

# African charter on human and peoples rights law international essay

[Law](#)



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Essay Title: Discuss the effectiveness of the African Charter on Human and Peoples' Rights (1981)  
Introduction  
The African Charter on Human and Peoples' Rights is the Regional mechanism for protection of human rights in African continent. It was adopted under the auspices of the organization of African Unity (OAU) in 1981 and come into force in 1986. 1Before the adoption of the African Charter on human and peoples' Rights (AFCHPR)<sup>2</sup>, the African human right system was operated under the organization of African unity, where human rights were not regarded as an objective of the Organization, and there were no independent regional human rights to respect for and promotion of human rights<sup>3</sup>. Hence African people suffered for their rights. The adoption of the AFCHPR, anchored the African regional system, providing a comprehensive catalogue of binding human and peoples' rights coupled with a specialized commission to monitor, respect for human rights and combat abuse of the doctrine of state sovereignty. 4The AFCHPR in its preamble state its objectives, as to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa, and to promote international cooperation having due regard to the charter of the United Nations and the Universal Declaration of Human rights. 5However despite of the good promise of the Charter, African people still criticized its effectiveness in implementation, hence regarded as ineffective and this is due to several reasons which will be discussed below. 1 Rachel Murray (200) pg. 92  
AFCHPR (Adopted 27 June

1981, OAU Doc. CAB/ LEG/67/3 rev. 5, 21 I. L. M. 58 (1981), entered into force 21 October 1986)<sup>3</sup> George William Mugwanya (2003) pg. 1704 ibid 1705 Preamble of the African Charter of Human and Peoples Rights. This essay, is divided into three parties, first part cover introduction, second part discussion regarding to effectiveness of African Charter on human and Peoples' Rights in theory and practice, by focus on African commission on Human and People Rights, Secretariat, under regional domestic, the African human rights court and AU through its Constitutive Act. Third part will be challenge which prohibit effectiveness as well a conclusion. 2. 0 African commission on Human and Peoples' RightsThe African Charter, like other regional human rights Instruments, have tried to incorporates many of the rights guaranteed by the UN charter<sup>6</sup>, UDHR<sup>7</sup>and other global human rights Instruments and also guaranteed in domestic bill of rights, including those of Uganda and south Africa. 8 The Charter embodies the following rights and duties: i) Social and political rights, article 2-13<sup>9</sup>, ii) Economic, Social and cultural rights article 14-18 <sup>10</sup>, iii) peoples' rights article 19-24. <sup>11</sup> and also duties and obligations of individual and state under article 27-29.

<sup>12</sup>According to article 1 of the charter<sup>13</sup>, provides for the obligation of the member states of the Africa Union to recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them. Also the same view was given by the African commissions' draft Principles and Guidelines on ESCR in the<sup>6</sup> Charter of the United Nations<sup>7</sup> Universal Declarations of Human Rights<sup>8</sup> George William mugwanya (2003) pg. 1919 Article 2-13 of African Charter on Human and Peoples' Rights<sup>10</sup> Article 14-18 of African Charter on Human and

Peoples' Rights<sup>11</sup> Article 19-24 of African Charter on Human and Peoples' Rights<sup>12</sup> Article 27-29 of African Charter on Human and Peoples' Rights<sup>13</sup> Article 1 of African Charter on Human and Peoples' Rights ACHPR<sup>14</sup>, that "All rights recognized in the African Charter must be made effective under national legal system, violation of economic, social and cultural right protected under the African charter must entitle affected individuals and peoples to effective remedies and redress under domestic law"<sup>15</sup> Also, different cases has been emphasized much on that, in the Case of Serac v Nigeria Communication<sup>16</sup>, the case alleged the violations under article 2, 4, 14, 16, 18 (1) and 24 of the African Charter<sup>17</sup>, the Communication alleged that, the military government of Nigeria was guilty of amongst other things, violations of the right to health, the right to dispose of wealth and natural resources, the right to a clean environment and family rights, due to its condoning and facilitating the operation of oil cooperation in Ogoni land. The Commission held that, although the right to housing or shelter is not explicitly provided for under the African Charter, but those rights are the rights of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity. <sup>18</sup> Another case which also bring the importance of the Indigenous people is the case of Endorois v Kenya, <sup>19</sup> the Endorois people were evicted from their traditional lands and relocated to an area which is unsuitable for the promise to be compensate for their land, but later on the government fail to fulfil the promise. <sup>14</sup> African Commission's Draft principles and Guidelines on ESCR in the ACHRP, adopted by Commission in October 2011<sup>15</sup> *ibid* pg. 16 Social and Economic Rights Action Centre and the Center for Economic and Social Rights v

