

A CRITICAL ANALYSIS OF THE NORMATIVE STRUCTURE OF THE AFRICAN UNION HUMAN RIGHTS SYSTEM

Oyepho Akeuseph, PhD* & Tamunoemi A. Abbiyesuku, PhD**

Abstract

The African Charter on Human and Peoples' Rights has been showered with praises both at the domestic, regional and international levels as a human rights instrument uniquely tailored to resolving human rights issues which were hitherto prevalent in the Continent especially foreign domination. This work examined the normative structure of African Human Rights System. The aim of the work was to critically examine the strength and/or the weakness of Africa's human rights normative structure with a view of making recommendations that will solve grey issues of human rights promotion, respect, protection and fulfillment. The work's major objectives were to chronicle African Union Human Rights instruments such as the African Charter on Human and Peoples' Rights, African Charter on the Rights and Welfare of the Child, Protocols to the African Charter on Human and Peoples Rights on Rights of Women in African and Protocol on the Establishment of the African Court on Human and Peoples' Rights and so on, and examine their normative structure; to identify and critically appraise the categories of Human and Peoples Rights guaranteed by the various human rights instruments in African with particular focus on the African Charter on Human and Peoples Rights. The doctrinal research methodology was adopted majorly in this work. It was discovered that the right to privacy, the right against forced labour, right to free and fair elections were not clearly provided for and/or not named and guaranteed as part of civil and political rights. Also, it was further discovered that economic rights particularly under the African Charter were scantily provided; no specific provisions to the right to food shelter and water. It was concluded that a lot is required to be done in the area of civil and political rights, economic and social rights, and peoples rights in the continent particularly in regard to respect, protection and fulfillment of these rights. The work recommended that the African Union should initiate measures geared toward drafting and adopting African Charter on economic, Social, and Culture rights, tailored to restraining the egregious violations of economic, social, and cultural rights of individuals and Peoples in the African Continent.

Key Words: Human Rights, Normative Structure, African Union, Human Rights System, Critical Analysis

1.0 Introduction

The African Charter on Human and Peoples' Rights¹ is an African Union Human Rights Charter containing normative and institutional structures aimed to promote and protect human and peoples' rights in the African Continent. The Charter was adopted by the Assembly of Heads of States and Governments in 1981 and entered into force in 1986.² It has been ratified by fifty-four (54) countries out of the 55 members of the African Union³ except Morocco. The Sole Supervisory institution or body created by the African Charter is the African Commission on Human and Peoples' Rights (African Commission)⁴. The Commission is charged with the responsibility of

* **Oyepho Akeuseph**, LLB (RSUST), LL.M (RSU) BL (Abuja), Ph.D Research Candidate, (RSU), Managing Solicitor Oyepho, Oyepho & Co, No. 10a Deacon Iheke Street, Mgbuoba Off NTA Road, Port Harcourt, Rivers State, E-mail: oyepho.akeuseph@ust.edu.ng; akeusephoyepho@gmail.com, Tel: 08035761997.

** **Tamunoemi A. Abbiyesuku**, LL.B (RSU), BL (ABUJA), LL.M (RSU), Ph.D Research Candidate (RSU), Senior Lecturer, Department of Law, Institute of Legal and Global Studies, Port Harcourt Polytechnic, Rumuola, Port Harcourt. Rivers State, Nigeria, Email: tamunoemi.abbiyesuku@portharcourtpoly.edu.ng.

¹African Charter on Human and Peoples' Rights 1981.

² C Heyns and M Killandaer, "The African Human Rights System in FG Isa and K De Fayter (eds), International Human Right Law in a Global Context (Bibao: University of Deciste 2009), 859.

³African Commission in Human and Peoples Rights 'State parties to the African Charter' <<https://achpr.au.int/en/states>>accessed 24th October, 2023.

⁴African Charter on Human and peoples' rights (n¹), Art. 30.

promoting human and people's rights and ensure their protection in Africa.⁵ The African Commission was constituted and met for the first time in 1987⁶. The Commission has adopted its own rules and procedures (amended in 1995)⁷. There are two protocols to the African ChArt.er, namely: the Protocol to the African ChArt.er on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Human Rights Protocol)⁸. The African Human Rights Protocol was adopted in 1988 and entered into force in January 2004⁹. The second protocol that has supplemented the African ChArt.er is the African ChArt.er on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003 and entered into force in November 2005.¹⁰

The following other instruments play strategic roles in the African Human Rights System: the African Union Convention Governing Specific Aspects of Refugee Problems in Africa¹¹, entered into force in 1974. The Convention has been ratified by forty-six (46) member States of the African Union, The African ChArt.er on the Rights and Welfare of the Child (African Children ChArt.er)¹². The African Children ChArt.er entered into force on 29th November, 1999¹³. The African Children ChArt.er has been ratified by fifty-three Member States of the African Union¹⁴. A special monitoring body for the African Children's ChArt.er, the African Committee on the Rights and Welfare of the Child was established by the ChArt.er.¹⁵ The Cultural ChArt.er for Africa¹⁶ was adopted by the Organization of African Unity (OAU) now African Union (AU) in 1976 and came into force in 1990. Another treaty pertinent to human rights in African is the Convention on Prevention and Combating Corruption¹⁷, adopted by the Assembly of Heads of States and Government of the Organization of African Unity (OAU), 2003, which entered into force in 2006; the Convention on Elimination of Mercenaries in Africa, was adopted in 1977 and entered into force in 1985¹⁸; the OAU (now AU) Convention on the Prevention and Combating of Terrorism was adopted in 1999 and entered into force in 2002¹⁹.

