

COMPARATIVE ANALYSIS OF HUMAN RIGHTS PROTECTION UNDER THE AFRICAN CHARTER WITH THE EUROPEAN AND AMERICAN CONVENTIONS

Adrian Osuagwu* Obinne Oguejiofor**
Sylvester Anya*** Emeka Adibe**** Portia Chigbu*****

Abstract

The formation of the United Nations, the Universal Declaration on Human Rights, and the two Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights internationalized human rights. These efforts were given an added boost at the regional levels by the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. This paper attempts an exposition of the African Charter about guaranteed rights therein, and the machinery for the enforcement of those rights. The paper undertakes a comparative analysis of the European and American Conventions on Human Rights. The paper claims that the guaranteed rights under the African Charter when compared to the other Conventions are either framed in ambiguous terms or are vigorously limited by claw-back clauses. Hence, these rights may be easily derogated under the African system. The paper finds that, though the African Charter is very zealous and latent with certain imperfections, the adoption of the Charter is indicative of Africa's efforts to promote and protect human rights. It is left to be seen how the recently established African Court of Justice and Human Rights can sustain this effort.

Key Words: *Human Rights Protection, the African Charter, the European Convention on Human Rights, the American Convention on Human Rights, The African Court of Justice and Human Rights*

1.0 Introduction

The first major proclamation after the United Nations Charter on the international legal promotion and protection of human rights was the Universal Declaration of Human Rights (hereafter the UDHR), which brought about the globalization of human rights.¹ The 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), gave a clear legal force and more precision to the UDHR.² At the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms,³ the American Convention on Human Rights,⁴ and the African Charter on Human and Peoples' Rights⁵ are all in force. These legal instruments have one thing in common — the protection and promotion of human rights at the regional level.

* **Adrian Osuagwu, LL.B, BL, LLM. PhD (In View)** is a lecturer in the Department of International and Comparative Law, Faculty of Law, University of Nigeria Enugu Campus. Tel: 08033248806. E-mail: Adrian.Osuagwu@unn.edu.ng

** **Dr. Obinne Oguejiofor, LL.B, BL, LLM. PhD** is a lecturer in the Department of International and Comparative Law, Faculty of Law, University of Nigeria Enugu Campus. Tel: 08175260700. E-mail: obinne.oguejiofor@unn.edu.ng

*** **Dr. Sylvester Anya LL.B, BL, LLM. PhD (In View)** is a lecturer in the Department of International and Comparative Law, Faculty of Law, University of Nigeria Enugu Campus. Tel: 07064561418. E-mail: Sylvester.anya@unn.edu.ng

**** **Dr. Emeka Adibe, LL.B, BL, LLM. PhD** is a lecturer in the Department of Jurisprudence and Legal Theory, Faculty of Law, University of Nigeria Enugu Campus. Tel: 08036281296. E-mail: emeka.adibe@unn.edu.ng

***** **Portia Chigbu, LL.B, BL, LLM. PhD (In View)** is a lecturer in the Department of International and Comparative Law, Faculty of Law, University of Nigeria Enugu Campus. Tel: 08065576519. E-mail: Portia.chigbu@unn.edu.ng

¹Kayode Eso, *Further Thoughts on Law and Jurisprudence* (Spectrum Law Publishing 2003) 154.

² Nigel Rodley, 'International Human Rights Law' in MD Evans (ed), *International Law*, (4th edn, OUP 2014) 788.

³(European Convention on Human Rights as amended) (ECHR) <[https://www.echr.coe.int/Documents/Conventions_>](https://www.echr.coe.int/Documents/Conventions_> EG.pdf) accessed 21 December 2023

⁴ 'Pact of San Jose, Costa Rica' 1969 (ACHR) <https://www.refworld.org/docid/3ae6b35510.html> accessed 21 December 2023.

⁵ (Adopted 27 June 1981, entered into force 21 October 1986) (African Charter) <https://www.achpr.org/legalinstruments/detail?id=49> accessed 21 December 2023.

This paper therefore attempts an exposé of the African Charter in terms of guaranteed rights and the machinery put in place for the enforcement of these rights. A segment of the paper is devoted to a comparative analysis of the European and American systems on the protection of human rights. The paper finds that although the African Charter is very ambitious and carries with it some imperfections, the adoption of the Charter is a clear manifestation of the continent's effort to promote and protect human rights.