Nigeria, Communication 155/96 Also at <http://www.escr-net.org/user/doc/serac.pdf> 17 Article 2, 4, 14, 16, 18 of the African Charter on Human and Peoples' Rights 18 (SERAC) and Another v Nigeria (2002) AHRLR 60 (ACHPR) 19 Centre for Minority Rights Development (Kenya) and Minority Rights groups International on behalf of Endorois welfare Council v Kenya The Endorois people, brought the case to the Commission, the Commission finds violations of the rights to freedom of religion, property, health, culture and natural resources under the African Charter on Human and Peoples' Rights, the Commission recommend restitution of the Endorois traditional lands, recognition of their ownership right, and compensation for harm suffered during the community's displacement and other measure 20. It has been argued by the Cynthia Morel, who was co-counsel for the Endorois as Senior legal advisor with minority rights Groups International 21 "that recognition is a victory for all Indigenous peoples' across Africa whose existence was largely ignored- both in law and in fact-until today, the ruling spells the beginning of a brighter future" 21. It could be argued that, though the African charter, provides such rights, the enjoyment of many of the above rights is subject to limitations as embodied in claw back clauses, and which creates the risk of being abused by the states to escape from their obligations under the Charter. 16 Also the African Charter like, European Convention on Human Rights, the Inter-American Convention on Human Rights; and the International Covenant on Civil and Political Rights, does not allow for state parties to derogate from their treaty obligations 20 Centre for Minority Rights and Development (Kenya) and minority rights Group International on Behalf of Endorois Welfare Council v Kenya, decision of

Commission Feb 2010<sup>21</sup> Human Rights watch, Kenya: landmark ruling on indigenous land Rights, 4 February 2010<sup>22</sup> George William Mugwanya (2003) pg. 201 During emergency situation. As it was discussed in the case of the Commission Nationale de Droits de l' Homme et des Libertes v Chad<sup>23</sup>, the Complainants alleges several massive and severe violation in Chad, including several accounts of killings, disappearance and tortured as a result of the Civil war between the Security Service and other groups. Though the government of Chad denied the responsibility, the Commission held that, Chad government is responsible for the violations of the African Charter by fail to provide Security and stability in the country, by allowing serious or massive violations of Human rights, because the government has the responsibility to secure the safety and the liberty of its citizens, and to conduct Investigation into murder. 242. 2 The African Commission on Human and Peoples' Rights Apart from that, the African Charter, creates the African commission on human and people rights as the primary institutions to supervise state parties compliance. 25 The African Commission of Human and Peoples' Rights is a quasi-judicial body, modelled on the UN human rights Committee, with no binding power<sup>26</sup> the commission vested with a lot of functions, but the legal basis of the Commission mandate to state parties can be found in the combined effect of article 45(1) and (2) of the African Charter<sup>27</sup>, which requires the African Commission to promote human rights and ensure their protection and article 46 of the same charter, which empower the African Commission to 'resort' to any appropriate method of Investigation. 28<sup>23</sup> Commission Nationale des Droits de l' Homme et des Libertés v Chad. (Un reported) communication. no 74/92 (1995)<sup>24</sup> ibid

Communication no 74/92 (1995)<sup>25</sup> George William Muganywa (2003) pg. 240-26 Dan Kuwali (2011) pg. 206-27 Article 45 (1) and (2) of the African Charter on Human and Peoples' rights<sup>28</sup> Malcolm Evans and Rachel Murray (1986-2006) pg. 316 General the Members of the African Commission meet at least twice a year during the ordinary session, <sup>29</sup> the session includes reports by commissioners about their promotional activities, also other report from the examinations of state reports submitted under Article 62 of the African Charter<sup>30</sup>, International Organization, Inter-governmental and contributions by non-governmental Organization (NGOs) about the Human rights situation in Africa. But in Practice, States have a poor record of submitting their initial reports to the Commission and even states compliance with findings of the Commission remained negligible. <sup>31</sup> Also the working system of the African Commission has been criticized on ground that, though the African Charter require to submit a report every two years, but does not specify to whom these reports should be submitted, and what should be done with them. <sup>32</sup> In addition of the functions of the African Commission, the Commission has established Special mechanisms to enable it pay particular attention to specific human rights issues. <sup>33</sup> Five Special rapporteur, all of who are members of the African Commission and covering the following thematic areas<sup>34</sup>: Prisons and Conditions of Dentetion<sup>35</sup>, Right of Women<sup>36</sup>, Human Right Defenders<sup>37</sup>, Freedom of Expression<sup>38</sup>, Refugees, Asylum Seekers and Internally Displacement persons<sup>39</sup><sup>29</sup> Malcolm Evans and Rachel Murray (1986-2006) pg. 316<sup>30</sup> Article 62 of the African Charter on Human and Peoples Rights<sup>31</sup> Vijoen and Louw, State Compliance with Recommendations of African Commission on Human and

