

RE-POSITIONING THE AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS IN THE ENFORCEMENT OF HUMAN AND PEOPLE'S RIGHTS IN AFRICA¹

Abstract

The African Court of Human and Peoples' Rights (ACHPR) as the human rights judicial body in the continent of Africa was adopted in 1998. The establishment of the African court was expedited by the legal and political developments in the continent. The enactment of the Constitutive Act 2002 was significantly lifeblood to the protection of the human rights principles set out in the African Charter on Human and People's Rights. The objective of the Act is, inter alia, to promote and protect human and peoples' rights in accordance with the Charter and other relevant human rights instruments. This study is aimed at identifying the impediments that have imperiled the success of the African Court on Human and People's Rights, and to discuss the prospects of the court in protecting human and people's rights across the continent of Africa. The doctrinal methodology was adopted in realizing the set purpose of this work. It was found that the jurisdiction of the court is confined to States Parties to the African Charter. The concept of extra-territorial jurisdiction has not been institutionalized in the enforcement of human rights in Africa. It therefore does not fall within the competence of the court to impose a treaty obligation on any non-state party. Again, individuals and non-governmental organization (NGO's) suffer great restraint in seeking the enforcement of human and people's rights as they lack direct recourse to the court. It is therefore recommended that the Protocol to the African Charter on Human and People's Rights and the Constitutive Act of the African Union should be amended to incorporate the principle of extra-territorial jurisdiction to facilitate the enforcement of human and people's rights across the continent without let or hindrance. Accordingly, section 34(6) of the Protocol on the African Court of Human and People's Rights should be amended to relax the condition that a State Party against whom the complaint of human rights violation is brought must have declared its commitment to the protocol to allow the invocation of the individual recourse system. The emergence of the protocol to the African Charter was a sweep development leading to the establishment of the African Court on Human and People's Rights. The purpose of establishing the court is to facilitate the enforcement of human and people's rights in Africa. Therefore, concerted effort should be taken expunge the impediments to the realization of human rights in Africa.

Key words: Human, Rights, Court, Enforcement, Extra-territorial and Jurisdiction

1. Introduction

The African Court of Human and Peoples' Rights marks the most recent new mechanism of the African system for the protection of human rights. The process of drawing up of the protocol was initiated at the summit of Heads of State and Government of the Organisation of African Unity (O.A.U.) in Tunis in June 1994. This was consequent upon the resolution adopted at the Assembly requesting the secretary general of the OAU (now AU) to convene a meeting of government experts to examine ways of enhancing the efficiency of the African commission and to consider in particular the question of the establishment of an African Court on Human and Peoples' Rights.² The draft protocol as prepared by the secretariat of the AU was submitted to a meeting of government experts in Cape Town, South Africa, in September 1995. This was followed by several intermediary meetings which culminated in the adoption of the draft protocol at the meeting of Ministers of Justice in December 1997, and then, its ratification by the Summit of Head of State and Government. The Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights was adopted on 9 June 1998 by the summit of heads of state and government in Ouagadougou, Burkina Faso.³ The Constitutive Act of the African Union was adopted at Lome, Togo, in 2000. The Constitutive Act 2002 is significantly strong on the human rights principles set out in the African Charter on Human

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² Resolution No. AHG 230 (XXX), See document OAU/LEG/EXP/HPR, September, 1995.

³ J.J. Gautier, Occasional Paper on the African Court on Human and Peoples' Rights – Presentation, Analysis and Commentary: The Protocol to the African Charter on Human and Peoples' Rights, establishing the Court, Geneva, 2000. The three regional human rights judicial bodies includes: The European Court on Human Rights, the Inter-American Court, and the African Court on Human and Peoples' Rights.

and People's Rights. Its objective is, *inter alia*, to promote and protect human and peoples' rights in accordance with the African Charter on Human Peoples' Rights and other relevant human rights instruments.⁴ The Act also entrenches respect for democratic principles, human rights, the rule of law and good governance.⁵ Therefore, the adoption of the protocol on the establishment of the African court was hugely actuated by the impact of the Constitutive Act of the African Union. Although, the Constitutive Act is silent on the African Commission and on the proposed African Court on Human and Peoples' Rights, it was nevertheless, generally believed that the Court of Justice, would become the main instrument for the interpretation of the Constitutive Act for the resolution of dispute arising between states in relation to the Act.⁶ The purpose of this paper is to consider the hiccups that has bedeviled the success of the African Court on Human and Peoples' Rights and project the future of the court.

