

# Over Two Decades of African Commission on Human and Peoples' Rights: Flying or Fledgeling

Dr. Timothy F. Yerima<sup>1</sup>

<sup>1</sup> Kogi State University, Anyigba.

*Received: 14 December 2011 Accepted: 4 January 2012 Published: 15 January 2012*

6

## Abstract

This article examines the operation and performance of African Commission on Human and Peoples' Rights since 2007 when it was constituted. It takes a survey of the historical background of the Commission and considers its establishment, membership and independence in comparative perspective with the Inter-American Commission on Human Rights and former European Commission on Human Rights. It points out that taking into consideration the large size of Africa, it is crucially important that the composition of the Commissioners be enlarged. The article evaluates the functions, failures and achievements of the Commission and evaluates the impediments that hinder the Commission from effective performance of its functions since inception. It argues that while some of the obstacles can be overcome by the amendment of the Charter or adoption of Protocols to the Charter, others require political will by African leaders. The article also answers the question whether, with the establishment of the African Court of Human and Peoples' Rights and African Court of Justice and Human Rights that might replace it, the African Commission should be abolished or the Commission should be strengthened by overcoming the obstacles that hinder it from effective performance of its mandates..

24

25 **Index terms**— African Commission, Flying or Fledgeling.

## 1 Over Two Decades of African Commission on

26 Human and Peoples' Rights: Flying or Fledgeling Timothy F. Yerima

27 Abstract - This article examines the operation and performance of African Commission on Human and Peoples' Rights since 2007 when it was constituted. It takes a survey of the historical background of the Commission and considers its establishment, membership and independence in comparative perspective with the Inter-American Commission on Human Rights and former European Commission on Human Rights. It points out that taking into consideration the large size of Africa, it is crucially important that the composition of the Commissioners be enlarged. The article evaluates the functions, failures and achievements of the Commission and evaluates the impediments that hinder the Commission from effective performance of its functions since inception. It argues that while some of the obstacles can be overcome by the amendment of the Charter or adoption of Protocols to the Charter, others require political will by African leaders. The article also answers the question whether, with the establishment of the African Court of Human and Peoples' Rights and African Court of Justice and Human Rights that might replace it, the African Commission should be abolished or the Commission should be strengthened by overcoming the obstacles that hinder it from effective performance of its mandates. The article points out that taking into consideration the problems that besiege the African Commission; and the fact that the African Courts are established, not to replace the Commission but to complement its protective mandate,

## 2 HISTORICAL BACKGROUND

---

42 it becomes imperative that the African human rights system be strengthened or else the efforts made by the  
43 African leaders in establishing the Courts would be an exercise in futility.

44 I.

### 45 2 Historical Background

46 like the Inter-American system, the history of African Commission on Human and People's Rights, 1 passed  
47 through series of process before it was finally established. Even though there was lack of a Commission on  
48 Human Rights at its inception, the Organization of African Unity undertook "to promote international co-  
49 operation with regard to the UN Charter and Universal Declaration of Human Rights. ?? Geneva, in January  
50 1961, had organized a Conference in Lagos on the Rule of Law. The Conference, which was attended by one  
51 hundred and ninety-four African Jurists, 3 addressed several human rights issues within the context of rule of  
52 law. "The Law of Lagos," 4 which was the outcome of the Conference's resolution, invited African Governments  
53 to, among other things, study the possibility of establishing international machinery for the protection of human  
54 rights in Africa. The Jurists, however, noted that this would not be easy to achieve; but the target would  
55 give impetus to "positive action by the Commission's national sections in Africa" 5 ; and it would "open a  
56 crucial chapter in human rights movements in Africa." ?? Although, African leaders rejected a draft Charter that  
57 provided for a Court of Mediation, Conciliation and Arbitration to be set up by means of separate treaty, they  
58 created, without hesitation, the "Commission of Mediation, Conciliation and Arbitration"; an ad hoc mechanism  
59 for the peaceful settlement of disputes among the OAU Member States, to accomplish the purpose of the Charter.  
60 ?? A Protocol to the Charter adopted in 1964, did not only define the duties and powers of the Commission, but  
61 also made the Commission became an integral part of the OAU Charter. ?? Aside the International Commission  
62 of Jurists, the pivotal role of the United Nations Commission on Human Rights (UNCHR) in the process of the  
63 establishment of African Commission cannot be undermined. After the Lagos Conference, the UN Commission,  
64 with a view to establishing an African Commission on Human Rights, organized seminars in different African  
65 States. The seminar on "Human Rights in Developing Countries", held in Dakar, Senegal in 1966, was concerned  
66 with gaining support within the OAU for the creation of a regional Commission on human rights for Africa. ??  
67 Participants at the Cairo Conference unanimously reached consensus to, inter alia: "Appeal to all Government  
68 of Member States of the OAU to give their support and co-operation in establishing a regional Commission on  
69 human rights in Africa." ??0 The Economic Commission for Africa (ECA) Conference on "Legal Process and the  
70 individual," held in Addis Ababa, 1971, did not only welcome the recommendations made at the Cairo Conference,  
71 entrusting the OAU with the establishment of Human Rights Commission for Africa, but also recommended that  
72 the OAU should hasten the implementation of the said recommendations. But the functions of the Commission,  
73 which the ECA recommended, were that of promotion rather than interpretation of human rights. ??1 It will  
74 be pointed out in this article that this was incorporated in the African Charter as the promotional mandate of  
75 the African Commission. ??2 Other several seminars organized in various African States also gave supports  
76 to the establishment of both African Convention and African Commission. ??3 Also, in pursuance of the  
77 recommendations of the African Jurists at the Lagos Conference, the International Commission of Jurists, in  
78 collaboration with the Senegalese Association of Legal Studies and Research, organized a colloquium in Dakar,  
79 Senegal in 1978. The participants recommend the establishment of a Human Rights Commission to tackle the  
80 problem of flagrant violation of human rights in Africa. They also set up a Committee to ensure that their  
81 recommendations were carried out.

