



The
African Regional
Human Rights
System

Getahun Atey Kassa

February 2015



The African Regional Human Rights System

Getahun Atey Kassa

February 2015

Getahun Atey Kassa

Getahun Atey Kassa has extensive experience in research and practice in the field of law, governance and human rights. He teaches at the Center for Human Rights, Addis Ababa University School of Law and Governance, Ethiopia. He was dean of the Faculty of Law, Mekelle University, Ethiopia, and Member of the National Legal Education Reform Committee. He has also served as executive director, Ethiopian Human Rights Commission. Getahun has undertaken research and published articles in the areas of Constitutional Law, Prisoners' Rights, Human Rights during Law Enforcement, Land Rights, Development Induced Displacement and Human Rights, Rule of Law, Women's Rights, National Human Rights System and Traditional Dispute Resolution Mechanisms. He has provided training for judges, prosecutors, prison and police officials, parliamentarians and representatives of civil society.

The African Regional Human Rights System

First Published: February 2015

© PWESCR. All rights reserved.

Published by:

PWESCR (Programme on Women's Economic, Social and Cultural Rights)

D-14, First Floor, Kalkaji, New Delhi-110019, India

Tel: +91-11-41086092-93 • Fax: +91-11-41086096

E-mail: pwescr@pwescr.org • Website: www.pwescr.org

Designed by: Vinay Aditya, Y S Rawat

Printed by: Systems Vision, New Delhi.

Contents

Acknowledgements	v
Foreword	vi
Abbreviation	viii
1. Introduction	1
2. The African Regional Human Rights System	2
2.1 Background.....	2
2.2 Origin	3
2.3 Normative framework.....	4
2.4 Rights recognised in the regional human rights treaties	4
2.4.1 The AU Constitutive Act.....	4
2.4.2 The African Charter on Human and Peoples' Rights.....	5
2.4.3 Protocol to the African Charter on the Rights of Women in Africa	6
2.4.4 The African Charter on the Rights and Welfare of the Child	7
3 Monitoring and Enforcement Mechanisms	8
3.1 African Commission on Human and Peoples' Rights	8
3.1.1 Promotional visits	8
3.1.2 Resolutions and press releases	9
3.1.3 Consideration of state reports	9
3.1.4 Procedure for state reporting	9
3.1.5 Communications	10
3.1.6 Special mechanisms of the commission	10
3.2 African Court on Human and Peoples' Rights	11
3.2.1 Jurisdiction of the court.....	11
3.2.2 Admissibility criteria	11

3.3	African Committee of Experts on the Rights and Welfare of the Child	12
3.4	NGO engagement in the African Regional Human Rights System.....	12
4	Developments and Challenges in and to the Protection	13
	of Human Rights in Africa	
4.1	Positive developments	13
4.1.1	Standard setting	13
4.1.2	Establishment of National Human Rights Institutions	13
4.1.3	Political participation	14
4.1.4	Ratification of human rights treaties	14
4.2	Challenges	14
4.2.1	Claw back clauses of the Charter.....	14
4.2.2	Weak enforcement mechanism	15
4.2.3	Member states' poor reporting record	15
4.2.4	States' non-acceptance of mandate of the African Court on.....	15
	Human and Peoples' Rights	
4.2.5	Big continent, different legal traditions and diverse pattern.....	16
	of ratification of human rights treaties	
4.2.6	Weak tradition of adjudicating human rights in domestic courts	16
4.2.7	Unconstitutional change of government	16

Acknowledgements

We would like to thank Getahun Atey Kassa for developing this publication on African Regional Human Rights System. We thank our colleagues Meklit T. Hessebon and Dawit Kahsay from the Office of the United Nations High Commissioner for Human Rights (OHCHR), Regional Office for East Africa - Addis Ababa for providing insight and expertise that greatly assisted in this publication. We duly acknowledge Ibrahima Kane, African Union Advocacy Director of Open Society Initiative for East Africa for comments that greatly improved this publication.

We are grateful to KIOS Foundation for providing financial support in this endeavour. Diligent efforts by Kripa Basnyat and Kriti Tuteja from PWESCR in the various stages of the publication made it a reality. We are thankful for Vinay Aditya from Systems Vision for designing and printing.

Foreword

PWESCR, an international human rights organisation based in the Global South, is committed to promoting women's human rights, especially in the context of economic, social and cultural rights (ESCR). We work to build capacity in human rights and economic justice to promote women's ESCR, foster collaborations to enhance learning, knowledge and skills and advocate problem solving alternatives in the context of gender. PWESCR in collaboration with several organisations in Africa continues to work to build capacity of African human rights defenders, especially women defenders, to effectively use national, regional and international human rights mechanisms.