2. General Overview of the African Court of Human and Peoples Rights

The African Court of Human and Peoples' Rights (ACHPR) is the most recent of all the three regional human rights judicial bodies. The Protocol establishing the African Court on Human and Peoples' Rights entered into force on 1 January 2004, having been ratified by fifteen member states. The statute of the court was yet to be determined. The establishment of the African court must have been expedited by the legal and political developments in the continent. Of much influence is the enactment of the Constitutive Act of the African Union. In contrast from the European and Inter-American systems for the protection of human rights where the judicial bodies are integral parts of the cardinal instrument of the system *ab initio*, the establishment of a regional judicial body via the African Court of Human and Peoples' Rights to ensure the protection of the human and peoples' rights under the African Charter is rather an afterthought. Prior to the adoption of the Protocol on the Establishment of African Court on Human and Peoples' Rights, the protection of the guaranteed rights under the African Charter rested on the shoulders of the African Commission on Human and Peoples' Rights. The Commission is merely a quasi-judicial body fashioned after the Human Rights Committee of the United Nations. The recommendations of the commission therefore had no binding force. The African Commission is confined to its functions of examining state reports, considering communications alleging serious and massive violations of human and people's rights, and interpreting the provisions of the African Charter at the instance of a state party, the African Union or any organization or body of persons recognized by the African Union. Accordingly, the enforcement and compliance control mechanism as contained in the African Charter suffered remarkably, and this was worse hit by the fact that most African States had great disregard for human right at the period the African Charter was adopted.⁷ However, the situation improved in the 1990's with several African States advancing in democracy. Besides, the weak records of the African Commission on Human and Peoples' Rights necessitated the urgent need for the African Court on Human and Peoples' Rights that will ensure stronger protection of human rights both at the domestic and the regional levels.⁸

The Court can make binding decisions, including orders of compensation or reparation, while the Commission can only make recommendations. Under article 5 of the 1998 Protocol establishing the Court, the Commission, State Parties to the Protocol and African inter-governmental organisations are entitled to submit cases to the Court. Non-governmental organisations with observer status before the Commission and individuals from State Parties that have made a declaration accepting the jurisdiction of the Court can also institute cases directly in accordance with article 34(6). The AU Constitutive Act provided for an African Court of Justice to be established as one of the AU's principal organs. The Protocol of the Court was adopted in July 2003.² However, the Court did not become operational. The AU Assembly decided at its July 2008 Summit to merge the African Court of Justice and Human Rights with the African Court on Human and Peoples' Rights (see previous entry) into an African Court of

⁴The Constitutive Act of the African Union, Article 3 (h).

⁵ *Ibid*, article 4 (m).

⁶ E. Baimu, 'The African Union: Hope for a Better Protection of Human Rights in Africa', *African Human Rights Law Journal*. (2001) Vol. 1. p. 32.

⁷ Only few African States such as Senegal, Gambia and Botswana entrenched democratic regime and respect for fundamental human rights in their *corpus juris*.

⁸ Available at <http://www.pict-peti.org/courts/ACHRP.html>, last accessed on January 11, 2017.

Justice and Human Rights. The Assembly adopted the 2008 Protocol on the Statute of the African Court of Justice to merge the courts (Assembly/AU/Dec.196 (XI)). Article 28 of the 2008 Protocol provides that the African Court of Justice and Human Rights shall have jurisdiction over all cases and legal disputes that relate to the interpretation and application of the Constitutive Act, Union treaties and all subsidiary legal instruments, the African Charter and any question of international law.

