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«Protection of Human Rights in Africa: African Human Rights in a Comparative Perspective»

1. Introduction

As international concern, Human rights issues are among the most widely debated in the world today. This is because the question of Human Rights is fundamental to mankind.¹ For a long time they have remained an issue strictly within national jurisdiction², that is until the end of the 1940's, when they became internationalized.³ This process of internationalization, as Azinge points out, is traceable to some international instruments which recognize the need to promote and preserve human rights for the ultimate attainment of world peace.⁴ In this respect, the United Nations has been able to consolidate the principle that human rights are a matter of international concern and that international community is entitled to discuss and to protect human rights⁵ through the 1948 Universal Declaration of human rights.⁶ In the African context, the OAU Charter was the first regional instrument that dealt with the protection of human rights in the continent. However, it contained very little references to the concepts of human rights⁷ and made reference to the protection of human rights as well as general statements regarding the welfare and well being of Africans.⁸ The OAU was preoccupied with more pressing issue such as unity, non interference in internal affairs and liberation.⁹ Practically, the OAU has served as talking shop for African states but has displayed considerable reluctance in intervening in systematic human rights abuses by various regimes in the region.¹⁰ That is what made Keba Mbaye¹¹ to state that African Governments appeared clearly to have sacrificed rights and freedoms for the sake of development and political stability.¹² With both the domestic and international pressure, African leaders adopted in 1986 the African Charter on Human and People Rights¹³ which is the major instrument aimed at protecting

¹ Azinge E, "Millstone Decision on Human Rights" in (ed) A U. Kalu & Y Osinbayo *Perspective on Human Rights* Vol 12 1992, p197.

² The Magna Carta 1215 in England, The French Declaration of 1789, ...

³ Human rights emerged as a subject of concern within the international law jurisdiction after the end of second war.

⁴ Azinge E (n 1 above), p 200; Internationalization of human rights through modern treaties founded its origin in the United Nations Charter (See the Preamble and Article 1 (3) of the Charter), see also Umzurike OU "The African Charter on Human and Peoples' Rights" in 77 *AJIL* 1983, pp 902, 912.

⁵ Azinge (n 1 above) p 200.

⁶ For more examples, see M Killander "The African human rights systems and others regional system: A comparison" in (ed) Viljoen F *The African Human Rights System/ 5 Judiciary Watch Report* (2006), p 177.

⁷ Mangu AMB "The changing Human Rights Landscape in Africa : Organization of African Unity, African Union, New Partnership for Africa's Development and the African Court" 2005 *Netherlands Quarterly of Human Rights* pp 379 381.

⁸ Ankumah E A, *The African Commission on Human and Peoples' Rights* (1996) p 4; the OAU Charter did not proclaimed individual rights for African people.

⁹ OAU Constitutive Act, Preamble Article 2.

¹⁰ Smith R K M, *Textbook on International Human Rights* (2005) P 132; The argument advanced to justify this attitude had been generally the principle of non interference in the internal affairs of OAU member states.

¹¹ He is considered as the father of the African Charter on Human and Peoples' Rights.

¹² Mbaye K and B Ndiaye "The Organization of African Unity" in VISAK (ed) *The International Dimensions of Human Rights vol2* (1982) pp 585, 593.

¹³ Hereinafter « ACHPR ».

human and peoples' rights in Africa. When it came into operation on 21 October 1986, the ACHPR was considered a miracle¹⁴, an extraordinary and powerful instrument of liberalization, and an unprecedented event in the history of the continent.¹⁵ It establishes the African Commission on Human and Peoples' Rights with the responsibility to promote human and peoples' rights and ensure their protection in Africa. However, the lack of a judicial enforcement mechanism pushed the African Union¹⁶ members to adopt on the 9 June 1998 a Protocol to the ACHPR establishing an African Court on Human and Peoples' Rights.

Historically, all regional systems of human rights protection derive from the universal system set by the United Nations and the African system is regarded as the youngest.¹⁷ As consequence, to undertake the present essay requires to make a comparison of the African system with its predecessors. In such respect a great emphasis will be laid on the main instruments, the rights entrenched and the enforcement machinery. These benchmarks are kinds of tools that will be use to achieve the comparison and to show up how original the ACPRH is, to what extend the African system differs from other regional systems.