Peoples rights, 1994-2004, (2007) 101 American Journal of International law, 3232 Malcolm Evans and Rachel Murray (1986-2006) pg. 32633 ibid pg 32134 Malcolm Evans and Rachel Murray (1986-2006) pg. 32135 Special Rapporteur on Prisons and Conditions of Detention, established October 199636 Special Rapporteur of Right of Women, established in April 199837 Special Rapporteur on Human Right Defenders; established June 200438 Special Rapporteur on Freedom of Expression; established on December 200439 Special Rapporteur on Refugee, Asylum Seekers and Internally Displacement Persons, established December 2004

Apart from that, the Commission also established four working groups and one follow-up committee on the Implementation of the Guidelines and measures for the prohibition and prevention of torture, cruel, inhuman and degrading punishment and Treatment in Africa<sup>40</sup>, which is made up by the members of the African Commission and experts from outside the African Commission membership<sup>41</sup>. It has been argued by Murray<sup>42</sup>, that “ the experience shows that, working groups have reinforced the African Commission by enhancing the promotion and protection mandate under the African Charter”<sup>2</sup>.

1 Effectiveness of the African Charter under domestic level

Article 1 of the African Charter<sup>43</sup>, sets out the basic obligation of states parties to “recognize” and to adopt legislative and other measure to give effect to the rights and freedoms in the Charter. <sup>44</sup> It is true that, the African Charter has been recognized at the regional level, the African Union which recognise human rights as one of its objectives, also the African Human Right Court and all the countries of Africa now have written constitution which recognise in one way or another , the concept of Human Rights. <sup>45</sup>However, despite of



that recognition, the domestic practice of human rights in Africa differ and the reason is that, each country in Africa has its own legal system<sup>46</sup>. The African Commission of Human and peoples' Rights have the task of ensuring that, states are implementing the Charter in their domestic jurisdiction. In implementing this task, the commission has faced with a lot of challenge when dealing with the petition which involve the alleging violations of rights in the Charter. 40 Malcolm Evans and Rachel Murray (1986-2006) pg. 32141 ibid pg. 32142 Malcolm Evans and Rachel Murray (1986-2006) pg, 40343 Article 1 of the African Charter on Human and Peoples rights<sup>44</sup> Heys, C and Kaguonyo, (2006); Constitutional human rights law in Africa: current development: South African Journal on Human Rights, vol 22, no 4 pp 673-717<sup>45</sup> ibid pg., 674<sup>46</sup> ibid pg. 674 For example, in the case of New Patriotic party v Ghana Broadcasting Corporation<sup>47</sup>, the case concern the violation of the right to information under article 21 (1) (f) of the Ghana Constitution, which provides that, all persons have the Right to information, subject to such qualification as are necessary in a democracy society. The court chose to seek spirit referred to in Ghana law, rather than in Article 9 (1) or 9 (2) of the African Charter, for the reasons that, article 9 (2) has a claw-back clause and everyone may express their opinion'' within the Law''<sup>48</sup> Also in the case Fawehinmi v Abacha<sup>49</sup>, In this case the appellant was arrested without a warrant and detained by members of the state Security service; He sought relief on the basis that, his right guaranteed in both the Constitution and under Chapter 10 had been violated. The Court of appeal found that, the provisions of the African Charter, as Incorporated into Chapter 10 are superior to National legislation. 50<sup>47</sup> New Patriotic Party v Ghana

Broadcasting Corporation {1996} LRC48 Frans Viljoe," Application of the African Charter on Human and peoples Right by domestic courts in Africa"(1999), Journal of African law 43 pg. 649 Fawehinmi v Abacha {1996} 9 NWLR (Pt. 475) 71050 Ibid pg. 112. 3 The African Court of human and peoples' RightsThis court, refer, as the African regional human Rights system which operates under the umbrella of Africa Union<sup>51</sup>. The purpose of the establishment of the African Court of human and peoples' Rights is to complement to, not as a panacea for, the protective activities of the under-resourced and ineffectual African Commission<sup>52</sup>. The African Court of Human Right and peoples' Rights was intended to be more effective than the African Commission, which has had a little impact since its establishment in 1987, because the commission does not make recommendations on the communications it hears but rather " it submits reports to the assembly of heads of State, who act- or more often, do not act<sup>53</sup>. The African Union Assembly decide under Article 18 of the AU Act, to establish the Court of Justice of Africa Union and African Court on Human and Peoples' Rights to function together, where in July 2008 the AU summit adopted the protocol on the statute of the African Court of Justice and Human rights which shall enter into force 30 days after the deposit of the Instruments of ratifications by 15 member states in terms of Article 9(1) of the single protocol<sup>54</sup>. Both Courts under Article 28 of (ACtJHR) <sup>55</sup>have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present statute. Also the statute guaranteed the following cases to be submitted to the African Court, such as, any violation of a right guaranteed by the Banjul Charter, by the Charter on the Rights of welfare of the child, the protocol to the Banjul