2.1 Jurisdiction of the Court

The Court is empowered to act both in a judiciary and an advisory capacity.⁹ The Court is also conferred with competence *ratione personae* (personal jurisdiction of the court) which comprise of two types of jurisdictions, to wit: compulsory jurisdiction and optional jurisdiction. The courts compulsory jurisdiction entitles the following to submit cases to it:

- i. The African Commission on Human and Peoples' Rights;
- ii. The state party which has filed a complaint to the commission;
- iii. The state party against which the complaint has been filed;
- iv. The state party whose citizen is a victim of a human right violation; and
- v. African Intergovernmental Organizations for issues concerning them.¹⁰

A State Party, not initially involved in a case, may refer the matter to the court as a third party if he has an interest to protect.¹¹ However, the optional jurisdiction of the court is in respect of cases submitted by individuals or non-governmental organizations (NGOs) with observer status before the African Commission on Human and Peoples' Rights. As a condition precedent, the state against which the complaint has been lodged must first have recognised the competence of the African Court to receive such communications pursuant to article 34(6) of the Protocol on the African Court.¹² It is argued that this condition precedent will operate to impede access to justice for the redress of human rights infractions against individual citizens of States yet to recognise the competence of the African Court to receive communications from individuals and non-governmental organizations acting on behalf of victims of human rights violations.

The Court also has the power to render an opinion, at the instance of a member state or of an organization recognized by the African Union, on any legal matter relating to the African Charter or any other applicable African human rights instruments. The advisory opinions are not binding. The opinions could however, serve as reference for a dynamic and progressive interpretation of the African Charter on Human and Peoples' Rights and other human rights instruments.¹³ Accordingly, the Court has powers to apply the provisions of the Charter and any pertinent human rights instruments ratified by the states concerned.¹⁴ The Court may therefore, apply other international bill of human rights and other international human rights treaties, whether adopted within the framework of the United Nations or its specialized institutions. The Court's jurisdiction applies only to states that have ratified the Court's Protocol. The Court may entertain cases and disputes concerning the interpretation and application of the African Charter, the Court's Protocol and any other human rights treaty ratified by the state concerned. The Court may also render advisory opinion on any matter within its jurisdiction. The advisory opinion of the Court may be requested by the AU, member states of the AU, AU organs and any African organisation recognised by the AU. The Court is also empowered to promote amicable settlement of cases pending before it. The Court can also interpret its own judgment.

⁹ Protocol on the African Court of Human and People's Rights, articles 3 and 4.

¹⁰ *Ibid.*, article 5 (1).

¹¹ *Ibid.*, article 5 (2).

¹² *Ibid.*, article 5(3); The Association for the Prevention of Torture (APT) comments that by the forgoing provision, the African System is in line with the procedural law of other human rights systems which also restrict the individual's right of access to international human rights organs. Whether at the level of the United Nations or other regional systems for the protection of human rights, the rights of individual appeal is generally the subject of an optional clause, and the organ's competence to examine individual petitions is made subjects to the state's having declared its recognition of this competence. Available at <http://www.apr.ch>, last accessed on January 11, 2017.

¹³ Protocol on the African Court, article 4.

¹⁴ *Ibid.*, article 7.

The Court may receive cases filed by the African Commission of Human and Peoples' Rights, State parties to the Protocol or African Intergovernmental Organizations. Non-Governmental Organizations with observer status before the African Commission and individuals can also institute cases directly before the Court as long as the state against which they are complaining has deposited the Article 34(6) declaration recognizing the jurisdiction of the Court to accept cases from individuals and NGOs as described in Article 5(3). To date, eight (8) States have accepted the Court's jurisdiction to receive complaints referred by individuals and NGOs; these are: Benin, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania. However, in February 2016, Rwanda announced it would withdraw its acceptance of the Court's jurisdiction over individual and group complaints. The impact of this withdrawal is yet to be determined. Additionally, the States of the African Union have agreed to establish an African Court of Justice and Human Rights, intended to hear disputes arising under all African Union instruments, including the human rights agreements, and to prosecute individuals for serious international crimes. This new tribunal would replace the African Court on Human and Peoples' Rights. However, the protocol must be ratified by 15 States before the African Court of Justice and Human Rights come into being.¹⁵ The Court delivered its first judgment in 2009. As at October 2016, the Court had received 119 applications and finalized 32 cases. Currently, the Court has 87 pending cases and 4 Requests for advisory opinion.¹⁶ In respect of cases brought by NGOs and individuals, articles 6 and 34(6) of the Protocol establishing the Court provides for the following admissibility requirements in addition to the seven admissibility requirements under article 56 of the African Charter: cases brought directly before the Court by individuals and NGOs are admissible only when the state against which the complaint is brought has made a declaration under article 5(3) of the Court's Protocol accepting the competence of the court to receive such complaints. As at 2016, only Ghana, Tanzania, Mali, Malawi and Burkina Faso have made the declaration.