Unfortunately, human rights in the South, in general, continue to be seen as a Western tool used by North countries to hold South governments accountable. Rooted in global politics, South government sees this as a way for North to exercise its dominance. Through our engagement in Africa we learnt that, like several countries in the world, the situation for human rights defenders has become very difficult and dangerous. Governments specially have developed oppressive laws, such as in Ethiopia, which restricts human rights work, especially activities that focus on using international mechanisms. In several of PWESCR's African workshops, we strategically began exploring African regional mechanisms. This publication "African Regional Human Rights System" is an outcome of our engagement with regional mechanisms.

The publication includes the background and origins of the regional human rights mechanisms. It elaborates the normative framework and rights recognised in the regional human rights treaties in the Africa. It also focuses on how to use these monitoring and enforcement mechanisms and some of the challenges faced in doing so. This is a learning tool for human rights

defenders, especially trainers interested in conducting training on African regional mechanisms. With a focus also on civil society engagement in the African regional human rights system, the publication provides useful insights at a practical level.

Inspired also by the expertise and knowledge of Ibrahima Kane, African Union Advocacy Director of Open Society Initiative for East Africa, the idea for this publication got conceived. PWESCR invited Getahun Atey Kassa, a renowned human rights lawyer from Ethiopia to develop this. Getahun, of course, is a human rights scholar with an academic interest in African mechanisms. He also is PWESCR's Leadership Institute in Women's ESCR alumni. He continues to be PWESCR's faculty for all its African regional workshops. Over the years, both PWESCR and I personally have gained immensely working from Getahun.

PWESCR is happy to present this publication and hope it will be useful in your work and help enhance your knowledge on African regional human rights mechanisms.

Priti Darooka
Executive Director
PWESCR

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ECOWAS	Economic Community of West African States
NHRIs	National Human Rights Institutions
NGO	Non-governmental Organisation
OAU	Organisation of African Unity
SADC	Southern Africa Development Community
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child



1

Introduction

Human rights are defined as entitlements all human beings assert merely because they are born human. They are claims invoked to enjoy decent living rooted in the dignity of human person, and asserted as 'natural' rights. Universality, inherence in human dignity, indivisibility, non-discrimination and equality are attributed as features of human rights. The law and practice of human rights are the result of continued human interaction and struggle for liberty, equality, and freedom. Although human rights are viewed as entitlements emanating from dignity and worth of human person, part of human history represents violation of fundamental rights and freedoms. The practice of slavery and slave trade; labour exploitation and unsafe working conditions; inequality between men and women; unequal treatment of human beings of different ethnic, social or economic background; disenfranchisement of groups in the exercise of right to vote and be elected; mass exterminations; and inequality with regard to right to property are a few examples of such violations. Human

beings have waged struggles to claim equality, freedom and protection against violations and discriminatory treatments. Human rights norms and standards that we invoke today are the result of continued struggles and series of negotiations across political regimes. Especially the post World War I and II negotiations and developments have marked significant step in the setting up of international, regional as well as national human rights norms and institutions.

As a result of such historical antecedents and developments, the law and practice of human rights have grown around the idea that human rights are not limited in application to any community, race, creed, system or civilization. Accordingly, a law, an executive action/inaction, or exercise of individual/group rights that breach/violate rights of others remain invalid. State has the responsibility and duty to protect and respect human rights. It in general has the obligation to ensure that the entire process of exercise of state power and law enforcement is carried out with due respect to human dignity.



2

The African Regional Human Rights System

2.1 Background

As part of developments in the international human rights movement, Africa has its own regional system for promotion and protection of human rights. Following the end of the Second World War, the international community has been working towards developing an international system for the promotion and protection of human rights that is binding on member states. With a view to attaining such goal, the international human rights system has developed human rights norms that apply across regimes and transcend geographical confines. Although the international human rights system is binding at the regional and national level, it is still difficult to adequately guarantee protection of human rights only through an international system. Credible and effective regional as well as national system is needed for the promises of human rights to become a reality. That is among the reasons why Africa has developed regional system for promotion and protection of human rights. The African Charter on Human and Peoples' Rights (ACHPR) was adopted to lay the normative frame for African Human Rights System. The Charter (unlike the UN system which developed two

separate treaties for civil and political rights and economic, social and cultural rights) has made an explicit declaration that civil and political rights cannot be dissociated from economic, social and cultural rights.

The African regional human rights system attempts to reconcile the universal human rights standards and African values. It reflects a blend of international human rights standards and recognition to African cultural values. Moussa Samba noted that "The African regional human rights system is both universal and distinctively African in its scope and principles". With the adoption of the ACHPR, the African regional system has been evolving for more than three decades. After independence, African states, among others, have been engaged in creating a regional human rights system that commenced with the adoption of the Charter. A further step by African states resulted in the adoption of the Protocol on the establishment of the African Court on Human and Peoples' Rights in 1998 that entered into force in 2004. These measures have laid the institutional architecture for implementation of international and regional human rights standards in Africa. As a result, the African Commission on Human and Peoples'

Rights and the African Court on Human and Peoples' Rights came into existence.