The African convention on the Conservation of Nature and Natural Resources was adopted by the Assembly of Head of States and Government of the African Union on the 15th day of September, 2003 and entered into force on June 16, 2016.²⁰ This work will critically examine the normative structure of the African Human Rights System with particular focus on the African ChArt.er on Human and Peoples' Rights 1981.

⁵*Ibid.*

⁶C Heyns and m Kellander (n²).

⁷*Ibid.*

⁸*Ibid.*

⁹*Ibid.*

¹⁰*Ibid.*

¹¹Convention Governing the Specific Aspect of Refugee problem in Africa 1969, Art.s 1-15

¹²African ChArt.er on the Rights and Welfare of the Child 1990.

¹³African ChArt.er on the Rights and Welfare of the child" <<https://au.int/sites/default/files/treaties/36804-treaty-african-chArt.er-on-rights>> accessed 24th October, 2023.

¹⁴African Network for the Prevention and Protection Against Child Abuse and Neglect of the Rights and Welfare of the Child (ACRWC)' <<https://www.anppcan.org/the-african-chArt.er-on-the-rights-and-welfare-of-the-child>>accessed 24th, 2023

¹⁵ACRWC (n¹²), Art. 32.

¹⁶Cultural ChArt.er for Africa 1979.

¹⁷Convention on Preventing and Combating Corruption 2003.

¹⁸Convention on Elimination of Mercenarism 1977.

¹⁹AU Convention on Prevention and Combating of Terrorism 1999.

²⁰African Convention on the Conservation of Nature and Natural Resources 2016.

2.0 Normative Structure of the African ChArt.er on Human and Peoples' Rights 1981

The African ChArt.er recognizes many internationally accepted human rights norms and has special features.²¹ Regarding the unique features of the ChArt.er in 1979, the then, President of Senegal, Lepold Sedar Senghor, in his welcome address to the meeting of experts who were preparing the draft African ChArt.er in Dakar, referred them to use example set by International Human Rights Instruments and further stated as follows: 'As Africans, we shall never copy, nor strive for originality, for the sake of originality ... you must keep constantly in mind our values of civilization and the real needs of Africans'²².

The ChArt.er recognizes not only Civil and Political Rights, but also Economic, Social and Cultural Rights, not only individual but also peoples' rights, not only rights but duties and it has a Singular System for restricting rights.²³ The ChArt.er *prima facie* has no derogations; therefore, the limitations on the rights and freedoms contained in the chArt.er cannot be justified by emergencies and special circumstances. The only legitimate reasons for limitations to the rights and freedoms guaranteed in the chArt.er are found in article 27(2)²⁴. The ChArt.er also has interpretation provisions which are very favourable to international law.

The obligation of State Parties in respect of all the norms recognized by the chArt.er is provided as follows:

The member States of the organization of African Unity parties to the present chArt.er shall recognize the rights, duties and freedoms enshrined in the chArt.er and shall under take to adopt legislative or other measures to give effect to them.²⁵

The above provision of the ChArt.er placed a sacred duty on State PArt.ies to the ChArt.er to respect, protect, promote and fulfill all the rights and freedoms set out in the ChArt.er. The normative structure of the African ChArt.er on Human and Peoples' Rights will be snapshot and examined below.

2.1 Civil and Political Rights

The Civil and Political Rights provided for by the African ChArt.er are reasonably similar to those provided for in other international instruments; the Civil and Political Rights' provisions of the chArt.er have received consideration of the African Commission.²⁶

The ChArt.er recognizes the following civil and political rights:

- (a) **The Prohibition of Discrimination:** It is provided that: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the ChArt.er without distinction of any kind such as race, sex, religion, ethnic group, colour, language, political opinion, national and social origin, fortune, birth or any Status.'²⁷

²¹C Heyns (n²), 861.

²²*Ibid.*

²³*Ibid.*

²⁴African ChArt.er (n¹), Art. 27 (2).

²⁵African ChArt.er (n¹), Art. 1.

²⁶C Heyns, (Civil and Political Rights in the African ChArt.er" in M Evans and R Murray (eds): *The African ChArt.er on Human and People's Rights* (Cambridge: Cambridge University Press 2002), 137.

²⁷African ChArt.er (n¹), Art. 2.

