, maintenance and realization of human rights and fundamental freedoms is among the major aims of the organization. Furthermore, the Statue provided that, in Article 4, ability and willingness of a state to observe the rule of law and respect human rights serves as a major criterion as far as admission to the Council is concerned. Any member state that violates these obligations may be suspended from the Council as per the Article 8 of the Statue. Thus, the foundation of the European human rights system was laid with the establishment of the CoE.

In addition to the CoE, the EU has played its own role in ushering of human rights protection scheme in Europe. For instance, one of the major criteria of membership to the Union is respect for human rights and commitment to uphold ‘the accepted norms of conduct’ (Williams, 2000: 78). Generally, the evolution and current status of the European human rights regime is directly attributable to the CoE and the EU as pilots of the system though the former’s contribution highly outweighs that of the later.

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<sup>7</sup> Nuremberg Trials refers to series of military tribunals held by the Allied forces to prosecute the Nazi officials. The first trial, which was held in Nuremberg Germany, involved cases against the major war criminals and the second set of trials, for instance the Auschwitz Trial, involved Nazi officials such as Doctors, Judges and low rank officers who were accused of lesser war crimes.

<sup>8</sup> Statue of the CoE, often called the Treaty of London, was signed on 5 May 1949.

### **2.2.2 Council of Europe and Human Rights in Europe**

As discussed before, human rights have always been a priority of the CoE. The Council's concern about human rights goes to the extent that, as provided in Article 1 of the Statue, maintenance of human rights is taken as a means of achieving greater unity among the 'European' states. Since its inception, the Council led promotion and protection of human rights in Europe and realized the birth of the most established and effective regional human rights scheme.

Internally, the Council consist four major organs. These are the Secretariat, Committee of Ministers, Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe (the Congress). The Secretariat oversees activities of the Council and serves other organs of the Council (Article 36 of the Statue). The Congress is the consultative organ composed of representatives of the local and regional authorities of the member states. It is intended to ensure increased participation of the sub-state units in the CoE, promote local democracy and enhance cooperation between the sub-state units across Europe (Article 2 of the Statutory Resolution 2011/2 of Committee of Ministers).

Committee of Ministers and Parliamentary Assembly are rather the two most important organs of the CoE with regards to human rights. The Committee of Ministers is composed of foreign affairs ministers, or their permanent deputies, of the member states and has executive powers which include conclusion of agreements, adoption of issue specific policies and setting up of the advisory and technical committees (Chapter IV of the Statue). Most importantly, the Committee is responsible for supervision of the decisions of the European Court of Human Rights (ECtHR) and may take different measures, including suspending from membership of the Council, if a concerned state fail to fulfill its obligation as provided under the Court's decision (Article 46 of the ECHRb). It also supervises execution of the terms of friendly settlement as provided in decision of the Court (Article 39(4) of the ECHRb). Thus, the Committee serves as the ultimate guarantor of the rights provided in the European Convention.

The Parliamentary Assembly, which was formerly called the Consultative Assembly, is a deliberative organ of the Council consisting parliamentary representatives from each member state. The Assembly has the power to discuss and make recommendations regarding any matter within the aim and scope of the Council (Preamble and Article 1 of the Statue of the Council). It elects judges of the ECtHR (Article 22 of the ECHRb). Thus, through the Committee of Ministers and the Parliamentary Assembly the CoE led Europe to have the most established human rights system.

To complement the activities of its internal organs and that of the ECtHR, the CoE set-up the Office of High Commissioner for Human Rights in 1999 (Matlary, 2002: 125-126). Furthermore, there are supervisory committees established by the Council to follow up states' compliance to particular instruments. For example, there is a group of fifteen experts called the European Committee of Social Rights established to follow up states' compliance to the European Social Charter which was adopted in 1961 and revised in 1996.

In addition to supervisory and deliberative role of its organs, the CoE coached adoption of numerous human rights instruments since the early 1950s; the major one being the European Convention on Human Rights and Fundamental Freedoms. The Convention established the European Commission and the Court of Human Rights as the two continental human rights organizations with the mandate of ensuring observance of obligations of states therein. In 1998, this two tier institutional system of human rights promotion and protection was abandoned and the Court was reestablished as the only standing regional human rights body.

### **2.2.3 European Union and Human Rights in Europe**

The other organization that works in a complementary manner with the CoE is the EU. Though its origin goes back to the 1952 Treaty of Paris and the 1957 Treaty of Rome, EU was established in its current form by the 1993 Maastricht Treaty. At the outset, the Union was organized as a tool for economic integration. As a result, the treaties of Paris and Rome failed to encompass human rights provisions and the European Court of

Justice<sup>9</sup> has not discussed human rights issues substantively. However, this was gradually changed with the transformation of European Economic Community<sup>10</sup> into a political union, the EU, where human rights became part of its spelt-out priorities.

The Union's engagement with regards to human rights includes provision of financial aid for installation and strengthening of institutions, support of human rights education programs, lobbying of governments to enhance respect for human rights and pulling back development cooperation agreements if a state fails to improve its human rights record (Williams, 2002: 104). Among its organs, the European Parliament (which consists directly elected representatives), the European Ombudsman (established in 1995 to investigate cases of maladministration), the EU Agency for Fundamental Rights (an advisory body established in 2007) and the European Economic and Social Committee have more direct engagement in human rights affairs.

In addition, EU adopted numerous legal documents addressing the issue of human rights. The major ones include the Copenhagen Criteria (adopted in June 1993), the Treaty of Amsterdam (signed in October 1997), and the Charter of Fundamental Rights (proclaimed on 7 December 2000). The Copenhagen criteria provided that a state applying for accession to the Union must have, among others, stable institutions with regards to democracy, rule of law, human rights and rights of minorities. The treaty of Amsterdam is an amendment to the Maastricht treaty and declared that EU is founded on principles of the rule of law, democracy and respect for human rights and fundamental freedoms. The Charter of Fundamental Rights is a declaration which enumerates wide array of the first and second generation human rights<sup>11</sup> to be promoted and protected by the Union and its member states.

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<sup>9</sup> European Court of Justice, which was established in 1952 and based in Luxembourg, is the highest judicial body in matters relating to the EU law.

<sup>10</sup> European Economic Community was an economic integration scheme established in 1958 by Belgium, France, Italy, Luxembourg, The Netherlands and West Germany. In 1967 it was changed into European Community which was finally transformed into the EU in 1993 following the adoption of the Maastricht Treaty.

<sup>11</sup> Aside from the civil and political rights, the Charter protects socio-economic rights such the right to education (Article 14), right to work (Article 15) and the right to health care (Article 35).

In December 2006, the EU Parliament and the Council of the EU adopted European Instrument for Democracy and Human Rights which allocates financial support to the human rights policies and courses of actions of the Union such as election observation and equipping the regional human rights bodies (European Parliament, 2010: 32). In June 2012, the Union adopted EU Strategic Framework on Human Rights and Democracy. The document provides for increased role of the EU in promotion and protection of all categories of human rights within its jurisdiction and across the world, calls for deepening of cooperation between the EU and various stakeholders for promotion and protection of human rights and underlines that EU's external relations policies should take into consideration the issue of human rights.

#### **2.2.4 Major Human Rights Instruments of the European System**

The European human rights system consists plenty of instruments primarily adopted by the CoE and the EU<sup>12</sup>. The major ones include the European Convention on Human Rights (ECHRa) (1950), European Social Charter (1961, revised in 1996), European Convention on the Exercise of Children's Rights (1996), Charter of Fundamental Rights of the EU (2000), and CoE Convention on Action against Trafficking in Human Beings (2005) (CoE, 2009). Though these and various unmentioned instruments together form the legal fabric of the European human rights system, the 1950 Convention and its protocols surpass all other instruments as the legal basis of the European system.

The ECHRa was signed in November 1950 and entered into force three years later. It is the first binding human rights instrument, first to institutionalize complaint procedure and materialize judicial settlement of human rights complaints (Steiner, Alston and Goodman, 2007: 933). ECHRa has five sections. The first section stipulates civil and political rights protected<sup>13</sup>. These include the right to life and liberty, freedom from torture and

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<sup>12</sup> Complete list of the human rights instruments adopted under the auspices of the CoE is available at <<http://conventions.coe.int>>, the official website of the treaty office of the Council. Human rights instruments concluded under the EU can be accessed from <[http://europa.eu/eu-law/treaties/index\\_en.htm](http://europa.eu/eu-law/treaties/index_en.htm)> which is the official web base of the Union for such documents.

<sup>13</sup> CoE adopted the European Social Charter as complement to the 1950 Convention with regards to the social and economic rights. Originally, the Charter was signed in 1961 and entered into force in 1965. The Charter was revised in 1996 and the revised version came into force in 1999.

servitude, and freedom of expression and association. The second section established European Commission on Human Rights (ECoHR) and the ECtHR as to ensure observance of engagements undertaken by the states. The third and the fourth sections deal with the structure, power and functioning of the ECoHR and the ECtHR respectively. The last section, section five, consist miscellaneous provisions related to practices and procedures under the Convention.

Provisions of the Convention were amended by the fourteen consecutive protocols. Among the protocols, the eleventh Protocol, signed in 1994 and entered into force in 1998, led to emergence of one tier institutional system for protection of the human rights in Europe. Thus, the ECtHR<sup>14</sup> was reestablished as the only control machinery of the human rights system under the CoE.

### **2.2.5 European Regional Human Rights Organizations**

At its inception, the European regional system for the protection of human rights has had two major institutions. These are the ECoHR and the ECtHR. The ECoHR was established, in May 1954, to identify admissibility of cases to the Court, broker friendly settlement between the parties concerned, report about the terms of resolution if the conciliatory efforts were successful and also to deliver reports, upon failure of friendly settlement, involving the Commission's opinion with regards to the case in consideration and the obligations under the Convention (Mower, 1991).

The Commission consist members numerically equal to the number of the signatories of the Convention who are elected by the Committee of Ministers to serve in their individual capacity for the period of six years (Articles 20 to 23 of the ECHRa). It conducts filtering of petitions which can be submitted by an individual, groups, NGOs and the states (Article 25(1) of the ECHRa). For a petition to be acted upon by the ECoHR, domestic

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<sup>14</sup> ECtHR, established in 1959 on par-time basis and became permanent in 1998, is a supranational human rights court under the European system. It is based in Strasbourg France. Its official website is <[www.echr.coe.int](http://www.echr.coe.int)>

remedies needs to be exhausted<sup>15</sup> and the submission must be made only within a period of six months after the previous final decision was delivered (Article 26 of the ECHRa).

Though Secretary-General of the CoE have had the responsibility to assist activities of the Commission, par time nature of the commissioners' work led to heightening of the Commission's burden (Mower, 1991: 90). Furthermore, the rapid increase in membership<sup>16</sup> of the Council following collapse of the communist regimes in Eastern and Central Europe and the resultant upsurge in number of applications necessitated a permanently functioning body capable of both screening of the petitions and judicial settlement of the complaints within reasonable time period. As a result, the ECoHR was abolished and a new regional human rights court was set up in 1998 following entry into force of the eleventh protocol to the ECHRa.

ECtHR was first established in 1958 consisting judges numerically equal to the number of members of the CoE who were elected by the Consultative Assembly of the Council to serve for nine years office term (Articles 38 to 42 of the ECHRa). The Court acts on cases brought to it only by states and the Commission and gives judgment, which is final, via a chamber of seven judges (Articles 43, 44 and 52 of the ECHRa). Its judgments are executed by the Committee of Ministers (Article 54 of the ECHRa).

Increase in Court's workload as result of upsurge in membership to the Council accompanied with the par time nature of its activities signaled the need for major reform of the Court and the whole institutional machinery (Preamble of the 11<sup>th</sup> Protocol to the ECHRa). The quest for institutional reform culminated with entry into force of the eleventh protocol to the Convention in 1998. The Protocol established a new full-time

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<sup>15</sup> Exhaustion of domestic or local remedies is a basic principle of the International Human Rights Law and dictates that human rights issues should be dealt first by the legal system of a country concerned before coming to the scene of any regional or global machinery (Shaw, 2008: 272-273). The later may precede when and where the internal remedies are either non-existent, unduly and unreasonably prolonged or unlikely to bring effective relief.

<sup>16</sup> Between 1989 and 1996 eighteen (18) countries, all of them (only except Finland) from the eastern and central part of the Europe joined the CoE. Full list of the members and respective date of membership can be accessed from <[www.coe.int](http://www.coe.int)>, the official web portal of the CoE.

court entrusted with all of the relevant functions of the former commission and court (Steiner, Alston and Goodman, 2007: 940). Thus, unlike its predecessor institutions, the new court is permanent in its standing and “not a flexible institution where political considerations or convinces may play a role” (Rozakis, 2002: 5).

Under the new protocol, admissibility criteria, size of the judges of the court, court’s power to give advisory opinion, supervisory role of the Committee of Ministers, primacy of friendly settlement before judicial adjudication and the binding nature of the court’s decision remained as they were. The changes include that judges of the new court act in their individual capacity on full time basis for office term of six years<sup>17</sup>, individuals were granted direct access to the court, political role of the Committee of Ministers was limited to issues related to enforcement of the court’s decision and the admissibility or otherwise of the cases is examined and decided by the court alone (Steiner, Alston and Goodman, 2007: 940; Shaw, 2008: 353-354).

## **2.3 African Regional System for Protection of Human Rights**

This section provides a descriptive account of the African regional human rights system focusing on its evolution, the role of OAU and AU, the major human rights instruments and the regional human rights organizations of the system.

### **2.3.1 Evolution of the System**

Likewise it’s European and American counterparts, the African human rights system is an event of the second half of 20<sup>th</sup> century. The African system was created in 1981 when the African Charter on Human and Peoples’ Rights (AChHPR) was adopted. History of the Charter goes back to the 1961 ‘The Law of Lagos’; set of recommendations developed by lawyers from different African countries underlining the need for a continental human rights charter and a human rights court (Wohlgemuth and Sall, 2006: 4). In spite of such pressures, the African leaders failed to give significant attention to

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<sup>17</sup> This was changed with entry into force of the Protocol Number 14 and the ECHRb provides, under Article 23, that judges of the ECtHR shall be elected for office term of nine years on non-renewable basis.

human rights till the late 1970s arguing that it is an internal affair and reaffirming their adherence to the principle non-interference.

In 1979, OAU Assembly requested Secretary-General of the organization to set up a committee of experts to design a regional charter in due consideration of the African philosophy of law and human rights and the international standards (Ambrose, 1995: 81; CHRs, 2011: 9). First draft of the Charter, developed by the group of experts convened in Dakar Senegal, was discussed by two subsequent ministerial meetings held in Banjul and the Charter was finally adopted at the eighteenth meeting of the Assembly of the OAU, held in Nairobi Kenya, on 28 June 1981 (CHRs, 2011: 9-10). Therefore, increased pressure from multiple actors<sup>18</sup> made adoption of the African Charter a reality in 1981. Added to this is the collapse of authoritarian regimes across Africa with Idi Amin, Bokassa and Nguema being the front-runners. This trend continued during the early years of the post cold war period accompanied with instating of the newer political regimes<sup>19</sup>.

Though there are improvements, still human rights violations continue to characterize the political landscape of Africa. During the early decades of the post war period, sovereignty and non-interference served as shields for the African states violating human rights and later gave the way to patron-client relationship with the cold war superpowers (Akopari, 2008: 3). In the post cold war period, though improvements are visible, human rights violations continue in Africa associated with the activities of the non-states actors and coming to the scene of pseudo-democracies (*ibid*: 3-4).

### **2.3.2 OAU and Human Rights in Africa**

OAU is a regional political organization established in 1963 as an expression of solidarity between the independent African states and their shared concern about the future of the continent and its people (Preamble of the OAU Charter). The Organization put out most

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<sup>18</sup> Kufuor (2010) provides detailed and critical account of the different factors which explain adoption of the AChHPR in 1981.