82 It will also be recommended in this article that African human rights should have a rethink and adopt  
83 this recommendation in the long-run. (accessed 04/03/2006). 10 UN, Seminar on the "Establishment of  
84 Regional Commission on Human Rights with Special Reference to Africa, Cairo Egypt, 12-15 Sept.1969". UN  
85 Doc.ST/TAO/HR/38. 11 E. ??sita ., Human Rights in Africa: Selected Problems, 1984, at 202-203. 12 See  
86 African Charter, Arts. 17-25. ??3 For example, Dar-Es-Salaam Seminar, alias, UN 'Seminar on the Study of  
87 New Ways and Means for promoting Human Rights with Special Reference to the Problems and Needs of Africa,  
88 Tanzania Oct.23 Nov5 1973', UN Doc/ST/TAO/HR/48. ??4 The setting up of the Committee tagged "The  
89 Follow up Committee", was headed by Judge K. Mbaye. As traced, "The Committee visited several African  
90 States considered supportive of human rights. It was in the course of one of such visits that President Senghor  
91 of Senegal agreed to present a proposal for the establishment of an African Human Rights Commission at the  
92 next Session of the OAU". See C.D. Dakas, *supra* note 3 at 16. All these efforts were aimed at prodding the  
93 OAU towards the creation of a system for the protection of human rights in Africa. By 1979, the sustained  
94 campaigns mounted by the UNCHR and International Commission of Jurists as well as other Non-Governmental  
95 Organizations (NGOs), coupled with the international condemnation of the atrocities perpetrated by some African  
96 leaders, 15 had laid a strong foundation which culminated in the directive given by the Assembly of Heads of  
97 State and Government of the OAU to the Secretary-General of the OAU to organize without delay a meeting of  
98 highly qualified experts to prepare a preliminary draft of an African Charter which should provide, inter alia,  
99 for the establishment of mechanisms to promote and protect human rights. ??6 This nearly coincided with  
100 the seminar organized by the UNCHR on the "Establishment of Regional Commission on Human Rights, with  
101 Special Reference to Africa", also in Monrovia, Liberia. The seminar favoured the establishment of African  
102 Human Rights Commission, with the mandate of promotion and protection of human rights in Africa. 17 All  
103 these arrangements ultimately culminated in the adoption of the African Charter on Human and People's Rights

104 in 1981. ??8 The Charter makes adequate provisions for the establishment and mandate of African Commission.  
105 ??9 The Commission was, however, constituted in 1987 after election of its Members, pursuant to Article 64(1)  
106 of the African Charter. 20 II. Re-Evaluating the Functions, Failures and Prospects of the African Commission  
107 Article 30 of the African Charter provides to the effect that African Commission is established to promote  
108 human and peoples' rights and to ensure their ??5 These included leaders such as Idi-Amin of Uganda, Marcais  
109 Nguema of Gabon, Mengistu Haile, Mariam of Ethiopia, Bokassa of the Central African Republic, Mobutu Sese  
110 Seko of Zaire (now DR Congo). See K. Quashigah, *supra* note 9, stating that: "These were leaders whose human  
111 rights records were and will remain a dark spot of shame in the records of African history". Cf. Makay W.M.,  
112 'The African Human Rights System Perspectives,' *Revision of African Commisin on Human and Peoples' Rights*  
113 ( 1993), at 359, where he stated, *inter alia*, that "the atrocities and abominations of Idi-Amin of Uganda, Bokassa  
114 of the Central African Empire and Nguema of Equitorial Guinea, were viewed internationally as paradigmatic  
115 of the African leaders". It is crucial to reiterate that the Cairo seminar, 1969 and the Addis Ababa seminar,  
116 1971, recommended that African Commission should essentially be a body saddled with promotional functions in  
117 the field of human rights. Recommendation of the delegates was incorporated in Article 45(1)(a) of the African  
118 Charter as the promotional mandate of African Commission. In the discharge of its primary functions under these  
119 provisions, African Commission is required: ?to collect documents, undertake studies and researches on African  
120 problems in the field of human rights, organize seminars, symposia and conferences, disseminate information,  
121 encourage national and local institutions concerned with human and peoples' rights; ?and give its views or make  
122 recommendations to Government;?(to) co-operate with other African and international institutions concerned  
123 with the promotion and protection of human and people's rights.