Recognition and incorporation of international human rights standards in regional and national framework is a step towards building a culture of human rights. However, such commitments will have meaning only when effective mechanism for protection and enforcement is in place. Governments often find it easier to make declaration of commitment for human rights protection and incorporate human rights standards in national documents such as the constitution. We can easily observe that human rights standards have gained wider acceptance in Africa and elsewhere. However, observance and respect to these standards never match the promise.

The global/regional realities in regard to protection of human rights demonstrate that states often fall short of their human rights obligations. Such mismatch between promise and practice can be addressed through contributions from international, regional and national systems for protection of human rights. The key challenge therefore is ineffectiveness/inability of such institutional mechanisms. This remains a key problem in Africa too. As is the case elsewhere, protection of human rights in Africa is not advancing in the same pace with the standard setting.

A system for promotion and protection of human rights has three features, i.e., normative standards, institutions for monitoring and enforcement and institutional practice. After the Second World War the United Nations has emerged as a leading organ in the universal human rights movement. Parallel to the UN, regional systems have emerged in different parts of the world (Europe, America and Africa) and contributed to the universal human rights discourse. It is believed that the regional systems were created to address gaps and inadequacies

that were existent in the international system. Alleged normative disconnect between the universal standards and the reality at the regional level was often viewed as a reason that necessitated creation of regional systems. It is argued that an international system could sometimes be too far and has to leave some space for regional peculiarities. It seems that these were the considerations that led to the creation of an African regional system for promotion and protection of human rights.

2.2 Origin

The initiative to establish African regional human rights system was first raised after several African countries have declared their independence from colonial subjugation. Several factors have led African leaders to discuss this initiative. The international discourse which was prevalent after World War II is believed to be one factor that motivated them. The desire to gain legitimacy as a right-respecting regime was another factor that contributed to bringing into being of the African system. The ACHPR while referring to UDHR (as an expression of its being part of the universal human rights movement) has indicated that it also considered African cultural values. Owing to this development, the African regional human rights system has in some ways departed from the international human rights tradition. It, among others, came up with the distinction between human and peoples' rights as a unique aspect of the African regional system.

The ACHPR and the Protocol on the Establishment of African Court on Human and Peoples' Rights, have laid the normative framework and institutional set up for promotion and protection of human rights in the continent. Adoption of these regional human rights treaties brought the African Commission on Human and

Peoples' Rights and African Court on Human and Peoples' Rights into being. The Charter has envisaged the African Commission on Human and Peoples' Rights as a primary organ for monitoring compliance. Promotion and protection of human rights through works of the Commission is foreseen as a mechanism for enforcement of the Charter. Mandate of the commission comprise four main functions, i.e., human rights promotion works, examining state reports, investigating alleged human rights violations, and interpretation of the Charter. State reporting and complaint procedure are therefore used as two principal mechanisms to monitor African states' compliance to the Charter.

In addition to such regional standard setting and institution building measures, sub-regional standards and institutions (such as ECOWAS Court of Justice, the Court of Justice of the Economic and Monetary Union of West Africa, The SADC Tribunal, East African Court of Justice, etc.) have also emerged as part of the African regional system.

2.3 Normative framework

The African regional human rights system has been developed through adoption of regional human rights treaties under the auspices of the Organisation of African Unity (OAU) and African Union (AU). Key documents of the African regional human rights system include the African Charter on Human and Peoples' Rights (African Charter); Constitutive Act of the African Union; The Protocol to the Africa Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; The Protocol on the Rights of Women in Africa; and The African Charter on the Rights and Welfare of the Child.

2.4 Rights recognised in the regional human rights treaties

The African regional human rights treaties listed above have recognised an array of rights that are also recognised by international human rights treaties. In some ways, normative standards of the African regional system for human rights go further than the international standards. The regional human rights treaties were adopted with the view to develop more comprehensive document on some thematic human rights issues (such as the African Protocol on the Rights of Women).

2.4.1 The AU Constitutive Act

The AU was established in 2002 replacing its predecessor the Organisation of African Unity (OAU). The AU Constitutive Act, in regard to promotion of human rights, is seen as representing a significant departure from the 1963 OAU Charter. It has made clear stipulation that promotion and protection of human rights will be one of the objectives of the union. Article 3 of the Constitutive Act provides that objectives of the union are as follows:

- a) Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights
- b) Promote democratic principles and institutions, popular participation and good governance
- c) Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

The Constitutive Act, among others, also provides that the Union shall function in accordance with principles of promotion of gender equality; respect for democratic principles, human rights, the rule of law and good governance; respect for sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; and condemnation and rejection of unconstitutional changes of government.

2.4.2 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (which is sometimes referred to as the Banjul Charter) is a regional human rights treaty issued for promotion and protection of human rights in the African continent. It was adopted in 1981 and entered into force in 1986. The Charter is ratified by all member states to the OAU/AU except South Sudan.