<sup>19</sup> Political historian Lary Diamond calls these regimes ‘pseudo-democracies’ arguing that the regimes exhibit features of both ‘democratic’ and autocratic systems and the political transition in those countries never resulted in truly functioning democratic system. See Diamond (1999).

focus at ending the colonial rule and assuring territorial integrity of the post-colonial state. As result, the ideals of African unity, decolonization and elimination of racism were the three spelt-out grand objectives of the OAU (Ambrose, 1995: 80). This allowed massive human rights abuse by the African despots<sup>20</sup> to be left unchecked.

Though the Charter of OAU lack section on human rights, minute references were made to the UN Charter and the UDHR. In the preamble of the Charter, it was indicated that the signatories were persuaded by the principles up on which the Charter of the UN and the UDHR were based. It was also provided that promotion of international cooperation with due regard to the UN Charter and the UDHR is among the purposes of the organization (Article 2(1) of the Charter). But, it is important to note that OAU's commitment for decolonization and ending of racial discrimination, call for closer cooperation between the African states for better future of Africa and Africans, and rejection of political violence and subversive activities were basically human rights project in context of colonized and balkanized Africa (Gawanas, 2009).

Aside from this, foundation of the African regional human rights system was laid was under the OAU with the adoption of the Banjul Charter. The Banjul Charter was polished by additional instruments such as the African Charter on the Child (adopted in 1990) and a protocol to establish the African Court on Human and Peoples' Rights (ACtHPR) (adopted in 1998) along with the inauguration on African Commission on Human and Peoples' Rights (ACoHPR) all under the OAU. Therefore, OAU gave its way to the AU not only with weaknesses but also important imprints which were furthered by the later in many issue areas including the promotion and protection of human rights.

### **2.3.3 African Union and Human Rights in Africa**

The search for methods of strengthening African unity by transforming the OAU began with the Sirte declaration of September 1999, and furthered in Lome (Togo) and Lusaka (Zambia), and finally realized in 2002 at Durban South Africa (Murithi, 2005: 3). The

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<sup>20</sup> At the top of the list are Idi Amin of Uganda, Bokassa of Central African Republic, Mengistu of Ethiopia, Mobutu of Democratic Republic of the Congo (formerly called Zaire) and Macias Nguema of the Equatorial Guinea.

Constitutive Act of AU<sup>21</sup> was adopted in July 2000 in Lome and the AU was formally inaugurated in 2002 in Durban.

The Act provides, in the preamble, that the signatories are determined, among others, for promotion and protection of human and peoples' rights and the consolidation of democratic practices and good governance in the continent. It was spelt out that encouraging international cooperation by upholding the UN Charter and the UDHR, promoting democratic practices, also promoting and protecting human and peoples' rights as provided by the African Charter and other human rights instruments, advancing research and cooperation to raise the living standard and development of the continent and cooperating with partners to enhance the health situation in the continent are among the objectives of the Union (Article 3 of the Act).

Internally, the Union encompasses many organs. Among these, the Economic, Social and Cultural Council (ESCC)<sup>22</sup>, the Pan-African Parliament<sup>23</sup> and the African Court of Justice<sup>24</sup>, together categorized as 'accountability institutions', have competence over the issue of human rights (Akopari, 2008; Mohamed, 2009). The Peace and Security Council of AU<sup>25</sup> also addresses human rights issues. The Protocol establishing the Council provided that promoting democratic practices and respect for human rights and fundamental freedoms is among the Council's objectives (Article 3(f) of the Protocol).

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<sup>21</sup> Constitutive Act refers to the foundational document of the AU. The document was signed on 11 July 2000 at Lome Togo and entered into force on 26 May 2001.

<sup>22</sup> ESCC is an advisory organ composed of social and professional groups. It was formally inaugurated in 2005.

<sup>23</sup> Pan-African Parliament is a deliberative body under the AU consisting representatives from national legislatures of the African states. It was inaugurated in 2004 and based in Midrand South Africa. Though proposed to be a law making organ, its powers are advisory and consultative to date. For details visit <<http://www.pan-africanparliament.org>> which is the official website of the parliament.

<sup>24</sup> African Court of Justice, though not operationalized to date, was established as one of the organs of the AU under Article 5 of the Constitutive Act. The Protocol establishing the Court was adopted in 2003 and entered into force in 2009 though superseded by the 2008 Protocol intended to merge it with the ACtHPR.

<sup>25</sup> The Peace and Security Council is a collective security and early-warning arrangement established to act as a standing decision-making organ for the prevention, management and resolution of conflicts in Africa. It is composed of fifteen states and was officially inaugurated on 25 May 2004 following entry into force of a protocol relating to its establishment.

In general, the various internal organs of the AU play 'legislative' (involving adoption of binding instruments and also provision of the advisory opinions and recommendations), executive (relating to implementations of the decisions) and adjudicative (judicial and quasi-judicial functions) roles (Viljoen, 2007). In addition, the AU created structures and initiatives which address human rights issues, either directly or indirectly; the major ones being the New Partnership for Africa's Development (NEPAD) initiative<sup>26</sup> and the African Peer Review Mechanism (APRM)<sup>27</sup> (Akokpari, 2008; Gawanas, 2009).

#### **2.3.4 Major Human Rights Instruments of the African System**

The major human rights instruments adopted by the African states include Convention Governing the Specific Aspects of Refugee Problem in Africa (1969), AChHPR (1981), African Charter on the Rights and Welfare of the Child (1990), Protocol on the establishment of the ACtHPR (1998), Grand Bay Declaration<sup>28</sup> (1999), Convention on the Prevention and Combating of Terrorism (1999), Convention on Preventing and Combating Corruption (2003), Protocol on the Rights of Women in Africa (2003), African Charter on Youth and Development (2006), African Charter on Democracy, Elections and Governance (2007), and Protocol on the Statue of the African Court of Justice and Human Rights (ACtJHR) (2008) (Heyns and Killander, 2007; CoE, 2009).

Among the human rights instruments, AChHPR forms the basis of the African system. The Charter is the most widely accepted regional human rights document as all the fifty three (53) member states of the AU (South Sudan excluded) have ratified it (Benedek and Nikolova, 2003: 32). The Charter is divided in three parts. The first part, titled rights and duties, enumerates rights protected under the Charter and the duties of individuals to the state and community. The second part, called measures of safeguard, details about the

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<sup>26</sup> NEPAD initiative is a comprehensive development plan aimed to eradicate poverty and ensure sustainable development in Africa focusing on good governance and human development.

<sup>27</sup> APRM is a program within the NEPAD initiative. It has four focus areas: Democracy and Political Governance, Economic Governance, Corporate Governance and Socio-Economic Development.

<sup>28</sup> The Grand Bay Declaration, adopted in April 1999 at the end of the first OAU Ministerial Conference on Human Rights in Africa, underlined the link between human rights and peace and security and also the necessity of multi-faceted approach to deal with human rights problems in Africa. In addition, it stipulated strategies for implementing the human rights instruments at the national and regional levels.

establishment and functioning of the ACoHPR. The last part, titled general provisions, provides supplementary provisions about institution of the Commission up on entry into force of the Charter and the ratification and amendment of the document.

The rights enumerated in the Charter include all the three generations of rights<sup>29</sup>. Some of the first generation rights protected are equality before the law (Article 3), the right to life (Article 4), freedom from inhuman treatment (Article 5), the right to liberty (Article 6), freedom of religion (Article 8), freedom of association (Article 10), the right to assembly (Article 11) and the right to property (Article 14). The second generation rights protected include the right to work under conducive conditions (Article 15), the right to mental and physical health (Article 16) and the right to education (Article 17).

The third generation rights spelt out include the right to development (Article 22), the right to national and international peace and security (Article 23) and the right to a ‘satisfactory environment’ (Article 24 of the Charter). Thus, the African Charter recognizes all the three generations of rights underlining that “...civil and political rights cannot be dissociated from economic, social and cultural rights ... and that the satisfaction of economic, social and cultural rights is a guarantee for enjoyment of the civil and political rights” (Preamble of the AChHPR).

In addition, the African Charter protects peoples’ rights. Though the Charter fails to define what it meant by ‘people’, implicitly it stands for totality of inhabitants within a state and/or a group sharing common language, ethnicity, religion and other features (Viljoen, 2007: 243; Ougergouz in Killander, 2010: 401). The peoples’ rights guaranteed include the right to existence and self-determination (Article 20), the right to control and use natural resources (Article 21), the right to national and international peace and security (Article 23) and the right to favorable environment (Article 24).

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<sup>29</sup> There is a hierarchical classification of human rights into three categories or generations: first, second and third. The first category or generation of rights includes more fundamental human rights like the right to life, freedom from torture, freedom of thought and religion which are collectively called the civil and political rights. The second category includes economic, social and cultural rights, whereas the third generation rights include the right to healthy environment, to peace, social and economic development and the like. See Davidson (1993: 39-45); Ife (2001: 24-43).

Moreover, the Charter imposes duties on individuals and the state declaring that “...enjoyment of rights and freedoms...implies the performance of duties...” (Preamble of the AChHPR). The state has duty to protect societal values (Article 17(3)), to protect the family (Article 18), to promote respect of rights and freedoms (Article 25) and to support establishment of national human rights bodies (Article 26). The individual bears duties to the family, the state and the larger international community (Article 27(1)) and also bears duty to respect other individuals (Article 28).

### **2.3.5 African Regional Human Rights Organizations**

The African human rights system consists two major institutions: the ACoHPR and the ACtHPR. The ACoHPR, based in Banjul The Gambia, was established as per Article 30 of the AChHPR and came into being in 1987. It consists eleven (11) members elected by the Assembly of the OAU/AU, with no two members from the same state, to serve for a period of six years in their personal capacity (Article 31 to 36 of the AChHPR).

The Commission is entrusted with both ‘promotional’ and ‘protective’ activities. These includes interpreting provisions of the AChHPR when requested by any state, AU or any recognized body; examination of the state reports; provision of recommendations to the governments; conducting promotional visits; organizing seminars and conferences and publication and dissemination of studies (Article 45 of the AChHPR).

ACtHPR, based in Arusha Tanzania, was established in 2006 to complement the protective activities of the ACoHPR. As the AChHPR doesn’t provide for a court, the ACtHPR was established by a protocol adopted in 1998. The Court is composed of eleven (11) judges, all from different nations, serving for the office term of six years on par time basis (Article 11 and 15 of the Protocol).

Jurisdiction of the Court covers “all cases and disputes...concerning the interpretation and application of the Charter...and other...instruments ratified by the states concerned” (Article 31(1) of the Protocol). The ACoHPR, any state and the African intergovernmental organizations have direct access to the Court (Article 5) while NGOs

and individuals can lodge cases before the Court if a concerned state have duly recognized the Court's competence to receive cases from the NGOs and individuals (Article 34(6)).

Since the AU was inaugurated, there are efforts being made to establish the ACtJHR<sup>30</sup> by merging the ACtHPR and the African Court of Justice. As result a protocol detailing about the new court was adopted in 2008 by the AU Assembly in *Sharm El-Sheikh* Egypt. The new court will have two sections: a general affairs section and a human rights section each consisting eight (8) judges (Article 16 of the Statue).

Jurisdiction of the ACtJHR<sup>31</sup> is highly expanded causing concerns<sup>31</sup> regarding the possible impact on protection of human rights in Africa. Critics argue that establishment of the ACtJHR will have negative impact on protection of human rights in Africa given the extended mandate of the court, possibility that some states may run out of the whole system by not ratifying the protocol, and also due to the possible reduction in focus on and prominence of human rights (Sceats, 2009; Ugiagbe, 2010; Viljoen, 2012).

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<sup>30</sup> Justifications for the merger include the need to reduce financial expenditure by merging the two courts and addressing crimes which are out of the jurisdiction of the ACtHPR. See Udombana (2003); Juma (2009); Ugiabe (2010); Viljoen (2012).

<sup>31</sup> As per Article 28 of the Statue of the ACtJHR, jurisdiction of the new court covers interpretation of the Constitutive Act, all legal instruments adopted under the OAU and the AU, any question of international law, and all acts, decisions and directives of the AU.

## **CHAPTER THREE: COMPARING THE SYSTEMS ON BASIS OF THE SETTING**

This chapter is intended to comparatively examine the European and African human rights systems focusing on the setting within which they operate. The *raison d'être* is that the regional systems can be better understood and their functional efficacy be appropriately evaluated if their operational setting is well examined. Therefore, this chapter provides a comparative assessment of the setting under which the two systems operate focusing on the socio-economic conditions at the regional level, nature of the political systems in the regions, the regional and national key actors which include the human rights NGOs, national human rights bodies and the regional organizations.

### **3.1 Socio-Economic Conditions**

The environment in which the European and African human rights systems operate remarkably differs with regards to various socio-economic indicators like distribution of educational, health and other social services and the economic indicators such as per capita income, size of population in poverty and level of unemployment.

Africa stands far behind Europe in terms of the per capita income (for instance, the regional per capita income is 2,630 USD for Africa whereas its 27,080 USD for Europe in 2012) and life expectancy at birth (in 2012 life expectancy at birth is 58 years in Africa and 77 in Europe) (PRB, 2012). Africa absorbs high under-five death (67 per every 1000 birth compared to 5 per the same number in Europe), children per women (4.7 Childs per women in Africa whereas it is only 1.6 per women in Europe) and people living with HIV-AIDS (about 3.85 % of Africans live with the virus whereas the rate is only 0.45 % in Europe) (*ibid*). Worst of all, Africa has only 3 % of the world's health professionals though it takes 24 % of the world's disease burden (Cooke, 2009: 8).

In addition to the aforementioned parameters, Africa also lags behind Europe with regards to other socio-economic indicators such as the rate of literacy and the distribution of physical infrastructure. For instance, physical infrastructure of the African continent is

inadequate and of poor quality as evidenced by the fact that only a third of the continent's population has access to electricity, the road access rate stood at 34 %, and telecom and internet coverage is only 6 and 3 % respectively (ECA and AU, 2012: 115-116).

With regards to the literacy rate, Africa still hasn't achieved the goal of universal primary education and the average youth literacy stood at 75.2 % in 2009 (WB, 2011: 82). The rate significantly varies across the continent and large number of states are below the continental average (UNESCO, 2011). On the other hand, youth literacy rate is between 90 to 100 % in 2009 for the whole Europe with slight variation between the Western and Eastern Europe (*ibid*: 2).

The two regions also remarkably differ with regards to the level of human development, i.e. human development index<sup>32</sup>. For instance, based on the 2011 UN Human Development Report, all the member states of the CoE fall in the very high and high categories whereas majority of the African states are in the low human development index category with few in the medium level and only four countries (Seychelles, Libya, Mauritius and Tunisia) in the high level category.

As far as the section of population living in poverty is considered, Europe has very small size in spite of the ongoing economic difficulties whereas nearly 50 % of the population in the sub-Saharan Africa lives under the yoke of poverty (WB, 2012). According to the IMF's 2012 report, out of the twenty poorest countries in the world eighteen are African. Level of unemployment is another area of significant variation between the two regions. Due to the continuing economic instability in the euro zone, the unemployment rate reached 11.8 % as of the November 2012 in the region (Sedghi and Burn-Murdoch, 2013). Unfortunately, only few African states enjoy unemployment rate below that of the euro zone. These are Seychelles (2%), Botswana and Mauritius (8 % each), Morocco (9 %), Algeria (10 %) and Ghana (11 %) (CIA, 2012; ILO, 2013). Thus, the large number of African states are engulfed with huge army of unemployed citizens with Zimbabwe,

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<sup>32</sup> The index is based on cumulative consideration of the various social, economic and demographic factors such as life expectancy and per capita income and the countries are grouped into four categories: very high, high, medium and low groups.