- (b) **Equality of All Individuals:** Equality of every individual before the law and equal protection of the law²⁸ is recognized and guaranteed by the ChArt.er.
- (c) **Bodily Integrity and the Right to Life:** According to the ChArt.er, human beings are inviolable. Every human being is entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of this right²⁹. It is instructive to conclude that the unqualified right to life as guaranteed by the ChArt.er is implicit in it, components rights that enable full or adequate enjoyment of the right. These components rights to the right to life are: right to food, shelter, wholesome environment and adequate healthcare and so on. The non-availability of these rights or inadequate protection of the component of the right to life makes its provision a mockery.
- (d) **Dignity and Prohibition of Torture and Inhuman Treatment:** The ChArt.er provides that every human being shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal Status³⁰. Slavery, Slave trade, torture, cruel, inhuman or degradation punishment and treatment are particularly prohibited³¹.
- (e) **Liberty and Security:** The right of every individual to liberty and the security of his person³² is guaranteed, and no one shall be deprived of his freedom except for reasons and conditions previously laid down by law³³. Also, no one is permitted to be arbitrarily arrested or detained³⁴.
- (f) **Fair Trial:** The right to fair trial or the right to be heard as provided for by the chArt.er includes:
 - (i) The right to an appeal to competent national organs against act of violation of individual fundamental rights as recognized and guaranteed by conventions, law, regulations and customs in force³⁵.
 - (ii) The right to be presumed innocent until proved guilty by a competent court or tribunal³⁶.
 - (iii) The right to defence including the right to be defended by counsel of his choice³⁷;
 - (iv) The right to be tried within a reasonable time by an impartial court or tribunal³⁸.

By article 7(2) of the ChArt.er, no one shall be punished for an act or omission which did not constitute a legally punishable offence at the time it was committed; no penalty may be inflicted for an offence for which no provision was made at the time it was committed; punishment is personal and can only be imposed on the offender³⁹.

- (g) **Freedom of Conscience:** The ChArt.er guarantees freedom of conscience, and religion, except in the case of maintenance of law and order, no one may be submitted to measures restricting the exercise of their freedom⁴⁰.

²⁸*Ibid.* Art. 3.

²⁹*Ibid.* Art. 4.

³⁰African ChArt.er (n¹), Art. 5.

³¹*Ibid*

³²*Ibid*, Art. 6.

³³*Ibid*

³⁴*Ibid*

³⁵*Ibid*, Art. 7 (1).

³⁶*Ibid*, Art. 7 (2).

³⁷*Ibid*, Art. 7 (3).

³⁸*Ibid*, Art. 7 (4).

³⁹*Ibid*, Art. 7 (2).

⁴⁰African ChArt.er (n¹), Art. 8.

- (h) **Information and Freedom of Expression:** Individuals have the right to express and disseminate his opinion within the law⁴¹ as well as right to receive information⁴².
- (i) **Freedom of Association:** The freedom of association for every individual is guaranteed and must be exercised within the ambit of the law⁴³. Except for the purpose of ensuring the performance of the duties⁴⁴ placed on individuals by the ChArt.er; no one may be compelled to join or become a member of any association⁴⁵.
- (j) **Freedom of Assembly:** The right to assemble freely with others is protected but may be restricted for the purpose of national security, national safety, healthy, ethics and the rights of others⁴⁶.
- (k) **Freedom of Movement:** Freedom of movement and residence within the borders of a state in accordance with law⁴⁷ are protected by the ChArt.er; every individual has the right of egress and ingress to his country⁴⁸. The right to freedom of movement and residence may only be subject to restrictions provided for by law for the protection of National Security, Law and order, public health or morality⁴⁹.
The right of individuals to seek asylum in other countries in accordance with Law⁵⁰ is guaranteed; Mass expulsion of non-nationals is prohibited⁵¹.
- (l) **Political Participation:** The right of every citizen to participate freely in the government of his country either directly or truly chosen representatives in accordance with the extant law⁵² is protected by the ChArt.er; the right to equal access to public services of the country and the right of access to public property and services in strict equality of all persons before the law⁵³ is guaranteed.
- (m) **Property:** The right to property is guaranteed and can only be encroached for public interest and in consonance with provisions of appropriate laws⁵⁴.
- (n) **Independence of the Courts:** By Article 26 of the ChArt.er, state parties are obligated to guarantee the independence of the courts and should also allow the establishment and improvement of appropriate national institutions charged with the promotion and protection of rights and freedoms guaranteed by the ChArt.er⁵⁵.

2.1.1 Absence of or Insufficient Provisions on some Civil and Political Rights by the African Charter

There are noticeable shortcomings in respect of provisions in respect of Civil and Political Rights in the African ChArt.er when placed side-by-side with other International Human Rights Instruments. For instance, no overt mention or reference in the African Charter to the Right to privacy, right against forced labour is not named and guaranteed; the rights to fair trial and political

⁴¹*ibid*, Art. 9(2).

⁴²*ibid*, Art. 9(1).

⁴³*ibid*, Art. 10(1).

⁴⁴*ibid*, Art. 29(1)-(8).

⁴⁵*ibid*, Art. 10(2).

⁴⁶*ibid*, Art. 11.

⁴⁷*ibid*, Art. 12(1).

⁴⁸*ibid*, Art. 12(2).

⁴⁹*ibid*.

⁵⁰*ibid*, Art. 12(3).

⁵¹*ibid*, Art. 12 (5).

⁵²*ibid*, Art. 13(1).

⁵³*ibid*, Art. 13(2) and (3).

⁵⁴African ChArt.er (n¹), Art. 14.

⁵⁵*ibid*, Art. 26.

participation are scantily provided for, under the Charter. There is also no explicit reference to the right to public hearing, the right to interpretation, the right against self-incrimination and the right against double jeopardy. Article 13(1) of the ChArt.er Recognizes the right of every citizen to participate freely in the government of his country. It does not provide that this should be achieved via regular, free, fair and credible elections.