2.3 Organization of the African Court

The court is made up of eleven judges elected by the Member States of the African Union for a six-year term of office which is renewable once only. Only the State Parties to the Protocol may propose candidates. A state party may nominate three candidates at least two of whom must be her nationals. However, the court may not comprise more than one national of the same state. There must be adequate gender representation in the nomination of candidates, and an equitable representation of the main regions of Africa and their principal legal traditions when electing the judges. The election is by secret ballot by the Assembly of Heads of State and Government of the African Union. For the purpose of continuity, in the working of the court, the terms of four judges elected at the first election expire after two years, and the terms of four more judges expire at the end of four years, while the terms of the remaining three expire after six years.¹⁷ The judges perform their functions on a part-time basis, excepting the president who performs on a full-time basis.¹⁸ The African Court elects its president and vice president for a two- year period, renewable once only.¹⁹ The first judges of the African Court on Human and Peoples' Rights were elected on 22 January 2006 at the 8th Ordinary Session of the Executive Council of the African Union, held in Khartoum, Sudan. The judges, hailing from 11 of the 53 member states of the African Union, are from backgrounds of varying levels of judicial experience and knowledge of international and human rights law.²⁰

¹⁵ Available at: <http://www.ijrcenter.org/regional/african/>, last accessed on January 16, 2017.

¹⁶ Available at: <http://www.ijrcenter.org/regional/african/>, last accessed on January 16, 2017.

¹⁷ *Ibid*, see article 11 to 15 for the foregoing on composition of the court and election of the judges.

¹⁸ Protocol on the African Court of Human and Peoples' Rights, articles 15(4) and 21(2).

¹⁹ *Ibid*, article 21. Note that the Rules of Procedures for the Court will set out the functions of both the President and the Vice President.

²⁰ The judges of the African Court include: Dr. Fatsah Ouguergouz (Algeria), Jean Emile Somda (Burkina Faso), Dr. Gerard Niyungeko (Burundi), Sophia A.B. Akuffo (Ghana), Kello Justina Masafo Guni (Lesotho), Hamdi Faraj Fanoushi (Libya), Modibo Tounty Guindo (Mali), Jean Mutsinzi (Rwanda), El Ha Crussee; (Senegal), Bernard Ngoepe (South Africa), and George W. Kanyaihamba (Uganda). This is available at <http://en.wikipedia.org/woko/judge-of-the-African-court-on-Human-and-peoples-right>, last accessed on January 19, 2017.

2.4 Independence of the Judges

The judges are elected in an individual capacity from among jurist of high moral character and of recognized practical, judicial or academic experience in the field of human rights. Although presented by the states, the judges are not representatives of the states. They undertake to discharge their duties faithfully and impartially.²¹ The independence of the judges is guaranteed in accordance with international law. They enjoy the diplomatic immunities and privileges necessary for them to discharge their duties.²² The judges may not hear any case in which they have previously taken part in any capacity, and must decline to give an opinion in all cases concerning the state of which they are a national. This is in projection of their moral independence. In accordance with professional ethics, the judges may not carry out any act which is incompatible with the demands of office or which might interfere with their independence or impartiality.²³ At any rate, the judges are subject to the disciplinary measures of the court. Thus, a judge shall not be suspended or removed from office unless, by the unanimous decision of the other judges of the court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the court. Unless set aside by the Assembly of Heads of State and Government at its next session, such a decision of the court shall become final.²⁴