124 In addition, the Commission has the responsibility of laying down rules and principles for the solution of  
125 problems and for legislation on human rights issues. Considering the promotional functions of the Commission,  
126 one is inclined to agree that: "The Charter gives pre-eminence to the promotion of human rights and vests a wide  
127 range of responsibility on the Commission?" that are not explicitly vested on the defunct European Commission  
128 and Inter-American Commission. ??3 Although, the functions of African Commission are tripartite with omnibus  
129 provisions, its promotional functions are considered as primary before others. Parties to abide by its decisions  
130 independently. ??4 Onje Gye-Wado had expressed similar view where he saw the promotional functions of the  
131 Commission as its primary responsibility because it is incapable of enforcing its decisions. As a result, it is  
132 easier, if not more convenient, to popularize the rights guaranteed by African Charter, so that their infringement  
133 can be minimized "requiring little or no enforcement action." ??5 It has also been noted that in a continent  
134 rife with egregious abuses of human rights, the primary functions of the Commission is promotional and not,  
135 as would be expected, protective, through giving publicity to violation or even acting in a quasi-judicial ??ay.  
136 26 The promotional functions of the Commission under the Charter are a device to raise popular awareness of  
137 the Charter and to increase human rights education. ??7 At the early stage of its establishment, it was advised  
138 that, to give effect to the provision of the Charter which requires the Commission to "give its views or make  
139 recommendations to the Government with regard to the promotion of human and peoples' rights", the African  
140 Commission should recommend to State Parties to translate the Charter into readable local languages, so that  
141 the message of the Charter can be understood by everybody. This is important as the degree of illiteracy in Africa  
142 is so high. ??8 In a similar way, in the discharge of its mandate to "disseminate information", the Commission  
143 has been advised to work closely with relevant NGOs operating in rural areas. The legal services, it is advised,  
144 should include pamphlets in the dialects explaining the rights, obligations and the roles of African Commission  
145 under the African Charter. This recommendation was based on the reasoning that until the people in the rural  
146 areas of Africa understand the provisions of African Charter in their local languages and dialects the Charter  
147 would become an ineffective legal instrument. ??9 dialects. Moreover, in view of the high rate of illiteracy in  
148 Africa, it is doubtful if this device can work successfully.

149 It has also been criticized that Member States of African Charter have not assisted African Commission to  
150 achieve its promotional mandate. This is due to the specific reason that State Parties to the Charter have  
151 no interest in the recommendation of the Commission on the establishment of human rights Committee at the  
152 national level; the consequence of which no significant effort has been made in passing information down to  
153 local populations of State Parties. ??0 Scholars have also criticized that African Commission has failed or  
154 been reluctant to take advantage of its promotional powers to effectively and aggressively promote human rights  
155 consciousness; the Commission has held only few conferences; it has not undertaken many studies as required  
156 by Article 45(1)(a) of the African Charter. ??1 Also, in the area of dissemination of information including the  
157 awareness by many people in Africa of the existence and work of the African Commission, the expectation that  
158 people need to be enlightened of the activities of the Commission, through radio and television programmes,  
159 newspapers, magazines and other means of communication, is still a vain hope.

160 On the contra, the Inter-American Commission has utilized its promotional power to conduct country studies  
161 and On-site investigations after which it published its findings with the aim to putting pressure on the Government  
162 involved. 32 However, it is difficult to accept that the African Commission has failed completely in achieving its  
163 promotional functions. The Commission in its Fifth Session had resolved that State Parties should incorporate  
164 in their educational curricula, the teaching of human rights at all levels; integrate the provisions of the African  
165 Charter into National Laws of Members and establish Committees on Human Rights at national, subnational and  
166 regional levels to ensure respect for the protection of human rights. ??3 Some African countries have incorporated

## 2 HISTORICAL BACKGROUND

---

167 the provisions of African Charter into their domestic Law. Nigeria, for example, incorporated the African Charter  
168 through the African Charter (Ratification and Enforcement) Act.

169 Today, all these have been achieved to certain level. 34 30 M.O.U. ??asiokwu , ??upra note 23, ??190] ??191]  
170 W. M. Makay, *supra* note 26. See also Gye-Wado O., *supra* note 22., stating that "? the Commission has  
171 failed in the area of popularizing the African Charter and its activities. Other than activities by workers and  
172 researchers in the area of human rights, very little is done to pass information down to the local population".  
173 32 U. Essien ., "The African Commission on Human and Peoples' Rights: Eleven Years After", Buffalo Human  
174 Rights Law Review, ??ol. 6 (2000), at 97. In fact, it has been held that "the Charter possesses 'a greater vigour  
175 and strength than any domestic Statute" of Africa. ??5 The Commission, during its Second Extra-Ordinary  
176 Session in Kampala, Uganda, from December 18-19, 1995, condemned human rights abuses of the past Nigerian  
177 Military regime of Late General Sani Abacha, and requested that the Government should prevent harm to the  
178 Ogoni detainees. Although, the Military Government went ahead with the trial, despite the directive given by the  
179 African Commission that it should hold on (which culminated to the execution of the Ogoni leaders including Ken  
180 Saro Wiwa), ??6 Also, in an effort to assist the African Commission to achieve its promotional mandate, Nigeria,  
181 like other African countries, establishes the National Human Rights Commission, the effort of the Commission  
182 gave a glimmer of hope, at least, that it was serious to promote and protect human rights in Africa.