However, it is instructive to express that the Commission has in many resolutions and decisions in cases brought before it, construed provisions of the ChArt.er to include some of the rights not clearly provided for or scantily provided for, which is *intadem* with international best practices in this regard. Some of the resolutions and decisions of the African Commission on Human and Peoples' Rights in respect of individual communications affecting civil and political rights will be chronicled below: In *Malawi African Association and others v Mauritania*, the Commission held that there is not only a negative duty on state parties to refrain from violating chArt.er rights themselves, but also a positive duty on state parties to protect those in their jurisdictions against violations by non-state actors. The Commission found that, although slavery had officially been abolished in Mauritania, the government was not effectively enforcing this against individual slave owners⁵⁶. Similarly in a matter involving Chad, the Commission held that the state's failure to protect people under its jurisdiction against attacks by unidentified militants during Civil War, not proven to be government agents, constituted a violation of the right to life⁵⁷ guaranteed under Article 4 of the African ChArt.er. In the same vein, the Commission in a matter against Zimbabwe, applied the jurisprudence of the Inter-American Court of Human Rights to examine the question whether the government has exercise due diligence with regard to violations perpetrated by non-state actors⁵⁸.

The Commission has also held in a matter brought against Sudan, that the imposition of Sharia Law on non-Muslims in Sudan violated the right to freedom of religion⁵⁹. The African ChArt.er guarantees the right to freedom of religion in its article 8. It is striking when the Commission expressed that regarding the application of Sharia Law 'there is no controversy as to Sharia being based upon the interpretation of the Muslim religion. When Sudanese tribunal apply Sharia, they must do so in accordance with the other obligations undertaken by the State of Sudan. Trial must always accord with international fair-trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Sharia are thus not competent to Judge non-Muslims, and everyone should be tried by regular court, if they wish⁶⁰. Conclusively, the Commission having considered the whole issues regarding the case before it, declared that there have been violations of Articles 2, 4, 5, 6, 7(1)(a)(b)(c)(d), 8, 9, 10 and 26 of the African ChArt.er on Human and Peoples' Rights and recommended strongly to the government of Sudan to put an end to these violations in order to abide by its obligations under the African ChArt.er on Human and Peoples' Rights⁶¹.

Similarly, the Commission has, in the *Constitutional Rights Project and Another v Nigeria*⁶², held that Nigeria's Government action by annulling the 12 June, 1993 Presidential Election which was

⁵⁶Malawi African Association and others v Mauritania 2000 AHRLR (ACHPR, 2000).

⁵⁷Commission National des Droits de l'Homme et des Libertes v Chad 2000 AHRLR 66; Social and Economic Right Action SERAC and another v Nigeria 2001 AHRLLR 60.

⁵⁸Zimbabwean Human Rights NGO Forum v Zimbabwe 2006 AHRLR 128.

⁵⁹Amnesty International and others v Sudan 2000 AHRLR 297.

⁶⁰*Ibid.*

⁶¹*Ibid.*

⁶²2000 AHRLR 180.

adjudged by local and international observers as free and fair; and the arbitrary arrests and detention of citizens, gagging of press freedom and so on, violated Articles 1,6,9 and 13 of the African ChArt.er; and appealed to the government of Nigeria to release all those who were detained for protesting against the annulment of the elections; and to preserve the traditional functions of the courts by not curtailing their jurisdiction⁶³.

The Commission has held that an execution after unfair trial is amongst, other things, a violation of the right to life⁶⁴ but that the death penalty itself doesn't constitute a violation of the African ChArt.er⁶⁵.

2.2 Economic and Social Rights

An important element of the ChArt.er is the incorporation of some economic and Social Rights alongside civil and political rights. The incorporation of both Civil and Political, and Economic and Social Rights underscores the idea of indivisibility of human rights. It also stresses the significance of the respect, protection and fulfillment of Civil, Political, Economic and Social Rights to the development of Africa and indeed States' PArt.ies to the African ChArt.er. Not all economic and Social Rights compared to the International Covenant on Economic, Social and Cultural Rights are explicitly incorporated in the African ChArt.er. The Economic and Social Rights guaranteed in the African ChArt.er will be snapshot and examined below:

- (a) **Right to work under Equitable and Satisfactory Conditions:** The right of every individual to work under equitable and satisfactory conditions and to receive equal pay for equal work⁶⁶ is guaranteed.
- (b) **Right to Health:** The ChArt.er succinctly stated that 'Every individual shall have the right to enjoy the best attainable state of physical and mental health⁶⁷, and the right to health can only be attained, where the right to a wholesome environment⁶⁸, right to the means of livelihood (food, shelter, unpolluted water, air and land) are fulfilled. Also, the respect, protection and fulfillment of the right to health obligates the state to make health care accessible to its citizens at all times. The right to life and dignity would be a mockery to citizens of a state where health care is not accessible.
- (c) **Right to Education:** The African ChArt.er recognizes the Right to Education as a Cherish Entitlement of Citizens of State PArt.ies, being inalienable and immutable as it carries the status of innateness and cannot be derogated. The ChArt.er made the right to education as mandatory.