Summary of Human Rights Incorporated in the ACHPR

Category of rights	Provisions of the charter	Rights recognised
Civil and political rights	Article 2, 3, 4, 5, 6, 7, 8, 9, 10	<ul style="list-style-type: none"> • Equal entitlement to the rights and freedoms recognized and guaranteed in the charter • Prohibition of discrimination • Equality before the law and equal protection of the law • The right to life and bodily integrity • Prohibition of arbitrary deprivation of the right to life and bodily integrity • The right to respect of inherent dignity of human person • Right to liberty and security of person • Right to fair trial • Freedom of conscience, the profession and free practice of religion • Freedom of expression • Freedom of association and assembly • The right of everyone to participate in the government of one's country • The right to property
Socio-economic rights	Articles 15, 16, 17	<ul style="list-style-type: none"> • The right to work under equitable and satisfactory condition and to receive equal pay for equal work • The right to enjoy the best attainable state of physical and mental health • The right to education • The right to special measures of protection of the aged and disabled
Women's rights	Article 18 (3)	<ul style="list-style-type: none"> • State obligation to ensure protection of rights of women and elimination of discrimination against women
Peoples' rights	Articles 19, 20, 21, 22, 23, 24	<ul style="list-style-type: none"> • All peoples shall have equal rights and enjoy the same respect • Prohibition of domination of a people by another • All people have an inalienable and unquestionable right to self-determination • All people have the right to freely dispose their wealth and natural resources • All people have the right to economic, social and cultural development and to peace and security
Duties ¹	Articles 27, 28	<ul style="list-style-type: none"> • Every individual has duties towards family and society, the state and other legally recognized communities and the international community • Every individual have the duty to serve his national community; to preserve and positive African cultural values; and to preserve and strengthen national independence and territorial integrity

¹Unlike many international human rights treaties which provide only list of rights recognised, the ACHPR lists rights as well as duties.

2.4.3 Protocol to the Charter on the Rights of Women in Africa

The Protocol on the Rights of Women in Africa was adopted by the AU Assembly in 2003 and entered into force on November 2005. It has been ratified by 36 AU member states. It complements the ACHPR and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); guarantees comprehensive rights to women in Africa; and acknowledge cultural specificity of Africa and the special needs of African women. The way ACHPR deals with gender issues was criticised for it puts women and children rights in one provision, i.e., article 18 (3). As this article of the Charter mainly deals with general family issues its approach to women's rights was seen as deficient. One scholar described this as follows: The lumping together of women and children, in an article that deals primarily with the family reinforces outdated stereotypes about proper place and role of women in society. One reason for considering the protocol as a more progressive document is that it provides clearer definition on discrimination and violence against women.

Discrimination against women means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

Violence against women means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

Countries that ratify the Protocol have now agreed to eliminate all forms of discrimination against women, to end all forms of violence against women, to abolish cultural practices that harm women including child marriage and genital mutilation and to protect women reproductive health rights. The Protocol constitutes a significant advance in the promotion of women's rights to equality. It places on states an obligation to ensure equal participation of women at all levels of decision making, provide affirmative action, encourage monogamy, adopt domestic legislation against violence against women, criminalise rape in marriage, and to enact and enforce laws that prohibit and punish domestic violence. The array of rights provided in the protocol is extensive which includes rights of women to food security, housing, and inheritance and protection of women in times of armed conflict. Furthermore, the protocol singled out groups such as elderly women, and disabled women for additional protection.

The Protocol in general serves as a legally binding supplement to the ACHPR, provides more specificity in regard to promotion and protection of rights of women in Africa, serves as a clear yardstick for assessing government action in regards to protection of the rights of women, and as a lobbying tool. Compared to ACHPR the protocol represents a significant departure in the protection of women's rights. The African Commission and the African Court on Human and Peoples' Rights are responsible for monitoring its implementation. Although the Protocol was part of wider efforts for women equality in Africa, women in the continent still continue to face discrimination and violation. Despite ratification of the Protocol by large number of AU member states, Africa is yet to come to grip with ensuring women's right to equality.

2.4.4 The African Charter on the Rights and Welfare of the Child

The ACRWC was adopted in 1990 and entered in to force in November 1999. Its content has a lot of similarity with the UN Convention on the Rights of the Child (UNCRC). The charter, though it has similarities with the UNCRC, also goes further, for example in making clear prohibition on child marriage. The ACRWC, as provided under articles 3, 4 and 5 is founded on principles of non-discrimination, best interest of the child, and protection of survival and development of the child. It prohibits child marriage, provides for protection of children from labor exploitation and child abuse. It also addresses issues such as special protection measures in the administration juvenile justice; protection of children against harmful social and cultural practices; protection against sexual exploitation; and protection of children from drug abuse.