183 37 with the aim to, *inter alia*, "facilitate Nigeria's implementation of its various treaty obligations in the area  
184 of human and peoples' rights and (to) provide a forum for public enlightenment and dialogue on human rights?".  
185 ??8 The main function of the Commission, under section 5(a) of the National Human Rights Act, is to deal with  
186 all matters relating to the protection of human rights as provided for by the Constitution of the Federal Republic  
187 of Nigeria and the African Charter, UN Charter and the UDHR as well as other international treaties on human  
188 rights to which Nigeria is a State Party. It is gratifyingly interested that the National Commission, like other  
189 National Commissions or Committees of other African States, Parties to the Protocol and Statute of the African  
190 Court of Justice and Human Rights , among other parties have direct access to the African Court of Justice  
191 and Human Rights, which may replace the Court. ??9 It is also noteworthy that the African Commission has,  
192 in collaboration with national and international institutions, sponsored a number of ??5 Per Ogundare JSC in  
193 Abacha v. Fawehinmi (2000) 2 SCNQR 496.

194 However, the learned Justice added: "but that is not to say that the Charter is superior to the Constitution?"  
195 See also Oshevere v. British Caledonian Air ways Ltd. (1990) ??0 Another significant achievement of the  
196 promotional functions of African Commission is its collaborative activities with the NGOs. It has been traced  
197 that prior to the establishment of the Commission, African Human Rights NGOs used to work only with NGOs  
198 based in Europe and America. Consequently, there was no significant interaction among African NGOs. But with  
199 the establishment of the African Commission, there is a change of event. The Commission created a platform  
200 for NGOs to meet twice every year to exchange ideas. The contributions and submissions of African NGOs,  
201 with Observer Status at the Commission's Sessions had given impetus to the 40 These include: Seminar on the  
202 "National Implementation of the African Charter in the Internal Legal Systems in Africa," Banjul, 26-30 October  
203 1992; Conference on the "Journalist and Human Rights in Africa," Tunis, 31 October -1 November 1992; Seminar  
204 on "State Reporting for English-Speaking Countries," Harare, 23-27 August 1993; Seminar on "State Reporting  
205 for Francophone, Arabophone and Lusophone Countries, "Tunis, 24-27 May 1994; Seminar on "Refugees and  
206 Internally Displaced Persons in Africa," Harare, 16-18 February 1994; Seminar on "Human Rights Education  
207 in South Africa," Durban, 24-27 September 1994; Seminar on "Human Rights of the African Women and the  
208 African Charter on Human and Peoples' Rights," Lome, 8-9 March 1995; Workshop on "Impunity in Africa,"  
209 Ouagadougou, 22-23 March 1996; "Brainstorming on Mechanism for Early Warning in Emergency Situations  
210 under Article 58 of the African Charter," Nairobi, 23-25 July 1996; Conference on "Prisons in Africa," Kampala,  
211 , et cetera. See U. Essien , *supra* note 32, at 96-97. See also P. C. Okorie, "The Contribution of the African  
212 Commission on Human and Peoples' Rights to the Enforcement of the African Charter," Human Rights Review-  
213 An International Human Rights Journal, Vol. 2, No. 2, July 2011 at 515, stating that "judged by its four plans  
214 of action which are in conformity with the provisions of Article 45(1) of the Charter, the Commission can not be  
215 fairly described as having failed to meet its promotional mandate," grouping its promotional achievements into  
216 "publications, lectures, and conferences, use of special rapporteurs, use of working group, collaboration with non-  
217 Governmental organizations (NGOs), collaboration with National Human Rights Institutions (NHRIs). See also  
218 P.C. Okorie, "The Contribution of the african Commission on Human and Peoples' Rights to the Enforcement  
219 of the Charter," Human Rights Review: An International Human Rights Journal, ??ol. 2, ??o. 2 July 2011,  
220 at 515, stating that "judged by its four plans of action which are in conformity with the provisions of Article  
221 45(1) of the Charter, the Commission cannot be fairly described as having woefully failed to meet its promotional  
222 mandate," grouping its promotion and achievements into 'publications, lectures, and conferences' 'use of special  
223 rapporteur,' 'use of working group,' 'collaborations with National Human Rights Institutions (NHRIs).' adoption  
224 of additional Protocol to the African Charter, 41 including the Protocol establishing the African Court of Human  
225 and Peoples' Rights, 42 and Protocol to the African Charter on the Rights of Women in Africa, ??3 and now  
226 the Protocol establishing the African Court of Justice and Human Rights. ??4 NGOs forum had also convinced  
227 African leaders of the crucial need for an African Union. ??5 In general, the number of NGOs, with Observer  
228 Status with African Commission, is increasing at the increasing rate, to use the sentiment of the economists.  
229 In its 37 th Ordinary Session alone, the Commission granted Observer Status to 13 NGOs, thereby bringing