2. Originality of the ACPHR, its strengths and Weaknesses

2.1 Originality from the normative aspects

2.1.1 Main Human rights instruments

The African system is unique in that it basically rest on the ACHPR and its protocol. The Universal system is grounded on more than one instrument, namely the UDHR, the ICCPR and the ICECSR.¹⁸ The European system combines the ECHR¹⁹ and the European social Charter while the Inter-American one rest on the AmCHR, the OAS Charter, the American Declaration.²⁰

2.1.2 Incorporation of socio-economic rights

The African Charter includes civil and political rights as well as specific economic and social rights.²¹ It has not separated socio-economic rights into a different instrument like in the European and American system.²² As to the Universal Declaration of Human Rights it contains a comparable catalogue of rights. For instance, both texts

¹⁴ Pityana NB 'Hurdles and Pitfalls in international human rights law: The ratification process of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights' *SAJIL* Vol 2 n 2, 2002, pp 110, 112 as quoted by Mangu AMB (n 7 above), pp 379, 383.

¹⁵ Mangu AMB (n 7 above), pp 379, 383.

¹⁶ The African Union succeeded to the OAU on 26 May 2002.

¹⁷ Churc J *et al. Human Rights from a Comparative and International Law Perspective* (2007)259.

¹⁸ The Universal Declaration of Human Rights(1948), The International Convenient on Civil and Political Rights (1966), The International Convenient on Economic, Social and Cultural Rights (1966).

¹⁹ The European Convention on Human Rights(1950).

²⁰ The American Convention on Human Rights, the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man.

²¹ Umozurike OU (n 4 above), pp 902, 910.

²² These rights were subsequently enshrined in the European Social Charter, adopted on 18 October 1996, and later completed by the Additional Protocol amending the European Social Charter of 21 October 1999; The American Declaration does not ignore the notion of socio-economic and cultural rights, but contrarily to the ACHPR, it provides merely for a single article where states parties undertake to adopt measures in order to achieve progressively the full realization of these rights. To remedy to the vagueness of this formulation, states parties adopted in 1998 an additional protocol where they detailed all these rights.

recognize the right to satisfactory working conditions and to equal pay for equal (Article 15 of the ACHPR and Articles 23 & 24 of the UNDHR).²³ Nevertheless, the African Charter is the only one to incorporate the right of equal access to public property and services.²⁴

The entrenchment of the second generation rights in the ACHPR should be regarded like a statement by African states that these rights as well as civil and political rights are indivisible and independent. In the *Preamble*, States parties have stated their conviction that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of these latter rights is a guarantee for the enjoyment of the formers.²⁵ In such respect, this integrative African approach must be regarded as a serious argument against the objection to the justiciability of socio-economic rights grounded on their alleged difference with civil and political right.²⁶ This is what makes Chidi asserting that the African Charter represents a significantly new and challenging normative framework for the implementation of economic, social and cultural rights advocates working in a position to pioneer imaginative approaches to the realization.²⁷

2.1.3 Duties of individual

Another feature of the ACHPR is that it breaks new ground by including individual duties.²⁸ It consecrates a whole chapter to the duties of individuals, although this chapter only consists of three articles.²⁹ In Ouguergouz's opinion, the concept of "individual duties" is actually not a feature of African society alone.³⁰ If this view is not wrong, however it is to be stressed that the approach adopted by the drafters of the African Charter was different. They believed that the references in extant international instruments to individual's obligations were so vague as to be meaningless.³¹ For this reason, they attempt to rectify this concern by enumerating obligations imposed upon individual.³² The UDHR also mentions the duties of individual but in very general terms.³³ At the regional level, the European system does not provides for such duties while the AmCHR does not ignore the notion of 'individual duties', but refers to it only in a single article formulated so widely that it is not easy to catch the legal content of duties prescribed.³⁴ In Elias's view, the African Charter seems to express another feature of the African conception of human right, whose basis would appear to be the nature of the various of social organization in

²³ For more details see Ouguergouz *The African Charter on Human and Peoples' Rights* (2003) p 56.