It states that: Every individual shall have the right to Education'⁶⁹. In consonance with this provision, state pArt.ies to the ChArt.er are duty bound to provide free and compulsory education at all levels; but where the means to provide free and compulsory education is manifestly seen to be impracticable as a result of insufficient resources, primary and basic education should be made free and compulsory. Furthermore, the ChArt.er provides that every individual may freely participate in the cultural life of the community⁷⁰. This implies that an individual in the community should not be coerced to take part. in the cultural activity of his community. The right and freedom of choice is implicit in the right created by Article 17(2)

⁶³*Ibid.*

⁶⁴Forum of Conscience v Sierra Leone (2000) AHRLR 293.

⁶⁵Intereght and Others (on behalf of Bosch) v Botswana (2003) AHRLR 55.

⁶⁶African Charter (n¹), Art. 15.

⁶⁷*Ibid*, Art. 16.

⁶⁸*Ibid*, Art. 24.

⁶⁹African ChArt.er (n¹), Art. 17(1).

⁷⁰African ChArt.er (n¹), Art. 17(2).

of the ChArt.er. The State is also obligated to promote and protect moral and traditional values recognized by the community⁷¹. It appears the obligation to promote and protect recognized morals and traditional values of the community demands the state to enact laws and formulate policies aim at preserving the moral and traditional values of the community. In line with this reasoning, amongst other laws, the Nigerian State, Party to the African ChArt.er on Human and Peoples' Rights 1981, enacted the Same Sex Marriage (Prohibition) Act, 2013⁷², and prohibited same sex marriage and related activities, and claimed that same sex marriage is against the recognized morals and traditional values of Nigerians. However, the SSMPA 2013 has been condemned internationally for its anti-same sex rights stance. It has been expressed that the Act violates the rights to sexual autonomy, individual autonomy, privacy and freedom of movement⁷³.

It is expedient to note that some economic and social rights are not expressly mentioned in the ChArt.er such as the rights to free and unpolluted water, food and housing and so on. However, in *SERAC v Nigeria*⁷⁴, the Commission held that the presence of implicit right to 'housing or shelter' in the ChArt.er has to be deduced from the explicit provisions on health, property and family life in the ChArt.er⁷⁵. Also, the right to food has been read into other rights⁷⁶.

2.3 Women's Rights

The ChArt.er has obligated states to ensure the elimination of every discrimination against women and further enjoined states to protect the rights of women and children as stipulated in international declaration and conventions⁷⁷. Article 18(3) of the African ChArt.er expressed above, implicitly placed responsibility on states parties to make laws aim at protecting the rights of women and children or domesticate the International Convention on Elimination of all Forms of Discrimination Against Women 1979 and International Convention on the Rights of the Child 1989. The lumped of Women and Children Rights in an article which deals with the family reflects archaic disposition about the exact nature and role of women in society. This inadequate and improper guarantee of the rights of women and children propelled the adoption of the Protocol to African ChArt.er on Human and Peoples' Rights on the rights of Women in Africa. The protocol on the rights of women was adopted by the AU Assembly in 2003 and entered into force in 2005⁷⁸. The Protocol on the Rights of Women has twenty-four Articles dealing categorical on issues affecting women, and other rights touching on both men and women. The rights in the protocol include elimination of discrimination against women⁷⁹, right to dignity⁸⁰, right to life, integrity and security of person⁸¹, elimination of harmful practices against women⁸², right to marriage⁸³ separation, divorce, and

⁷¹*Ibid*, Art. 17(3).

⁷²Same Sex Marriage (Prohibition) Act 2013, SS. 1-5.

⁷³O. Akeuseph, 'Human Rights Implications of Nigerian Laws, dealing with Sexual Orientations' 2023 (3) (2) Rivers State University Journal of Environmental and Human Rights Law, 39.

⁷⁴Social and Economic Rights Action Centre (n⁷²), 60.

⁷⁵*Ibid*, 65.

⁷⁶*Ibid*.

⁷⁷C Heyns (n²), 886.

⁷⁸Protocol to the African ChArt.er on the Human and People's Right on the Right of Women in Africa 2003.

⁷⁹*Ibid*, Art. 2.

⁸⁰*Ibid*, Art. 3.

⁸¹*Ibid*, Art. 4.

⁸²*Ibid*, Art. 5.

⁸³*Ibid*, Art. 6.

annulment of marriage⁸⁴, rights to access to justice and equal protection of the law⁸⁵, right to political participation⁸⁶, peace⁸⁷ protection of women in armed conflict⁸⁸ right to education⁸⁹, rights to economic and social welfare⁹⁰, rights to health and reproduction⁹¹, right to food security⁹², adequate housing⁹³, positive cultural development⁹⁴, right to a healthy and satisfactory environment⁹⁵ right to sustainable development⁹⁶ widow's rights⁹⁷, inheritance rights⁹⁸, special protection of elderly women⁹⁹, women with disabilities¹⁰⁰, and right of women in distress¹⁰¹.

3.0 Provisions on Peoples' Rights

The ChArt.er protects peoples' rights better than any other international human right instrument¹⁰².