2.0 The Meaning of Human Rights

The term 'human rights' is derived from two words namely: human and rights. Human refers to things relating to or characteristic of humankind.⁶ While the word right refers to a legal claim or entitlement.⁷ Therefore, human rights universally stand as legal claims of the human being irrespective of race, religion, gender, or color.⁸ In other words, human rights are legal entitlements of individuals in the society. This agrees with the definition of human rights by Eze⁹ but with some modifications:

Human rights represent demands or claims that individuals or groups make on society some of which are protected by law and have become part of *lex lata*, while others remain aspirations to be attained in the future.¹⁰

An analysis of the above definition reveals that some aspects of human rights are given protection under the law while others are not. The former are identified either as fundamental rights or fundamental human rights, hence justiciable. The latter imposes no obligation on the government but are considered goals or objectives that the government should consider in formulating policies. In sum, human rights are those rights that are considered inherent in all human persons by the mere fact of their humanity. They are inherent in the sense that the mere fact of being a human person makes one competent to enjoy human rights. Thus, they do not have to be purchased or granted.¹¹

3.0 The African Charter and Human Rights

The African Charter is not a product of accident. Makua Mutua gives an illustrative account of the birth of the African Charter.¹² For him, the Charter and its rhetoric of human rights is a result of the following reasons. First, post-colonial African states came into existence out of the anti-colonial human rights struggle, a melee for political and economic self-determination.¹³ Second, black-ruled African states used human rights arguments to vilify and undermine the colonial and minority white-ruled states of Angola, Namibia, Rhodesia (now Zimbabwe), Mozambique, and Apartheid South Africa.¹⁴ Most importantly, the atrocities of some of the most vicious dictators in Africa accelerated the urgency of a regional human rights framework. Thus, the obscenities of Bokassa

⁶ Catherine Soanes and Angus Stevenson (eds), *Concise Oxford English Dictionary*, (11th edn, OUP 2008) 693.

⁷ *Ibid* 1238.

⁸ UDHR Arts 1 and 2.

⁹ OC Eze, *Human Rights in Africa*, (Macmillan Nigeria Publishers Ltd 1984) 5.

¹⁰ *Ibid*.

¹¹ Alina Kaczorowska, *Public International Law* (4th edn, Routledge 2010) 499.

¹² Makua Mutua, 'The African Human Rights System: A Critical Evaluation' < <https://ideas.repec.org/p/hdr/hdocpa-2000-15.html> > accessed 21 December 2023.

¹³ *Ibid*.

¹⁴ *Ibid*.

of the Central African Republic, Idi Amin of Uganda Nguema of Equatorial Guinea, and so forth were seen by the international community as paradigmatic of African leadership.¹⁵

As a result of these incidents, and coupled with previous attempts at establishing a human rights protection mechanism in Africa, the Assembly of Heads of States and Government of the Organisation of African Unity met in Monrovia and without exception, requested the Secretary General of the organization to convoke a meeting of experts to draft a regional human rights instrument for Africa.¹⁶ The work of these experts saw the birth of the African Charter which was finally adopted by the OAU Assembly on 28 June 1981, in Nairobi, Kenya.¹⁷ It came into force on 21 October 1986 after ratifications by the absolute majority of member states of the OAU.¹⁸ At the time of writing, only one African State (South Sudan) has not ratified it.

4.0 Civil and Political Rights under the African Charter

4.1 Non-Discrimination, Equality and Fair Trial

In keeping with the principles of human rights law, the African Charter recognizes the doctrine of non-discrimination and equality. Article 2 of the African Charter consecrates the prohibition of any discrimination in the enjoyment of protected rights in the following non-exhaustive reasons including race, ethnic group, color, sex, language, religion, political or any other opinion, national or social origin, fortune, birth, or another status.¹⁹ The inclusion of ethnic groups is a welcome development for the African region because its realization will lead to the equitable distribution of economic opportunities for groups outside the kingship of the head of government.²⁰ Article 3 of the African Charter guarantees equality before the law and equal protection before the law. The significance of Articles 2 and 3 of the African Charter in the African context is evidenced by the need to jettison discriminatory caste systems and protect members of minority groups, including women and children.²¹