The ACRWC established African Committee of Experts on the Rights and Welfare of the Child with the mandate to promote and protect rights of the child stipulated in the Charter. The committee has the competence to receive state reports on implementation of the charter; monitor implementation of rights enshrined in the charter; interpret provisions of the charter; collect and document information; commission inter-disciplinary assessment of situations in the protection rights and welfare of the child in Africa; and receive communications from individuals, NGOs, state parties to the Charter; and the United Nations. In the exercise of its mandate, the committee examined the case of Nubian descent children in Kenya concerning Kenya's failure to register and provide nationality to children of Nubian descent. The Committee in this case found Kenya in violation of the ACRWC.



3

Monitoring and Enforcement Mechanisms

The ACHPR and the subsequently adopted regional human rights treaties have provided rights and duties and established organs and procedures for protection and monitoring compliance. The African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and African Committee of Experts on the Right and Welfare of the Child are bodies established to ensure promotion and protection of human and peoples' rights. These bodies in the exercise of their mandate, besides using treaties of the African Human Rights System, have the authority to make use of any other treaty adopted within the UN human rights system or by other regional human rights systems, such as the European and the Inter-American systems.

3.1 African Commission on Human and Peoples' Rights

The ACHPR established the African Commission for Human and Peoples' Rights. The Commission was inaugurated in 1987 and its secretariat is now based in Banjul, Gambia. It is composed of 11 members elected by the AU assembly. Members of the Commission are elected for a six-year term

and the election process considers equitable geographical and gender representation. Members are eligible for re-election. The Commission elects its Chairperson and Vice-chairperson for a two-year term with a onetime chance for re-election. Activities of the commission are regulated by its rules of procedure (Rules of Procedure of the African Commission on Human and Peoples' Rights).

As it is set out in the ACHPR the commission is mandated to perform three main functions. That includes activities and measure for promotion and protection of human and peoples' rights; investigating human rights violations; considering member states treaty report; and interpreting provisions of the charter upon request by a state party, organs of the AU or individuals. The commission discharges these functions in a variety of ways discussed below.

3.1.1 Promotional visits

Commissioners of the African Commission on Human and Peoples' Rights perform a variety of functions. One of the functions is visiting member states. In their visits they encourage member states for universal ratification of human rights

treaties and timely submission of state reports. They use such visits to make recommendations for necessary changes and improvement in the law and practice of the country visited. Such visits are also used to gain picture of the situation of human rights in the country visited and indicate issues of concern in their report.

3.1.2 Resolutions and press releases

The Commission in a number of instances issued resolutions and press releases condemning human rights violations committed by various groups, expressing concern on the situation of human rights, and stating what ought to be done to rectify the problem. As an example of exercise of this mandate, the commission has recently issued resolutions 264, 265, 266, and 267 on the situation of human rights in the Federal Republic of Somalia, Republic of South Sudan, Central African Republic, and Federal Republic of Nigeria. By these resolutions the commission condemned human rights violations committed in the countries and called upon government authorities, parties to the conflicts, and regional authorities for cessation of ongoing violations, and requested member states to investigate violations committed and hold perpetrators accountable. Resolutions are also important in the development of soft law by the Commission related to the development of guidelines and general principles, general comments, etc.

3.1.3 Consideration of state reports

State reporting is one mechanism of assessing states' compliance to their obligation under the ACHPR. In this process, states are required to submit periodic report on legislative and other measures taken to give effect to provisions of the ACHPR and other regional human rights treaties such as the African Protocol on the Rights of

Women. Article 62 of the ACHPR provides that *each state party shall undertake to submit report every two years, from the date the present charter comes into effect, 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.*

State reporting process offers an opportunity for the state party and the commission to review developments and challenges in the implementation of human rights obligations of the state. The process serves the commission as a mechanism for monitoring and identifying challenges impeding implementation of the charter. Equally the process enables states to assess their achievements and failure in complying with their obligation to respect and enforce human rights. State report on the ACHPR must be submitted every two years and shall provide information regarding measures taken to give effect to the provisions of the charter, progress made so far, and challenges affecting implementation of the charter.

3.1.4 Procedure for state reporting

Submission to and consideration by the commission of state reports pass through the following stages:

- a) Submission of report to the secretariat of the African Commission on Human and Peoples' Rights
- b) Secretariat upload the report on the Commission's website, indicating when the report will be considered
- c) Circulation of copies of reports to commissioners and relevant NGOs
- d) Interested stakeholders wishing to contribute to the examination of the report submit their contributions including shadow reports to the

commission's secretary at least 60 days prior to the date fixed for examination of the report

- e) The secretary may invite specific institutions to submit information relating to the report
- f) Preparation of questions by the secretariat based on the report
- g) Communication of questions to all commissioners
- h) Communication of questions to the reporting state (accompanying by a letter requesting the attendance of state's representatives)
- i) Examination of state report in open session as scheduled
- j) Presentation of report by state representative
- k) Questioning by commissioners
- l) Answers to questions by state delegation (sometimes supplemented by written responses)
- m) Summation and conclusion by chairperson of the commission
- n) Adoption and dissemination of concluding observations.