The Peoples' Rights Protected in the ChArt.er are expressed as follows:

- (a) **Equality of all Peoples:** According to the ChArt.er, 'All Peoples shall be equal; they shall enjoy the same respect and shall have same rights; nothing shall justify the domination of a people by another¹⁰³. It is instructive to note that human rights which flow from the realm of natural law, being divine, eternal or God's law, vests in all men equal rights irrespective of geographical zone, tribe, origin, gender, political, colour, affiliation and so on. The rights endowed upon human beings by nature are inalienable, immutable and inextinguishable. At the heart of human rights dominates the principle of non-discrimination in all spheres of human endeavours. This notion has found expression in many Democratic Constitutions of the world. In Nigeria, it is embedded in section 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Accordingly, the right to non-discrimination is synonymous with equal rights of all Peoples.
- (b) **The Rights to Self Determination:** The ChArt.er has guaranteed right of existence to all people and unquestionable right to self-determination¹⁰⁴. All peoples have the right to freely determine their political status and shall pursue their economic and social developments according to the policy they have freely chosen¹⁰⁵. In *Katangese Peoples' Congress v Zaire*¹⁰⁶, a complaint was brought before the commission, on the ground that Katangese People had a right, as a people, to self-determination in the form of Independence. The Commission held

⁸⁴*Ibid*, Art. 7.

⁸⁵*Ibid*, Art. 8.

⁸⁶*Ibid*, Art. 9.

⁸⁷*Ibid*, Art. 10.

⁸⁸*Ibid*, Art. 11.

⁸⁹*Ibid*, Art. 12.

⁹⁰*Ibid*, Art. 13.

⁹¹*Ibid*, Art. 14.

⁹²*Ibid*, Art. 15.

⁹³*Ibid*, Art. 16.

⁹⁴*Ibid*, Art. 17.

⁹⁵*Ibid*, Art. 18.

⁹⁶*Ibid*, Art. 19.

⁹⁷*Ibid*, Art. 20.

⁹⁸Protocol to the African ChArt.er (n⁹³), Art. 21.

⁹⁹*Ibid*, Art. 22.

¹⁰⁰*Ibid*, Art. 23.

¹⁰¹*Ibid*, Art. 24.

¹⁰²R Murray and S Wheatley, 'Group and the African ChArt.er on Human and People's Rights' 2003 (25) *Human Right Quarterly*, 213.

¹⁰³African ChArt.er (n¹), Art. 19.

¹⁰⁴*Ibid*, Art. 20.

¹⁰⁵*Ibid*.

¹⁰⁶(2000) AHRLR 71.

that the facts presented before it did not show evidence that provision of the ChArt.er had been violated as egregious human rights infractions or want of political participation by the Katangese people had not been established¹⁰⁷.

It could be inferred from the conclusion reached by the Commission that if the Katangese people had established egregious infractions of their right to political participation and unquestionable right to self-determination, that secession would have been justifiable in the circumstance.

It has also been expressed in this regard that the commission was careful to emphasize that self-determination can also take forms other than secession, such as self-government, local government, federalism or confederation¹⁰⁸. Conversely, in *Jawara v The Gambia*¹⁰⁹, concerning the 1994 coup d'état against the Democratically elected government of Gambia, the Commission held that the act violated the right to self-determination of the people of the Gambia as a whole. A similar conclusion was arrived at in *Constitutional Rights Project and Another v Nigeria*¹¹⁰, wherein Abacha regime annulled the June 12, 1993 Presidential election that was internationally recognized as free and fair election.

The Charter went further and provides that 'Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination, by resorting to any means recognized by the International Community'¹¹¹.

In fighting for liberation from the bonds of domination by oppressed peoples, state parties to the African Charter are duty bound to render requisite assistance or help in the struggle for liberation against foreign domination.¹¹²

(c) The Right of all Peoples to Freely Dispose of their Wealth and Natural Resources:

The ChArt.er re-echoed the Sovereign Right of a people over their natural resources when it states that 'All Peoples shall freely dispose of their wealth and natural resources and it should be exercised for the common good or benefit'¹¹³. This is in consonance with one of the rights (the right to benefit from the common heritage of mankind) as third generation of right in Karel Vasak Categorization of Rights.

Deprivation of a people from the right to freely dispose of their wealth and natural resources for the general good constitutes an infraction. Where spoliation or forceful taking of the wealth and natural resources of a people occurs the dispossessed people have a right to the lawful recovery of their wealth and natural resources as well as to an adequate compensation.¹¹⁴ The ChArt.er went further to encourage what appears to be expropriation where foreign Companies monopolize peoples wealth and natural resources, so that '... their peoples will fully benefit from the advantages derived from their natural resources'.¹¹⁵

¹⁰⁷2000 AHRLR 71.

¹⁰⁸C Heyns (n2) 867.

¹⁰⁹2000 AHRLR 107.

¹¹⁰2000 AHRLR 191.

¹¹¹African Charter (n1), Art. 20(2).

¹¹²*ibid*, Art. 20(2).

¹¹³*ibid*, Art. 21(1).

¹¹⁴African ChArt.er (n1) Art. 21(2).

¹¹⁵*ibid*, Art. 25(5).

- (d) **The Right to Economic, Social and Cultural Development:** The rights to economic, social and cultural development is guaranteed by the ChArt.er in its Article 21(1) and (2). The idea of a human right to development was originally launched in the early seventies by two scholars/practitioners Karel Vasak and Kaba M'Baye,¹¹⁶ and had found expression in human rights instruments. In Vasak view, the active holders of the right to development were not only individuals but also states and sub-national groups such as local collectivities and national, ethnic and linguistic communities¹¹⁷. The duty holders included not only territorial responsible states but the international community as a whole¹¹⁸.