Burkina Faso, Liberia, Djibouti and Namibia being the worst cases having more than half of their labor force without jobs (*ibid*).

Therefore, Africa lags behind Europe with regards to various socio-economic indicators and the recent improvement in some aspects of social and human development such as under five mortality rate, education enrollment and HIV prevalence are said to be very slow and regionally uneven (ECA and AU, 2012). And it is important to bear in mind such big disparities between the two regions with regards to the socio-economic conditions while examining the functioning of the respective human rights systems. Thus, the two human rights systems operate under highly differing socio-economic conditions which, either directly or indirectly, affect their functional efficacy. For instance, the above discussed discrepancy in terms of the socio-economic indicators by implication means the category of human rights subject to violation, and in turn human rights which needs to be protected, basically differs.

### **3.2 Nature of the National Political Systems**

Nature of political systems or whether the regimes of countries within certain region are 'democratic' or not and the level of their stability have its own bearing on the domestic and regional attempts to protect human rights. There exists positive relationship between democracy and human rights as unlike the authoritarian regimes democratic governments are less hostile to human rights. Therefore, "[h]uman rights are more likely to be defended, or less likely to need defending, in a democracy than in an authoritarian political system" (Mower, 1991: 12). For instance, in democracies, compliance with decisions of the supranational bodies becomes "...less a question of ceding sovereignty than responding to constituent pressure...[and]...sovereignty becomes inextricably interwoven with accountability" (Helfer and Slaughter, 1997: 388). In addition, observance of the human rights is higher where states are stable than where there is uncertainty with regards to holding of the political power and sustainability of the state apparatus (Mower, 1991: 12).

It is under this general framework that the impact of nature of political systems has had on the regional human rights systems in Africa and Europe can be looked at. Level of openness of the political systems in the two regions can be evaluated using the annually published indexes of the four institutions on themes such as democracy, press freedom and level of corruption.

Democracy index, which is the annual index published by the Economic Intelligence Unit, provides the general picture of the level of political openness of the countries across the world. The Index categorizes countries as ‘full democracies’, ‘flawed democracies’, ‘hybrid regimes’ and ‘authoritarian regimes’ on the basis of electoral process, civil liberties, functioning of the government, political participation and political culture. On basis of these criteria, African and European states are in different categories. For instance, the 2011 report shows that only Mauritius is a ‘full democracy’ among the African states while CoE has sixteen (16) of its members in the category. The second category, ‘flawed democracies’, consists nine (9) African states with eighteen (18) counterparts from Europe. Marked difference exists between the two regions with regards to the last category: ‘authoritarian regimes’. While only Azerbaijan and the Russian federation are in this category out of the forty seven (47) member states of the CoE, twenty eight (28) African states form the largest regional group in the category.

In similar manner, the Freedom House’s 2013 Freedom in the World report shows that majority of the African states are “Not Free” as there is no or very limited open political competition and independent media, and human rights are not respected and systematically denied. Among the CoE states only Russia is categorized as ‘Not Free’ along with twenty (20) African states and only four states (Bosnia, Turkey, Armenia and Ukraine) are in the ‘Partly Free’ group. As regards to the countries categorized as ‘Free’ and characterized by open political completion, greater respect for rights and independent media, forty (40) CoE members are found in the list along with twelve (12) Africa states.

The regional variation between Africa and Europe is also visible with regards to press freedom and the level of corruption. For instance, as per the 2013 Press Freedom Index of

the Reporters Without Borders, which categorizes status of press freedom as good; satisfactory; with noticeable problems; difficult and very serious, Eritrea, Sudan and Somalia represent “very serious situation” while there is no such case in Europe. Europe’s worst cases in this regard are Russia, Ukraine, Turkey and Armenia all found in category of “difficult situation” with thirteen (13) African states. Africa’s best case is Namibia though fifteen (15) CoE states are above the country in the ranking.

Transparency International’s Corruption Perception Index shows that majority of the African states are characterized by higher prevalence of corruption than their European counterparts. As per the 2012 report of the organization, out of the twenty (20) most corrupt countries in the world, nine (9) are from Africa. These are Angola (157<sup>th</sup>), Democratic Republic of the Congo (DRC) (160<sup>th</sup>), Libya (160<sup>th</sup>), Equatorial Guinea (163<sup>rd</sup>), Zimbabwe (163<sup>rd</sup>), Burundi (165<sup>th</sup>), Chad (165<sup>th</sup>), Sudan (173<sup>rd</sup>) and Somalia (174<sup>th</sup>) (Transparency International, 2012). In opposite, eleven (11) CoE member states are among the twenty (20) least corrupt countries in the world and no single African state is in this particular list (*ibid*). Europe’s worst cases are Ukraine (144<sup>th</sup>), Azerbaijan (139<sup>th</sup>), Russia (133<sup>th</sup>) and Albania (113<sup>th</sup>) (*ibid*).

All these odds related to the African political systems basically stem from ‘artificial’ nature of the African states and the failure of the post-colonial state to adjust the deficiencies related to and born-by the colonial state (Zartman, 1995; Mamdani, 1996; Hyden, 2006). States in Africa are not indigenous<sup>33</sup> in their origin and are largely colonial creations by arbitrary division of the pre-colonial African societies. Thus, African states lack indigenous roots unlike majority of the European states. This lack of legitimate foundation is exacerbated by the failure of the post-colonial state.

The post-colonial African state failed “...to forge viable...countries;.... to inspire loyalty in the citizenry; ...to inculcate ...the security forces their proper roles in society; to build a nation from different linguistic and cultural groups; and to fashion economically viable

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<sup>33</sup> The ‘Ethiopian state’ and Eritrea are argued to have ‘indigenous’ state base driven by ‘internal war’ for state building and defense of ‘external’ threat though incomparable to the experience of the European states. See Clapham (1999; 2001) for details on state formation in Ethiopia and Eritrea.

policies” (Mutua, 1995: 365). The cumulative effect is the greater tendency to use coercion to sustain political power and the widespread violation of all categories of human rights.

Generally, it is safe to argue that the prevailing political situation is more conducive for promotion and protection of human rights in Europe than in Africa. What needs to be in mind is that there are some African states which are better placed with regards to multitude of the political indicators but at the continental level majority of the African states have national political structures less conducive for enhanced promotion and protection of human rights as compared to their European counterparts.

### **3.3 Regional and National Key Actors**

The third issue which constitutes the setting of the two regional human rights systems is related to the key national and regional actors. These include human rights NGOs, NHRIs and the regional political frameworks under which the human rights systems operates.

#### **3.3.1 Human Rights NGOs**

Though their historical root goes back as far as the 19<sup>th</sup> century, human rights NGOs<sup>34</sup> significantly emerged beginning from the early 1990s primarily due to the end of cold war confrontation, revolution in communication and information technology and strong financial backing by the individuals and organizations (Blitt, 2004: 295-96; Richmond, 2005: 274). Their major functions include documentation, lobbying, dissemination of information, monitoring norms and practices and transferring humanitarian resources (Dieng, 2001; Blitt, 2004; Richmond, 2005). NGOs played important role for inclusion of human rights provisions into the Charter of the UN and provided useful input for the UDHR and other treaties under the UN and regional systems (Richmond, 2005: 274).

NGOs are part of the European and African human rights systems. NGOs were integrated into the CoE’s human rights scheme as early as 1950s when the organization started to

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<sup>34</sup> Simply to mean the international, regional, national and local NGOs focusing on human rights. For details on human rights NGOs. See Weisberg (1991).

grant them ‘consultative status’. In 1995 the Council adopted a protocol to the European Social Charter, which allowed NGOs to lodge complaints against any state violating the Charter. The Resolution (2003)<sup>8</sup> of the Council furthered NGOs interaction with the Council and upgraded their engagement to the ‘participatory status’. Overall activity of the human rights NGOs in Europe is coordinated by a body called the Conference of NGOs. The Conference meets twice a year and considers issues pertinent to the functioning of the member NGOs and concerning the relationship with other stakeholders. As of the early 2013, four hundred (400) NGOs were granted ‘participatory status’ by the Council and are actively performing upward (implying interactions with various organs of the Council) and downward (which involves dissemination of information to people and grass root organizations) functions (CoE, 2013a).

Originally, the European Convention (ECHR<sub>a</sub>), under Article 44, provided that only states and the ECoHR have the right to lodge cases before the ECtHR. It also provided that NGOs can only petition to the ECoHR (Article 25). But with the entry into force of the eleventh protocol to ECHR<sub>a</sub>, this was changed and Article 34 of the ECHR<sub>b</sub> provides that NGOs can present applications against any state violating the Convention and its protocols. Therefore, NGOs enjoy direct access to the new ECtHR.

Aside from this, NGOs play crucial role in the implementation of decisions of the ECtHR by pressuring government authorities and influencing preparation of the action plans at the domestic level, by providing assistance to the actors involved in the process and by providing information to the public, media and the monitoring institutions (including the Committee of Ministers) about the implementation process (Cali and Bruch, 2011). They provide details of what is required for implementation of the decisions and also the status of implementation on the ground (*ibid*). Generally, NGOs are considered as an integral part of the whole body of CoE.

With regards to the African experience, the ACoHPR has been granting ‘observer status’ to NGOs since 1988 and this was formalized with the adoption of a resolution detailing

the criteria<sup>35</sup> for that purpose in 1999. As of the early 2013 about four hundred and forty (440)<sup>36</sup> NGOs has been granted observer status by the ACoHPR; some eighty six (86) of which are from outside of the continent. The NGO Forum coordinates the organizations' interaction with the ACoHPR and their overall activities which includes bringing communications on behalf of the individuals, monitoring states' compliance, awareness creation and submission of shadow reports (CHRs, 2011: 39).

Under the 1998 protocol to the African Charter, NGOs with observer status at the ACoHPR can lodge cases before the ACtHPR (Article 5(3)). But, this requires additional declaration of a concerned state, i.e. NGOs can lodge cases before the ACtHPR if and only if a concerned state has made declaration granting such right<sup>37</sup> (Article 34(6) of the Protocol). In addition, NGOs' access to the ACtHPR also requires discretion of the Court (Article 5(3) of the Protocol). Thus, NGOs lacks direct access to the ACtHPR and can only access the Court via ACoHPR and/or if a state has recognized their right to do so.

The role of NGOs in promotion and protection of human rights in Africa includes organizing of seminars and conferences, preparation of the shadow reports, adoption of resolutions and bringing cases before the ACoHPR. NGOs, via their Forum, adopted resolutions which are usually presented to and adopted at the sessions of the ACoHPR. For instance, the NGO Forum adopted resolutions regarding human rights situation in Zimbabwe and Ethiopia which were adopted by the Commission at its thirty eighth (38<sup>th</sup>) session in December 2005 (Mbelle, 2008b: 295).

The resolution on human rights situation in Zimbabwe, *Resolution No.89*, underlined the Commission's concern regarding the situation of judiciary in the country and also violation of freedoms of expression, association and assembly. The Commission urged the government of Zimbabwe to stop forced eviction, to uphold the principle of

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<sup>35</sup> These include objectives in line with the AU Constitutive Act and the AChHPR, NGO must be working in the field of human rights, provide proof of legal existence and statement of its activities.

<sup>36</sup> Detailed information about the NGOs granted observer status by the ACoHPR can be found at <<http://www.achpr.org/network/ngo/by-name/>>.

<sup>37</sup> To date, only six (6) countries namely Burkina Faso, Ghana, Malawi, Mali, Tanzania and Rwanda declared competence of the ACtHPR to receive applications from individuals and NGOs.

separation of power and repeal or amend the repressive legislations. The resolution on human rights situation in Ethiopia, *Resolution No.92*, reflected concerns of the Commission in relation to human rights situation in the country in aftermath of the May 2005 parliamentary election. The Commission requested the Ethiopian government, among others, to release individuals detained as result of the election-related violence and also guarantee the prisoners the right to fair trial.

In addition, NGOs organized several seminars and conferences intended to raise public awareness and, in some cases, ended up with adoption of guidelines elaborating the AChHPR and other instruments. For instance, an NGO called Association for Prevention of Torture played crucial role in adoption of “The Robben Islands Guidelines” focusing on prohibition and prevention of torture, inhuman treatment and punishment in Africa in July 2003 (*ibid*). In similar vein, NGOs played vital role in the adoption of principles and guidelines on the right to fair trial and declaration on principles of freedom of expression (*ibid*: 307). Most importantly, large part of the protocol establishing the ACtJHR was initially drafted by a conglomeration of NGOs called the African Court Coalition<sup>38</sup> (Kane and Motala, 2008: 419).

Furthermore, NGOs submit shadow reports on human rights situation in the states as an alternative source of information to the state reports and also take part in fact finding missions to examine situations in hot spots like Darfur, eastern DRC and refugee camps across Africa (Mbelle, 2008b). Lastly, NGOs engage with the ACoHPR by lodging complaints before it and managed to become the main complainants as almost all of the cases before the Commission are brought by the NGOs (Kane and Motala, 2008: 440). The most notable case brought before the ACoHPR by the NGOs is *the Social and Economic Rights Action Center and the Center for Economic and Social Rights vs. Nigeria*, which is commonly called the *Ogoniland* case.

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<sup>38</sup> African Court Coalition, alternatively called the Coalition for an Effective ACtHPR was established in 2003 to ensure effective redress of human rights violations and strengthen the human rights promotion and protection system in Africa by strengthening the ACtHPR. See for details <<http://www.africancourtcoalition.org>>, the official website of the Coalition.

The communication, *Numbered 155/96*, was made by the two NGOs<sup>39</sup> in March 1996 and related to environmental degradation and other problems caused by oil exploration and production in the *Ogoniland* region of Nigeria. The complainants argued that activities of the oil companies caused environmental degradation and health problems among the *Ogoni* people. In addition, the communication marked that the Nigerian government facilitated the exploitation, as result violation of the rights, by providing military back-up to the companies, by not setting safety requirements and also by not providing studies about the potential or actual damages related to operations of the companies.

The African Commission delivered its final ruling in October 2001 and concluded that the Nigerian government violated Articles 2, 4, 14, 16, 18(1), 21 and 24 of the AChHPR. The Commission requested the Nigerian government to stop all kinds of attacks on *Ogoni* people by the security forces, to investigate the violations committed and to compensate victims of the violations. This ruling is highly pronounced because it showed capacity of the ACoHPR to deal with the socio-economic rights which are of greater importance in the African context and also because the decision included rights which weren't expressly provided in the African Charter like the right to food and housing (Coomans, 2003).

In spite of their contribution, human rights NGOs active in Africa are distinctly subject to various criticisms and limitations. These include their small size relative to the size of the continent and intensity of the human rights violations, limited budget and the resultant dependence on external sources of finance, greater concentration around the urban areas and neglect of majority of the continent's population which resides in the rural areas, more attention to the civil and political rights than the socio-economic ones, unclear goals and objectives and the resultant tendency to take on all sort of issues, and low national and regional coordination (Carver, 1994; Forster, 2006; Zeleza, 2006; Viljoen, 2007).

For instance, according to the African Center for Democracy and Human Rights Studies (ACDHRS) which leads the NGOs Forum, the Forum encompasses about two hundred

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<sup>39</sup> These are the Social and Economic Rights Action Center and the Center for Economic and Social Rights based in Nigeria and United States (New York) respectively.

(200) NGOs, i.e. less than half of the NGOs with observer status at the ACoHPR (ACDHRS, 2013). In addition, human rights NGOs in Africa are not given the opportunity to access the state reports (Viljoen, 2006: 140). And this lack of access to the state reports prior to its consideration by the ACoHPR limits the ability of the NGOs to prepare well founded shadow reports (Mbelle, 2008b: 299).

