

# **AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (AfCHPR)**

## **I. Introduction**

Following the dismantling of colonialism in the twentieth century, newly independent African countries came together under the umbrella of the Organisation of African Unity (OAU) in 1963. However, it was not until 1986 that an African charter on human rights would come into force. One of the main reasons for this was the principle of state sovereignty on which the OAU was based. Still, at the time, relishing their newly found independence, the primary focus of OAU member states was the protection of the territorial sovereignty of its members. The OAU Charter only recognized human rights within the context of promoting African unity and facilitating the liberation of African states still under colonial rule. A human rights charter, at the time, would have conflicted with the principles of sovereignty and non-interference on which the OAU was built (intervention, prohibition of).

The OAU, however, began to see the need for regional human rights protection following the abusive conduct of some dictatorial African regimes. This was particularly prompted by a number of conferences and consultations initiated by African jurists and statesmen on the need for an African human rights framework. One of the earliest of such consultations was the Congress of African Jurists held in Lagos in 1961. The Congress adopted a declaration calling for the adoption of an African convention on human rights. Again, in 1967, at the Conference of Francophone African Jurists held in Dakar, the need for a regional machinery for the protection of human rights was, however, mooted.

In 1979, the OAU finally took steps geared towards the creation of a regional human rights charter. These came after the collapse of three African governments notorious for human rights violations: Idi Amin of Uganda (1971-1979), Macias Nguema of Equatorial Guinea (1968-1979) and Jean-Bedel Bokassa of the then Central African Empire (1966-1976). The OAU's Assembly of Heads of States and Governments requested its Secretary-General to organize a restricted meeting of highly qualified experts to prepare a preliminary draft of an African charter on human rights. Such a charter was to provide for the establishment of organs to promote and protect human rights. Subsequently, a conference of twenty African jurists was held in Dakar, Senegal. A draft charter was prepared and considered by a meeting of government experts, and adopted and signed in June 1981 during an OAU Summit in Nairobi, Kenya. The African Charter came into force in October 1986 after being ratified by the majority of African states. By 1999, the African Charter recorded complete membership of OAU states following ratification by Eritrea. Three countries entered reservations (reservations to treaties): Egypt, South Africa, and Zambia. Egypt's reservation stated that the application of Article 8 (freedom of conscience and religion) and of Article 18(3) (elimination of discrimination against women discrimination, prohibition of) must be in the light of Islamic law (Sharia). Also, Article 9 (right to receive information (access to information)) was to apply only to information authorized by Egyptian laws. Zambia recommended amendments to Articles 13 and 37 (right to participate in government, and tenure of the members of the Commission), and an additional provision allowing non-ratifying states to submit reports to the Commission. South Africa requested for clarification of the criteria for the restriction of rights and freedoms guaranteed under the Charter. It also suggested that the African Charter follow United Nations resolutions regarding the characterization of Zionism. The latter suggestion was in reference to the Charter's equation of Zionism to practices such as apartheid and colonialism—the preamble had emphasized member states' undertaking to 'eliminate colonialism, neo-colonialism, apartheid [and] Zionism'. The Charter's position was in keeping with United Nations (UN)

General Assembly Resolution 3379 (1975) which determined that Zionism was a form of racism and racial discrimination (UNGA, Res 3379(XXX) [1975]). However, by the time South Africa ratified the Charter in 1996, the UN General Assembly Resolution 46/86 (1991) had revoked Resolution 3379, prompting South Africa's suggestion for this to be reflected within the African Charter (UNGA, Res 46/86 [1991]).

As of late 2021, every African state, apart from Morocco, has ratified the African Charter. In June 1998, a protocol on the establishment of an African Court of Human and Peoples' Rights was adopted. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) was drafted in 2003 as part of the work of the African Commission on Human and Peoples' Rights' Special Rapporteur on the Rights of Women in Africa. In 2016, the African Commission adopted a protocol on the rights of persons with disabilities. This was followed by a protocol, in 2018, on the rights of older persons in Africa.