2.5 Court Procedure

The African Court rules on the admissibility of cases submitted by individuals. The provisions of article 56 of the African Charter on Human and Peoples' Rights stipulates the conditions for admissibility of communications addressed to the African Commission on Human Rights, and these conditions are applicable to cases brought before the African Court. The court may also request the opinion of the Commission before ruling on the admissibility of a case. Whatever be the conditions, the court is free to either consider the case or to transfer it to the Commission.²⁵ However, the protocol on the African Court does not contemplate every imaginable rule of procedure. The Rules of Procedures of the Court therefore, stands in cross-reference to the Protocol. Bearing in mind the complementarily between the African Court and the Commission, the African Court shall set forth the conditions under which the court shall consider cases.²⁶ The Court shall examine cases brought before it, if it has a quorum of at least seven judges.²⁷

The African Court shall conduct its proceedings in public, unless it is decided, in particular instance, to hold them in camera in keeping with the conditions established by the Rules of Procedure of the Court. A party to a case is entitled to be represented by a legal practitioner of his or her choice. Where the interest of justice so requires, a legal aid may be made available to a party. Any person, witness or representative of the parties who appears before the court shall be provided with necessary protection and facilities in accordance with international law.²⁸ Matters of evidence are also considered by the court, including conducting an enquiry.²⁹ In course of the proceedings, the court can avoid irreparable harm to persons in cases of extreme gravity and urgency, by adopting necessary provisional measures.³⁰

2.6 Court Judgments and its Execution

The African Court delivers its judgment within 90 days of the conclusion of its deliberations. The judgments of the court are decided by a simple majority. However, each judge is at liberty to hold his or her dissenting opinion to the majority decision. Upon giving due notice to the parties, the judgment is read out in open court. The reason for the decision must be embodied in the judgment of the court. In the event that a violation of a human or peoples' right is established, the court makes appropriate orders or grant proper remedies to the situation, including the payment of fair reparation or compensation. The

²¹ Protocol on the African Court, article 15.

²² *Ibid.*, article 17.

²³ *Ibid.*, article 18.

²⁴ Protocol on the African Court of Human and People's Rights, article 19.

²⁵ *Ibid.*, article 6.

²⁶ *Ibid.*, article 8.

²⁷ *Ibid.*, article 23.

²⁸ *Ibid.*, article 10.

²⁹ *Ibid.*, article 26.

³⁰ *Ibid.*, article 27.

court may interpret and review its own decision in the light of new evidence under conditions to be stipulated in the Rules of procedure. The judgment of the court is therefore final and not subject to an appeal.³¹ If the Court finds the rights of an applicant have been violated, it can order remedial measures such as compensation or reparations. Article 27 of the Protocol also allows the Court to order provisional measures, if a case is of "extreme gravity and urgency, and when necessary to avoid irreparable harm." Member States subject to the Court's jurisdiction must comply with judgments in any case to which they are parties, within the time given by the Court. States are also responsible for guaranteeing execution of the Court's judgments. If a State fails to comply, this failure is noted in the Court's report to the Assembly, as required under Article 31 of the Protocol. State parties to the Protocol undertake to comply with the judgment of the court in any case to which they are parties and to guarantee execution within the time stipulated by the court. Hence, execution of court judgment is basically voluntary. In a report submitted to each regular session of the Assembly of Heads of State and Government, the Court particularly specifies the cases in which a state has failed to comply with the judgment of the court. Note that the Council of Ministers is responsible for monitoring the executive of the judgment of the court.³² The African Human Rights Court is meant to complement the protection mandate of the African Commission.³³ This suggests that both the Court and the Commission will coexist as independent bodies but within a mutually reinforcing relationship. On the basis of its status as a court, the African Court will be the final arbiter and interpreter of the African Charter.³⁴