230 the total number of NGOs enjoying Observer Status to 332. ??6 African Commission itself acknowledged the  
231 contributions of NGOs in the promotion of human rights in Africa. 47 b) Protective Functions

232 The second mandate of the African Commission as contained in Articles 30 and 45(2) is to ensure the  
233 protection of human and peoples' rights under the conditions that are provided under the African Charter. It is  
234 important to state from the onset that the protective mandate of the Commission consists principally of receiving  
235 communications and acting on them in the manner prescribed by the Charter. The Charter provides for the  
236 reception of complaints or communications of human rights violations by both State Parties to the Charter and  
237 individuals. After a thorough consideration of the complaint, the Commission prepares a report clearly stating  
238 the fact and its findings. The report is, thereafter, transmitted to the State concerned; and if reconciliation fails,  
239 the Commission may refer the matter to the General Assembly of Heads of State and Government, where the  
240 fate of the re to consider any communication from anyone, including NGOs, provided that any of the rights 41  
241 Y. Akinseye-George, 'New Trends in African Human Rights Law:

242 Prospects of an African Court of Human Rights', 10 University of Miami Inter'l & Comp. Law Review, ??2001)  
243 ??2002) A Year enshrined in the African Charter is alleged to have been violated. ??8 The device of "friendly  
244 settlement" or "amicable settlement" allowed by the Charter is significant; it ends dispute between the parties  
245 as witnessed in Kalenga v. Zambia. ??9 In that case, the complainant, who had filed a communication alleging  
246 port lies. ??0 In Dauda Jawara v. The Gambia, ??1 Similarly, under the former European system, any person,  
247 NGOs or group of persons, who claimed to be victim of violation of the European Convention by Contracting  
248 Party, might petition the Commission. But the Commission would entertain the petition only on condition  
249 that the Contracting Party against whom the petition had been logged had deposited a Declaration with the  
250 Secretary-General of the Council of Europe stating that it had recognized the competence of the Commission to  
251 deal with such petition(s).

252 the Commission declared that it is empowered violation of the right to liberty, was released because a  
253 Commissioner adopted a peaceful resolution. Consequently, the communication was struck out without further  
254 inquiry into its merits. ??2 To that extent, the defunct European Commission system, unlike African Commission,  
255 could be compared with the procedure under the Second Protocol to the ICCPR 53 and the African Human Rights  
256 Court Protocol. ??4 In contrast, the requirement of a State lodging a declaration recognizing the competence of  
257 the Commission to deal with petition(s) does not exist under the Inter-American system. ??5 African Commission  
258 also ensures the protection of human and peoples' rights under the condition provided by the African Charter.  
259 Strictly speaking, this depicts that the Commission is not allowed to act beyond the provisions of African Charter.  
260 However, The mission to Nigeria, particularly to Ogoni land between 7 th -14 th March, 1997, was as a result  
261 of the communication filed by the Social and Economic Action Rights Center ??SERAC) and Others alleging,  
262 inter alia, violations of the rights to health, clean environment, life and housing. The Commission during its  
263 on-site visit witnessed the deplorable situation in Ogoni land, including the environmental degradation. ??7  
264 Similarly, the purpose of the visit to Mauritania by African Commission was prompted by the Communication  
265 submitted to it revealing "disturbing violations of human rights"; in particular the massacres and expulsions of  
266 Black Mauritanians and violations of their rights to speak their own language; incidents of torture and deaths in  
267 detention. ??8 At the 37 th Ordinary Session of the Commission in Banjul, Gambia, between 27 th April and 11  
268 th May 2005, it adopted the Report on the missions to Angola (now DR Congo), Nigeria, Sierra-Leone and Sudan.  
269 On human rights violations in Darfur, the Commission called on the Government of Sudan to comply with its  
270 obligations under the Constitutive Act of the AU and the relevant instruments to which Sudan is a State Party.  
271 ??9 Also, the role of African Commission in democratic process in Africa cannot be underscored. For example,  
272 the Commission had pointed out that the presidential election in Togo before the one held in March, 2010,  
273 which brought Faure Gnassingbe to power was characterized by violence culminating in the outflow of internally  
274 displaced persons (IDPs) and of refugees The Commission has also passed plethora of resolutions expressing its  
275 views and recommendations to Governments and for the purpose of solving legal problems relating to human and  
276 peoples' rights. ??0 The Commission had earlier during its Sixteenth Session condemned the military take-over of  
277 the Government of the Gambia on 22 July 1994, regarding it as "a flagrant and grave violation of the rights of the  
278 Gambian people to freely choose their Government." 61 Similar resolutions were adopted with regard to other more  
279 recent military take-over of Governments in other States, including Mauritania. ??2 The African Commission has  
280 also utilized its powers under the provision of Article 46 of the African Charter to appoint thematic rapporteurs  
281 including, Special Rapporteur on Extra Judicial, Summary or Arbitrary Executions; Special Rapporteur on  
282 Prisons and Conditions of Detention; and Special Rapporteurs on Women's Rights. 61 See ACHPR/RPT/8 th  
283 Annex VII Rev.1, adopted on 3 Nov. 1994. Similarly, the Commission regretted and condemned the annulment  
284 of the June 12, 1993, which "had been adjusted free and fair by national and international observers". See also Y.  
285 Akinseye-George., *supra* note 41 at 167 and Dauda Jawara v. This is the competence of African Commission to  
286 give an advisory opinion on any legal question. To that extent, the interpretational powers of African Commission  
287 can be compared with the power of International Court of Justice to offer advisory opinion at the request of  
288 whatever body might be authorized by or in accordance with the UN Charter to take such a request. 65 In the  
289 exercise of its interpretational powers, the African Commission is required, under Article 60 and 61 of the African  
290 Charter, to draw inspiration from international law on human and peoples' rights including those enshrined in the  
291 UN Charter, the AU Constitutive Act, the UDHR, ICCPR, ICESCR and other specialized Conventions ratified  
292 by State Parties. The very reason that these international human rights instruments are sources of law of African