## **II. Substantive Aspects**

The provisions of the African Charter are a fusion of varying ideologies and conceptions of rights. Given the vastness, cultural, and religious differences of the different member states of the OAU, there was the need to create a document that tended to each member's philosophy. There was also a conscious effort to create a charter that reflected African communitarian values and traditions. Accordingly, the African Charter in its preamble, notes the importance of culture in setting out a human rights template while not deviating from the general principles of human rights.

The African Charter is unique in a number of ways. First, it embodies traditional African philosophy and values. The Charter provides for a range of rights with the collective or 'people' as the right-holders (collective and group rights). There are also provisions for family rights and duties (human duties). The Charter adopts a moderate form of relativism whereby international norms such as in the Universal Declaration of Human Rights are regarded as minimum standards permitting dynamic cultural developments and variations (universalism and (cultural) relativism). An example of this is in its approach to polygamous relationships under the Maputo Protocol. Instead of a blanket ban on polygamous marriages, the Protocol provides that the rights of women be protected in such relationships. Also, the Charter does not make any distinction between socioeconomic rights and civil and political rights (generations of human rights). This is despite precedents such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) subjecting socioeconomic rights to the availability of resources of a state (core obligations and progressive realization). Rather, the African Charter notes that civil and political rights cannot be dissociated from socioeconomic rights and that the latter are a guarantee for the enjoyment of the former.

The African Charter provides for a range of human rights. Articles 2-14 provide for the right to freedom from discrimination, right to equality before the law and equal protection of the law, right to life, prohibition of torture and cruel, inhuman and degrading treatment, right to a fair trial (fair trial, right to (civil proceedings); fair trial, right to (criminal proceedings); fair trial, right to (administrative proceedings)), right to freedom of conscience, freedom of opinion and expression, right to freedom of association, right to free movement, right to participate in government (elections and government, right to participate in), and right to property. From Article 15, the Charter provides for socio-economic and group rights. These include the rights to work, health, education, self-determination; economic, social and cultural development; and free disposal of wealth and natural resources. Articles 27-29 provide for individual duties.

The Charter provides for a range of individual rights. These rights are similar to provisions in other international and regional human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Under Article 2 of the African Charter, every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. For example, in the case of *Ezzat and Enayet v Egypt* (2016), the ACHPR held that the Egyptian policy of registering citizens under one of three religions was discriminatory as it denied adherents of other religions of such benefit (*Ezzat and Enayet v Egypt* [2016]). By Article 3, every individual is equal before the law and is entitled to equal protection of the law. Article 12(5) of the Charter further prohibits the mass expulsion of non-nationals whether aimed at national, racial, ethnic or religious groups (expulsion, protection against).

Article 4 of the African Charter provides that every person is entitled to respect for their life and the integrity of their person. In *Malawi African Association and Others v Mauritania* (2000), the ACHPR held that a flawed trial which resulted in the conviction and execution of three army lieutenants was a violation of the right to life under Article 4 (*Malawi African Association and Others v Mauritania* [2000]). The right to life would also be infringed where a person's life is endangered even though such endangerment does not result in death. Thus, the ACHPR held in *International PEN and Others v Nigeria* (1998) that the denial of medication to a prisoner to the extent that his life was seriously endangered was considered to be a violation of the right to life, even though this had not caused his death (*International Pen and Others v Nigeria* [1998]). In keeping with the approach and interpretations of other regional courts such as the European Court of Human Rights (ECtHR), this right also comes with the twin duties of protection and investigation. Thus, the ACHPR held that any deprivation of life without due process amounted to a violation of this right (*Forum of Conscience v Sierra Leone* [2000]).

Under Article 5 of the African Charter, every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his or her legal status. All forms of exploitation and degradation of a person, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment are prohibited. In *Curtis Francis Doebbler v Sudan* (2003), the ACHPR held that the punishment of lashing imposed by the Sudanese court was in violation of this article (*Doebbler v Sudan* [2003]). In reaching this decision, the ACHPR referred to the decision of the ECtHR (*Tyler v UK* [1978]), which held that even lashings carried out under strict hygienic conditions and medical supervision, were in violation of the victim's rights. As with the right to life, there is a duty on the state to investigate and try those alleged to have violated this right (ACHPR, *Thomas Kwoyelo v Uganda* [2018]).