3.1.5 Communications

Individual and interstate communication is one mechanism used by the Commission to monitor member states compliance to the ACHPR. In accordance to articles 48, 49 and 55 of the ACHPR and its rule of procedure, the commission is mandated to receive such communications. An individual communication may be brought before the commission by an individual person or an NGO. Rule of procedure of the commission does not provide for a victim requirement, and the NGO does not have to have an observer status with the commission. And the individual NGO need not be registered in the state against which the communication is made.

Article 56 of the charter provides that a communication shall be considered if it fulfils the following requirements:

- a) Must indicate the author(s)
- b) Must be compatible with the AU Constitutive Act and the ACHPR
- c) Must not be written in disparaging language
- d) Must not be based exclusively on media reports
- e) Must be submitted in a reasonable time after exhaustion of local remedies
- f) Domestic remedies must have been exhausted unless the domestic procedure is unduly prolonged
- g) The issues raised in the communication must not have been settled under other UN or AU Procedures.

3.1.6 Special mechanisms of the commission

The commission, based on the mandate granted by the ACHPR, has created subsidiary mechanisms such as special rapporteurs and working groups. It has established 15 special rapporteurs and working groups through this process. Some of them are the following:

- a) Special rapporteurs on prisons and conditions of detention; refugees, asylum seekers, and internally displaced persons; freedom of expression and access to information in Africa; and human rights defenders
- b) Working groups on indigenous communities/ population in Africa; economic, social and cultural rights in Africa.

The commission determines the mandate and terms of reference of each subsidiary body. Each mechanism shall present to the commission a report on its performance. The special procedures

undertake research and studies on problems in the protection of human rights in the continent. Their works comes up with recommendations that serve as a way for improving promotion of respect for human rights in Africa.

3.2 African Court on Human and Peoples' Rights

The Court was established to strengthen the regional human rights protection system which often was viewed as weak and ineffective. Before establishment of the court, the commission was the only organ responsible for monitoring compliance, but with only a recommendatory mandate. Unlike the European and Inter-American systems for human rights, the ACHPR does not make a provision for an African Human Rights Court. It only envisaged establishment of the African Commission on Human and Peoples' Rights, a quasi-judicial body which cannot make binding decision. Later, an African Court on Human Rights was created to complement the work of the commission and fill gaps created from the non-binding nature of the commission's resolutions. It was established through a protocol to the ACHPR entered into force in 2004. Unlike the commission, the court is authorised to pass binding decisions. One problem, however, is that the court's competence to accept individual complaint is subject to declaration of the state concerned. The court will be able to exercise the mandate to receive individual complaint only when the concerned state allow individuals to take their case to the court.

3.2.1 Jurisdiction of the court

Articles 3 and 7 of the protocol on the African Court on Human and Peoples' Rights give the court broad jurisdiction. The court accordingly

is vested with the mandate to entertain cases and disputes concerning the application and interpretation of the ACHPR and other human rights treaties ratified by the state concerned; to give advisory opinion (to requests by the AU, member states to the AU and organs of the AU) on legal matters relating to the ACHPR and any other relevant human rights instruments; and to settle a case pending before it on amicable terms. The protocol on the establishment of the court identified the following entities as competent to submit a case to the court:

- a) The commission
- b) The state party which has lodged a complaint to the commission
- c) The state party against which the complaint has been lodged at the commission
- d) The state party whose citizen is a victim of human rights violation
- e) African intergovernmental organisation.

The protocol also provides that individuals and NGOs with observer status before the African Commission on Human and Peoples' Rights are entitled to submit a case before the court. However, this is an optional access on the condition that the state party against whom the complaint is being made must declare its acceptance of the competence of the court to receive cases of individual complaint.

3.2.2 Admissibility criteria

A case brought before the court shall be admitted when it fulfils admissibility requirements established by article 56 of the ACHPR. In determining admissibility of a case, the court may request opinion of the commission.

3.3 African Committee of Experts on the Rights and Welfare of the Child

The ACRWC provides for the establishment of a committee of experts (which is known as African Committee of Experts on the Rights and Welfare of the Child) that monitor compliance. The committee is mandated to promote and protect rights of children enshrined in the charter; interpret provisions of the charter; monitor member states compliance to their treaty obligation; receive and consider complaints (from individual, group of persons or NGOs) of violations of rights provided in the charter; collect and document information on African problems in the rights and welfare of the child; and undertake investigations necessary for monitoring situation of rights of children.