The United Nation had in 1986 declared the right of every human person and all peoples to economic, social, cultural and political development¹¹⁹. The UN Declaration on the right to development identifies human persons as the central subject of development and the primary duty or responsibility for development lies with national states¹²⁰.

- (e) **The Right to Peace and Security:** All Peoples have the right to National and International Peace and Security and the principle's of solidarity and friendly relation inherently affirmed by the ChArt.er of the United Nations 1945 and re-echoed by that of the African Union ChArt.er shall guide or govern relations between states¹²¹.
- (f) **The Rights to a Satisfactory Environment:** The ChArt.er in its article 24 has provided for the right of all peoples to a general satisfactory environment favourable to their development.

3.1 Duties Created by the African ChArt.er

The ChArt.er does not only create or provide for rights of individuals and peoples', but also creates duties. The states and individuals are the duty holders.

The State pArt.ies to the ChArt.er amongst other duties to respect, protect and fulfill the rights of individuals and peoples' as provided for by the ChArt.er have the following duties to ensure performance:

- i) To promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the ChArt.er and to ensure the freedoms and rights as well as corresponding obligations and duties are understood¹²².
- ii) To guarantee the independence of the courts¹²³.
- iii) To allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the ChArt.er¹²⁴.

The Charter has also apportioned the following duties to be carried out by individuals:

- i. Every individual has the duty towards his family and society, state and other legally recognized communities and international community¹²⁵.

¹¹⁶K Vasak, 'Le Droits International des Droits de l'Homme (1972) (51) *Revue des Droits de l'Homme*, 43 -51; K M'Baye, 'Le Droits au Development Comme un Droits de l'Homme (1972) (51) *Revue des Droits, l'Homme*, 505-534.

¹¹⁷K d Feyter, 'Globalization and Human Rights in F G' Isa and K Feyter (eds) *International Human Rights Law in Global Context* (Bibao: University of Deusto 2009), 62.

¹¹⁸*Ibid* 63.

¹¹⁹*Ibid*.

¹²⁰*Ibid*.

¹²¹African ChArt.er (n¹), Art. 23(1).

¹²²African ChArt.er (n¹), Art. 25.

¹²³*Ibid*, Art. 26.

¹²⁴*Ibid*, Art. 26.

¹²⁵*Ibid*, Art. 27 (1).

ii. Every individual has the duty to respect and consider his fellow human beings without discrimination.¹²⁶

iii. Every individual has duty to maintain relations aimed at promoting, safeguarding and reinforcing, Maintain respect and tolerance.¹²⁷

Also, the individual shall also perform the following duties placed upon him by the ChArt.er:

(a) To preserve harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.¹²⁸

(b) To serve his national community by placing his physical and intellectual abilities at its service.¹²⁹

(c) Not to compromise the security of the state whose national or resident he is.¹³⁰

(d) To preserve and strengthen social and national solidarity particularly when the latter is strengthened.¹³¹

(e) To preserve and strengthen national Independence and territorial integrity of his country and to contribute to his defence in accordance with the law.¹³²

(f) To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of society.¹³³

(g) To preserve and strengthen positive African cultural values in his relations to other members of the society, in the spirit of tolerance, dialogue and consultation and above all to contribute to the moral wellbeing of society.

(h) To contribute to the promotion of African Unity.

3.2 Limitations and Derogations

The African ChArt.er does not contain a general limitation clause. However, Article 27(2) which says that 'the rights and freedoms of each individual shall be exercised with regard to the rights of others, collective security, morality and common interest', appears to play this role. It is a serious challenge that the ChArt.er does not contain a clear and general guide lines on how the rights provided by it should be limited. It is instructive to note that a well spelt out limitation or derogation is pertinent in any human rights regime, if not the exercise of the rights will be illusory.

All the individuals and Peoples' rights guaranteed by the ChArt.er, based on the intendment of article 27(2), may be limited or derogated as follows:

(i) in the interest of collective security or public security.

(ii) in the interest of collective or public morality.

(iii) for the common interest

(iv) for the purpose of protecting the rights and freedom of other persons.

4.0 Normative Structure of other Human Rights Treaties in Africa

Some of the OAU (now AU) treaties has significant impact on human rights. They include: the OAU (AU) Convention Governing Specific Aspects of Refugee Problems, African ChArt.er on the Rights and Welfare of the Child and AU Convention on preventing and combating corruption.

¹²⁶*Ibid*, Art. 28.

¹²⁷*Ibid*.

¹²⁸*Ibid*, Art. 29 (1).

¹²⁹African ChArt.er (n¹), Art. 29 (2).

¹³⁰*Ibid*, Art. 29 (3).

¹³¹*Ibid*, Art. 29 (4).

¹³²*Ibid*, Art. 29 (5).

¹³³*Ibid*, Art. 29(8).