Charter on the rights of women in Africa, or any other legal instrument relevant to human rights ratified by the state parties concerned<sup>56</sup>. 51 Dan Kuwali (2011) the responsibility to Protect at pg. 20752 ibid pg. 20853 ibid pg. 20854 ibid pg. 20955 African Union, Statute of the African Court of Justice and Human Rights, attached to the protocol on the Statute of the African Court of Justice and Human Rights ( single protocol) available at ; [www.africa-union.org/root/au/Documents/Treaties/traties, htm](http://www.africa-union.org/root/au/Documents/Treaties/traties.htm)<sup>56</sup> Dan Kuwali (2011) pg. 208 However the statute under article 30 (f) of ACTJHR, individual and NGOs are not allowed to bring the case to the African Court, unless its organ can submit cases against states if the State concerned has made a declaration accepting the competence of the African Court to do so under article 8 of the Single protocol<sup>57</sup>. It has been argued that, “such restriction is in stark contrast with the practice of African regional and sub-regional human right mechanisms which have long recognised individual petitions for human rights abuses, the procedures of the African Commission and sub-regional courts such as the Court of Justice of the ECOWAS, the East African Court of Justice (EACJ) and the SADC Tribunal clearly demonstrate that victims require direct access to human rights institutions in order to ensure effective protection of human rights in the region.”<sup>58</sup> Also the African Court, through its functions under article 45 and 46 of the ACTJHR statute, it has the power, if it considers that, there was a violation of a human or peoples’ rights, to order any appropriate measures in order to remedy the situation, including granting fair compensation<sup>59</sup>. This shows a significant development in the African human rights system because, it ensures that African states should be more accountable for Human Right violations, also

unlike the African Commission, the decision of the African Court are final and binding on state parties to the single Protocol, and they can be referred to the AU Assembly for enforcement. Where a part has failed to comply with the judgment, the African court shall refer the matter to the AU Assembly, which shall decide upon measures to be taken to give effect to the

Judgement<sup>60</sup>. 57 Article 30 (f) of the Statute of the African Court of Justice and Human Rights<sup>58</sup> Dan Kuwali (2011) pg. 21259 ibid pg. 21260 op cit pg.

212It is clear from the explanation above that, the African Court of human right and peoples' rights has brought some changes compare to the African commission, though on other side it is not effective by deny individual and NGOs right to bring the case before it. 2. 4 ConclusionGenerally, the African Charter on Human and Peoples Rights have mostly given positive comment by different Authors as best, because it represented the African concept of rights. According to Rachel<sup>61</sup>, she argue "that the African Charter is seen as a unique document among the Instruments by inclusion of civil and political rights, economic , social and cultural rights and peoples' rights in one document treating them as indivisible."However, though the Charter have tried to recognised most of the rights like those of the Universal Declaration of Human Right, but the problems or challenges remains to those who supposed to implement those provisions in the African Charter. African Commission on human and peoples' Rights, has been criticized for not being effective, because the findings of the Commission are not legally binding to the parties as a result, the state are not obliged to abide by them. Also the functions of the commission are not clear especial those function which are delegated to be performed by the Secretariat of the African Commission are

not clear, and hence create uncertainty. The States parties to the African Charter on Human and Peoples' Rights are the major factor to the ineffectiveness of the Charter, though almost all African countries recognise the Charter, 61 But there still problems in implementing some of the Provisions of the Charter. Some countries has been implementing by incorporate the Charter within their domestic law but others not. There is a need for African countries to put theory in practice in order to fulfil the promise which they made during the adoption of African Charter on Human and Peoples' Rights, which includes promoting and protecting human and peoples' right, respect for democracy, rule of law and good governance. Fons Coomans (2003). The Ogoni Case Before The African Commission on Human and Peoples' Rights. *International and Comparative Law Quarterly*, 52, pp 749-760. doi: 10. 1093/iclq/52. 3. 749. See art 18(3) & (4) of The African Charter on the Rights and Welfare of the Child (1990); The Protocol to the African Charter on the Rights of Women in Africa; See also UNCommittee on Economic, Social and Cultural See for example article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women and article 14 (2) of the Optional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. 59 See para 11 (c Viljoen, F ' State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (2000) Vol 44 No 1 *Journal of African Law* 110 Viljoen, F ' Introduction to the African Commission and the regional human rights system' in Heyns, C (ed) (2004) *Human rights law in Africa – International human rights law in Africa Volume 1* Leiden: Martinus Nijhoff Publishers

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