²⁴ Article 13(3) of the ACHPR.

²⁵ Preamble of the ACHPR, para 5.

²⁶ See the situation of socio-economic rights in the South Africa Constitution.

²⁷ Ondinkalu CA in Evans & Murray *The African Charter on Human and Peoples' Rights* (2002) pp 178, 186.

²⁸ Umozurike UO (n 4 above) p 907.

²⁹ In Articles 27, 28 and 29, the ACPHR recognizes explicitly the duty of the individual to the family, society, the state and the international community. Furthermore, the Preamble declare that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone".

³⁰ Ouguergouz F (n 23 above), p 379.

³¹ Réunion des experts pour l'élaboration d'un avant-projet de Charte Africaine des droits de l'Homme et des Peuples 1-2 (mimeo 1979) as quoted by Gittleman, 1982 *Virginia Journal of International Law* p 667.

³² See Gittleman R (n 31 above) p 677.

³³ Article 29 of the UNDR.

³⁴ Article 32 of the AmCHR. More details was provided in the Chapter 2 of the American Declaration.

traditional Africa, in which the human person is at the centre of whole raft of rights and obligations.³⁵ At the time of the drafting of the Charter, the former President of Senegal, L Senghor, made a wish that, contrarily to the Europe where human rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it, the African Charter should be made in accordance with the African tradition which consists in not alienating the subordination of the individual of the community, in coexistence, in giving everyone a certain number of rights and duties.³⁶

2.1.4 'Claw-back' Clauses

A 'claw-back' clause, once again a distinctive feature of the African Charter, is one that permits, in normal circumstances, breach of an obligation for a specified number of reasons.³⁷ The exercise of most of rights in the ACHPR is limited *ab initio* by clause of type: "whithin the law", "provided that individual abides by the law..."³⁸ With regard to other systems, universal as well as regional³⁹, they include derogation clauses. Derogation clauses are different from claw-back clauses in that they explicitly provide circumstances in which rights may be limited and define rights that are non-derogable and must be respected, even when derogation is permitted.⁴⁰

2.1.5 The concept of "People rights"

The African Charter has a much stronger focus on the subject of the rights of peoples. It has the distinction of being the only international instrument to provide a detailed exposition of rights of people.⁴¹

2.2 Originality from the Institutional aspects

The enforcement machinery in the African system had long rested on a single institution which is the African commission. In that, it was similar to the universal system whose enforcement is monitoring by the UN Human Rights Committee, but it departed from the regional systems. Obviously, the system approved in 1981 by African leaders is different from the one conceived in 1998 adding the African Court on Human and People rights beside the Commission. In this respect, it joined the Inter-American system which have this couple of institutions but still depart from the European one which suppressed the European Commission the very same year.

2.3 Strengths

1. The fact of including civil and political rights as well as socio-economic rights in a single instrument. It reveals the adherence of the African states parties to the conception that socio-economic rights are not different from civil and political rights and therefore, that they are justiciable.⁴²

³⁵ Elias T.O *The Nature of the African Customary Law* (1996),p 83 as quoted by Ouguergouz R(n 23 above) p 377; Para 6 states that "the enjoyment of rights and freedoms also implies the performance of duties on the part every one".

³⁶ "Adress delivered by H.E.M Leopold Sedar Senghor, President of the Republic of Senegal" OAUDOC CAB/LEG/67/5.

³⁷ Higgins R "Derogation under Human Rights Treaties" in 48 *British Yearbook of International Law* 281 (1978) p 281.

³⁸ Ouguergouz F (n 23 above) p 61. See for instance, articles 9, 10, 12, 13 (1) in the ACHPR.

³⁹ See Article 29 (2) of the UNDR, 4 of the ICC, Article 15 of the ECHR, Article 29 and 30 of the AmCHR.

⁴⁰ Gittelman R (n 31 above) pp 667, 692.

⁴¹ For the discussion on the meaning of the concept "People" see section 5.1 below.

⁴² See for instance the situation of socio-economic rights in the South Africa Constitution.