It has been observed that the principles of non-discrimination and equality are too wide in content to accommodate the concept of fairness in judicial proceedings.²² The right to a fair trial is protected under Article 7(1) of the African Charter. Thus, every individual is entitled to have their case heard. This right is a consortium of other rights which include the right of appeal, presumption of innocence, the right to defend oneself and be defended, and the right to be tried within a reasonable time.²³

4.2 Right to Life, Dignity, and Integrity of the Person

Article 4 of the African Charter provides that human beings are inviolable and that every human being shall be entitled to respect for their life. The Article also provides for the integrity of the

¹⁵ *Ibid.*

¹⁶ Centre for Human Rights, *A Guide to the African Human Rights System* (Pretoria University Law Press 2016) 2.

¹⁷ *Ibid* 3.

¹⁸ ACHPR, 'History of the African Charter' <www.achpv.org/instruments/achpr/history/> accessed 21 December 2023.

¹⁹ ACHPR, 'Principles and Guidelines on the Implementation of Economic, Social, and Cultural Rights in the African Charter (in full)' <www.achpr.org/files/instruments/economic-social-cultural-achpr-instr-guide-draft-esc-rights-ens.pat> accessed 21 December 2023.

²⁰ Richard Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 23 *Va J. Int'l L* 667, 683.

²¹ Allwell Raphael Uwazuruike, 'An Immanent Critique of the African Human Rights System: Theory, Practice, and Reforms' (Ph.D Thesis, University of Central Lancashire 2017) 68.

²² Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson 2010) 315.

²³ *Ibid.*

person. Thus in *Kazeen Aminu v Nigeria*,²⁴ the African Commission held that though there was no loss of life, the series of arrests and detentions amount to a violation of Article 4. It is humbly submitted that this Article is couched vaguely. The vagueness of Article 4 of the African Charter could lead to a subjective interpretation of what the term 'human being' means, thus, leaving the issue of abortion to a whimsical and capricious determination by state parties to the Charter.²⁵

In Africa, some states still have in operation the punishment of death sentence for certain offenses. On this point, the African Commission on Human and Peoples' Rights has advocated for the progressive abolition of the death penalty in Africa. The Commission maintains that the death penalty is inconsistent with the right to life, the dignity of the person, and so forth.²⁶

Article 5 of the African Charter guarantees the individual's right to dignity and legal status. Thus, all forms of exploitation and degradation of the individual especially slavery, slave trade, torture, and cruel, inhuman, or degrading punishment and treatment are all prohibited. These prohibitions are of great significance for the Africans where Sharia law is practiced in some states.

In addition to the prohibition on slavery and slave trade, the African Charter provides for the right to liberty and security of persons. Except for reasons and conditions previously provided by law, no one may be deprived of this right. The article also prohibits arbitrary arrest and detention.²⁷ The right to liberty and security of person suggests physical liberty of the individual in the society in terms of proscribing unnecessary arrest and detention. Thus, one should not be arbitrarily dispossessed of this right to liberty.²⁸

4.3 Right to Freedom of Religion, Expression, Association, Movement and Assembly

The African Charter in Article 8 provides that freedom of conscience, the profession, and the free practice of religion shall be guaranteed. A close analysis of this article reveals that there is a protection of different types of rights though with marginal differences,²⁹ namely: freedom of conscience and freedom to profess and practice one's religion freely. Freedom of conscience is the right to individual belief or belief in things about religion or morality. Hence, freedom of conscience entails freedom of thought, belief, and religion.³⁰ Freedom of religion is the right to choose a religion or no religion without interference from state apparatus. From the foregoing, it is arguable that freedom of conscience involves the right to profess and practice a particular religion and vice versa.³¹ It is submitted that freedom of conscience is intrinsically connected to other rights domiciled in the African Charter such as freedom of expression,³² freedom of association,³³ and right to assembly.³⁴

²⁴ [2000] AHRLR 258 [27].

²⁵ Gittleman (n 19) 685.

²⁶ Paul Ogendi, 'The Right to Life in Africa: General Comment No 3 on the African Charter on Human and Peoples' Rights' <<https://africlaw.com/2016/02/10/therightto-life-in-africa-general-comment-no-3-on-the-africa-charter-on-human-and-peoples'-rights/>> accessed 21 December 2023.