3.4 NGO engagement in the African Regional Human Rights System

The regional human rights system in Africa requires the regional human rights monitoring organs to cooperate with African and international institutions for promotion and protection of human and peoples' rights. Articles 45 (1) of the ACHPR and XLII (iii) of the ACRWC are good examples of this. Owing to this the African Commission on Human and Peoples' Rights has been granting observer status to NGOs. To date there are 477 NGOs with consultative status at

the African Commission on Human and Peoples' Rights and play multifaceted roles that contribute to the promotion and protection of human rights in Africa. NGOs are granted observer status based on criteria listed below:

- a) Objectives of the NGO must be in consonance with the principles of the Constitutive Act of the AU and the African Charter
- b) The NGO must be working in the field of human rights
- c) Submit written application accompanied by proof of legal existence, list of members, constituent organs and source of funding
- d) Submit declaration of financial resource
- e) Submit last financial statement
- f) Submit statement of activities.

NGOs that are granted observer status play a role primarily through the following activities:

- a) Engage in human rights awareness raising activities
- b) Draw attention of the Commission and other responsible bodies to human rights violations
- c) Submit communications on behalf of individuals or group of persons
- d) Participate in the reporting procedures through submitting shadow/parallel report and disseminating concluding observation.



4

Developments and Challenges in and to the Protection of Human Rights in Africa

While the regional human rights system in Africa has enlisted a number of achievements for a better future in the protection of human rights, the system and practice in Africa still witness problems that are challenges to building a culture of respect for human rights in the continent. Owing to this the regional human rights situation in Africa represents a mix of positive developments and challenges.

4.1 Positive developments

4.1.1 Standard setting

The OAU/AU has adopted a number of regional human rights treaties most of which are ratified by large number of member states. Standards set in these treaties require member states to take legislative, administrative, and institutional measures for promotion and protection of human rights. Based on these treaty obligations, a number of African states, have enacted laws aimed at giving effect to obligations that emanate from these regional normative frameworks; amend or repeal domestic laws incompatible to the standards; and laid institutional mechanisms for implementation. In addition to such measures, establishment of sub-regional standards and

institutions (such as ECOWAS Court of Justice, the Court of Justice of the Economic and Monetary Union of West Africa, The SADC Tribunal, East African Court of Justice, etc.) have been part of the human rights discourse in Africa.

4.1.2 Establishment of National Human Rights Institutions

The National Human Rights Institutions (NHRIs) are bodies established by national constitution or legislation to contribute to the promotion and protection of human rights at national level. NHRIs execute their mandate through human rights education, complaint handling, research, and advocacy. Provided they are independent and effective, they can contribute to the development of strong national mechanism for protection of human rights. To use the words of Professor Murray the “common reason” for establishment of NHRIs is that “they can provide another ways of ensuring states to comply with their international obligations”. NHRIs have now flourished across Africa as an expression of national commitment to respect and protect human rights and as one way of giving effect to international human rights standards at the national level.

The initiative taken by African states in establishing such institutions has demonstrably been growing. A look into records of the Network of African National Human Rights Institutions confirm this assertion and provide evidence of the growing interest of African states to the development of national system for protection of human rights. Irrespective of differences in terms of independence and effectiveness creation of these institutions is a contribution to the strengthening of national system for protection of human rights. Although these institutions have the potential to positively contribute in the protection of human rights, some of them face challenge in maintaining their independence and credibility.

4.1.3 Political participation

The 30th activity report of the African Commission on Human and Peoples' Rights acknowledged improvements in Africa in the recognition and protection of the right to political participation. Electoral practices and exercise of the right to political participation in Africa often ended contentious sometimes leading to bloody conflicts and massive human rights violations. Yet some positive developments are coming out of such exercise in the governance practice in the continent.

4.1.4 Ratification of human rights treaties

The number of African countries that subscribe to regional and international human rights treaties is constantly on the rise. African states appeared forward looking in incorporating international human rights standards in national constitutions and legislations, and adoption of the ACHPR all of which put a limit on their power. Africa at the time of adoption of the ACHPR was a continent of dictatorial regimes of diverse political persuasion.

At the time Africans started to talk about regional system for human rights, there were only a few democracies such as Mauritius, Senegal and Botswana. However, that hasn't yet prevented the coming into existence of the ACHPR which laid the foundation for the regional system of human rights. Further to that a number of regional and international human rights treaties were ratified and given domestic effect in a number of African countries. Some members also adopted laws that protect vulnerable members of the society.

Such facts imply positive developments in regard to promotion and protection of human rights in Africa. Looking into those issues may give the message that Africa is responding to demands for protection of human rights in the continent. True as this may be one should not, however, be mistaken to take this as evidence of effective protection. Despite such positive developments, the reality in Africa still witness weaknesses of the system and its inability to effectively respond to demands for realisation of human rights. Reports and studies of international human rights groups and academic institutions reveal that African states have fallen short of international human rights standards in a number of aspects.