2. The express prohibition in the African Charter against discrimination according to ethnic group⁴³ constitutes a major step for the continent as a whole because the realization of this right will lead to greater economic opportunity for those people not of the same kinship as the head of government.⁴⁴
3. The enforcement machinery involving both the Commission and the Court. These institutional couples committed to promote and look after the observance of Human rights in the region are to be regarded positively if each of them plays its genuine role without interfering in the area of the other.⁴⁵
4. The wide jurisdiction recognized to the African Court on Human and Peoples' Rights in Article 3(1) of the Protocol to the ACHPR. The Court can rely not only on the ACPHR and the Protocol but also on any other relevant Human Rights instrument ratified by the State concerned. Comparatively to the Commission, the Jurisdiction of the Court is broadly defined. Indeed, even if it is mentioned that the Commission shall draw inspiration from various international law instruments, its main role is to watch out for the observance of the ACHPR. *A contrario*, the extended jurisdiction of the Court relates to the subject-matter of cases, and not only to the use of the instruments as interpretative guides.⁴⁶ This has the positive consequence of enlarging the legal basis of Human rights protection within the African region.
5. Apart from inter-state communications, article 55 of the Charter mentions other communications which can be considered by the commission on certain conditions. Although, there is no clear indication in this formulation that individual communications are allowed, the Commission at its 33rd session has established a procedure for dealing with individual communications and has considered a number of such communications and taken decisions on their merits.⁴⁷

2.4 Weaknesses

1. The omission of some important human right and the vagueness in the definition of certain rights protected. For instance, the Charter does not provide for the right of the accused to the aid where language is a problem and for the right to request witness.⁴⁸ With regard to the right of "every human" being to life, the Charter does not define what should be the meaning of "human being", thereby leaving the issue of abortion to each state individual determination.⁴⁹ Furthermore, the enumeration of socio-economic rights is somewhat limitative. For instance, it does not mention rights such as the right to form or to join a trade union, the right to strike, the right to social security ...and even some that are included have not been given a strong contain. An illustration can be taken from the right to work which is not formulated in a way that put upon the state the duty to provide for jobs. There is merely a reference to equitable and satisfactory conditions of work and to equal pay for equal work.⁵⁰

⁴³ See Article 2 of the ACHPR.

⁴⁴ Gittelman R (n 31 above) pp 667, 683.

⁴⁵ See Wahiu W in *The African Human Rights System: Towards the Co-Existence of the African Commission on Human and People and Peoples' Rights and the African Court on Human and Peoples' Rights* (2006) pp 49, 69.

⁴⁶ Vilojen F *International Human Rights Law in Africa* (2007) p 444.

⁴⁷ Murray as quoted by J Churc *et al.* (n 17 above) p 261.

⁴⁸ Gittelman R (n 31 above) pp 667, 685.

⁴⁹ Gittelman R (n 31 above) pp 667, 685.

⁵⁰ See Article 15 of the ACHPR.

2. The proliferation of claw-back clauses which allow a state to restrict or infringe the granted right to the extent permitted by domestic law.⁵¹ As mentioned previously, claw-back clauses tend to be less precise than derogation clauses because the restrictions they permit are almost totally discretionary.⁵²
3. The fact that the enforcement of the Charter rights has long been informed by a philosophy of negotiation and conciliation rather than the adversarial approach associated with adjudicatory mechanisms.⁵³ In this respect, the noticeable weakness is the establishment of an African commission with the duty to protect and to promote human rights in the region, but whose powers are in any case somewhat limited in terms of the Charter.⁵⁴ There is no coercive machinery enabling the Commission to impose performance of its recommendations on the states concerned. For instance, in the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, recommendations made by the Commission since 2001 are yet to be implemented.⁵⁵ Evans is of the view that failure of many States to comply with their Charter obligations and the subsequent arguably lack of reaction by the Commission can perhaps be explained by the emphasis which the Commission places upon the element of 'dialogue' within the reporting process.⁵⁶ However, the Commission has reacted at its 24th session through a resolution noting the absence of compliance by states parties.⁵⁷ To remedy to this weakness, an African Court on Human and Peoples' Rights was established in a recent past under the Protocol to the ACPHR. Such ideological shift expresses the adherence of states parties to the alleged efficiency attached to a judicial adjudicatory system.⁵⁸ Nevertheless, it is to be stressed that the beneficence of having an African Court on Human Rights will largely depend on the willing of states parties to abide with its judgments that are binding.⁵⁹