## 6 A) LACK OF EFFECTIVE ACCESS TO THE COMMISSION BY INDIVIDUALS

---

293 Commission means that the Commission, in discharging its interpretational power, should be bold to reconcile  
294 some conflicting provisions of the African Charter with those international human rights provisions. These include  
295 those provisions dealing with claw-back clauses and absence of derogation clause; socio-economic rights, group  
296 or peoples' rights; and duties of individuals, 66 and others. 67 In all fairness, it has been pointed that in recent  
297 years, the Commission's functioning has been revamped; it has interpreted the relevant provisions of the Charter  
298 in such a manner as to provide for a right to submit individual complaints; it has often ignored confidentiality  
299 provisions; and it has interpreted the socalled 'claw-back clauses' restively. In Amnesty International (on behalf  
300 of Benda and Chinida) v. Zambia, ??8 the African Commission ruled that recourse to claw-back clauses should  
301 not be used as a means of giving credence to violations of the express provisions of the African Charter. It will,  
302 however, be shown latter in this article that there is ample evidence establishing that confidentiality clause is  
303 still one of the problems of African Commission.

### 304 3 Global

### 305 4 Year

306 It is also no longer tenable to argue that African Commission has not had any opportunity to interpret the  
307 socio-economic rights as well as group rights provisions of the African Charter. The Commission has, in fact,  
308 interpreted the provisions regarding these rights and duties of States to respect, protect and promote these rights.  
309 In SERAC v. Nigeria, ??9 In interpreting the provision of Article 21 of the Charter dealing with the right of  
310 "all peoples to freely dispose of their wealth and natural resources", the Commission relied on the decision of the  
311 Inter-American and European Courts. in deciding the allegation in the communications by the complainants that  
312 Nigeria Government had violated the right to health and right to clean environment as recognized under Article  
313 16 and 24 of the African Charter respectively by failing to fulfill the minimum duties required by these rights,  
314 African Commission relied on the provisions of Article 12 of the ICESCR, which Nigeria is a party to buttress that  
315 the provisions require Government to take necessary steps for the improvement of all aspects of environmental  
316 and industrial hygiene. ??0 Accordingly, the Commission declared that the Government of Nigeria did not only  
317 have a duty to protect its citizens through both appropriate legislation and effective enforcement but also from  
318 damaging acts that might be perpetrated by private Parties. "This duty", the Commission concluded, "calls for  
319 positive action on the part of Governments in fulfilling their obligation under human rights instruments." ??1  
320 Concerning the right to education, the African Commission held that the failure of Government to provide basic  
321 services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage  
322 of medicines in the country constitute a violation of the right to the best attainable State of physical and mental  
323 health guaranteed under Article 16 of the African Charter. ??2 III.

### 324 5 Impediments to the Effective Performance of the Commission

325 While some writers have admitted that at least African Commission has made giant strides in the area of  
326 promotion and protection of human rights, 73 70 These are Valesquez Rodriguez v. Honduras, ??1988) Series  
327 C, No.4 and ?? and ?? v. Netherlands, 91 ECHR (1985) at 32, respectively. 71 SERAC v. Nigria, supra,note  
328 57. ??2 See Union Inter-Africane des Droits de l' Homme v. Zaire, Comm 100/93 73 Y. Dankofa, 'Towards an  
329 Effective Safeguard for the Enforcement of Human Rights in Africa -The Need for an African Court', Ahmadu  
330 Bello Univ. Law Journal, ??ol.21-22, (2004), at 83. others have regarded it as a total disgrace to Africa and  
331 to Africans, relegating it to a toothless bulldog that can bark but has no ability to bite; arguing that after  
332 all it was not created to bite; 74 it was rather intended to be a paper tiger and it actually turned out to be  
333 a paper tiger. ??5 The African Commission has also been vilified as a "façade, a yoke that African leaders  
334 have put around our necks", and so there is need to "cast it off and reconstruct a system that we can proudly  
335 proclaim as ours." 76 Based on the tripartite mandate vested on the Commission by the African Charter, a  
336 renowned scholar has not only considered it to be "more rhetoric than effective", but also reduced it to "a  
337 research center"; adding that if the mandate of the Commission is functionally rhetoric, then the procedure to  
338 be followed by the Commission is worse or in his words, "more contagious." ??7 The question that comes to the  
339 fore for consideration is: what are the factors that hamper the effective performance of African Commission?  
340 Views of scholars over the performance of the Commission reveal that the factors have been differently classified  
341 into "procedural, substantive and administrative"; 78 "structural and normative", 79 and "organizational and  
342 procedural" problems. 80