²⁷ African Charter Art 6.

²⁸ Vincent O Nmeielle, *The African Human Rights System: Its Laws, Practice and Institutions* (Martinus Nijhoff Publishers 2001) 92.

²⁹ *Ibid* 104

³⁰ AK Lahidji, 'Freedom of Conscience' < www.ihrr.org/ihrr-article/religion-en-freedom-of-conscience/ > assessed 22 December 2023.

³¹ Nmeielle (n 27) 105.

³² Africa Charter Art 9(2).

³³ *Ibid* Art 10(1).

³⁴ *Ibid* Art 11.

Article 12 enshrines freedom of movement and residence of the individual within their own country. Other rights and freedoms that could be distilled from it include the freedom to choose where to reside within that country, the freedom to leave any country including their own, the right to return to their own country, the right to seek asylum in another country when faced with persecution from their own country. Freedom of movement also implies that non-nationals who are legally admitted in a state that is a party to the African Charter are protected from arbitrary expulsion. There is also a prohibition on mass expulsion if it is aimed at national, racial, ethnic, or religious groups.³⁵

5.0 Socio-Economic and Cultural Rights

One of the distinctive features of the African Charter is the incorporation of all the generations of rights into one single instrument. This is not the case with the other regional instruments on human rights under discussion. These rights are labeled, economic, social, and cultural rights. Among the traditional economic, social, and cultural rights enshrined in the African Charter are as follows: the right to work under equitable and satisfactory conditions, and receive equal remuneration for equal work.³⁶ If the intendment of this provision is to compel the governments of African states to provide jobs for their citizens, it is humbly submitted that the right to work is not adequately protected as such. Rather what is guaranteed is that once an individual is employed, they would have a right to work under equitable and satisfactory conditions and must receive equal pay for equal work.³⁷ The jurisprudence behind this provision is aimed at ensuring equal treatment for women³⁸ in a continent where women are marginalized. However, in *Annette Pagnouille (on behalf of Abdou Laye Mazou v Cameroon)*,³⁹ the African Commission found a violation of the right to work as enshrined in Article 15 of the African Charter.

The Charter also guarantees the right to health.⁴⁰ In this regard, state parties are obliged to take all necessary steps to protect the health of their people and make sure that they receive medical attention when they are ill. Article 16 therefore obliges states to take practical and targeted steps by utilizing their available resources, to ensure the full realization of this right.⁴¹ In *Purohit and Moore v The Gambia*,⁴² the African Commission found that the Gambia had violated an array of rights guaranteed in the Charter and made a pronouncement that states are under an obligation under Article 16 to take positive steps and judiciously apply their available resources in ensuring that the right to health is fully realized in all its aspects without discrimination.

Article 17 provides for the right to education and the individual right to freely participate in the cultural life of their community. The article also imposes an obligation on states to promote and protect the morals and traditional values recognized by the community. It is observed that there is no specification of the content of this right to education,⁴³ thus it becomes difficult to ascertain or

³⁵ Fatsah Ougurgouz, *The African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers 2003) 121.

³⁶ African Charter Art 15.

³⁷ *Ibid.*

³⁸ Rehman (n 21) 320.

³⁹ [2000] AHRLR 61 [30].

⁴⁰ African Charter Art 16(1)

⁴¹ [(2003) AHRLR 96 [84].

⁴² *Ibid* [84], [85].

⁴³ Rehman (n 21) 320.

measure its implementation.⁴⁴ Are state parties to the African Charter obliged to make primary education compulsory, and secondary and tertiary education merely available and accessible?⁴⁵

Taking cognizance of the paucity of economic resources at the disposal of most African States, the immediate enjoyment of these socio-economic rights is doubtful.⁴⁶ Hence, socio-economic rights in the Charter may be regarded as purely exhortatory, having the resemblance of Fundamental Objectives and Directive Principles of State Policy under the Nigeria Constitution.⁴⁷ This is arguable because some states like Nigeria have not only ratified the African Charter but have gone further to domesticate it.