Article 6 provides that every individual shall have the right to liberty and security of his or her person. In particular, no one may be arbitrarily arrested or detained. In defining arbitrariness, the ACHPR has stated that this would include elements of inappropriateness, injustice, lack of predictability, and lack of due process of law (*Article 19 v Eritrea* [2007]). Therefore, an arrest or detention may be legal according to domestic law but arbitrary by reason of its inappropriate, unjust, or unpredictable nature.

Article 7 provides for the right to have one's cause heard including the right to an appeal, presumption of innocence, right to defence, and right to be tried within a reasonable time by an impartial court or tribunal. This article also prohibits retroactive criminal legislation. Unlike the ICCPR and ECHR, the article does not list minimum procedural measures such as the right to be informed of any charges, examine witnesses, or access to an interpreter. However, the

Commission has recognized the existence of positive duties like the provision of interpreters and legal aid should a suspect need them (ACHPR, *Armand Guehi v Tanzania* [2016]).

Freedom of conscience and the profession and free practice of religion are guaranteed under Article 8 of the African Charter. The Commission has held in *Prince v South Africa* (2004) that this right is not absolute and that restrictions could be imposed in the interest of society (ACHPR, *Prince v South Africa* [2004]).

Article 9 guarantees every individual the right to express and disseminate his or her opinions within the law. This is one of the few provisions in the African Charter with a clawback clause and without further provisions on the limit of such clause. The provision is not as detailed as Article 10 of the ECHR which allows for limitations on public interest basis such as national security, territorial integrity, public safety, health, and morals.

Article 10 of the African Charter makes provision for the individual's right to free association and the right to assemble freely provided that the individual abides by the law. Like the previous provision on the freedom of expression, this provision is not as detailed as similar provisions in the ICCPR and ECHR. The article prohibits restrictions on membership of group and compulsion to join groups. In *Tanganyika Law Society v Tanzania* (2013), the African Court held that the requirement for a person to be sponsored by a political party in order to contest an election was an infringement of this freedom as it compelled such persons to join a group (*Tanganyika Law Society v Tanzania* [2013]).

Article 12 of the African Charter guarantees the individual's right to freedom of movement and residence within the borders of a state. The individual also has the right to leave any country including his or her own, and to return to that country subject, however, to restrictions provided for by law for the protection of national security, law and order, public health or morality. In *Huri-Laws v Nigeria* (2000), the Commission held that the arrest and detention of the victims at the border amounted to a violation of this right (ACHPR, *Huri-Laws v Nigeria* [2000]).

Article 13 of the African Charter provides for the citizen's right to participate freely in the government of his or her country, either directly or through freely chosen representatives in accordance with the provisions of the law. In *Lawyers of Human Rights v Swaziland* (2005), the Commission held that the King's proclamation outlawing the formation of political parties was a violation of this right (*Lawyers of Human Rights v Swaziland* [2005]). Furthermore, the individual is entitled to equal access to the public service and public property of his or her country.

Article 14 protects the right to property. This right 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 of the African Charter confers on individuals the right to work 'under equitable and satisfactory conditions' and the entitlement to equal pay for equal work. This right would be violated where a person loses their job as a result of unjustified government actions or policies. Thus, in *Elgak and Others v Sudan* (2015), it was held that the state was in violation of this right following the arbitrary closure of the complainant's workplace by the government (ACHPR, *Elgak and Others v Sudan* [2015]).

[21] Under Article 16 of the African Charter, every individual shall have the right 'to enjoy the best attainable state of physical and mental health'. Furthermore, states are to take 'necessary measures' to protect health and ensure that people receive medical attention when they are sick.

Article 17(1) of the African Charter states that everyone shall have the right to education. In *Free Legal Assistance Group v Democratic Republic of Congo* (1995), the Commission held that the closure of universities and secondary schools violated this right.

The African Charter provides for a range of peoples' rights reflective of the diverse and communal nature of many African societies. The provision for peoples' rights is also in marked contrast to other instruments like the ECHR which provides only for individual rights.

Under Article 19, all peoples shall enjoy the same respect and rights and shall be free from domination by another group.