3. Impediments to the Success of the African Court

The jurisdiction of the court is confined to the interpretation and application of the African Charter and any other international human rights instruments ratified by the states concerned.³⁵ This implies that the African Court can only entertain matters that are *prima facie* within the mandate of the court. The court does not entertain matters or disputes relating to the Constitutive Act; neither does it entertain disputes between states, unless such disputes can be categorized as human rights disputes as demonstrated in *Democratic Republic of Congo v. Rwandan, Burundi, Uganda*.³⁶ Where states have not assumed international duty by themselves, it does not fall within the competence of the court to impose a treaty obligation on them.³⁷ Noticeably, individuals and non-governmental organization (NGO's) lack *locus standi* as they do not have direct recourse to the court. For NGO's with observer status before the Commission and individuals to secure direct recourse to the Court, State Parties concerned must have made a declaration accepting the competence of the court to receive cases from NGOs and individuals as contained in article 5(3) of the Protocol on the African Court.³⁸ Without such declaration, the individual compliant has to be submitted first to the African Commission. Thus, apart from the prevailing limitations such as exhaustion of domestic remedies which shuts out some matters out of the ambit of the court, the element of *locus standi* has tremendous capacity of limiting access to the African Court. It is pertinent to note that the African Court should not be used as a court of first instance especially on matters it is not competent to determine. The foregoing provision brings the advocacy role of the African Commission into lime light, and consequently averts the undue violation of the sovereignty of member states.

³¹ Protocol on the African Court of Human and People's Rights, article 28.

³² *Ibid.*, article 29.

³³ The African Court is to reinforce and make more complete the objectives of the African Charter.

³⁴ I.A.B. El Sheikh, 'The Future Relationship between the African Court and the African Commission' in *African Human Rights Law Journal* (2002), Vol. 2., pp.252-260.

³⁵ Protocol on the African Court, article 7.

³⁶ Communication No. 227/99. Two other similar Communications were regrettable camouflaged as Article 55 Communication instead of the inter-state communications under Article 47. These are Communication No 233/99 relating to the Ethiopia/Eritrea dispute and Communication No 15/96, against Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia relating to the sanctions imposed by these states against Burundi, following the declaration of a military *coup d'etat* in that country.

³⁷ R.W. Eno, 'The Jurisdiction of the African Court of Human and Peoples' Rights, *African Human Rights Law Journal*, (2002), Vol. p. 223; K. Hopkins, 'The Effect of an African Court on the Domestic Legal Orders of African States', *African Human Rights Law Journal*, (2002), Vol. 2, p. 234.

³⁸ The Protocol on the African Court, article 34(6).

The African Commission lacks enthusiasm about of the African Court. The opinion among members of the Commission is mixed. Some believe that since the African Commission was established as a treaty body made up of independent experts under the Charter which was adopted by the OAU (now AU) Summit, the African Commission should have been specifically provided for in the Constitutive Act. Others believed that the African Commission can best carry out its function inherent in both the Charter and the Constitutive Act by remaining independent and set apart from the African Court.³⁹ In this way, the Commission can make independent decisions, and can account for its activities to the African Union. The relationship of the African Human Rights Court to the domestic situation raises serious concern on issue of sovereignty. The growing apprehension is that the court will undermine domestic courts, and shall be viewed from the domestic perspective as being unconstitutional. The concept of extra-territorial jurisdiction is yet to receive popular acceptance in African in contrast from Europe where the decision of the European Court binds state parties to the European Convention.⁴⁰

4. Innovations and Prospect of the African Court on Human and Peoples' Rights

In furtherance of effective protection of human rights, certain features of the African courts of Human and Peoples' Rights are prevailing over the American and European congeners, including other judicial bodies. Actions may be brought before the court on the basis of any instrument which has been ratified by the state party concerned.⁴¹ The African Court could become a judicial arm of panoply of human rights instruments concluded under the aegis of the United Nations. Many of those instruments do not contain judicial mechanisms for ensuring their implementation. There is therefore the potentiality of several African State ending up with a dispute settlement and implementation control system stronger than the one provided by those UN and other treaties.