4.1 OAU (AU) Convention Governing Specific Aspects of Refugee Problems

The meaning of refugee as contained in article 1 of the OAU (now AU) Refugee Convention is relatively broader than that of the UN refugee convention.¹³⁴ A part. from protection from being persecuted on reasons of race, religion nationality, membership of particular group or political opinion,¹³⁵ the OAU Convention further states that the term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part. or the who of his country of origin or nationality¹³⁶ shall be considered a refugee. The AU Refugee Convention does not create institutional structure for refugee; and the African ChArt.er has considered several communications dealing with refugees.¹³⁷

4.2 African ChArt.er on the Rights and Welfare of the Child

The ChArt.er defines ‘a child to mean every human being below the age of 18 years.¹³⁸ The rights of the child guaranteed by the ChArt.er include the right to non-discrimination¹³⁹ right to survival and development¹⁴⁰ right to freedom of expression¹⁴¹ right to freedom of thought, conscience and Religion,¹⁴² right to privacy¹⁴³ right to education¹⁴⁴, right to leisure, recreation and Cultural Activities¹⁴⁵, right of handicapped children to special measures of protection,¹⁴⁶ right to health and health services¹⁴⁷ right against child labour¹⁴⁸ right to protection against child abuse and torture,¹⁴⁹ right to family protection and maintenance¹⁵⁰ right to parental care and protection¹⁵¹, right to the protection against harmful social and cultural practices¹⁵², right to protection against armed conflicts¹⁵³, right against sexual exploitation,¹⁵⁴ right against drug abuse,¹⁵⁵ right against sale, trafficking and abduction¹⁵⁶ right to nationality¹⁵⁷ and right to freedom of association¹⁵⁸.

¹³⁴C Heyns (n²)870.

¹³⁵OAU (now AU) Convention Governing Specific Aspect of Refugee problems 1969, Art. 1(1); UN Refugee Convention 1951, Art. 1 (a) 2; Protocol on the Status of Refugee 1967, Art. 1(2).

¹³⁶Protocol on the Status of Refugee (n¹⁵¹), Art. 1(2).

¹³⁷*Organizational Mandate Contrela Torture and others v Revenda* (2000) AHRLR 282; *Rencontre Africana pour la Defense des Droits de l’Homme v Zambia* (2000) AHRLR (ACHPR 1996).

¹³⁸African ChArt.er on the Rights and Welfare of the Child (n¹²), Art. 2

¹³⁹*Ibid*, Art. 3.

¹⁴⁰*Ibid*, Art. 5.

¹⁴¹*Ibid*, Art. 7.

¹⁴²*Ibid*, Art. 9.

¹⁴³*Ibid*, Art. 10.

¹⁴⁴*Ibid*, Art. 11.

¹⁴⁵*Ibid*, Art. 12.

¹⁴⁶*Ibid*, Art. 13.

¹⁴⁷*Ibid*, Art. 14.

¹⁴⁸*Ibid*, Art. 15.

¹⁴⁹*Ibid*, Art. 16.

¹⁵⁰*Ibid*, Art. 18.

¹⁵¹African ChArt.er on the Rights and Welfare of the Child (n¹²), Art. 19.

¹⁵²*Ibid*, Art. 21.

¹⁵³*Ibid*, Art. 22.

¹⁵⁴*Ibid*, Art. 27.

¹⁵⁵*Ibid*, Art. 28.

¹⁵⁶*Ibid*, Art. 29.

¹⁵⁷*Ibid*, Art. 6.

¹⁵⁸*Ibid*, Art. 8.

4.3 OAU (now AU) Convention on Preventing and Combating Corruption

The obligation to fulfill human rights by States require adequate funds and resources. Corruption depletes the resources needed for States to carry out their human rights obligations. The AU Convention preventing and combating corruption has as one of its cardinal objectives to ‘promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political right.¹⁵⁹ Similarly, State parties to the convention have undertaken to respect human and peoples’ rights in accordance with the African ChArt.er on Human and Peoples’ Rights and other relevant human rights instruments.¹⁶⁰ The Convention also provides for rights linked to the fight against corruption, such as access to information.¹⁶¹

5.0 Conclusion and Recommendation

The African Human Rights System is a combination of normative and institutional structures engendered by AU human rights instruments such as the African ChArt.er on Human and Peoples’ Rights 1981, the Protocol to the African ChArt.er on Human and Peoples Rights on the Establishment of African Court on Human and Peoples Rights, 1988, African ChArt.er on Human and Peoples Rights on the Rights of Women in African, the African ChArt.er on the Rights and Welfare of the Child 1990 and so on.

The African ChArt.er has civil and political rights, economic, social and cultural Rights, women’s rights, peoples rights, duties for individuals and the States; implicit limitation clause – Art. 27(2) and interpretation clause which lean to international law. The other thematic treaties such as ChArt.er on the Rights and Welfare of the Child, the two protocols aforesated and AU Convention Governing specific Aspects of Refugee problems play complimentary roles to the African ChArt.er on Human and Peoples Rights in providing the needed normative as well as institutional structure for the fulfillment of Human and Peoples’ Rights in the African Continent.

There are some civil and political as well as economic and social rights that the African ChArt.er on Human and Peoples’ Rights do not clearly provide for, such as the right to privacy, right against forced labour, right against self-incrimination, and right against double jeopardy; the right to free and fair election is not named and guaranteed as Art. 13(1) only provides for the right of every citizen to participate in the government of his country.

The African Union should put in motion measures aimed at drafting a ChArt.er on Economic and Social Rights that will Comprehensively embody normative structure that will fastly endanger development in the continent. The right to the means of livelihood i.e. the right to food, shelter, and water should be named or explicitly guaranteed.

¹⁵⁹AU Convention on preventing and combating corruption, 2012, Art. 2(4).

¹⁶⁰*Ibid*, Art. 3(2).

¹⁶¹*Ibid*, Art. 9.