Furthermore, NGOs from outside of Africa, such as International Commission of Jurists; Amnesty International; Interrights; Penal Reform International and the International Work Group for Indigenous Affairs, play dominant role in Africa though majority of the NGOs granted observer status by the ACoHPR are African (Viljoen, 2007: 408-412). Though contributions made by the non-African NGOs can't be neglected, there are criticisms against their activities in Africa. The criticisms are related to their outmost focus on the civil and political rights, their tendency to paternalize and use the local NGOs largely for data collection, sporadic relationship with the local groups and individuals at grass-root levels and the funding trends and choices that are directed by their interest and that of their financiers than the real need of the African groups (Mutua, 2004: 195-196). These all limitations means a lot to the African system where there is a broader need for NGOs to represent alleged victims from a broad swath of states in light of a regional system curtailed by multitude of challenges.

### **3.3.2 National Human Rights Institutions**

National human rights institutions (NHRIs) are bodies created by states, but supposed to be independent of it, to monitor human rights situation within a country (UN, 2010: 13). Thus, states have responsibility to establish, respect and ensure their independence and fund the NHRIs (Peter, 2009: 352). NHRIs are important actors in promotion and protection of human rights serving as a bridge between the civil society and the government and also narrow the discrepancy between international human rights standards and their implementation at the national level (UN, 2010: 13). Their role is significant because human rights can be best enforced at the national level as the real power to affect human rights standards remains with the states (Rhona, 2005: 267). Thus, creation and support of NHRI shows state's commitment for protection of human rights.

The establishment and functioning of NHRIs is guided by what is commonly called the Paris Principles which was adopted in 1991 during the meeting of human rights institutions in Paris and endorsed by the UN General Assembly in 1993. The document spelt out that national institutions shall be established by a founding document with broad but clearly set mandate, an independent appointment procedure and specified term of office and should be pluralistic in composition, independent from government bodies in their functioning and be adequately funded. As per the Principle, the responsibility of NHRIs include preparing reports on human rights situations, raising public awareness, promoting implementation of the international and regional instruments to which the state is a party and cooperating with the national, regional and international actors for promotion and protection of human rights.

The history of NHRIs in Europe predates the adoption of the Paris Principles. For instance, the historical root of national human rights bodies in the Scandinavian countries<sup>40</sup> extends as far as the 19<sup>th</sup> century (Rhona, 2005: 268). The oldest NHRI in Europe is that of the France called *Commission Nationale Consultative des Droits de l'Homme* established in 1947 and followed by the Danish Institute of Human Rights established in 1987 (Rhona, 2005). Thus, NHRIs in Europe largely came after the adoption of the Paris Principles in spite of reluctance on the side of many European governments.

It is argued that establishing NHRIs is unnecessary as European governments are sufficiently compliant with the international human rights standards and the countries have relatively efficient judicial system, parliamentary committees specializing on human rights<sup>41</sup> and many non-state human rights organizations (Beco, 2007: 9-10). Therefore, NHRIs situation in Europe needs to be understood in light of this assumption. Despite such skepticism, numerous NHRIs were established and managed to play crucial role in the European human rights system by providing necessary information to organs of the

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<sup>40</sup> Though Finland and Iceland are occasionally included in the list, it is Denmark, Norway and Sweden that are usually called the Scandinavian countries.

<sup>41</sup> For instance, the British parliament has Joint Committee on Human Rights, German Bundestag has a Committee on Human Rights and Humanitarian Aid and there is Human Rights Committee of the Belgian parliament.

CoE, monitoring implementation of the standards set by the regional bodies and also by advising the legislative and executive authorities of the member states (European Parliament, 2010: 90).

With regards to the establishment of NHRIs, Africa showed remarkable improvement since the entry into force of the AChHPR. The number of NHRIs in Africa increased from one in 1989 (that of Togo which was established in 1989) to thirty one (31) in 2009 (Peter, 2009: 352). The crucial role of national institutions was recognized even by the drafters of the AChHPR which provides, under Article 26, that states have the duty to establish and support such bodies. In 1998, ACoHPR adopted a resolution granting observer status to the NHRIs with due consideration of the Paris Principles. Currently, the Network of African (NANHRIs), a regional conglomeration of the NHRIs, consists forty one (41) NHRIs though sixteen (16) of them lack the International Coordinating Committee of National Institution's (ICCNIs) accreditation (NANHRIs, 2013).

NHRIs are given accreditation by the ICCNIs on bi-annual basis. The Committee categorizes national institutions into A, B and C labels which respectively means NHRIs in full compliance with the Paris Principles, partly in compliance and not in compliance. The A-label NHRIs are voting members of the Committee and the B and C label NHRIs only have the observer status. Generally, the better label of NHRI indicates continual effort of a state to realize an independent watchdog body and implies that credibility and effectiveness of the NHRI is higher (ICCNIs, 2012). The following table shows status of NHRIs from Europe and Africa as of May 2012.

**Table 3.1: NHRIs in Europe and Africa**

Region	Number of NHRIs Accredited			States without NHRIs or NHRIs not sought ICCNI's Accreditation
	A	B	C <sup>42</sup>	
Africa	18	5	2	29
Europe (CoE)	20	9	2	16

Source: Tabulated from the ICCNI's May 2012 Report.

<sup>42</sup> These are those of Romania and Switzerland from Europe and of Benin and Madagascar from Africa.

As the table has shown, Europe and Africa have a good number of NHRIs which are in full compliance with the Paris Principles. But marked difference exists between the two regions with regards to the states which haven't established NHRIs and/or have the NHRIs which haven't sought accreditation from the ICCNIs. Most importantly, the African states in this category are those which are characterized by the widespread human rights violations. These include Somalia, Sudan, Zimbabwe, DRC and Eritrea. Thus, African states whose national human situation is not good either lack the state established body responsible for promotion and protection of human rights or the institutions established fall short of the Paris Principles. In addition, the need for NHRIs is higher in Africa than Europe as the large number of the African states lack well established substitutive national structures (such as parliamentary committees, strong and independent judiciary, vibrant media and NGOs) unlike their European counterparts.

NHRIs in Africa face multitude of limitations. African states are less willing to provide sufficient funds, despite formal obligation under the Paris Principles, to the institutions (Peter, 2009: 370). Though there are few strong NHRIs (for example those of South Africa, Ghana, Uganda and Kenya) with competent and impartial individuals at the top, majority of the African NHRIs are lead by incompetent and politically biased commissioners or directors (*ibid*). As result, NHRIs in Africa, with few exceptions, are criticized as the instruments used to cover up acts of the abusive governments (HRW, 2001). This again contravenes the Paris Principles which dictates that the NHRIs shall be independent from the government.

The Paris Principles also requires the NHRIs to cooperate with the regional human rights institutions. This is relatively put into practice in Europe than Africa. For example, as early as 1993 the first involvement of a NHRI was made before the ECtHR by the Northern Ireland Human Rights Commission in relation to British government's derogation of rights in fight against Irish Republican Army (Rhona, 2005). Since then, NHRIs in Europe either individually or under their regional coalition involved in deliberations of the regional court. Their role is also significant in implementation of the

Court's decisions. Thus, NHRIs in Europe play their assumed role during consideration of cases by the ECtHR and in implementation of the decisions (Buyse, 2012).

With regards to Africa, the relationship between the ACoHPR and the NHRIs in Africa began in 1998 with the adoption of a resolution on granting 'affiliate status' to the national institutions. On basis of the resolution, the Commission has granted 'affiliate status' to twenty two (22) NHRIs as of the late 2011 (CHR, 2011: 42). In spite of the affiliate status and participation in meetings and other deliberations, African NHRIs lack clearly set role in the ACoHPR and thus haven't yet made meaningful appearances before either the Commission or the Court (Viljoen, 2007; 2009). Their interaction with the ACoHPR is limited to facilitation of the promotional visits and attendance of its public sessions (Mbelle, 2008b: 290). In addition, they lack strong regional forum through which information and experiences may be shared and meaningful engagement with the regional human rights and political organizations can be made (*ibid*).

### **3.3.3 Regional Organizations and the Human Rights Systems**

Both European and African human rights systems operate within the wider regional political frameworks. The European system forms a part of the CoE and the EU while the African system operates within the umbrella of the AU.

#### **A. Council of Europe, the EU and the European System**

CoE has two organs which directly take part in human rights issues: Committee of Ministers and the Parliamentary Assembly. While the Committee of Ministers is responsible for supervision of implementation of decisions of the ECtHR, the Parliamentary Assembly makes recommendations and elects judges of the ECtHR. The Council has Congress of Local Regional Authorities which brings it closer to the grass root level. The Congress conducts numerous monitoring activities and carries out political control of the commitments entered into by the states (Drzemczewski, 2001: 170). In addition, CoE has Secretariat, established under Article 36 of the Statue, that is strongly resourced and effectively enshrining its responsibility of serving other organs of the Council.

Furthermore, the linkage between the Council and other stakeholders such as the NGOs, NHRIs and the EU is well founded. The Council has been organizing meeting of the NHRIs and supporting cooperation between the NGOs. For instance, the Council “runs roughly 100 workshops, conferences and study visits across Central and Eastern Europe” on issues such as press freedom every single month (*ibid*: 174-175). The CoE also has the Commissioner for Human Rights which is responsible for issuing recommendations to the states and other organs of the Council and making direct contacts to clarify and solve human rights problem in a particular state (Schokkenbroek, 2001: 211). In cumulative, the CoE managed to realize the most effective regional human rights system with a “refined enforcement mechanism” (Rhona, 2010: 95).

EU on its part also has made visible contributions for effectiveness of the regional human rights system. Its contribution includes provision of financial support and adoption of legal instruments with particular focus on social issues such as rights of workers, non-discrimination and remedy of maladministration (*ibid*: 112-114). The Union also established the Agency for Fundamental Rights with the responsibility of gathering information on situation of rights within the Union, providing expert assistance and, most importantly, to strengthen its relationship with the CoE in protection of human rights in the region (*ibid*: 112)

## **B. AU and the African System**

AU, unlike its predecessor OAU, has provisions on human rights beginning from the Constitutive Act. The Union encompasses various organs which have responsibilities related to human rights. These include the Assembly, Pan-African Parliament, Peace and Security Council, and the ESCC. The Union has introduced various fresh policies such as condemnation of unconstitutional change of government and the right to intervene in time ‘grave’ situations. It also devised mechanisms such as the NEPAD initiative and the APRM to address the continent’s developmental, governance and human rights problems.

Aside from these, AU’s contribution for the protection of human rights in Africa is heavily criticized. Though the AU is responsible for overseeing implementation of the

decisions of the regional human rights bodies, the Union largely failed to take actions when states fail to comply with the decision of regional human rights bodies. On this ground, the ACoHPR regrettably reported that the "...member states generally do not comply with the decisions of the Commission or implement its recommendations" (ACoHPR, 2012). The Commission added that the Union's funding, which is about 2 % of the overall AU budget for the 2012 fiscal year, is insufficient (*ibid*). Furthermore, the Commission is sidelined by the majority of organs of the Union even in time of discussions on human rights issues and never been consulted during preparation of some of the human rights instruments like the Convention on Terrorism (Kane, 2006: 162-163).

Secondly, multitude of the organs devised under the Union like the Pan-African Parliament and the ESCC are haven't yet fully materialized as to realize their entrusted objectives and contribute for the protection of human rights in the continent. For instance, ESCC, which is designed to serve as a primary channel through which non-state actors could take part in activities of the Union, is haven't yet activated with strong involvement of the civil society and operationalized at the sub-regional and national levels (Mbelle, 2008a; Mutasa, 2008).

Related to this, the NEPAD initiative and the APRM are also subject to criticisms. Though praised for linking human rights with development, the NEPAD initiative is criticized for, among others, little or no participation of Africans at the local, national and regional levels during its formulation, lack of concrete measures with regards to women's rights and poverty reduction and for its failure to recognize the tragic impact of slavery, colonialism and neo-colonialism on Africa (Bunwaree, 2008; Matunhu, 2011). Similarly, APRM, which is a voluntarily acceded mechanism aimed at improving governance in Africa, is criticized for lack of compulsory face given the usual reluctance of the majority of the African states (Akokpari, 2008: 9; Gawans, 2009: 152).

Thirdly, Constitutive Act of the Union provided, under Article 4(h), that intervention is possible "...in respect of grave circumstances, namely war crimes, genocide and crimes against humanity." Though this is an appreciable innovation, questions like what about

human rights violations in situations which mayn't be categorized as "grave circumstances"?; How such circumstances are to be defined? and Doesn't the widespread human rights violations in Darfur and eastern DRC are 'grave circumstances'? can be raised. Thus, these and other questions can be raised with regards to the provisions of the Act and Union's effort to realize them.

Another distinct development in Africa with regards to human rights is the evolution of sub-regional tribunals across the continent. The sub-regional courts established so far are the Economic Community of West African States (ECOWAS) Court of Justice, Court of Justice of Economic and Monetary Union of West Africa, Southern Africa Development Community (SADC) Tribunal, Common Market for East and Southern Africa Court of Justice and the East Africa Court of Justice where as the Court of Justice of the Arab Maghreb Union and the Court of Justice of the Central African Economic and Monetary Union are proposed to be established (Akokpari, 2008). The coming to scene of these courts raises concerns over the relevant human rights instruments, question of primacy in adjudication of the human rights cases between them and the continental court on one hand and in time of overlap in jurisdiction as result of overlapping membership of states on the other hand (*ibid*: 8; Ebobrah, 2009).

All in all, contribution of the CoE and EU for the European system is well organized and focused as compared to the AU's contribution to the African system which lacks focus, political will, participation of the stakeholders at different levels and implementation on the ground. Generally, as the above discussions have shown the two human rights systems operate in markedly differing setting in terms of various socio-economic indicators, nature of the political systems, involvement of the human rights NGOs, NHRIs and the region wide political organizations in promotion and protection of human rights. All these factors taken into consideration, the African regional system operates in a less favorable setting than its European counterpart. Thus, the setting of African human rights system contains obstacles that are largely absent before its European equivalent.

## **CHAPTER FOUR: COMPARING THE SYSTEMS ON BASIS OF THE INSTRUMENTS AND INSTITUTIONS**

This chapter provides a substantive comparison of the European and African human rights systems focusing on the human rights instruments and institutions. Thus, the first section of the chapter deals with the human rights instruments of the two systems. The second section focuses on the human rights institutions under the two systems. The third section provides a brief summary of the areas of difference between the two systems as stepping stone for the next chapter, chapter five, where lessons for Africa are set.

### **4.1 Principal Regional Human Rights Instruments**

Foundational basis of the European human rights system is the European Convention on Human Rights and Fundamental Freedoms (ECHRa), commonly called the European Convention. In addition to the European Convention and its Protocols, the European Social Charter also forms the basis of the European human rights system. On the other hand, the African human rights system is based on the AChHPR, commonly called the African or Banjul Charter. The 1998 protocol to the African Charter on establishment of the ACtHPR is another major instrument of the African system.

#### **4.1.1 Content of the Rights Protected**

The European Convention primarily protects the first generation rights or the civil and political rights where as the AChHPR encompasses both the first generation and other category of rights in one document. This emanates from the belief that all the generations of rights are closely related and cannot be disassociated from one another (Preamble of the AChHPR). The Charter enumerates various civil and political rights, from Article 2 to Article 14, such as equality before the law; right to life; freedom of association, conscience and movement; non-discrimination and right to property. The ECHRa also enumerates various civil and political rights, between Article 2 and Article 14, such as right to life and liberty, freedom of conscience, assembly and non-discrimination but in more comprehensive manner than the AChHPR. For instance, though both the ECHRa and the AChHPR recognize the right to fair trial, the European Convention provides,

unlike the African Charter, certain minimum rights an accused person has, under Article 6, such as the right to witness and to have interpreter in case of language problem.