2.5 Loopholes and escape roads

1. An absence of a clear indication on the binding or non character of the ACHPR and then of the African Commission decisions has enable states parties often to not comply with their obligations. For instance, states parties have neglected to submit reports to the African Commission as required at Article 62.
2. The existence of claw-back clauses allowing states parties to restrict rights *ab initio*. To remedy to this weakness, the African commission, relying on articles 60 and 61 of the ACPHR, has interpreted the Claw-back clauses in a way that they may only restrict exercise of rights to the extent permitted by domestic law, provided that it is consistent with international law minimum standards.⁶⁰

⁵¹ Gittelman R (n 31 above) pp 667, 691.

⁵² Gittelman, R (n 31 above) pp 667, 692.

⁵³ Church J *et al.* (n 17 above) p 259.

⁵⁴ See J Church *et al.* (n 17 above) p260. In response to human rights abuses, the Commission can investigate the matter with the view to reaching an amicable solution, where admissible. If this attempt fails, the communication must submit a report on the matter to the states concerned, and to the Assembly of Heads of State and Government, with or without recommendations (Article 52-53). Any report of this nature remains confidential until the Assembly of Heads of State and Government authorizes its publications (Art 59).

⁵⁵ Communication 155/96 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* ACHPR/COMM/A044/1, 22 May 2002 Hereinafter "*Ogoni Case*".

⁵⁶ Evans M *et al.* In *The African Charter on Human and Peoples' Rights* (2002), PP 30, 42, see also Church J (n 17 above) 259, K. M'Baye, in *The African Charter on Human and Peoples' Rights : A legal Analysis* (1985), p 27.

⁵⁷ Mukundi G in F Viljoen *The African Human Rights System: Towards the Co-existence of the African Commission on Human and Peoples' Rights and the African Court and Peoples Rights* (2006) pp 1, 24.

⁵⁸ See Harrington J In *The African Charter on Human and Peoples' Rights The system in practice, 1986-2000* (2002), 305, at 334.

⁵⁹ Harrington J (n 58 above) states the following: "African states are the parties who chiefly bear the consequences of international adjudication regarding human rights..."

⁶⁰ See the *Ogoni* case (n 55 above).

3. The omission of some rights and the vagueness in the definition of some others has provided an escarpment corridor to states parties in the fulfilling of their obligation.⁶¹

3. Resemblance and the difference between the African and the European human rights systems

3.1 Resemblances

- Both systems provide for a judicial settlement through a court.⁶²
- Both systems require the exhaustion of local remedies before the case can be admissible.⁶³
- Both systems provide for the possibility of a friendly settlement procedure.⁶⁴
- Both systems provide for a machinery of national report. However while the European system provides for reporting system at the request of the secretary general of the Council of Europe⁶⁵, the ACPHR establishes a permanent reporting system.⁶⁶
- Both systems provides for amicable settlement.⁶⁷
- Both systems provides for possibility to request advisory opinions from Courts. However, in the European system such opinions is limited on legal questions concerning the interpretation of the Convention and Protocols thereto while in the African system such opinions may be provided on any legal matter relating to the Charter and any other relevant Human rights.⁶⁸

3.2 Differences

- The enforcement machinery of the African system consists of the African Commission and the African Court of Human and People Rights. Under the European system, the protocol N. 11, which came into force on November 1, 1998, replaced the European commission and the former Court of Human Rights with the actual European Court on Human Right.⁶⁹
- The Jurisdiction *ratione materiae* of the European Court is restricted to matters concerning the interpretation and application of the Convention and the protocols thereto while the African Court has a wider jurisdiction encompassing the interpretation and application of the Charter, the Protocol and any relevant Human Rights instrument ratified by the states concerned.⁷⁰ Moreover, the jurisdiction *ratione personae* in the African system is wider defined than in the European system. The European Court can sit only on cases submitting by victims while the African Court, through the channel of the African Commission, can received cases submitted by non-victims.⁷¹
- The European Court is composed of a number of judges equal to that of the High contracting parties and there is no restriction on the number of judges of the same nationality. In the African system the

⁶¹ See section 2.4 (1) above.