Under Article 20, all peoples shall have an 'unquestionable' and 'inalienable' right to self-determination. They shall have the freedom to freely determine their political status and pursue their economic and social development according to the policy that they have freely chosen. In *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2003), an inter-state complaint, the Commission found that the occupation by the respondent state of territories in the complainant state was a violation of this right (ACHPR, *Congo v Burundi, Rwanda and Uganda* [2003]). The Commission has however been reluctant to extend the right to secessionist movements. For instance, in *Congrès du peuple Katangais v Democratic Republic of Congo* (1995), the Commission stated that the right to self-determination was to be exercised with due consideration to principles of state sovereignty.

Article 21 provides that all peoples shall freely dispose of their wealth and natural resources.

Article 22 stipulates that 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. In *Endorois v Kenya* (2010), the Commission held that the restrictions on access to their land and adequate involvement in the process of developing the region for use as a tourist game reserve was a violation of the right of the Endorois people by the Kenya government (*Endorois* [2010]).

The African Charter is unique in its provision for state and individual duties (human duties). While the notion of duties may be traceable to the American Declaration on the Rights and Duties of Man and the Universal Declaration of Human Rights, these duties are spelt out more clearly in the African Charter than anywhere else. The provision for duties buttresses African family and communitarian values and can be seen as an adoption of a communitarian perspective of 'rights and attendant duties'. There were early concerns on the inclusion of duties within the Charter. For instance, it was argued that the inclusion of individual duties in the Charter downplayed the force of rights and was an ideological reflection of the authoritarian nature of African states. On the other hand, it has been argued that the provision for duties was necessary to avoid having a Charter based solely on the concept of individualism.

Under Article 18, the state has a duty to assist the family in its role as the custodian of morals and traditional values. The ACHPR held in *Good v Botswana* (2010) that the sudden and unjustified deportation of a man in the knowledge that he would be separated from his minor daughter was a violation of this duty (*Good v Botswana* [2010]). The ACHPR has also held in *Malawi African Association v Mauritania* (2000) that holding people in solitary confinement before and during trial deprived them of the right to family life (*Malawi African Association and Others v Mauritania* [2000]). The state is to ensure the elimination of discrimination against women, protection of the rights of women, children, disabled, and aged persons. Article 25 provides for the duty to promote and ensure the respect of human rights through teaching, education, and publication (human rights education). States also have the duty to guarantee the independence of domestic courts and allow the development of national human rights institutions.

According to 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 provides that individuals have the duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect and maintain their parents. There is also the individual duty to serve the community. The individual is also required to preserve and strengthen positive African cultural values and to contribute to the moral wellbeing of the society. Duties owed to the state include not to compromise the security of the state, to pay taxes, and to preserve the state's territorial integrity.

The Charter does not contain a derogation clause (emergency, state of). In *Commission Nationale des Droits de l'Homme et des Liberte v Chad* (1995), the ACHPR interpreted the absence of a derogation clause to mean that the Charter did not permit derogations (*Commission Nationale des Droits de l'Homme et des Liberte v Chad* [1995]). However, the Charter does contain a number of clawback provisions. These clawback clauses may be seen in provisions on the rights to liberty and security, conscience and religion, expression, association, movement, political participation, and property, all of which make enjoyment of those rights subject to the 'law' (limitations and restrictions of rights). In *Media Rights Agenda and Others v Nigeria* (1999), the Commission found that references to 'law' in the Charter refer to international rather than national law (*Media Rights Agenda and Others v Nigeria* [1999]). In *Konaté v Burkina Faso* (2014), the Court held that for a restriction to be acceptable, it must serve a 'legitimate purpose' and be 'proportionate to and absolutely necessary for the benefits to be gained', such necessity to be assessed within the context of a democratic society (*Konaté v Burkina Faso* [2014]).

A range of women's rights are provided under the Maputo Protocol, including sexual and reproductive rights. These include the right to a medical abortion under limited circumstances (e.g. rape, incest, and where the pregnancy endangers the health of the mother or child), elimination of harmful practices such as female genital mutilation; equality in marriage, health and reproductive rights; the right to inheritance; political participation; and widows' rights. Article 6 of the Protocol sets the minimum age of marriage at 18. Thus, in *APDF and IHRDA v Republic of Mali* (2016), the African Court held that the Malian law which set a minimum age of 16 was contrary to Article 6 of the Maputo Protocol (*APDF and IHRDA v Mali* [2018]). The Court also held that customary law which allowed women to only inherit half as much as a man was contrary to the Protocol.