The two instruments clearly differ with regards to inclusion of the socio-economic and cultural rights. While the European Convention lack provisions on the second generation rights, the African Charter has a lot of articles dealing with this category of rights. The socio-economic rights protected by the AChHPR include the right to 'satisfactory working conditions', the right to equal pay for equal work, the right to attainable state of health and the right to education. This gap in the European Convention was addressed by the European Social Charter.

The revised European Social Charter lists large number of the socio-economic rights to be protected by the states under Part I. And those rights listed under Part I were detailed in Part II which ranges from Article 1 to Article 31. Thus, again unlike the African Charter or any other African human rights instrument, the European Social Charter provides better detail of the socio-economic rights protected. For instance, both the African Charter and the European Social Charter provided that every individual have the right to satisfactory conditions of work. But the African Charter, under Article 15, fails to provide what this particular right entails whereas the European Social Charter details what satisfactory conditions of work basically means. These include right to weekly rest, reasonable working hours and safety (Article 2 of the Charter).

In addition, the African Charter also fails to recognize some of the first and second generation rights unlike the European Convention, its protocols and the European Social Charter. These include the right to privacy, to food and shelter, to form and join trade unions, to social security, to regular and free elections, freedom from forced labor, and the right to strike. Therefore, though the AChHPR can be praised for inclusion of all the three generation rights within in a single document, it can also be criticized for both lack of clear definition of some rights enumerated and for sidelining of some others.

#### **4.1.2 Enforcement Machinery Established**

The two foundational documents established bodies responsible for monitoring of the state compliance with the obligations therein. The ECHRa established a two tier system of monitoring constituting a human rights commission and court whereas the AChHPR established only a human rights commission. This structure of enforcement under the two systems was changed in 1990s when the 11<sup>th</sup> Protocol to the European Convention and a protocol to the AChHPR on establishment of the ACtHPR were adopted. With the entry into force of the eleventh protocol, the European human rights system was left with single tier enforcement machinery of regional human rights court. On the other hand, the 1998 protocol to the AChHPR introduced a human rights court to the African system and led to the two tier enforcement machinery of a human rights commission and court.

#### **4.1.3 Limitations on Rights<sup>43</sup>: The Derogation and ‘Claw-back’ Clauses**

Another theme of focus between the two legal documents is the issue of limitations on rights protected. That is, the way limitations are set on exercise of the rights provided by the two instruments significantly differs. While the European Convention encompasses derogation clause, the African Charter lack such a clause and limitations were set in the form of ‘claw back’ clauses. ECHRb provided, under Article 15, that limitations can be set on rights enumerated therein in time of public emergency such as war. But the same article also provides that no derogation can be made on certain rights such as the right to life (excluding deaths resulting from lawful acts of war), freedom from inhuman treatment and the right to fair trial.

In opposite, the African Charter lacks any clear derogation clause and limitations were set using general terms such as “in accordance with the law”, “within the law” and “provided

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<sup>43</sup> Limitations on rights are usually set using either the derogation clause or the claw-back clauses. Derogation clause refers to a reservation in a treaty which allows signatories to bypass certain provisions of the treaty under circumstances provided while the claw-back clause refers to limitations on rights protected under a treaty by implying to provisions outside that particular treaty (Garner, 2009). Therefore, derogation clauses specifies circumstances under which a state mayn’t be required to comply with certain provisions along with rights which can’t be subject to limitations whereas the claw-back clauses don’t clearly provide circumstances under which certain rights may be limited and also the rights which mayn’t be subject to such limitations.

that he abides by the law”. For instance, Article 10 guarantees freedom of association to every individual on ground that the individual “abides by the law”. Similarly, Article 13 provides that citizens have the right to participate in government of their country “in accordance with the provisions of the law”. In general, absence of the derogation clause in the African charter is “the most serious flaw” and allows the African states to restrict human rights using the domestic laws which are basically repressive (Mutua, 2000: 146).

#### **4.1.4 Africa’s ‘Innovations’: The Concept of Duties and Peoples’ Rights**

Another distinct feature of the African Charter is the inclusion of duties and third generation or peoples’ rights. The African Charter sets duties on both states and individuals. The state has duty to promote moral and traditional values (Article 17(3)), duty to assist family (Article 18(2)), duty to eliminate discrimination against women (Article 18(3)), duty to eliminate all forms of foreign economic exploitations (Article 21(5)) and duty to realize the right to development (Article 22(2)).

The individual is duty bounded to his family, society, the state and the larger international community (Article 27(1)) and also to respect others (Article 28). The insertion of duties, particularly the individual duties, has been subject to criticisms. First, it is argued that inclusion of duties of individuals means there is a possibility that states might abuse rights of the individuals citing, for instance, that the individual has failed to fulfill his/her ‘duties’ (Cohen, 1993; Okoth-Ogendo, 1993). Secondly, it is argued that duties of individuals stipulated in the African Charter lack precise meaning, specified conditions of compliance and the enforcement mechanisms (Mutua, 2000: 148).

Though the African Charter doesn’t define the term people, it recognizes the peoples’ or group rights. These are equality of peoples (Article 19), the right to existence and self determination (Article 20 (2)), sovereignty over natural resources (Article 21), the right to economic and socio-cultural development (Article 22), right to peace and security (Article 23) and the right to “a general satisfactory environment” (Article 24). It is argued that the term people in the African Charter can be interpreted as implying to either all

citizens of the state, all inhabitants of the state, population under foreign domination or ethnic groups (Ouguergouz in Killander, 2010: 401).

For instance, in *Katangese Peoples' Congress vs. DRC (Zaire)* case, designated as *Communication No.75/92*, the ACoHPR implicitly defined people as a section of population of a state. The Commission declared that the *Katangese* have the right to self-determination, which is one of the peoples' rights protected by the African Charter, that can be exercised in different forms like independence, federalism, confederalism or any other form of relations taking into consideration interest of the concerned people with due regard to other related principles like the principle of territorial integrity.

All in all, the African Charter differs from the European Convention in content of the rights it protects, absence of the derogation clause, insertion of duties, and the inclusion of group or peoples' rights. With regards to enforcement machinery, the two systems have had witnessed fundamental changes in the structures with the adoption of protocols to their respective foundational documents in 1990s.

## **4.2 Regional Human Rights Institutions**

This section is concerned with the mainstream human rights institutions under the European and African human rights systems. Currently, the European system has only a regional human rights court whereas the African system consists a regional court and commission in direct resemblance to the European system before the entry into force of the eleventh protocol to the European Convention.

### **4.2.1 Regional Human Rights Commissions**

The two regional systems are similar in that their respective foundational documents established regional human rights commissions. The European convention established, by Article 19, the ECoHR where as the African Charter established, by Article 30, the ACoHPR. The ECoHR was operationalized in 1954 and became obsolete in 1999 after a single tier system of human rights enforcement was established under the Protocol Number 11 to the European Convention. The European Commission used to deal with

petitions from an individual, group of individuals or NGOs claiming to be victims of violation, attempt to achieve friendly settlement, report to the Committee of Ministers on success or failure of the friendly settlement and refer cases to the court within three months after the failure of friendly settlement.

The ACoHPR, on the other hand, was operationalized in 1987 following the entry into force of the African Charter. Unlike the European Commission the African Commission is entrusted with wide array of ‘promotional’ and ‘protective’ responsibilities. The promotional responsibilities of the Commission includes collecting documents, conducting researches, organizing seminars and conferences, supporting national and local human rights bodies and cooperating with the likeminded African and international institutions (Article 45 of the AChHPR).

With regards to the protective mandate of the Commission, the African Charter lacks clarity and simply provided that the Commission shall “ensure the protection of human and peoples’ rights...”(Article 45(2)). The protective mandate of the ACoHPR primarily involves consideration of allegations of human and peoples’ rights violations. Since its inception to early 2013, the African Commission received four hundred and twenty six (426) communications from the individuals and states in this regard (ACoHPR, 2012). Unfortunately, decisions of the Commission are not binding and it is common that states don’t usually implement its recommendations.

The worst fact with regards to compliance of the states to decisions of the African Commission is that the African states which are assumed to be relatively open usually fail to comply with the Commission’s rulings. The principal examples are Nigeria, Botswana, Zambia and Kenya. The Commission decided on merits nineteen (19) cases against Nigeria till 2003 though the country made full compliance to only two (2) of them (Louw in Oluwasina, 2011: 2). For instance, Nigerian government executed nine *Ogoni* environmental activists on 10 November 1995 (a week after Commission’s appeal) though the ACoHPR requested pending of the execution (*ibid*). Similarly, on 31<sup>st</sup> March 2001, Botswana hanged a woman, South African emigrant called Mariette Bosch,

accused of murder disregarding the Commission's request for a stay of the execution (Juma, 2011: 360).

Kenya is also often accused of non-compliance to decisions of the Commission. For instance, the African Commission requested Kenya to stop activities, till it concludes communication brought before it by a local NGO<sup>44</sup>, related to communal land belonging to the *Endorois* community though the country never gave positive response to the request (*ibid*: 362). Thus, deliberations of the African Commission are usually sidelined not only by states such as Zimbabwe and Sudan but also by the relatively 'democratic' ones like the aforementioned ones.

In addition to differences in scope of responsibility, the two Commissions also differ in terms of their internal composition. The European Commission was composed of individuals numerically equal to the size of the state parties (Article 20 of ECHR). In contrast, the African Commission consists only eleven (11) members or commissioners (Article 31(1) of the AChHPR). As result it is difficult to balance critical issues such as gender, geographic and linguistic diversity across the continent which in turn negatively affects activities of the ACoHPR (Heyns and Viljoen, 2004: 137).

Closely related to this is the independence of the commissioners. Throughout its days the ECoHR has been a human rights body primarily composed of the independent legal experts (Dembour, 2005: 114). In contrast the ACoHPR is usually criticized for inclusion of individuals with direct connections to governments as far as ambassadorship and ministerial positions (Murray, 2005: 7; Heyns and Killander, 2006: 525).

The two Commissions correspond each other in that both have the secretariat responsible to assist their functioning. The ECHR set, under Article 37, that the Secretary-General of the CoE is responsible to provide secretariat to the ECoHR. Similarly, the African

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<sup>44</sup> The NGO is called Center for Minority Rights Development. The case is identified as *Communication No.276/203: Center for Minority Rights Development vs. Kenya*.

Charter set that Secretary-General of the OAU<sup>45</sup> is responsible for appointment of Secretary of the African Commission and also has the duty to provide the staff, services and funding required for effective functioning of the Commission (Article 41 of the AChHPR). As provided, the European Commission entertained the required support from the Secretariat established by the CoE. The Secretariat of the Commission was strongly established and, for instance, had thirty two (32) lawyers and eighteen (18) administrative assistants as early as 1988 (Mower, 1991: 90).

In contrast, the African Commission has only twenty two (22) staffs as of the late 2012 and suffers from acute shortage of qualified officers (ACoHPR, 2012). In addition, the Commission is ill funded receiving as low as 2 % of the AU's annual budget (*ibid*). This shortage of finance forced the Commission to cancel many proposed extraordinary sessions for consideration of crucial issues such as the mission reports and reduce duration of its biannual meeting from fifteen to about ten days (Baricako, 2006: 29-30).

The Commission also lacks effective enforcement mechanisms to ensure implementation of its decisions and recommendations other than submitting annual reports to the Assembly of the AU via the Executive Council and questioning state representatives during presentation of the country reports (*ibid*; Viljoen, 2006: 142-144). The dilemma is that the heads of states usually accused for human rights violations have to decide whether the annual activity report of the Commission has to be publicized. Worst of all, the Commission lacks its own headquarter and to date functions from a rented building under severe conditions of electric interruption and broken tell-phone lines and other facilities (ACoHPR, 2012).

Another area of similarity between the two Commissions is the par time nature of their work. The European Convention (ECHRa) implicitly provided, under Article 35, that the Commission shall function on par time basis and operate as "circumstances require". Similarly, the ACoHPR operates on par time basis (Jallow, 2006: 46). The

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<sup>45</sup> Now days this became the responsibility of the Chairperson of the AU Commission (Rule 17(3) of the rules of procedure of the ACoHPR).

Commissioners also serve as Special Rapporteurs on issues such as extra-judicial executions, rights of women, freedom of expression and human rights defenders. The part-time nature in functioning of the ACoHPR accompanied with its extended responsibilities and limited size of the members presents a daunting challenge on activities of the Commission. One of the best evidences of this is the size of communications submitted and finalized within short period of time.

The size of communications before the ACoHPR and those cases considered by it were small compared to that of the ECoHR. For instance, the African Commission received nine (9), twenty two (22), fourteen (14), and twelve (12) communications in 1988, 1992, 1997 and 2002 respectively and finalized (either declaring inadmissible or deciding on merits) one (1), one (1), four (4) and three (3) cases in the years mentioned (Viljoen, 2006: 113-115).

In two decades of its operation, i.e between 1987 and 2008, the ACoHPR have finalized total of one hundred and forty one (141) applications declaring sixty three (63) of them inadmissible and deciding on the merits sixty three (63) communications with eleven (11) and four (4) applications closed after withdrawal and amicable settlement respectively (Killander, 2010: 406-407). Thus, though the African Commission receives limited number of petitions compared to its European counterpart, sizable number of the communications submitted to the ACoHPR were not immediately considered and finalized.

On the other hand, the European Commission received about three hundred and ninety (390) petitions just the same year it was established and the number reached one thousand four hundred and forty five (1,445) in 1989 with average annual size of petition being three hundred and forty two (342) for the first two decades of the Commission and reaching seven hundred and sixty eight (768) in 1980s (Mower, 1991: 94). It is important to bear in mind that ECoHR receives petitions only from those claiming to be victims of the human rights violations as stipulated under Article 25 of the ECHR whereas non-victims can submit cases to the African Commission. The upsurge in number of cases

submitted to the European Commission was due to increase in recognition of the competence of the commission by the states, ascendance in awareness about the Convention and machineries of its enforcement and significant improvement in the number cases finalized each year by the Commission (*ibid*: 94-95). It is also important to note that the major factor for abolition of the ECoHR was the need for a permanent body capable to deal with petitions on regular basis (Preamble of the Protocol No. 11).

#### **4.2.2 Regional Human Rights Courts**

One of the common features between the European and African human rights systems is the presence of human rights courts for judicial settlement of applications. The ECHR established ECtHR by Article 19 and the court was instituted in 1958. With the passage of time the court faced significant upsurge in caseload as result of the increase in cases referred to it by the ECoHR which was in turn caused by increase in the number of countries which accepted the court's jurisdiction and expansion in membership of the Council (Mower, 1991). As result, the Court was overhauled and a new court was established upon entry into force of the Protocol Number 11 to the European Convention.

As the AChHPR lack provisions for a court, the ACtHPR was established following entry into force of a protocol to the Charter. The protocol establishing the ACtHPR was adopted in 1999 and entered into force in 2004. The African Court was instituted with the first batch of judges in 2006. The two regional human rights courts can be compared using various themes such as internal composition, respective jurisdiction, *locus standi*, criteria of admissibility and enforcement of the judgment.

First of all, the two courts differ in terms of their internal composition. Similar to the defunct European Commission, the new ECtHR consists judges numerically equal to the size of members of the CoE (Article 20 of the ECHRb). The judges operate on full-time basis and are not expected to engage in activities which may affect their impartiality and full-time responsibility (Article 21(3) of the ECHRb). Though the protocol establishing the ACtHPR dictates that judges shouldn't take part in activities which may negatively affect their duty, it clearly set that all the judges, except the president, serve on par-time

basis (Article 15(4) of the Protocol). They are eleven (11) in number; all from different states and the election takes into account ‘gender and geographic representation’ and the major legal traditions across the continent (Article 14 of the Protocol).