⁶² See Article 1 of the Protocol to the ACHPR and Article 19 of the ECHR.

⁶³ See Article 50 and 56 (5) of the ACHPR, Article 6 of the Protocol to the ACHPR and Article 35 of the ECHR.

⁶⁴ See Article 9 of the ACHPR and Articles 38 and 39 of the ECHR.

⁶⁵ See Article 52 of the ECHR.

⁶⁶ See Article 62 of the ACHPR.

⁶⁷ See Article 9 of the Protocol to the ACHPR and Articles 38 -39 of the ECHR.

⁶⁸ See Article 4 of the Protocol to the ACHPR and Article 47 of the ECHR.

⁶⁹ See Agarwal H O *International Law and Human Rights* (2003) 795.

⁷⁰ See Article 3 of the Protocol to the ACHPR and Article 32 of the ECHR.

⁷¹ See Article 34 of the ECHR and Article 55 of the ACHPR.

situation is unlike. It is provided that the Court consists of eleven judges and that no two judges shall be nationals of the same state.⁷²

- While the African Court has to render its judgment within ninety days of having completed its deliberations.⁷³ No time-limit is required from the European Court.
- While the African system entrenches civil and political rights as well as socio-economic rights in a single, the European system provides for the protection of these rights in different instruments.
- While the European system provides for derogations clauses and precises what are the rights that may not be limited even in case of emergency, the African Charter incorporates claw-back clauses which allow a state to restrict the granted right, even in normal circumstances, by reference to its own domestic laws.⁷⁴

4. *Locus standi* of individuals and remedies before the African Court for Human and Peoples' Rights and the Inter-American Court

4.1 *Locus standi*

Under Article 5 of the African Court Protocol, only the African Commission, states parties and African inter-governmental organizations enjoy an unconditional direct standing before the African Court on Human and Peoples' Rights. As to NGOs and individuals, a combined reading of Article 5 (3) and 34(6) of the African Court Protocol shows that they cannot apply directly to the African Court, save if the matter involves a state that has made a declaration accepting the Court jurisdiction to this end. In the inter-American system, there is not such an option. It is only the Inter-American Commission and the states parties that may bring a case directly before the court, individuals are in any case obliged to submit their complaint through the Inter-American Commission. In other words, both systems are similar in that they mediate individuals' submission of cases through the Commissions, but they differ to the extent that in the African system individuals have, depending on the will of states parties, an optional road which allows them to pass by the Commission and apply directly to the Court. So far, only Burkina Faso has made such an option available to individuals.⁷⁵ Another aspect that deserves to be pointed out is that in both systems the jurisdiction of Courts is not limited only to victims due to the fact that Commissions can receive petitions even from non-victims and therefore submit them the Court.⁷⁶

4.2 Remedies

As to remedies, Article 27 of the Protocol corresponds closely with the Article 63 of the American Convention. Both articles provide for remedies that are appropriate, for the payment of fair compensation to the injured party and for the possibility to adopt provisional measures in cases of extreme gravity. Killender points out that

⁷² See Article 11 of the ACHPR and Article 20 of the ECHR.

⁷³ See Article 28 of the Protocol of the ACHPR.

⁷⁴ See section 2.1.4 above.

⁷⁵ Viljoen F *International Human Rights Law in Africa* (2007) 439. Such an option was dismissed in the Inter-American system in the case of *Government of Costa Rica (in the Matter of V Gallardo, et. AL.)* No. G 101/81 where the Government of Costa Rica attempted to bring directly the case of Viviana Guallardo before the Court, by passing by the Commission.