The Protocol on the Rights of Older Persons makes specific provisions for people aged 60 years and above. It provides for such rights as the right to make decisions, protection against discrimination in employment, social security, protection from abuse and harmful traditional practices, and residential care.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa seeks to promote the full and equal enjoyment of human rights by all persons with disability. It provides for such rights as equality, non-discrimination, life, liberty, rehabilitation, accessibility, health, and adequate standard of living.

### **III. Procedural Aspects**

The implementation of the African Charter is overseen by two bodies: the African Commission on Human and Peoples' Rights (ACHPR) and the African Court on Human and Peoples' Rights (ACtHPR).

#### **1. ACHPR**

Article 30 of the African Charter provides for an ACHPR to promote and protect human rights. Protection of human rights is done through the communications procedure. Article 47 provides for state complaints (inter-state complaint procedures). There is no express provision for individual complaints although these are implicitly provided for under Article 55 which provides for communications 'other than those of state parties' (individual and collective communication or complaint procedures).

There are a number of requirements that must be met for a complaint to be admissible (admissibility (of individual communications and complaints)). Under Article 50, the ACHPR must be satisfied that all local remedies, where they exist, have been exhausted (exhaustion of domestic remedies). This requirement may however be waived if the procedures of obtaining those remedies are unduly prolonged.

According to the African Commission (Centre for Human Rights [2021]), such reasons include:

- Where the victim is indigent;
- Where the complaint involves serious or massive violations of rights;
- Where domestic legislation ousts the jurisdiction of national courts;
- Where the rights claimed are not guaranteed by domestic laws;
- Where it is physically dangerous for the complainant to return to the erring state in order to exhaust domestic remedies;
- Where the complaint involves an impractical number of potential plaintiffs;
- Where the procedure for obtaining domestic remedy will be unduly prolonged;
- Where it is simply illogical to require exhaustion of domestic remedy.

Other admissibility requirements are that complaints be compatible with the African Charter, not use disparaging language, indicate the authors, and not be based exclusively on news disseminated by the media. Article 58 provides that, in special cases of serious or massive violations, the ACHPR may draw the attention of the Assembly of Heads of State and Government (the Assembly) to such violations and the Assembly may, in turn, request the ACHPR to undertake an in-depth study of the situation and make a factual report accompanied by findings and recommendations. The ACHPR initially referred such special cases to the Assembly with little follow-up by the latter. However, the Peace and Security Council, created in 2003, has since become the first port of call in such instances. The African Commission is also to make recommendations to the Assembly after considering complaints between states. However, states have hardly put the system to use with only one inter-state communication, the abovementioned *Democratic Republic of Congo v Burundi, Rwanda, Uganda* (2003), completed with the decision given after the matter had been substantially resolved. The African Charter is, however, silent on what should happen after an individual communication has been considered (ACHPR, *Congo v Burundi, Rwanda and Uganda* [2003]). But, just as in the previous instances, it has come to be accepted that the Commission would also make recommendations after considering individual communications. Pursuant to Article 59, all measures taken under the Charter are to remain confidential until otherwise decided by the Assembly.

The African Charter does not expressly state that the ACHPR's decisions are binding neither does it provide for states to implement them. An argument may however be made for the binding authority of the Commission's decisions after they have been adopted by the Assembly.