### 343 6 a) Lack of Effective Access to the Commission by Individuals

344 This is a serious problem! Victims of human rights violations in Africa often do not find their ways to the  
345 Commission. This is predicated on many reasons. First, the work of the Commission is unknown to majority of  
346 Africans, many of whom are illiterates. Even most of the people who are aware of the Commission's existence are  
347 not in the financial position to access it. Illiteracy, ignorance and poverty have been pointed out as impediments  
348 to the realization and enjoyment of fundamental rights in Africa. An individual who is indigent or ignorant  
349 of his rights cannot exhaust domestic remedies; even though it is a mandatory general requirement which a  
350 complainant must fulfill before the African Commission could admit his communications. The individual needs

---

351 the service of a counsel to pursue and prosecute his case before the Commission. African Charter, which is  
352 the primary source of African Commission, only provides for the right to counsel. 81 74 Id. See also N. J.  
353 Udombana, *supra* note 67 at 125. Year Protocol, the Charter has no provision on free legal representation. ??2  
354 Individual access to the Commission is further restricted by the provision of Article 56 of the African Charter,  
355 which allows the Commission to hear individual complaint only if such complaint is not "written in disparaging or  
356 insulting language" against the State concerned, its institutions or the AU; it is not incompatible with the African  
357 Charter and the communication was not disseminated through mass media in the first instance. We concur with  
358 the submissions of some scholars that the African Assembly of Heads of State and Government has complete  
359 discretionary power in determining the validity of complaints submitted under the Charter, This omission is not  
360 mind-boggling because even if the drafters of the Charter had included provision on free legal representation, it  
361 would have been an exercise in futility as it would have been extremely difficult, if not virtually impossible for  
362 the Commission to implement it in view of the financial constraint and lack of resources which the commission  
363 has been facing since it was constituted. ??3 and that the requirements are not only too rigid, but also tend to  
364 defeat the very basis of African Charter. ??4 The sad effect of the strict rules of procedure of the Commission  
365 cannot be underscored. Sometimes communications take two or more than two years, before they are determined.  
366 This is so notwithstanding the Commission's Rule of Procedure, which states that it "shall decide as early as  
367 possible ?whether or not the communication shall be admissible under the Charter." 85 One typical case, that  
368 buttresses this point, is SERAC v. Nigeria, 86 where the Commission received communications in the case in  
369 March 1996, but did not examine them until 27 th October 2001 (a period of more than five years). In fact, mere  
370 letters from the Commission to the complainants, acknowledging receipt of the communications or complaints  
371 took the Commission six months. No doubt, incurable harm might have been done before the communications  
372 were finally determined. ??7 Article 58 of the African Charter, alias, "emergency" provision, which seems to be  
373 an exception to the exhaustion of domestic remedies clause, 88 82 African Charter, Art.10(2). 83 E. Anthony .,  
374 *supra* note 48.

## 375 **7 D. Yakubu , 'Rules of Admissibility under the African Charter 376 ON**

377 Human and Peoples' Right', Journal of Comparative Law, ??ol.1, No.1 (2007). at 50. ??5 Rules of Procedure  
378 of the African Commission on Human and Peoples' Rights, Rule 113. 86 *Supra* note 57. ??7 *Ibid*. 88 F. O.  
379 Wara, *supra* note 63. turns out to compound the problem of individual access to the Commission. Under this  
380 provision, where it appears to the Commission that one or more communications of special cases reveals the  
381 existence of series of serious or massive violations of human and peoples' rights, the Commission must draw  
382 the attention of the Assembly of Heads of State and Government to such cases, after which the Assembly may  
383 request the Commission to undertake an in-dept study of the special cases, make a factual report, findings and  
384 recommendations. If the case is one of emergency, the Commission must submit it to the Chairman of the  
385 Assembly "who may request an in-dept study."

386 The provision of Article 58 has been frustrating African Commission from carrying out investigations on  
387 egregious violations of human rights. It is also not clear whether the phrase "drawing the attention of?", used by  
388 the provision is synonymous with "reporting to?" 89 Notwithstanding these ambiguities, we accept the observation  
389 that Article 58 deals with cases of urgency. It, therefore, restricts and deprives individual access to the Commission  
390 in urgent cases. One cannot dispute the submission that the procedure is not only cumbersome, but also subjects  
391 the work of African Commission to the approval of the AU General Assembly, comprising of African Heads of  
392 State and Government.