4.2 Challenges

4.2.1 Claw back clauses of the charter

The ACHPR and ACRWC incorporated controversial "claw back" clauses. These are stated in expressions such as "within the law," "except for reasons and conditions previously laid down by law," "in accordance with the provisions of the law," "necessary restrictions provided by law". Such clauses have an immense potential of limiting applicability of the charter and could be used to unduly limit or deprive rights.

4.2.2 Weak enforcement mechanism

The ACHPR, until the recent establishment of the African Court on Human and Peoples' Rights, was considered to be deficient for its failure to provide a binding enforcement mechanism. The lonely supervisory organ it created (the African Commission on Human and Peoples' Rights) has only recommendatory mandate which contributed to member states poor compliance to its findings and recommendations. Besides, problems related to availability of finance, understaffing of the commission's secretariat and mismatch between volume of work and duration of the commission's work sessions, have limited the commission's contribution to the protection of human rights. Despite such challenges, the human rights bodies are exerting efforts to reinforce their collaboration in order to strengthen the continental human rights system.

4.2.3 Member states' poor reporting record

Reporting has been designed to serve as mechanism of monitoring member states compliance to obligations that emanate from membership to the ACHPR and other regional human rights treaties. Article 62 of the ACHPR requires state parties to submit report on the legislative and other measures employed to ensure realisation of rights and freedoms enshrined in the charter. Objective of the reporting is to discuss the extent to which human rights enshrined in the charter are implemented or fulfilled and to identify challenges encountered. Nonetheless, the system has been less effective because African states extended little support and respect to it. Only a few African states have reported regularly and send representatives to deliberate on the report. The following statement by Evans, Ige and Murray best illustrates the problem: "There

is no doubt that the existing system is far from being effective in attaining even these minimal prescribed and desired goals. After almost fifteen years being in operation, only a small number of states have discharged their Charter obligations by submitting periodic state reports and sending their representatives to respond to the commission's questions on their reports". Facts from the commission's 30th activity report seem to reinforce this assertion. The report shows that 13 African states have never reported to the commission, and 11 states three and 8 states two reports behind their reporting obligation.

4.2.4 States' non-acceptance of mandate of the African Human Rights Court

The ACHPR was considered weak instrument because it failed to provide binding enforcement system. The African regional human rights system has later addressed this gap by adopting a protocol on the establishment of African Court on Human and Peoples' Rights with a mandate to pass binding decision. This development is not without problem either. The protocol that established the court put the matter beyond doubt that decisions of the court will be binding. Nevertheless, the court's competence to accept individual complaint is subject to consent of member states to allow the court accepts individual complaint. Given the fact that many African states have record of failing short of their human rights obligations in a number of human rights issues and the overall culture towards protection of human rights in the continent, the individual complaint system is less likely to become operational in the near future. This is further confirmed by the fact that there are only seven African countries (namely Burkina Faso, Cote d'Ivoire, Ghana, Mali, Malawi, Rwanda, and Tanzania) that declared acceptance to the individual complaint system.

4.2.5 Big continent, different legal traditions and diverse pattern of ratification of human rights treaties

The regional human rights system in Africa serves a big continent with different legal traditions and diverse ratification pattern of international and regional human rights treaties. This has made enforcement of international and regional human rights standards in Africa more complicated. Diverse nature of the traditional institutions and cultural values of African societies is challenging efforts towards building effective system for protection of human rights in the continent. Some African countries view some aspects of the regional human rights standards as contradicting their religious or cultural values and entered into reservation.

4.2.6 Weak tradition of adjudicating human rights in domestic courts

Adjudication before courts is important mechanism for protection of human rights. International or regional courts can deal with complaints that have exhausted local remedies. As local remedy mechanism, domestic courts have an important role in the protection of human rights. Provided that they are independent and guided only by law domestic courts in Africa

could play an essential role in the protection of human rights. The challenge in Africa, however, is that domestic courts often shy away from using international and regional human rights normative standards as a basis to their judgments. This practice of domestic courts in many African countries has resulted in undermining the judiciary's role in the protection of human rights.

4.2.7 Unconstitutional change of government

Africa's long history witness that dictatorial and unaccountable regimes have persistent records of violating human rights. Paradoxically such regimes in Africa often were part of the human rights movement in the continent. Commitment to human rights of such regimes only lasts as long as it serves their stay in power and public relation purposes. Political regimes in Africa have in several cases come to or stay in power through unconstitutional means, violent use of force and violation of human rights. Recent unconstitutional changes of governments in Africa offer evidence on the link between unconstitutional change of government and violation of human rights in the continent. That seems the reason why the African Commission on Human and Peoples' Rights has issued resolution condemning such unconstitutional changes of government.



D-14, First Floor, Kalkaji, New Delhi-110019, India
Ph: +91-11-41086092-93 • Fax: +91-11-41086096
pwescr@pwescr.org • www.pwescr.org