Despite the clause ‘adequate gender representation’ the Court have had only two women out of the eleven (11) judges elected while the court was inaugurated in 2006 (Motala, 2008: 278). The number remained similar to date though the position of presidency is occupied by a woman<sup>46</sup>. In opposite, the European Court currently have about fifteen (15) women judges out of the total forty seven (47) judges with no two judges from a single state (ECtHR, 2013a). As result of its extended membership, the ECtHR operates via four groups of judges: single judge formation, committee of three judges, chamber of seven judges and grand chamber of seventeen judges (Article 26(1) of the ECHRb).

As amended by the Protocol Number 14, a single judge can give final decision on admissibility or otherwise of individual applications (Article 27 of the ECHRb). If a judge fails to do so, he/she can forward the application to the committee of three judges which gives final judgments on admissibility of individual applications and also give judgment on the merits for admissible cases (Article 28 of the ECHRb). The Chamber of judges decides on admissibility and merits of individual applications if no decision is taken by a single judge or by the committee of three judges (Article 29(1) of the ECHRb). In addition, the Chamber decides on the admissibility and merits of inter-state applications (Article 29 (1) of the ECHRb).

The Grand Chamber considers applications if the other formations of the court haven’t dealt with it or if the application is transferred to it by the Chamber (Article 31 of the ECHRb). In addition, the Grand Chamber also, up on request by the Committee of Ministers, decides whether a state party has failed to fulfill its obligations under the judgment of the court and gives advisory opinion on legal questions regarding the

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<sup>46</sup> The current president of the ACtHPR is Justice Sophia Akuffo, Ghanaian women. Prior she served as vice-president of the ACtHPR between 2008 and 2012 and elected as president in 2012.

Convention and its protocols (*ibid*). These clearly show the division of labor within the ECtHR given its extended membership.

Secondly, the two courts have differing jurisdictions. The jurisdiction of the ECtHR covers "...all matters concerning the interpretation and application of the Convention and the protocols..." (Article 32(1) of the ECHRb). The ACtHPR considers "...all cases and disputes submitted to it concerning the interpretation and application of the Charter, [the] protocol and any other human rights instrument ratified by the states concerned" (Article 3(1) of the Protocol). Thus, the jurisdiction of the African Court is much more extended than that of its European counterpart.

Thirdly, the two courts differ from one another with regards to who can bring cases or in *locus standi* before the Court. The ECtHR receives applications from any signatory state claiming violation of provisions of the European Convention and/or any of its protocols by another state party (Article 33 of the ECHRb). In addition to the state, any individual, group of individuals or NGO claiming to be victim of the violation can apply to the Court (Article 34 of the ECHRb). Thus, individuals and NGOs have the right to present cases directly to the ECtHR if they are victims of the violation.

In contrast, individuals and NGOs lack such direct access to the African Court. They have indirect access to the Court which depends on particular states ratification of the Article 34(6) of the Protocol establishing the Court. Even if a state has ratified Article 34(6), it is only those NGOs with observer status at the ACoHPR that can present compliant to the ACtHPR. In addition, the Court has full discretion to allow or otherwise the NGOs and individuals to file cases before it (Article 5(3) of the Protocol).

The impact of individual's lack of direct access to the African Court was felt even as early as the first case before it. The first case before the African Court, under *Application No.001/2008*, was instituted by a Chadian called Michelot Yogogombaye against the Republic of Senegal. The applicant requested the Court to order suspension of activities of the state of Senegal aimed at charging Hissein Habre, former Chadian president

asylum in Senegal. In its final deliberation, the Court ruled that it has no jurisdiction to hear the case as the state of Senegal haven't made declaration to Article 34(6) of the Protocol establishing the Court which entitles individuals to bring cases before it.

Till the early 2013, the ACtHPR finalized thirteen (13) cases of which nine (9) were brought by individuals against the state of Senegal, Algeria, Mozambique, Morocco, Nigeria, Gabon, South Africa, Sudan and Tunisia (ACtHPR, 2013b). With the exception of the application against Morocco<sup>47</sup>, the cases against all other states were ruled out by the Court citing non ratification of the Article 34(6) of the protocol. This clearly shows that redress of human rights violations by the judicial means through the African Court is curtailed as result of the limitation on individuals' access to the Court.

Fourthly, it is important to look at the support the two courts receive from their parent organizations in terms of budget, necessary facilities and staff. The ECHRb provides that the CoE bears expenditure of the ECtHR (Article 50). Furthermore, the Court is entitled to registry and legal secretaries (Article 24 of the ECHRb). With regards to the African Court, the Protocol provided that OAU/AU determines and bears all the costs related to the court (Article 32 of the Protocol). The ACtHPR is also entitled to appoint registrar and other staffs necessary for its smooth functioning (Article 24(1) of the Protocol).

As provided by the ECHRb, the European Court have a well established registry consisting about six hundred and forty (640) staffs as of the early 2013 out of which two hundred and seventy (270) are lawyers recruited on basis of open competition (ECtHR, 2013b). The African Court has a well structured registry in terms of departments<sup>48</sup> though they were established as late as July 2012. In addition, the African Court lacks

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<sup>47</sup> With regards to the application against Morocco, designated *Application No.007/2011: Youssef Ababou vs. the Kingdom of Morocco*, the Court decided that it has no jurisdiction as Morocco is a non-AU state and neither signed nor ratified the protocol establishing the ACtHPR.

<sup>48</sup> The African Court's registry has nine departments. These are the department of administration and finance; documentation; information and communication; information technology; legal services; protocol; safety and security; languages and the department of procurement, travel and stores. Details can be found at <http://www.african-court.org/en/index.php/about-the-court/jurisdiction-3/other-departments>.

experienced staffs. For example, at its institution in 2006 the assistant legal officers hired were “...junior lawyers with little or no litigating experiences” (Motala, 2008: 280).

Fifthly, there exists big disparity between the two courts with regards to their respective annual budgets. As a show case, the European Court’s annual budget for the 2013 calendar year is about sixty six (66) million euro which mainly covers judges’ remuneration, staff salary and the operational costs excluding expenditures on the building and infrastructure (ECtHR, 2013b). In contrast, the African Court’s annual budget is relatively low. For instance, annual budget of the Court for 2012 calendar year was about eight and half (8.5) million USD (ACtHPR, 2012). Related to this, there is low use of the available budget by the ACtHPR. For instance, the Court used only about 70 % of the money contributed from member states of the AU and as low as 25, 27 and 36 % of the contributions from the EU, German International Cooperation (GIZ) and the MacArthur Foundation<sup>49</sup> respectively in between 2010 and 2011 (*ibid*).

ACtHPR and the ECtHR also differ with regards to the procedures required to suspend or remove a judge. A judge can be dismissed from ECtHR if two-third of the members of the court decides that he/she has failed to fulfill the required conditions (Article 23(4) of the ECHRb). In ACtHPR, unanimous decision of other judges is required to remove or suspend a judge from the office (Article 19(1) of the Protocol Establishing the ACtHPR). Such decision of the judges of the ACtHPR will only be final if it is not set aside by the Assembly of the OAU/AU (Article 19(2) of the Protocol). Therefore, AU Assembly has the power to set aside removal of a judge of the ACtHPR though decided so by other judges unanimously. Thus, there exists a probability that political considerations may outweigh duty related requirements in suspending or removing judges of the ACtHPR.

Lastly, the two courts differ in size of states which jurisdiction of the court covers. Territorial competence or jurisdiction of the ECtHR covers all the member states of the CoE. Thus, currently the court has forty seven (47) state parties. In opposite the ACtHPR’s territorial jurisdiction covers only those states which have signed and ratified

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<sup>49</sup> EU, GIZ and the MacArthur Foundation are the principal external financial contributors to the ACtHPR.

the 1998 Protocol to the African Charter. As of April 2013, only twenty six (26) states<sup>50</sup> have ratified the Protocol out of fifty four (54) member states of the AU (ACtHPR, 2013d). In addition, only six (6) states accepted competence of the court to examine cases brought by the individuals and NGOs. Thus, there exists big gap between the two courts in terms of respective territorial jurisdiction.

Despite the differences discussed above, the two courts resemble one another in terms of various issues. For instance, the admissibility criteria the two courts use corresponds to some extent. For example, in both cases exhaustion of local remedies and clear indication of the author/s of the application are required. In addition, a case substantially similar to the already settled case and ill founded can't be considered by the courts. Despite these, the African Court has additional considerations while deciding on admissibility of the cases including compatibility of the cases with the Constitutive Act and the AChHPR, wording of the case should not be in an insulting language and the cases should be presented within the 'reasonable period' after exhaustion of the local remedies (Rule 40 of Rules of Procedure of the ACoHPR). For the ECtHR, the cases should be submitted within six months<sup>51</sup> after exhaustion of the local remedies (Article 35(1) of the ECHRb).

The two courts also correspond one another in conduct of the cases. Article 40 of the ECHRb provides that the hearings of the court shall be public unless decided by the court otherwise. Similarly, Article 10 of the protocol establishing the African Court set that proceedings of the court shall be public except some instances where the court may hold its deliberations 'in camera'.

Aside from the contentious jurisdiction, the two courts have also advisory jurisdictions. The African Court is entitled to give advisory opinion if requested by any member state of the OAU/AU, organs of the OAU/AU and any recognized African organization (Article 4 of the Protocol). The ECtHR also has an advisory jurisdiction that is limited to

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<sup>50</sup> These are Algeria; Burkina Faso; Burundi; Côte d'Ivoire; Comoros; Congo, Gabon; The Gambia; Ghana; Kenya; Libya; Lesotho; Malawi; Mali; Mauritania; Mauritius; Mozambique; Nigeria; Niger; Uganda; Rwanda; Senegal; South Africa; Tanzania; Togo; and Tunisia.

<sup>51</sup> The drafted Protocol Number 15 to the European Convention cuts down this time period to four months.

the requests from the Committee of Ministers and only related to legal questions concerning interpretation of the Convention and its protocols (Article 47(1) of the ECHRb).

In addition, the two courts have mechanisms for enforcement of their decisions. The decision of the European Court is executed by the direct supervision of the Committee of Ministers of the CoE (Article 46(2) of the ECHRb). Similarly, Council of Ministers of the OAU (now the Executive Council of AU on behalf of the Assembly) is responsible for implementation of the decisions of the African Court (Article 29(2) of the Protocol).

Lastly, relationship between the regional human rights courts and commissions is important particularly in the context of the African system where both of them are operational. With regards to the European experience in those days of the two tier system, there was clear division of labor between the two bodies. As per the original text of the European Convention i.e. ECHRa, the Commission is concerned with filtering of the cases and resolution of the complaints through friendly mechanisms. If the need arises the Commission may refer cases to the ECtHR. In this vein, the Commission referred about 80 % of its cases to the Court in 1980s (Mower, 1991: 137).

With regards to the African Court and its relation with the Commission, there exist ambiguities. The Protocol establishing the Court lack detailed provisions concerning the relationship between the two institutions and it was put in general terms that the Court shall “complement the protective mandate of the African Commission on Human and Peoples’ Rights...” (Article 2 of the Protocol). Aside from this, there some aspects of the Court-Commission relationship.

The Commission can present cases before the Court (Article 5 of the Protocol); the Court may request opinion of the Commission while deciding on admissibility of the cases brought by the NGOs and individuals (Article 6(1)); the Court may transfer cases to the Commission (Article 6(3)) and the Court may consult the Commission in drawing its rules of procedure (Article 33). The ACtHPR is also obliged to meet with the ACoHPR at

least once a year and the Bureau of the Court<sup>52</sup> may meet with that of the Commission as often as necessary (Rule 29(1) of the Rules of Procedure of the ACtHPR).

In practice, the two institutions have drawn their respective rules of procedure in 2010 in consultation with each another. To date, the African Court transferred a single case to the African Commission. The case is titled *Daniel Amare and Mulugeta Amare vs. Republic of Mozambique and Mozambique Airlines* with *Application No.005/2011* and reached the ACtHPR on 16 March 2011. Though the applicants requested compensation for irregularities happened to them on their way from Addis Ababa to Maputo Mozambique via Nairobi Kenya, the Court unanimously declared that it has no jurisdiction to hear the case as the respondent state haven't ratified Article 34(6) of the protocol establishing the ACtHPR. As result, the Court referred the case to the ACoHPR.

Though the African Court hasn't yet requested opinion of the African Commission while deciding on the admissibility of the applications, the ACoHPR brought three cases before the Court. Even though this is an encouraging forward move, it represents a fraction of the cases brought before the African Court<sup>53</sup>. The Commission filed two cases<sup>54</sup> against Libya, *Application No.004/2011* and *Application No.002/2013*, and the remaining single case, *Application No.006/2012*<sup>55</sup>, was against the republic of Kenya. Therefore, it is not the African Commission that is bringing large number of cases before the African Court. Rather, it is the individuals who brought overwhelming number of applications before the African Court despite their lack of direct access to it. In addition, among the three<sup>56</sup> requests made so far for advisory opinion of the Court, none of them were made by the

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<sup>52</sup> As provided by the Rules of Procedure of the two institutions, Bureau of the ACoHPR encompasses chairperson and vice-chairperson of the Commission and the Bureau of the ACtHPR encompasses president and vice-president of the Court.

<sup>53</sup> As of May 2013, the ACtHPR received total of 24 cases. See <[http://www.african-court.org/en/index .php/2012-03-04-06-06-00/list-cases](http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases)> for details about all the cases brought before the African Court.

<sup>54</sup> The first case, Application No.004/2011, was against the regime of Colonel Gaddafi and related to excess use of force by the Libyan security forces against demonstrators across the country. The second case, Application No.002/2013, was against The National Transitional Council with regards to the handling of Saif Al-Islam Gaddafi.

<sup>55</sup> The Application was related to Kenyan government's order to issued to evict Ogiek community from the Mau forest which serves the Community as source of their livelihood, identity and religion.

<sup>56</sup> Mali and Libya made one advisory opinion request each and the third request was made by an NGO called Socio-Economic Rights and Accountability Project (SERAP).

African Commission. All these issues show that the relationship between the African Commission and the African Court is embryonic and insufficient.

#### **4.3 Overview of the Differences between the two Systems**

As the preceding discussions have shown, the African and European human rights systems differ with regards to number of issues. For matter of simplicity, the differences can be categorized as general and particular or substantive. The general differences between the two systems include socio-economic conditions under which the systems operate, nature of the political systems in the regions, tier of institutions of the systems, state reporting mechanism, category of rights protected by the foundational documents and the size of state parties to the regional court.

As far as the general socio-economic conditions are concerned, the two regions largely differ in terms of per capita income; distribution of educational and health facilities; level of poverty, literacy and unemployment. These factors have both direct and indirect influence on the regional attempts to promote and protect human rights. Thus, effectiveness of the European system can be partly explained by the conducive socio-economic environment along side with other factors such as prevalence of the open political systems characterized by greater respect for human rights, refined legal instruments and strong regional human rights bodies.

With regards to the tier of institutions, the European system has single tier system of a regional court whereas the African system has the two tier system of human rights court and commission. The two tier nature of the African system's institutional machinery makes clarity of the Court-Commission relationship very important. As far as state reporting is concerned, the African Charter, under Article 62, uniquely obliges the states to submit reports detailing about the measures taken as to affect the rights protected therein. But from the practical standpoint, the state reporting mechanism is proved to be of less impact.

This problem largely emanates from the fact that African states don't prepare and submit reports on the timely basis. For instance, as of March 2013, only six (6) states have submitted all their reports as provided by the African Charter (ACoHPR, 2013a). In opposite, twelve (12) states have never submitted any of their reports whereas twenty two (22) states have three or more overdue reports and another fourteen (14) states have one or two overdue reports (*ibid*). In addition, those reports submitted by the states don't provide relevant and sufficient information (Evans and Murray, 2008).