Further, there is the recognition by the African Charter of what has come to be accepted as third-generation rights. Thus in Articles 19-24 of the African Charter, there is the creation of what has been termed 'peoples' rights, 'group rights' or solidarity rights which include equality of all peoples,⁴⁸ peoples' right to existence, and the unquestionable and inalienable right to self – determination,⁴⁹ peoples' right to their economic, social and cultural development and equal enjoyment of the common heritage of mankind,⁵⁰ peoples' right to international and national peace and security⁵¹ and peoples' right to a general satisfactory environment.⁵² In other words, respect for community rights promotes the protection of individual human rights.

6.0 Enforcement Mechanisms under the African Charter

The enforcement of rights enshrined in the Charter is carried out by two bodies namely; the African Commission (hereafter, the Commission), and the African Court of Human and Peoples' Rights (hereafter, the African Court).

6.1 The African Commission

Article 30 of the African Charter establishes the Commission. The mandate of the Commission is provided in Article 45 namely: the promotion of human and peoples' rights, the protection of human rights, and the interpretative mandate. As regards promotional mandate, the Commission is expected to formulate principles and rules for solving legal problems associated with human and peoples' rights, on which African governments may base their legislation.⁵³ The protective functions of the Commission include: receiving and attending to communications submitted by state parties to the African Charter, individuals or groups of individuals, non-governmental organizations (hereafter, NGOs), and indigenous peoples alleging that their rights and freedoms under the Charter have been violated by a contracting party,⁵⁴ analyzing state reports on legislative

⁴⁴ Uwazuruike (n 20) 79.

⁴⁵ *Ibid.*

⁴⁶ B Okere, 'Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis' (1984) 6(2) *Human Rights Quarterly* 141, 151.

⁴⁷ See 1999 Constitution of the Federal Republic of Nigeria (as amended) Chapter II.

⁴⁸ African Charter Art 19.

⁴⁹ *Ibid* Art 20.

⁵⁰ *Ibid* Art 22.

⁵¹ *Ibid* Art 23(1).

⁵² *Ibid* Art 24(1).

⁵³ *Ibid* Art 45(1)(b).

⁵⁴ Alina Kaczorowska, *Public International Law* (4th edn, Routledge 2010) 546.

and other measures put in place to give effects to the rights protected under the Charter.⁵⁵ About its interpretative mandate, the Charter⁵⁶ authorizes the Commission to interpret all the provisions of the Charter if so requested by a state party, an institution of the African Union (hereafter, the AU), or any African institution recognized by the AU. These present writers support the view of Kaczorowska that as regards the interpretative function, the Commission has been innovative. Hence, its interpretation of the term other communications in Article 55 includes communications from individuals and NGOs, which authorizes the Commission to deal not only with communications exemplifying massive violations of human rights but also occasional violations of the rights of individuals.⁵⁷

The non-binding nature of these decisions of the Commission is an affront to the protective mandate of the Commission under the Charter. This and other weaknesses of the Commission necessitated the decision to establish a court that would render binding decisions in cases of any violation of the provisions of the Charter.

6.2 The African Court of Human and People's Rights/The African Court of Justice and Human Rights

As a result of some of the shortcomings of the African Commission identified above, there was a need for the establishment of a court to improve the African mechanisms for the protection of human and people's rights. Thus, in June 1998, the African Court of Human and Peoples' Rights (hereafter, the African Court) was established.⁵⁸ The jurisdiction of the court and access to the court are provided in the Protocol to the African Charter.⁵⁹ However, events outstripped the institutional developments within the AU mechanism;⁶⁰ hence, a crucial development took place that saw the establishment of the African Court of Justice and Human Rights.⁶¹ By the Protocol, the African Court of Human and Peoples' Rights and the Court of Justice of the African Union have been replaced and merged into a single court known as the African Court of Justice and Human Rights⁶² (hereafter, the African Court).⁶³

The African Court has a broad contentious jurisdiction when compared to that of the replaced African Court of Human and Peoples' Rights.⁶⁴ Access to the court is provided in Article 29. A significant feature of the newly created African Court is that, under the present arrangement,

⁵⁵ Roger-Claude Liwanga, 'From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies' (2015) 41 Brook. J. Int'l L. (2015) <<https://brooklynworks.brooklaw.edu/bjil/vol41/iss1/2/>> accessed 10 January 2024.

⁵⁶ African Charter Art 45(3).

⁵⁷ Kaczorowska (n 53) 547.