Given the standing of individuals and NGOs, advisory opinion can be asked for by not only member states and African Union Organs, but by any African NGO that has been granted recognition by the African Union. This is consistent with the proviso that at the time of ratifying the Protocol or thereafter, the state concerned must have made a declaration accepting the jurisdiction of the court to hear such cases. On the strength of the foregoing, individuals also can bring cases to the court. In contrasts, both the inter-American Court and the European Court of Human Rights are short of this individual system. Given the increased and renewed emphasis on democratization, and the protection of human rights in Africa, including the transformation of the OAU into the African Union, the way was paved for the entry into force of the African Court. The African Court on Human and Peoples' Rights was originally designed to be one of the two separate courts for Africa. The African Union however, determined in June 2004 that African Court on Human and Peoples' Rights should be merged with the African Court of Justice, which Charter was not yet in force. The Protocol on the Court of Justice has not been ratified. However, African Union has proceeded to establish the African Court on Human and Peoples' Rights and to elect the judges.

The African System for the protection of human rights is greatly strengthened by the adoption of the Protocol to the African Charter on Human and People's Rights on the establishment of the African Court on Human and Peoples' Rights. Although the Protocol does not cover all procedural issues, the Rules of Procedure of the court is expected to make up the lee-way. The skill and clear-sightedness with which the Rules of Procedure of the Court is drawn up will largely determine the effectiveness of the court. Besides, much is expected from the judges who bear great responsibility and burden of setting the African human rights court in motion. The determination and commitment expected to be displayed by the eminent judges will influence the credibility of the court.

The coming into existence of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was a catalyst for effective functioning of the African Court on Human and Peoples Rights. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) draws its

³⁹ Pityana, N.B. "Reflections on the African Court on Human and Peoples' Rights", p. 4: also available at <http://www.africa.union.org>. Last accessed on January 19, 2017.

⁴⁰N.B. Pityana, *op. cit.*, p. 5.

⁴¹The Protocol on the African Court, article 3.

mandate from articles 32–46 of the African Charter on the Rights and Welfare of the Child (ACRWC), which was adopted by the OAU Heads of State and Government on 11 July 1990 and came into force on 29 November 1999. The Charter provides for an 11-member committee of experts. The Committee is supported by a secretariat.

The Committee's functions, as set out in article 42 of the Charter, include to:

- i. Promote and protect the rights enshrined in the Charter, particularly;
- ii. collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of children, organise meetings, encourage national and local institutions concerned with the rights and welfare of children, and where necessary give its views and make recommendations to governments;
- iii. formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;
- iv. cooperate with other African, international and regional institutions and organisations concerned with the promotion and protection of the rights and welfare of children;
- v. Monitor the implementation and ensure protection of the rights enshrined in the Charter;
- vi. Interpret the provisions of the Charter at the request of a State Party, an AU institution or any other person or institution recognised by the AU; and
- vii. Perform other tasks as entrusted by the Assembly.

The state parties to the Protocol on the African Court undertake to comply with the judgment in any case where they are parties within the time stipulated by the court to guarantee its execution.⁴² Thus, the success of the African Court is, above all, predicated on the political will of state parties. The favourable disposition of state parties towards adhering to the protocol will give the court the operational progress it deserves.⁴³ Now that the African Court is constituted, it falls on state parties to endow the court with apparatus and means, necessary and expedient for it to assume a truly functional court on human and peoples' rights.⁴⁴ In light of the recent withdrawal of Burundi (11th October 2016), The Gambia (25th October 2016) and South Africa (21st October 2016) from the Rome Statute, the Coalition for an Effective African Court on Human and Peoples' Rights (the Coalition) recognizes the pertinent need for African states to secure access to justice for its citizens and to strengthen the various African human rights mechanisms in order to guarantee victims' rights and access to justice. To this effect, the Coalition urges African States to ratify existing AU human rights instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (the Protocol), to guarantee redress for victims of human rights violations on the African continent. Till date, out of 54 AU member states, only 30 have ratified the Protocol.⁴⁵ However, ratification of the Protocol doesn't suffice as the Protocol and Rules of the African Court on Human and Peoples' Rights (AfCHPR) further provide that direct access to the AfCHPR by individuals and NGOs with observer status before the African Commission on Human and Peoples' Rights (ACHPR), will be granted to citizens of member states that have made the declaration under Article 34 (6) of the same Protocol, accepting the AfCHPR's jurisdiction. Till date, only 8 states have made this declaration and they include Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Rwanda and Tanzania. However in February 2016, Rwanda withdrew its acceptance of the Court's jurisdiction over individual and group complaints.