⁷⁶ See Article 44 of the AmCHR and Article 55 of the ACHPR

'though the African Court Protocol provides that its judgments are binding, there is no provision similar to the one in the American convention⁷⁷ that provides that reparations ordered by the Inter- American Court can be enforced in national courts.⁷⁸ From a practical point of view, this statement would not make a very significant difference if Article 30 of the African Court Protocol Can be regarded like binding on states parties. In such case, it will be possible for the complainant in any case to initiate a process of execution of judgment against the state concerned. Apart form this, it is to be desired that the African Court follows the practice of the Inter- American Court which has usually précised the amount of compensation, instead of the African commission one which consists of only stating the right of the complainant to an adequate compensation without providing the amount.⁷⁹

5. Assessment of the African Commission Jurisprudence

5.1 Jurisprudence on Peoples' rights to self-determination

Article 20(1) of the ACHPR reaffirms the right of all people to the self-determination. As known, this principle originates from the United Nations.⁸⁰ However, the relevant question that has never found the unanimity of all remains the exact meaning of the concept "people". While some are of the opinion that "people" relates only to sovereign state, others support that it cannot be limited to this category only and should extend to different communities inside a state.⁸¹ The African Commission has already dealt with cases brought on the basis of Article 20 (1) and has mixed the both approaches of it.⁸² For instance in the *Katangese Peoples' Congress v Zaïre*, where the president of this congress tried to rely on the right to self determination to achieve the independency that region, the Commission held that " in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government (...), Katanga is obliged to exercise variant of self determination that is compatible with sovereignty and territorial integrity of Zaïre".⁸³ As pointed out by Dresso, the finding of the Commission suggests that as long as, there is a constitutional and statutory framework that guarantied participation of all zaireois equally, the self-determination of Katangese found expression through exercise of the self determination of all zaireoise.⁸⁴ According to Ouguergouz, this was a measure of extreme prudence of the African commission, which preferred to link the exercise of the right

⁷⁷ Article 68(2) of the AmCHR.

⁷⁸ Killander M in *The African Human Rights System: Towards the Co-Existence of the African Commission on Human and People and Peoples' Rights and the African Court on Human and Peoples' Rights* (2006) 177, at 186. In the extract, this author refers to Article 68(2) of the AmCHR.

⁷⁹ In the *Last temptation* case, judgment of February 5, 2001, the Inter-American Court estimated the reimbursement of expenses due to the victim at 4.290 US\$ while in *Communication 97/93 John K. Modise/Botswana* the African Commission prescribed adequate compensation, but refrained from stating the amount.

⁸⁰ See G.A Res. 1514(XX) and G.A Res. 2625(XXV).

⁸¹ See the general discussion during the drafting process of the International Convenient on Economic, Social and Cultural Rights and the International Convenient on Civil and Political Rights 21 U.N. GAOR Supp (No.16) at 49, U.N.Doc. A/6316 (1966).

⁸² That is to say the external and the internal dimensions of the Concept.

⁸³ Communication 75/92, *Katangese People' Congress v Zaïre*, 8th Annual Report of the Commission-1994/1995.

⁸⁴ Dresso SA "The Jurisprudence of the African Commission on Peoples' rights of the African Charter" available at <http://www.chr.up.ac.za/about/introduction.html> [Accessed on 22/9/2008].

to self-determination to that of the right of the individual to participate in the government of this country.⁸⁵ The Commission held the same position in *Constitutional Rights and Civil Liberties Organization v. Nigeria*⁸⁶. It is clear from the *Katangese* and others cases that the Commission considered the peoples' right to self-determination like applying to the population of a state as a whole as well as like applying to a particular people within a state. The African Commission has not limited the concept "people" to sovereign states but it has usually combined its application with other principles in order to reach a fair and balanced decision. In the case involving the *Ogoni* community against the state of Nigeria, the African Commission applied peoples' rights to that community.⁸⁷ The case provides evidence that the African Commission regards peoples' rights as also providing protection to subgroup against their states. In this connection, it is to be pointed out that the people right to self-determination has also an economic dimension. It implies that every people shall exercise permanent sovereignty over their natural resources.⁸⁸ Although the African Charter does not expressly mention the phrase "permanent sovereignty over natural resources", it provides for this right in the terms of Article 21. It is in this context that in the *Ogoni* case, the African Commission founds that the state of Nigeria had violated the rights to free disposal of ones wealth and natural resources. The wider application of the concept "people" is somewhat in line with the original context in which this right arose in the region. At the beginning this right was invoked in connection with peoples under colonial and alien domination who naturally did not enjoy sovereignty. Nevertheless, despite the possibility to broadly apply the concept, the practice of the African Commission has reflected the will of this institution to remain in accordance with the practice of African states and the OUA.⁸⁹ In this respect, the people right to self-determination can be asserted in any case, provided it is consistent with the African Union notions of sovereignty.⁹⁰