⁵⁸ Protocol to the African Charter which came into force on 25 January 2004, African Court, 'Welcome to the African Court' <www.african-court.org/en/> accessed 10 January 2024.

⁵⁹ Arts 3(1), 5(1) (a-e), 36(6).

⁶⁰ Rehman (n 21) 331.

⁶¹ Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008 (Protocol on the Statute <<https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>> accessed 10 January 2024.

⁶² Protocol on the Statute Art 2; Rehman, (n 21) 332.

⁶³ When operational, the African Court will have two chambers namely; the general affairs section and the human rights section. See Centre for the Nigerian Judicature, 'International Tribunals' Applicable to Nigeria' <www.lawnigeria.com/judicature/africancourtjusticeandhumand%20rights.html> accessed 10 January 2024.

⁶⁴ Statute of the African Court of Justice and Human Rights (adopted 1 July 2008) (Statute annexed to the Protocol) Art 28 <<https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>> accessed 10 January 2024

individuals and NGOs have direct access to the court and are therefore not subject to the limitations stated in the former arrangement, whereby these entities can only have access to the court subject to the consent of their states.⁶⁵ Again, the Statute gives the African Court the competence to offer advisory Opinion on any legal matter.⁶⁶

The Court has not become operational due to a lack of the required ratification status.⁶⁷ Until such a time, the Protocol makes a provisional validity of the 1998 Protocol to the African Charter on Human and Peoples' Rights.⁶⁸

7.0 Comparative Perspectives:

7.1 Guaranteed Rights under the Three Systems

This section undertakes a comparison between the African system of human rights protection and the European and American Conventions on Human Rights, regarding the substance of the rights protected under the three systems and the mechanisms put in place for the protection of the rights guaranteed therein.

7.1.1 Right to Life, Dignity, and Integrity of the Person

The right to life, dignity, and integrity of the person is protected under the three systems. This right is a consortium of rights that include the right to life, respect, integrity, and dignity of the person, freedom from torture, and cruel, and degrading treatment, thus prohibiting all forms of exploitation and degrading of the individual, especially slavery and the slave trade, prohibition of arbitrary arrest and detention. Among the rights protected under this heading, particular consideration must be given to the right to life. Article 4 of the African Charter which secures the right to life is couched in unclear terms, hence its provision is vague as to the exact meaning of life and it becomes unclear 'the extent to which the rights of the unborn child are protected'.⁶⁹ This is a clear departure from the American Convention which added a qualification to the right to life. Hence, there is a comprehensive protection of life from the moment of conception.⁷⁰ Another difference between the African Charter and the European and American Conventions on this matter is that the former is silent on the vexed issue of the death penalty. The latter on the other hand, have clear provisions on the issue.⁷¹ The European Convention abolishes the death penalty while the American Convention prohibits states that have abolished it from reestablishing it.

7.1.2 Non- Non-Discrimination and Equality

The three systems under consideration have these rights enshrined in their respective instruments.⁷² However, in providing for this right, the African Charter went beyond the normal indices associated with this right such as sex, color, language, etc, to include other factors such as fortune

⁶⁵ Protocol to the African Charter arts 5(3), 34(6).

⁶⁶ Statute annexed to the Protocol art 53(1).

⁶⁷ The Protocol and Statute annexed to it shall enter into force thirty days upon deposit of instruments of ratification by fifteen member states. Protocol to the Statute, art. 9(1). At the time of writing, only six states have deposited their instruments of ratification. They are; Benin, Burkina Faso, Congo, Libya, Liberia and Mali. See African Union, 'Protocol on the Statute of the African Court of Justice and Human Rights' <<https://au.int/stes/default/files/treaties/7792-sl-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights=3.pdf>> accessed 10 January 2024.

⁶⁸ Protocol on the Statute, art. 7; Rehman (n 21) 335.

⁶⁹ *Ibid* 316.

⁷⁰ ACHR art 4 (1).