For instance, the republic Seychelles submitted only its national constitution under the theme 'initial state report' at the twenty-third session of the Commission held in April 1998 (*ibid*). Though the country presented its 'state report' at the twenty-third ordinary session which took place in April 1998, the Commission failed to examine the report till the twenty-seventh ordinary session which was held in May 2000 due to successive absence of the delegates from the republic of Seychelles. Thus, large number of African states either fail to submit state reports nurtured with sufficient details on the timely basis or delay examination of the reports by the African Commission by not sending their representations to take part in the sessions of the Commission.

Aside from these general areas of difference, there are various substantive or particular differences between the two regional systems. First, the two systems differ with regards to the individual application or complaint procedure. In European system, individuals can directly approach the Court if they claim to be victims of the human rights violations. But in the African system individuals lack such direct access to the regional body which is entitled to give the binding decisions. Individuals and NGOs have access only to the Commission which can't give the binding decisions.

Secondly, human rights courts of the two systems have significantly varying jurisdiction. While the ECtHR is concerned with the issues rising in relation to the Convention and its protocols, the ACtHPR is entitled to deal with issues related to the African Charter and any other human rights instrument ratified by the state concerned.

Thirdly, the two courts also differ in the number of the judges. ECtHR has judges numerically equal to the size of membership of the CoE whereas the ACtHPR consists only eleven (11) judges. Related to this, judges of the ECtHR operate on permanent basis while judges of the ACtHPR operate on par-time basis.

Fourthly, the two systems differ as regards to the ways by which limitations were set on exercise of rights protected by the foundational documents. In ECHR there exists clear derogation clause which specifies situations under which states mayn't be forced to be obliged by provisions of the Convention. In addition, it also specifies rights which can't be derogated during any kind of situations. In opposite, the AChHPR lack such a derogation clause and the limitations were set via the obscure claw-back clauses.

In general, the difference between the European and African regional human rights systems in terms of the functional efficacy needs to be seen under these areas of divergence between the two systems. And it is on the basis of those areas of differences that this study tries to elicit lessons for the African system.

## **CHAPTER FIVE: LESSONS FOR AFRICA**

One of the objectives of this study is looking for lessons which can be drawn for the African system from experiences of its European counterpart. As a result, the sole focus of this chapter is eliciting lessons based on comparative examination of the two systems.

### **5.1 The Need for Elaboration of the African Charter**

European human rights system is based on the European Convention which was adopted in 1950. Since its adoption the Convention was amended by the fourteen subsequent Protocols. For instance, the first Protocol to the Convention, which was adopted in 1952, added three rights to the catalogue of rights protected by the Convention. These are the right to property, education and free elections.

The fourth Protocol, adopted in 1963, assured freedom of movement, prohibited expulsion of nationals and collective expulsion of aliens. The sixth Protocol, signed in 1983, prohibited death penalty and the Protocol Number 13 extended the abolition to all circumstances. The Protocol Number 11 changed the whole institutional machinery of the European system and established human rights court as the sole institutional mechanism of rights enforcement. The last Protocol to date, Protocol Number 14, which was adopted in 2004 and entered into force in 2010, introduced a single judge formation by which an individual judge can consider admissibility of the cases.

In addition to the fourteen subsequent protocols, there are instruments which constitute the legal fabric of the European system. The most notable one in this regard is the European Social Charter, which was adopted in 1961 and revised in 1996. The Charter added wide array of the socio-economic rights which were sidelined by the Convention. Aside from this, the rights protected by the Charter are well defined. Furthermore, there are binding instruments on child rights and on the prohibition of human trafficking. These all clearly shows that one of the factors for effectiveness of the European system is presence of refined legal instruments through timely amendment of the foundational document and also by adding the new issue specific treaties.

Therefore one important lesson which can be drawn for the African system is the importance of having refined legal instruments. Thus, refining some of the provisions of the African charter via specific protocols and also adopting the issue specific and binding treaties may help to minimize the loopholes related to the absence of derogation clause, ill-definition of some rights and the duties of individuals, *locus standi* before the ACtHPR and other such limitations related to the African human rights instruments.

While the limitations related to the claw-back clauses are evident, practical effort of the ACoHPR to innovatively deal with them remains important. The Commission innovatively dealt with the threat posed by the claw-back clauses in some of its decisions. For instance, in *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda vs. Nigeria* case<sup>57</sup>, the ACoHPR ruled that limitations set via a decree issued by the Nigerian military government contravenes Article 9(2) of the AChHPR and underlined that such limitations can only be set in line with the duties under Article 27(2) of the African Charter (Kufuor, 2010: 43-44).

In addition, in *Civil Liberties Organization vs. Nigeria* case which is concerned with the Nigerian government's issuing of a decree that nullified the power of civilian courts' to review military decrees, the ACoHPR ruled that the decree goes against Article 7 of the AChHPR and added that its violation of rights in itself and permits further violations (*ibid*: 45). Furthermore, in *Commission Nationale des Droits l'Homme et des Libertes vs. Chad* case, the ACoHPR ruled that situations such as civil war doesn't justify violations of the rights as the AChHPR has no derogation clause though the Chadian government argued that its violation of some of the articles of the Charter was because the country is in civil war (*ibid*). These examples show that the ACoHPR is not only innovatively interpreting the African Charter but also progressively rewriting some its provisions.

While such innovative interpretation of the claw-back clauses in the Charter is appreciable, it doesn't totally downplay the need for clear legal grounds regarding

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<sup>57</sup> The Application was related the three subsequent decrees made by the military government of Nigeria prohibiting publication and circulation of thee newspapers (The Guardian, Punch and Concord) in the country.

limitations on the rights protected. In addition, lack of significant challenges or demanding situations in relation to the claw-back clauses may partly be due to the low popularity of the African regional human rights bodies. So, when the system matures in terms of the public awareness and the size of cases both the African Commission and Court receives and deals with upsurges, difficulties related to the claw-back clauses and other provisions of the Charter would be much more compelling. Thus, the need for specific legal provisions dealing with the loopholes in the existing African human rights instruments remains important.

## **5.2 AU and the African Human Rights System**

AU is a regional political framework within which the whole African human rights system operates. As such it corresponds the CoE and the EU which forms the political umbrella of the European human rights system. Thus, AU is responsible for smooth functioning of the African system. But practically, the Union is not enshrining its responsibilities like its European counterparts and to the level required. Though providing sufficient fund, the needed resources such as staff and physical facilities and political support for the regional human rights bodies are required from the Union, much of these hasn't been provided as required. It is common that the ACoHPR and the ACtHPR suffer from limitations emanating from the rough support of the Union. Specifically, the Union is not providing the needed finance which in turn curtails activities of the regional human rights institutions, particularly that of the ACoHPR.

In addition, the mainstream regional human rights institutions, i.e. the ACoHPR and the ACtHPR are not well integrated with organs of the Union which have mandates covering human rights. Furthermore, the Union continues to create more instruments and mechanisms without critical evaluation of the already existent schemes and sidelining acute challenges like shortage of finance and manpower. One best example in this regard is the decision to establish ACtJHR by merging the ACtHPR with the non-existent African Court of Justice. So, it can be asked that why it became necessary to establish a new body than strengthening the existing court and the related institutions?, Is there can be any guaranty that the new institution will deliver better with regards to human rights

than the ACtHPR? and Does the large number of African states which sidelined the ACtHPR would be parties to the new court?

Therefore the role of AU with regards to promotion and protection of human rights in African needs to be redefined or overhauled. First, the Union should integrate activities of its organs with that of the regional human rights institutions. Particularly, it has to operationalize the Pan-African Parliament and the ESCC which are supposed to be the channels of public and civil society engagement with the Union and also have mandates on human rights. The embryonic relationship between the Peace and Security Council and the ACoHPR needs to be strengthened and furthered with other organs of the Union. In addition, ACoHPR and the ACtHPR should be considered as presiding institutions on the human rights issues in the continent and should have the pioneering role in adoption of the instruments and such other issues concerning human rights in Africa.

Secondly, clear inclusion, in addition to references to human rights in Constitutive Act, of the African Charter and other regional human rights instruments as the integral part of the legal framework of the Union is important. Experience of the CoE shows that one of the requirements to join the organization is ratification of the European Convention and all its protocols. Therefore, the states can't sideline the regional human rights treaties. This trend needs to be replicated in Africa where large array of states lack the free will to ratify human rights instruments and put themselves under the obligations therein. Typical example in these regard is the ACtHPR which constitutes less than half of the members of the AU as its state parties due to non-ratification of the protocol establishing it by more than half of the AU member states.

Thirdly, the Union is the ultimate responsible body for regional human rights institutions in terms of funding, staff and provision of necessary facilities. But it's subject to criticisms as result of inadequate funding of the ACoHPR, politicization of appointment of the Commissioners<sup>58</sup> and also due to its silence over the failure of The Gambia to

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<sup>58</sup> Literally stands for the usual inclusion of individuals with strong connections to the governments.

provide permanent headquarter for the ACoHPR<sup>59</sup>. If the Union has to realize its spelt out objectives of good governance, stability, democratic rule and promotion and protection of human rights, which were provided under Article 3 of the Constitutive Act, it must positively respond to these and related criticisms.

Given the demanding nature of human rights situation across the continent and the extended responsibility of the African Commission, the Union must increase its funding to the Commission. The Union also has the responsibility of assuring permanent headquarter for the ACoHPR. It is unfortunate that a body responsible for ‘promotion and protection of human rights’ in a continent of the widespread human rights violations operates from a rented office with broken communication facilities and incapable to accommodate its few staffs and belongings.

Lastly, the Union also has to encourage and/or persuade states to accede to the ACtHPR and comply with their obligations under the African Charter such as state reporting. If the Union has to achieve its organizational objectives with regards to human rights, it has to pressurize the states to comply with the requirements set by the African Charter and other regional human rights instruments. Member states should be encouraged to join the Court. And those states which submit states reports to the African Commission on timely basis has to be publically encouraged and be given priority in internal nominations such as membership of the Peace and Security Council.

Thus, for the African human rights system to be an effective regional human rights scheme the AU has irreplaceable role. The organization has to be committed for its own objectives and needs to be a body of practical commitment than a body simple text writing and organ making.

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<sup>59</sup> Headquarters Agreement between the OAU and the Republic of The Gambia on the establishment of the Headquarters of the ACoHPR in The Gambia, which was signed in 1989, obliges the host government to provide all the needed facilities for the effective functioning of the Commission.

### **5.3 NGOs and the African Human Rights System**

European experience shows that NGOs are important actors in promotion and protection of human rights. While NGOs are elements of the African system, their participation is curtailed. They lack direct access to the African Court and they can't access state reports unless otherwise decided by the Assembly of AU. In addition, shortage of finance, neglect of rural Africa, unclear goals, low national and regional coordination and unholy relationship with the non-African NGOs characterize human rights NGOs in Africa. Furthermore, foreign based NGOs play dominant role in Africa. Therefore, the African system can benefit from NGOs if these challenges are adequately dealt with.

First, if the ACtHPR has to reach majority of the Africans, NGOs have to be granted direct access to the Court. Thus, allowing NGOs direct access to the Court may enhance profile of the Court among the African people. For instance, for a poor African farmer it would be difficult to approach the Commission whose decisions are not binding while incurring economic and political costs. But if NGOs provide legal and related support, redress of the human rights violations will be more viable in that binding judgments may be sought from the supranational body. This means NGOs can enhance popularity of the African Court by representing the Africans before it and/or by providing the legal and other supports required to stand before it. In addition, the Court may benefit from information provided by the NGOs and may get greater detail about the cases before it.

Second, shortage of finance and dependence on foreign sources of finance needs to be addressed as well. It has to be noted that foreign financial support can be used as far as it is unconditioned or is compatible with the objectives of the African human rights NGOs. But, African NGOs needs to cultivate local sources of funding. Given the relative increase in the size of the middle class across the continent<sup>60</sup>, African NGOs should devise different mechanisms of mobilizing local business persons, professionals and the

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<sup>60</sup> The size of middle class in Africa increased from 111 million in 1980 (which was about 26% of the continent's population) to 313 million in 2010 equating to 34.3% of the Africa's total population. See African Development Bank's 2011 report.

grass root level community organizations. Such innovative mechanisms may help them to reach Africans at the grass root level and enlist strong support from the bottom.

Thirdly, African NGOs also need to devise specific objectives and commit themselves for achievement of those objectives than trying to address diverse issues. For instance, Penal Reform International, a London based NGO, works only on issues related to penal and criminal justice reform. In opposite, majority of the African human rights NGOs lack such functional focus or specialization (Zezeza, 2006; Viljoen, 2007). Lack of area of specialization accompanied with the shortage of finance and manpower has obvious impact on success of their activities for promotion and protection of human rights. Therefore, African NGOs need to work out areas of specialization taking into consideration the resource shortage they are facing.

Lastly, NGOs active in European human rights system have appreciable national and regional networks of cooperation among themselves and with the sub-state units. In opposite, African NGOs lack strong continental and national networks among themselves and the closer cooperation with the sub-state units of government is missing. Thus, the African NGOs need to strengthen relationship among themselves both at the national and regional levels. This may help them to share experience and make meaningful contribution for promotion and protection of human rights in Africa. In addition, they must have to attempt to make sensible presence at the local levels by cooperating with the responsible sub-state authorities. This may also help them to put visible impact on implementation of the international and regional human rights standards on the ground and acquire first hand information.

#### **5.4 NHRIs and the African Human Rights System**

NHRIs are state created bodies responsible for human rights issues at the national level. Thus, their contribution for the promotion and protection of human rights is significant. This critical role of NHRIs is evidenced in some European and African countries which have the strong NHRIs. The large number of the CoE member states have strong NHRIs in addition to efficient judicial system and the parliamentary and civil society groups

working on human rights issues. Similarly, some African states established strong NHRIs to monitor human rights situation within the country. Despite this, large number of African states lacks strong and independent NHRIs. Therefore, contribution of the NHRIs for promotion and protection of human rights in Africa is limited as compared to Europe.

First, NHRIs in Africa suffer due to lack of willingness of the governments to provide sufficient resources and allow them function independently. The European experience shows that strongly resourced and impartial NHRIs significantly contribute for promotion and protection of human rights both at the national and regional levels (Buyse, 2012). Thus, African states bear the responsibility of strengthening the NHRIs by providing the needed resources and assuring functional freedom of the institutions.

Secondly, the relationship between NHRIs in Africa and the regional human rights bodies, particularly the ACoHPR, lacks clarity. In European system NHRIs provide detailed information for the regional bodies, monitor implementation of the decisions and standards at the national level and provide assistance to state authorities (*ibid*). Thus, they act as an important bridge between the national level and the regional human rights institutions. Therefore, NHRIs in Africa need such defined line of interaction with the regional bodies. This can be settled, for instance, via adoption of manuals, by the ACoHPR, detailing specific responsibilities of the NHRIs with regards to its activities.

Lastly, NHRIs in Africa lack strong continental forum where they may share information and experiences and also coordinate their engagement with the regional human rights bodies. Thus, well developed and financed NHRIs like those of South Africa, Ghana and Kenya should take pioneering role as to ensure meaningful coordination between the NHRIs in Africa. The existing regional NHRIs forum needs to be revitalized and those NHRIs which fall short of the Paris Principles and the ICCNIs requirements needs to be encouraged to improve their status, for instance, via experience sharing with the better performing ones from across the continent. In addition, close cooperation with the NHRIs from other regions like Europe may be important source of experience and resources.

## **5.5 African Commission on Human and Peoples' Rights (ACoHPR)**

European human rights system used to have a human rights commission until 1998. Similar to the court, the defunct commission used to have members equal to the size of members of the CoE. Though it operated on part-time basis, its responsibilities were largely promotional and its jurisdiction was limited to filtering of the applications and securing friendly settlement. In addition, the Commission has had strongly established Secretariat to support its activities. Furthermore, during its formative years the Commission faced low public awareness about its activities which it reversed primarily through country visits and demonstrative decisions. Therefore, the experience of the European Commission has a lot of lessons for the ACoHPR.