Apart from the communications procedure, compliance with the African Charter is monitored through the state reporting system (state reports). Under Article 62 of the Charter, each state party is to submit, every two years, a report on the measures taken with respect to giving effect

to the provisions of the Charter. However, the vast majority of states fail to submit their reports as required,

## 2. African Court

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) came into force in 2004. The African Court was officially installed in 2006. By 2021, 30 states had ratified the Protocol, however with Cote D'Ivoire announcing its withdrawal in 2020 following an unfavourable decision from the Court. By Article 2 of the Protocol, the Court was created to 'complement' the protective mandate of the African Commission. This complementary mandate however leaves room for ambiguity on the roles of the two bodies. At its 33<sup>rd</sup> Ordinary Session, in June 2018, the AU Executive Council called on member states to review the Commission's mandate vis-à-vis the Court in order to avoid a potential jurisprudential conflict. It also called on the African Commission to address the ambiguity of its status within the framework of the latter's revision of its Rules of Procedure. The African Commission did this in its revised Rules of Procedure (2020), by reiterating provisions of complementarity in the African Court Protocol such as the Commission's right to lodge complaints in the African Court and provisions for consultations between both bodies (*Rules of Procedure* [2020]). The Commission may, before deciding on the admissibility of a communication, decide to refer it to the Court. In the event of this, the Commission, and not the complainant, becomes the applicant in the matter before the Court. However, the Commission is to obtain the complainant's consent before such a referral. Once the matter has been referred to the Court, the Commission is no longer seized of the complaint, and cannot consider it as a communication unless it is formally withdrawn (ACHPR, *Rules of Procedure* [2020] Rule 135). By Article 4, the Court may also provide an advisory opinion on any legal matter relating to the Charter or any human rights instrument, except on matters being examined by the Commission. As of 2021, the Court had delivered twelve such advisory opinions.

According to Article 5 of the African Court Protocol, the following may submit complaints to the Court: the African Commission, a state party which has lodged a case before the African Commission, a state party against which a complaint has been lodged before the African Commission, a state party whose citizen is a victim of human rights violations, and African intergovernmental organizations. There is no automatic right of individuals and NGOs to submit complaints. This is only possible, if the respondent state has made a declaration under Article 34(6) of the Protocol accepting the competence of the Court to receive complaints against it from individuals and NGOs. By 2021, only ten states had made this declaration: Benin, Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania, Republic of Côte d'Ivoire, Tunisia and the Gambia. Four of these states, Benin, Cote D'Ivoire, Rwanda and Tanzania (where the Court has its seat), have since had withdrawn their declaration, leaving only six states allowing individual/NGO complaints. These withdrawals have generally come after unfavourable decisions by the Court against those states. Furthermore, only individuals, and NGOs with observer status before the African Commission, may be entitled to initiate cases.

The procedure before the Court consists of written and oral proceedings. As with the African Commission, the written procedure consists of a communication to the Court, the parties' pleadings, and supporting materials. Oral proceedings consist of hearings. The admissibility requirements, as set out in the Court's Rules of Procedure, are also similar to those of the African Commission and include identification of the authors of the complaint, compatibility with the African Charter, use of non-disparaging or insulting language, exhaustion of local



remedies, submission within a reasonable time, and need not to base complaints exclusively on news disseminated through the mass media.

Parties to a case are entitled to be represented by counsel. The Court may also, where it deems it necessary in the interest of justice, provide free legal assistance to the parties. The state party against which a complaint has been filed must respond within 90 days of being served. The applicant may also file a Reply to such response within 45 days. Extensions of 30 days may be granted by the President of the Court in both instances.

Unlike the ambiguity on the nature of the Commission's decisions, the judgement of the Court is final and binding on the parties. The vast majority of cases have been initiated by individuals from countries that allow individual/NGO access to the Court and cover the gamut of civil and political rights.

#### **IV. Practical Relevance and Impact**

The African Charter has been ratified by 54 of 55 African states. This high number of ratifications demonstrates the general acceptance of the Charter by African states. It should be recalled that the Charter was created at a time of gross human rights violations across African countries. Prior to that time, the existing OAU Charter placed emphasis on national sovereignty and non-interference in the domestic affairs of member states. The African Charter could therefore be described as the start of an ideological movement towards human rights enforcement which eventually crystallized into the right of interference under the later African Union Constitutive Act. Its wide acceptability may also underlie the African Charter's status as representing the African conception of human rights – a blend of universalist, cultural, and communitarian values and interpretations.