5.2 Jurisprudence on Socio-economic rights

Socio-economic rights have usually been dealt with by the African Commission subsequently to civil and political violations.⁹¹ However, there are cases where they were the main subject of complaints. In both contexts, the African Commission has in many cases found violations of these rights:

- In the *John K. Modise* case, where the complainant was rendered homeless by a denial of nationality by both Botswana and South Africa, the Commission held on the basis of Article 5 of the ACHPR that such enforced homelessness was inhuman and degrading treatment that offended human beings dignity.⁹²

⁸⁵ Ougergouz F (n 27 above) p 255.

⁸⁶ Communication 102/93, *Constitutional Rights and Civil Liberties Organisation v. Nigeria*, 12th Annual Report of the Commission-1998/1999 Para.51.

⁸⁷ The *Ogoni* case (n 55 above).

⁸⁸ See for instance G.A Res. 3202, 6 Special Sess. U.N. GAOR Supp (No.1) at 5, U.N Doc. A/9559 (1974).

⁸⁹ See Ougergouz F (n 23 above) p 253.

⁹⁰ See Gittelman R (n 31 above) pp 680.

⁹¹ See Odinkalu CA (n 27 above) pp 178, 209.

⁹² See n 79 above.

- In *Union Interafricaine des Droits de l'Homme v. Zaire*, where the Complaint was grounded, *inter alia*, on allegations of mismanagement of public finances, the failure of Zaire to provide basic services, and shortage of medicines, the Commission held that there had been a violation of Article 16 of the ACHPR.⁹³
- In *Annette Pagnouille (on Belhalf of Abdoulaye Mazou) v. Cameroon*, the Commission found a violation of Article 15 of the ACHPR guarantying the right to work because a Magistrate, Mr Mazou, had been held in prison without trial and not reinstated in his position when others condemned in similar circumstances had been.⁹⁴

All the following decisions and others show a real willing of the African commission to promote and protect socio-economic rights in the region. Unfortunately, despite all the violations found by the African Commission, this institution has not clearly stated through its jurisprudence its views on legal nature of these rights. In such connection, considering the approach undertaken in the ACHPR, one may contemplate the assertion that the African Commission should regard them as justiciable and not merely as 'objectives'.

6. Conclusion

In light of preceding developments, it appears that the African system of human rights promotion and protection has, like all others, its own values and weakness. Unlike the pessimistic views expressed by many authors, the African system disposes of a large range of tools that make possible the effective promotion and protection of Human rights in the region. Of significant relevance is the establishment of the African Court on Human Rights which really is a step forward to this end.⁹⁵ Nevertheless, it cannot be said strongly that the African system, as it looks today is an achieved one. There still is too much to do in order to improve the system and to remedy some of its shortcomings. The ACHPR should be reviewed in order to include more rights and to provide them with a clear definition. Individuals and NGOs should be granted direct access to the African Court without any dependence on the will of states parties. Definitely, it results from this comparative perspective that the European system is the most advanced one. This is, *inter alia*, because individuals, who are the main beneficiary of Human rights protection, are granted direct application to the European Court. In the meanwhile, the African Commission and the African Court should take advantage of what is available to them and do their best to efficiently protect human rights in the region.

⁹³ Communication 100/93 *Union Interafricaine des Droits de l'Homme v. Zaire*, 9th Activity Reports 1995-1996, Annex VIII.

⁹⁴ Communication 39/90 *Annette Pagnouille (on Belhalf of Abdoulaye Mazou) v. Cameroon*, 10th Activity Reports 1996- 1997 Annex X.

⁹⁵ See Mangu AMB (n 7 above) pp 379, 404.

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