⁷¹ ACHR art 4(3)(4); 1983 Protocol to the ECHR art 1

⁷² ECHR Art 14; ACHR Arts 1 and 24; African Charter Arts 2 and 3.

and ethnic group. The inclusion of such rubrics especially that of ethnic groups is to ensure equity in governmental activities.⁷³

The rights of non-discrimination and equality are embodiments of other rights such as fair trial in adjudications, the right to judicial protection,⁷⁴ and freedom from retrospective proceedings.⁷⁵ Among the rights considered under this heading, the right to a fair trial deserves special treatment. In the elaboration of this right, it is observed that the African Charter is laconic when compared to the European and American Conventions. In these Conventions, all the usual safeguards associated with fair trial are given fair consideration.⁷⁶ On the other hand, these detailed safeguards are absent in the African Charter.⁷⁷

7.1.3 Right to Freedom of Religion, Expression, Association, Movement, Assembly and Information

All three systems provide for rights under this heading.⁷⁸ However, there are remarkable differences. In providing for freedom of expression, the American Convention forbids pre-publication censorship.⁷⁹ The European Convention and the African Charter do not contain such prohibitions. Nonetheless, the European Convention makes this right subject to such conditions as prescribed by law and is necessary for a democratic society to protect national security, territorial integrity, public safety, etc. The African Charter subjects this right to the usual claw-back clauses such as within the law, prescribed by law, etc.⁸⁰ Such laws could be undemocratic.

7.1.4 Other Areas of Differences as Regards Substantive Rights

By its distinctive characteristics, the African Charter guarantees civil and political rights as well as economic, social, and cultural rights in one single instrument. The European system for the promotion and protection of human rights protects these rights in different instruments such as the European Charter, the Social Charter, and the European Convention. The American system adopts a median position. This is because Part 1, Chapter II⁸¹ of the American Convention enshrines civil and political rights; Part 1 Chapter III contains a provision for the progressive development of economic, social, and cultural rights in generic terms without any elucidation of the rights referred therein.⁸²

Further, the African Charter is replete with claw-back clauses in its provisions on substantive rights. Thus, almost all the rights are prone to limitations in such elusive terms as subject to law, except for reasons and conditions previously laid down by law, within the law, etc.⁸³ These claw-back clauses have the potency of giving wide discretionary powers to states, limiting the enjoyment of these rights.⁸⁴ On the other hand, the European and American Conventions have derogation clauses. Hence, there are express provisions regulating those circumstances under which certain

⁷³ Gittleman (n 19) 683.

⁷⁴ ACHR Art 25.

⁷⁵ ECHR Art 7; ACHR Art 9; African Charter Art 7(2).

⁷⁶ ECHR Art 6(3) (a)(C)(f); ACHR Art 8(2) (a)(b)(e).

⁷⁷ African Charter Art 7.

⁷⁸ ECHR Arts 9, 10, 11; Protocol No 4 to the ECHR Art 2; ACHR Arts 12, 13, 15, 16, 22; African Charter Arts 8, 9, 10, 11, 12.

⁷⁹ ACHR Art 13(2)(a).

⁸⁰ ECHR Art 10(2); African Charter Art 9(2).

⁸¹ Arts 1 – 25.

⁸² ACHR Art 26.

⁸³ Arts 5 – 12.

⁸⁴ Higgins, 'Derogations under Human Rights Treaties' 48 *BYIL* (1976-77) 28 in Rehman, (n 21) 312.

rights may be derogated especially in times of emergency. Aside from such situations, derogation of rights under the Conventions might be allowed subject to law suitable in a democratic setting.

7.2 Enforcement Mechanisms

Under the African Charter, the main organs for the protection and promotion of human and people's rights are the African Commission and the African Court of Human and Peoples' Rights which has been replaced by the African Court of Justice and Human Rights. This position is similar to the American system. Thus, the main enforcement organs under the American system are the Inter-American Commission and the Inter-American Court of Human Rights.⁸⁵ However, under the European Convention, the enforcement of the Convention is left to the European Court of Human Rights.⁸⁶ The functions of the African Commission summarily are to protect, promote, and interpret the provisions of the Charter and Protocol thereto. These functions surpass that of the Inter-American Commission which is to promote respect for and defense of human rights.⁸⁷