Given the limited number of states that have ratified the Protocol and made the Declaration accepting the AfCHPR's jurisdiction, individuals and NGOs with observer status before the ACHPR access to the AfCHPR is equally very limited, with the AfCHPR throwing out many applications. This prevents citizens of these states from getting access to justice and seeking reparation under the law. The Coalition

⁴² The Protocol on the African Court, article 30.

⁴³ J.J. Gautier, *op. cit.*; also available at <http://www.aht.ch>, last accessed on January 19, 2017.

⁴⁴ *Ibid.*

⁴⁵ The states include Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

would also to remind member states of the African Union of their commitment to ‘promote and protect human and people’s rights’ in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments as per Article 3(h) of the Constitutive Act of the AU. The Coalition further reminds African leaders of their slogan ‘African solutions to African problems’ and that African human rights mechanism, such as the AfCHPR, have been established to address human rights issues in the Continent. Therefore, taking into account that 2016 is the African Year of Human Rights as declared by AU Summit in January of 2014, the Coalition urges AU member states to support the work of the AfCHPR by ratifying the Protocol and making the Article 34(6) declaration accepting the Court’s jurisdiction.⁴⁶

8. Conclusion and Recommendations

The ostensible limitation of the jurisdiction of the African Court on Human and Peoples’ Rights as a means of curbing undue violation of the sovereignty of member states, has earlier been noted. It is trite principle of international law that states’ international obligation does not occasion derogation from the domestic laws. A state will however only incur treaty obligations by itself, and seek to bring its domestic laws in conformity with such international treaty obligation. Nonetheless, it is not the duty of the African Court on Human and Peoples’ Rights to substitute its own opinion for that of any domestic courts, as the African Court is not a court of appeal from the national or domestic courts. Granted that African States are parties to the African Charter on Human and Peoples’ Rights, hence, the Constitutive Act of the African Union, the decisions of the African Court are directed at the States. However, such decisions of the African Court are not binding on the States as to annul the contrary position at the domestic system. The decisions of the African Court can at best play a powerful authoritative and persuasive role in domestic jurisprudence. The States, not the African Union, take primary responsibility for the execution of the judgments of the African Court. Upon the default of the state in this regard, the African Union takes recourse to other persuasive and coercive means. The Court identifies the specific cases in which a state has refused to comply with judgments of the Court, and submits its reports to the Assembly of Heads of States and Government under the aegis of the African Union.

It is therefore recommended that the Protocol to the African Charter on Human and People’s Rights and the Constitutive Act of the African Union should be amended to incorporate the principle of extra-territorial jurisdiction to facilitate the enforcement of human and people’s rights across the continent without let or hindrance. Accordingly, section 34(6) of the Protocol on the African Court of Human and People’s Rights should be amended to relax the condition that a State Party against whom the complaint of human rights violation is brought must have declared its commitment to the protocol to allow the invocation of the individual recourse system. The prevailing challenges imposing against the success of the African Court on Human and Peoples’ Rights cannot be over-emphasized. Therefore, the support of the non-governmental organizations, civil societies and the entire international community cannot be undermined. This supportive prop from these bodies is most essential in ensuring that the African Court records efficient and effective performance in the discharge of its all-important mandate. It is further recommended that all African States should ratify existing human rights instruments under the auspices of the African Union such as the Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights to guarantee redress for victims of human rights violations on the African continent. Accordingly, this will promote and strengthen African human rights mechanisms, by guaranteeing citizens of African Union member states protection and redress under these mechanisms.

⁴⁶ Available at: <http://www.africancourtcoalition.org/>, last accessed on February 20, 2017.