First, mandate of the ACoHPR needs to be clearly defined. The Commission is granted with both promotional and protective responsibilities. In addition to the Commission, the African system also has a court which was established to 'complement' the protective mandate of the commission. Therefore, it would be sound if the Commission specializes on promotional activities such organizing seminars, country visits, public lectures and mass education via the media. Therefore, the provision of the African Charter which grants both promotional and protective mandate to the Commission has to be refined taking into consideration coming to the scene of a court with judicial function.

Second, though the ACoHPR consists only eleven (11) members, it has extended responsibilities. In opposite, the ECoHR used to have large size of members equaling members of the CoE. Members of the ACoHPR serve as special rapporteurs and the members of the working groups and committees<sup>61</sup>. The Commissioners are also allocated at least four countries each to promote the AChHPR<sup>62</sup>. One important experience with regards to rapporteurship is that of the ECtHR. Currently, the ECtHR have special rapporteurs which are part of the court's registry (Article 4 of Protocol Number 14). Therefore, the Court has opportunity to use the legal experts who are recruited via open

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<sup>61</sup> The ACoHPR this date have five special rapporteurs, three committees and eight working groups. For details about the special mechanisms visit <<http://www.achpr.org/mechanisms/>>.

<sup>62</sup> List of commissioners alongside with their respective countries of charter promotion as of this date is included in the ACoHPR (2012).

competition as rapporteurs. In this vein, the ACoHPR needs to ‘outsource’ some of its activities to the legal experts. This will relieve the Commissioners’ workload and enhance credibility of the Commission and its relationship with the key stakeholders such as the Law faculties, research institutes and the certified legal consultants.

Thirdly, European experience shows that strength of the secretariat of the Commission in terms of staff and resources significantly contributed to its functional efficacy. While the ECoHR was well resourced in terms of manpower, finance and physical infrastructures in those days of its operation, the reality of the ACoHPR is quite different. ACoHPR, which belongs to a continent characterized by the widespread human rights violations, operates from a rented building and suffers from shortage of finance and manpower. Therefore, one of the keys to augment the functional efficacy of the ACoHPR is solving those challenges related to staff and resources.

Fourthly, similar to the defunct ECoHR the ACoHPR operates on par-time basis. The par-time functioning of the ECoHR led to increase in backlog of the cases and echoed the need for a permanently functioning body. This need was culminated with the establishment of the ECtHR as the sole permanent machinery for the promotion and protection of human rights in Europe. Therefore, permanency in functioning of the African Commission is necessary for rapid consideration and finalization of cases. In addition, if the ACoHPR operates on full time basis the usual criticisms related to impartiality of its members may be substantively lowered.

Lastly, ACoHPR has also to conduct massive self-advertisement to enhance public awareness about its activities using seminars, visits, NGOs, NHRIs and demonstrative decisions. For instance, if the Commission concludes applications on timely basis, this will send a message that it is capable of assuring timely remedies to human rights violations. In addition, the ACoHPR also has to organize seminars and such other means of interacting with the Africans across the continent as its European counterpart did.

## **5.6 African Court on Human and Peoples' Rights (ACtHPR)**

ACtHPR is a continental human rights judicial body instituted in 2006. Its European counterpart is the ECtHR which was established in 1958 and reestablished in 1998 following entry into force of Protocol Number 11 to the ECHR. Experience of the ECtHR provides a lot of lessons for the young human rights court of Africa.

First, permanent nature of the work of judges plays important role in enhancing functional capacity of the court and also limits the possibility of judges' engagement in other activities which may adversely affect their duty at the Court. Before 1998, the ECtHR operated on par-time basis. This par-time nature of its operation led to the dramatic increase in the caseload. Though the ACtHPR is not subject to rapid increase in cases before it these days, this may be changed in near future when both public awareness about the court and the number of state parties to the court increases. In addition, if the judges are on duty on permanent basis they will be capable to carry out promotional activities across the continent about the court. In the current form where judges are few in number and operate on par-time basis<sup>63</sup>, carrying out such activities is difficult.

Secondly, as result of its extended composition the ECtHR has five administrative divisions or sections which have a president, vice president, section registrar, deputy section registrar and additional seven (7) to eight (8) judges per section and operates via a single judge formation, committee of three judges, chamber of seven judges and grand chamber of seventeen judges. These internal divisions perform different but closely interrelated duties. In opposite there exists no such intra-court division of labor within the ACtHPR given its limited membership. In ECtHR a single judge can decide on admissibility of cases. In opposite there is no such setting in ACtHPR. Thus, ACtHPR is a single chamber court where all the eleven (11) judges, or at least a quorum of seven (7), seat to examine the cases. As result, the ACtHPR should consider such formations in particular with regards to the applications which may not require convening of all the judges of the court. Generally, par-time nature of its work and the limited size of its

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<sup>63</sup> ACtHPR convenes four times a year on ordinary basis for about two weeks (Rule 14(1) of the Rules of Procedure of the ACtHPR).

members accompanied with its extended jurisdiction have the greater possibility to adversely affect efficacy of the ACtHPR.

Thirdly, despite the provision ‘adequate gender representation’ the ACtHPR have inadequate number of women judges as compared to the ECtHR where women constitutes around a third of the court’s judges. Therefore, the clause adequate gender representation needs to be clearly defined either by the Court’s rules of procedure or by a protocol amending the provisions of the protocol establishing the court.

Fourthly, the European experience shows that compliance to court’s decision over cases involving the private parties, i.e individuals and NGOs is higher than that of the state-to-state disputes. This means the ECtHR has seen a more successful track record of compliance to its judgments which involved individuals and NGOs “...litigating directly ...” against either the governments or one another (Helfer and Slaughter, 1997, p.277). Therefore, the ECtHR built its good compliance record beginning with the cases brought to it by the non-state parties. As result, direct access of the individuals and NGOs to the ACtHPR may serve as an important way to build good compliance track-record to the decisions of the court in an incremental manner.

Lastly, the ACtHPR needs to conduct massive self-advertisement through seminars, visits, through decisions demonstrating its neutrality and autonomy, by publicizing its decisions and also by enhancing its link with the civil society groups, NHRIs and the academia. This is because “[a supranational] court that is scarcely used...cannot hope to make much of a mark [and]...a court that is perceived as effective will attract more claimants” (*ibid*, p.301). During early years of its establishment the ECtHR also faced low public awareness about its activities and the legal framework under which it operates. But, the ECtHR enhanced its profile using various self-advertisement activities and also via the decisions which reviled its autonomy and efficacy (Mower, 1991). Therefore, judges of the ACtHPR bear the responsibility of building public profile of the court via strong decisions, through visits and other such promotional activities across the continent.

## **5.7 Relationship between the ACoHPR and the ACtHPR**

Unlike the ECHRa, the AChHPR established only a human rights commission. Thus, relationship between the ACoHPR and the ACtHPR is covered by the protocol establishing the ACtHPR and the rules of procedure of the two institutions. The experience of the European system shows that in those days of the two tier enforcement machinery, the ECoHR and ECtHR have had clearly set functional domains. Such a clear division of labor is not well established in the African system.

The ACoHPR enjoys both promotional and protective responsibilities and the ACtHPR is established 'to complement the protective mandate of the Commission'. In opposite, the ECoHR complemented the protective mandate of the ECtHR and the ECoHR served as an obligatory pathway to the ECtHR (Harris, Boyle and Warbrick, 1995: 571). In other words, the ECoHR was held responsible for receiving petition, achieving friendly settlement and communicating the Committee of Ministers in matters relating to the friendly settlement whereas the ECtHR served as a sole organ for judicial settlement of the applications.

This clear division of labor between the ECoHR and the ECtHR contributed for rapid publicity of the two institutions across the region and the resultant upsurge in cases they dealt with from the 1960s to the late 1990s (Mower, 1991). Thus, the need for clear division of labor between the human rights Commission and the human rights Court is of a paramount importance for the African human rights system. And this will help the two institutions to have visible impact on the human rights issues across the continent which is characterized by the widespread human rights violations.

In addition, division of labor between the ACoHPR and the ACtHPR may help the Commission to be focused and decrease the work load of the commissioners who operate on par-time basis and are at the same time members of the special rapporteurs, working groups and also responsible for conducting visits when and where the need arises.

## CONCLUSION

Comparative examination of the European and African human rights systems shows that the two systems have both similarities and differences. As the guiding objective of this study is drawing lessons for the African system from experiences of the European system, the areas of differences between the two systems were appreciated and lessons for the African system were set. One area of the fundamental difference between the two systems is related to the socio-economic setting or condition under which the systems operate. While the European system operates under a condition of better socio-economic situations, the African system functions in a continent characterized by lowest record of the various socio-economic indicators.

The second area of basic difference between the two regional systems is related to the nature of the constituent political systems. With regards to the nature of national political systems, the European human rights system and its umbrella organization the CoE encompass states which have by standards open domestic political structures and processes. In opposite, the African system operates in a setting that constitutes authoritarian regimes and pseudo-democracies which are largely hostile to human and peoples' rights domestically and less cooperative to the attempts for promotion and protection of human rights at the regional level. Aside from these general differences, the two regional systems also differ in terms of various specific issues.

The specific areas of difference are related to the regional human rights instruments, establishment and functioning of the enforcement machineries, the role of the regional political organizations with regards to human rights, engagement of the NGOs and NHRIs in promotional and protective activities and the relationship between the regional human rights institutions. Said in other words, comparative examination of the European and African human rights systems using these themes shows that there are various areas of differences between the two systems. And these areas of differences largely explain effectiveness of the European human rights system. Therefore, they give important insights for improvement of the African human rights system which is usually

categorized as weak and ineffective. Thus, the African human rights system has a lot of practically tested lessons which can be drawn from the experiences of the European human rights system.

But it has to be noted that for the African human rights system to be effective, addressing the specific areas of differences as compared to the European system is not sufficient though important. For enhancement of the functional efficacy of the African system, improvement in general setting of the system as regards to the socio-economic conditions and the nature of political systems is necessary. For instance, low level of literacy across the continent means the various human rights promotion activities will have little reach to the majority of the continent's population.

In addition, the regional integration schemes, primarily as proposed by the 1991 Abuja Treaty for establishment of the African Economic Community<sup>64</sup>, needs to be fastened for the greater intra-regional socio-economic interdependence in Africa. Strong intra-regional interdependence is necessary for the advancement of human rights promotion and protection in certain region as theoretically argued and practically seen from the experience of the European system.

Most importantly, improvement in the nature of the national political systems is crucial for the African system to be effective and ensure better promotion and protection human rights in the continent. As the comparison of the two systems with regards to the nature of the national political systems has shown there exists big discrepancy in the nature of state-society relations in Europe and Africa. As discussed above, the large number of European states have open political systems characterized by well established democratic processes and institutions, press freedom and low level of corruption. In opposite, state system in Africa is characterized by the authoritarian governments which are antithesis to the democratic processes and institutions by their very nature.

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<sup>64</sup> Abuja Treaty provided for the establishment of the African Economic Community through a gradual process which encompasses six (6) major stages. The Regional Economic Communities are regarded as the building blocks of the African Economic Community. As the treaty set, final stage of the process will be culminated by 2028 with, among others, establishment of African Central Bank, adoption of a single currency and institution of the first popularly elected Pan-African Parliament.

African states lack legitimate foundation and are artificial in their creation. This artificial nature of the state led to higher use of repression and violence to maintain the political power. Thus, it can be safely concluded that there is disconnectedness between the state and society in Africa. By implication, the major panacea for improvement in human rights situation in Africa is bridging the state-society relations or overhauling the interactions between the state and society. Therefore, a state with accountable public institutions, the well established rules of political competition and representative processes is a fundamental requisite.

Generally much of the burden of overhauling the African human rights system is on the states, the AU and individuals. European experience shows that commitment of states, due to fear of adverse effect of non compliance to the instruments and decisions of the institutions and/or as result of the domestic political dynamics, is among the crucial requisites for effective human rights promotion and protection both at the national and regional levels. AU bears the responsibility of strengthening the African system and must have to be committed to its own organizational objectives which are holistic as adopted but less implemented. Most importantly, innovative activities and might-be costly commitments of the individuals, particularly commissioners of the ACoHPR, judges of the ACtHPR and the leaders of African human rights NGOs and heads of the well to do African NHRIs is crucial for improvement of human rights situation in a continent where all the three generations of rights continue to be violated by both state and the non-state actors.

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## **Appendix I: Universal Declaration of Human Rights**

(Adopted by the United Nations General Assembly on 10 December 1948, Paris France)

### Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

### Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

### Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

#### Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

#### Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

#### Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

#### Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

#### Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

#### Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

#### Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

#### Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

#### Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

#### Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

#### Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

#### Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

#### Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

#### Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

#### Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

#### Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due

recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

#### Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

## **Appendix II: African Charter on Human and Peoples' Rights**

(Adopted 27 June 1981 by the 18<sup>th</sup> Assembly of the OAU, Nairobi Kenya)

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking 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;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a particular attention to the right to development and 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, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

Part I: Rights and Duties  
Chapter I: Human and Peoples' Rights

Article 1

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.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

#### Article 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.

#### Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

#### Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

#### Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

#### Article 14

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.

#### Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

#### Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

#### Article 17

1. Every individual shall have the right to education.

2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

#### Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

#### Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

#### Article 20

1. All peoples shall have the right to existence. They 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.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

#### Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

#### Article 22

1. All peoples shall have 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.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right

to development.

#### Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

#### Article 24

All peoples shall have the right to a satisfactory environment favorable to development.

#### Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

#### Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

### Chapter II: Duties

#### Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

#### Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

#### Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;

5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

## Part II: Measures of Safeguard

### Chapter I: Establishment and Organization of the African Commission on Human and Peoples' Rights

#### Article 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

#### Article 31

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.

#### Article 32

The Commission shall not include more than one national of the same state.

#### Article 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

#### Article 34

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States party to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

#### Article 35

1. The Secretary General of the Organization of African Unity shall invite States parties to the present Charter at least four months before the elections to nominate candidates;
2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

#### Article 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

#### Article 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and

Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

#### Article 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

#### Article 39

1. In case of death or resignation of a member of the Commission the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

#### Article 40

Every member of the Commission shall be in office until the date his successor assumes office.

#### Article 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the costs of the staff and services.

#### Article 42

1. The Commission shall elect its Chairman and Vice Chairman for a two-year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The Secretary General may attend the meetings of the Commission. He shall not participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

#### Article 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

#### Article 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

### Chapter II -- Mandate of the Commission

#### Article 45

The functions of the Commission shall be:

1. To promote Human and Peoples' Rights and in particular:
  - (a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
  - (b) 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.
  - (c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

### Chapter III -- Procedure of the Commission

#### Article 46

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

#### Communication from States

##### Article 47

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

##### Article 48

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

##### Article 49

Notwithstanding the provisions of 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

##### Article 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

#### Article 51

1. The Commission may ask the States concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

#### Article 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in 48, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government.

#### Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

#### Article 54

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities.

#### Other Communications

##### Article 55

1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

##### Article 56

Communications relating to human and peoples' rights referred to in 55 received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

##### Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

##### Article 58

1. When it appears after deliberations of the Commission that one or more communications

apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.

2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

#### Article 59

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

#### Chapter IV -- Applicable Principles

##### Article 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

##### Article 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

##### Article 62

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.

##### Article 63

1. The present Charter shall be open to signature, ratification or adherence of the member states of the Organization of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the member states of the Organization of African Unity.

### Part III: General Provisions

#### Article 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

#### Article 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

#### Article 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

#### Article 67

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

#### Article 68

The present Charter may be amended if a State party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

### **Declaration**

I, the undersigned graduate student, declare that this thesis is my original work and has not been presented for a degree in any other university and that all sources of material used for the thesis have been duly acknowledged.

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_