Although under the American Convention and the African Charter, states, individuals, groups, and NGOs are competent to send communications to the respective Commissions established under their constituent instruments, there are remarkable differences in their provisions. About the American Convention, there is an express provision on this matter. Thus, any person or group of persons or any non-governmental organization that is legally recognized in one or more member states of the organization may send a petition to the Commission. Under the African Charter, there is no express mention of individuals, group of persons, or NGOs and their competence to bring communications to the Commission. All three systems provide for an amicable settlement of disputes.⁸⁸ However, the European and American systems are all in agreement that such peaceful settlement must be based on respect for human rights as defined in their respective instruments. These express conditions are not found in the African Charter. Despite the friendly procedure in the settlement of disputes, the three systems currently provide for adjudicatory settlement of human rights violations through the courts.⁸⁹ However, there are some differences. In her advisory jurisdiction, the African Court has the competence to render advisory opinions on any legal issue if so requested by authorized bodies.⁹⁰ This provision is similar to the provision under the American Convention. However, under the European Convention, only the Committee of Ministers has the competence to request for an advisory opinion and such request is limited to the interpretation of the Convention and Protocol thereto.⁹¹

As regards the contentious jurisdiction, there are some notable divergences. The European Convention stipulates that the jurisdiction of the European Court of Human Rights shall extend to all matters concerning the interpretation and application of the Convention and Protocol thereto which are brought to it as provided in Articles 33 and 34.⁹² This provision is similar to the provision of the American Convention.⁹³ The jurisdiction of the African Court is more extensive than that of

⁸⁵ ACHR Part II Chapter VIII.

⁸⁶ See Protocols Nos 11 and 14 to the ECHR.

⁸⁷ ACHR Art 41.

⁸⁸ ECHR Arts 38(1), 39; ACHR Art 48(f); African Charter Art 48.

⁸⁹ ECHR Art 19; ACHR Part 11 Chapter V111; Protocol to the African Charter art 1; Protocol on the Statute Art 2.

⁹⁰ Statute annexed to the Protocol Art 53(1).

⁹¹ ECHR Art 47.

⁹² *Ibid* Art 32.

⁹³ ECHR Art 32(1); ACHR Art 62(3).

the European Court of Human Rights and the Inter-American Court of Human Rights.⁹⁴ Access to the Court is provided for in all three regional treaties for the promotion and protection of human rights with some remarkable disparities. In the American Convention, only state parties and the Commission have direct access to the Court, individuals must go through the Commission. The European model is akin to the American system in its restrictive access to the Court but for the fact that in the former, non-governmental organizations or groups and individuals have direct access to the court. This is similar to the system under the African Charter.⁹⁵

Finally, compensation is provided for under the various regional instruments being considered. The American Convention provides for fair compensation to be paid to any injured party whose rights have been violated.⁹⁶ The European Convention does not mention compensation in all cases of human rights violations. However, it provides for just satisfaction for any violation of the Convention or Protocol thereto to the injured party.⁹⁷ The only instance of compensation provided for under the Convention is in a case of wrongful conviction of individuals.⁹⁸ The provision under the African Charter leaves much to be desired. Thus, under Article 45⁹⁹ the African Court may on a decision that there has been a violation of a human and peoples' rights under the Charter, order the granting of fair compensation.

8.0 Conclusion

The African Charter, when compared to the European and American Conventions, shows its distinctive nature and is credited for its originality and innovativeness. Thus, there is the incorporation of the three generations of rights into a single document. Most African states are struggling to keep faith with civil and political rights and freedoms. The induction of these other generations of rights in the African Charter is indicative of obvious pretensions and unguided ambition. Further, a careful analysis of the rights guaranteed under the African Charter reveals a struggle by the drafters of the Charter to protect the sovereignty of African states while at the same time showing faith, no matter how infinitesimal, in the protection and promotion of human and peoples' rights. This explains why most of the protected rights under the Charter are either couched in unclear terms or vigorously limited by claw-back causes. Thus, the violation of these rights is easily experienced. In the other systems discussed, human rights could be derogated from, subject to clearly defined circumstances. Despite the notable shortcomings of the African Charter, it is safe to conclude that, its adoption signifies an effort on the part of African states to promote and protect human rights. We hope to see how this effort will be sustained by the recently established African Court of Justice and Human Rights.

⁹⁴ Statute annexed to the Protocol Art 28.

⁹⁵ Statute annexed to the Protocol Arts 29 and 30.

⁹⁶ ACHR Art 63(1).

⁹⁷ ECHR Art 41.

⁹⁸ Protocol No 7 of the ECHR art 3.

⁹⁹ Statute annexed to the Protocol.