The African Charter is accorded significance across a number of African legal systems and domestic courts have been known to make reference to it in court judgments. In Nigeria, the African Charter has been incorporated into national law by the legislature. The country's Supreme Court has held, in *Abacha v Fawehinmi* (2000) that the African Charter is superior to other domestic laws and is only inferior to the country's constitution (*Abacha v Fawehinmi* [2000]). Ghana's Supreme Court has also relied on the Charter to hold as unconstitutional legislation which required a police permit for demonstrations. The Ghanaian Supreme Court, in *New Patriotic Party v Inspector General of Police* (1993) stated that the fact that the state legislature had not passed specific legislation giving effect to the Charter did not mean that it could not be relied on (*New Patriotic Party v Inspector General of Police* [1993]).

The African Charter's impact is even more noticeable in the decisions of the African Commission and African Court created under the Charter, as well as those of other regional courts across Africa. In their decisions, these regional courts such as the ECOWAS Community Court of Justice, East African Court of Justice, and the Southern African Development Community Tribunal have made references to specific provisions of the African Charter. The African Charter can therefore be said to have developed an authoritative status thereby commanding general reference on matters of human rights in Africa.

The African Charter can however be argued to have had little impact in stemming the violation of human rights across the continent. Despite the near unanimous acceptance of the African Charter, systemic violations of human rights persist in many African countries. States have also been known to openly disregard decisions of the African Commission. One argument that has been made is that, by failing to impose stringent membership requirements such as for member states to be democratic and abiding by the rule of law, the African Charter encouraged accession by states that were notorious for human rights violations. Some of these states, it

can be argued, only ratified the African Charter to improve their international reputation rather than from a sense of obligation. That there was little interest in applying the Charter may also be gleaned from the creation of a weak Commission which would, rather than make clear binding decisions against states, only make recommendations to the AU Assembly. It can however be argued that the Charter was a necessary introduction to human rights for many dictatorial African states which, at the time, needed gradual introduction to human rights application and enforcement.

It must however be pointed out that African states have shown great reluctance in accepting regional enforcement of the Charter. This reluctance is clearly demonstrated in the poor acceptance of the African Court. Unlike the African Charter, which was ratified by a host of African states, the Protocol creating the Court has been ratified by fewer countries. Worse still, only ten states allowed individual and NGO access to the Court, of which four of these states have since withdrawn this commitment. As of late 2021, the African Commission website listed only 244 decisions on communications in its over thirty-year history. Less than half of these communications resulted in findings on the merits. The African Court's website documented 318 cases with 121 judgments. By comparison, the ECtHR has decided more than 900 000 cases by the end of 2020. A number of reasons have been adduced for the low numbers of the African Commission and Court. These include lack of cooperation and compliance by member states, lack of resources, and jurisdictional limits on the court. The level of compliance with decisions of the institutions are also generally low; studies have put the rate of full compliance with decisions of the African Commission at between 12-18%. Furthermore, several states fail in their state reporting obligations. For instance, by 2021, only 11 states had submitted all the necessary reports. There therefore appears to be poor political commitment to enforce the Charter on the part of African states. Thus, granted that the African Charter sets necessary regional human rights standards, the institutional structures for enforcing those standards, hampered by non-compliance, funding, and political will, appear to be ineffective and underutilized.

## **V. Conclusion**

The African Charter ushered in an era of regional human rights recognition and observance. Great attempts were made to ensure that the Charter reflected African ideals and values whilst not departing from universal standards. Thus, while espousing communitarian ideals, the Charter adopts a moderate 'cut and mix' approach to Western liberal ideas. The Charter is therefore a blend of civil and political rights, group rights, socio-economic rights, duties, and responsibilities. The Charter's clear attempt to enthrone the enforceability of socio-economic rights is reflective of the poor economic situation in many African states and the concomitant need to address those challenges. Also, the provisions on peoples' rights emphasize the need to protect minorities and endangered groups on the continent. The Charter is also unique in its approach to duties owed by states and individuals. The Protocol on women's rights addresses issues peculiar to women and the girl child such as sexual health and child marriages.

The Charter also creates two main institutions, the African Court and African Commission, to enforce its provisions. However, both institutions have failed to make meaningful impact largely owing to the lack of political will on the part of member states. States have generally failed to implement decisions of the African Commission. They have also failed to either ratify or grant individual and NGO access to the African Court.

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