393 Article 58 also uses the words "special cases", but does not define these words; nor does it state who determines  
394 whether a particular violation of human rights is a special case. One may also wonder whether there is really any  
395 difference between "special cases, which reveal the existence of a series of serious or massive violations of human  
396 rights" and "a case (or cases) of emergency." 90 This is a serious problem in Africa where commitment to human  
397 rights is yet to be ingrained into the psyche of African Governments. 91 Indeed, the procedure is a serious flaw  
398 in the Charter's effectiveness as a weapon for human rights because it undermines the independence of Members  
399 of African Commission. We agree with the submission that there can be no independence of Members of the  
400 Commission, if they cannot be permitted to examine complaints submitted to A Year dept study, but it does  
401 not state what happens if the Chairman fails to request an in-dept study. The negative effect of such omission  
402 occurred in 1991 and 1994, when the Commission received communications alleging serious violations of human  
403 rights in Sudan, Rwanda and Burundi, and it communicated them to the Chairman of the OAU in compliance  
404 with Article 58(3) of the African Charter. To no avail; there was no any response from the Chairman. This is  
405 not surprising most especially that Article 58(3) uses the word "may" as opposed to "shall" thereby giving the  
406 Chairman a discretionary power to request (or not to request) an indept study.

## 407 **8 Global**

408 It has, however, been suggested that to avoid the cumbersome procedure in Article 58 and its embarrassing  
409 consequences, African Commission should, in cases of urgency "resort to any appropriate method of investigation"  
410 or "any other person capable of enlightening it", as allowed by Article 46 of the Charter. ??3 This submission is

411 predicated on the observation that Article 46, being a general provision, provides better protection than Article  
412 58; and it is "a provision specifically intended to respond to special and urgent cases" without subjecting the  
413 investigative power of the Commission to the approval of the AU General Assembly. ??4

414 **9 b) Confidentiality of the Commission's Work**

415 Another clause in the African Charter, which inhibits the African Commission's effectiveness with regard to its  
416 protective mandate, is the confidentiality clause. The African Charter declares to the effect that all measures taken  
417 within the provisions of Chapter Three, regarding procedure of the Commission, remain confidential until such  
418 time the Assembly of Heads of State and Government decide otherwise. ??5 The Chairman of the Commission,  
419 however, publishes report of the Commission or activities of the Commission on the decision or after consideration  
420 by the Assembly. ??6 Numerous problems have emanated from the confidentiality clause. As pointed out by  
421 a scholar, it Article 58 of the Charter, considered in the preceding sub-topic, read together with Article 59,  
422 would mean that not only must a report of the Commission's finding be submitted to the General Assembly, but  
423 also that any actions undertaken by the Commission concerning alleged human rights violations are to remain  
424 confidential unless otherwise decided by the Assembly, which decision (if at all is given) may be to the detriment  
425 of the Commission. 93 U. O. Umozurike, *supra* note 47 at 77; E. Ankumah, *supra* note 90 at 49. 94 E. Ankumah,  
426 ., *id.* ??5 See African Charter, Article 59(1). 96 *Ibid.*, Art.59(2)(3); Also under Rule 106 of its procedure, the  
427 African Commission may issue a press release on its private activities without the details or pointing accusing  
428 fingers.

429 renders "an assessment of the role of the African Commission in the development of the jurisprudence of  
430 human and peoples' rights ?a 'Herculean task'". ??7 The clause does not state what are authorized and what  
431 are not authorized to be published. Consequently, the hands of the Commission are tied, compelling it to  
432 adopt strict approach towards the issue of confidentiality. The Commission, for example, has decided not to  
433 publish vital information such as the names of States against which complaints on violation of human rights  
434 have been leveled. ??8 While the confidentiality clause is incorporated in the African Charter purposely to  
435 protect (and indeed it protects) State Parties from being exposed of their egregious violations of human rights,  
436 it also exposes "the Commission to charges of ineffectiveness and lack of certainty about the end result of its  
437 work". ??9 The consequence of this is that it undermines the confidence, which the general public had on the  
438 effectiveness and relevance of the Commission. Little wonder, therefore, that the decisions of African Commission,  
439 unlike those of the Inter-American Commission and the defunct European Commission, are not popular because  
440 they are confidential. This loophole in the Commission's procedure is compounded by the fact that even if the  
441 Commission's reports are ultimately authorized by the General Assembly, "they are not detailed (and) the full  
442 reasoning of the Commission is often not reflected". 100 c) Lack of Enforcement Power and Remedial Provisions

443 In spite of the broad areas of mandate of the African Commission, its power of implementation and investigation  
444 is weak. The decisions of the Commission are not binding, but mere recommendations, which the State  
445 against which the decisions are given is not bound to obey. After its findings, the Commission can only make  
446 recommendations to the African Heads of State who have the final say. ??01 This procedure is against fair  
447 trial; in particular the rule against bias, known as *nemo judex in causa sua*, 102 which is one of the pillars of  
448 natural justice. ??03 It is predicated on this lack of enforcement power of the African Commission that it has  
449 been tagged with various embarrassing words and phrases, such as toothless bulldog, looks helpless and 97 C. D.  
450 Dakas, *supra* note 3, at 25. 98 A. Philip ., *supra* note 29, at 237-238. ??9 *Ibid.*, at 236; See also B. O. Nwabueze,  
451 Constitutional Democracy in Africa, ??ol. 2, (2003), at 84. 100 C. D. Dakas, *supra* note 3, at 25. ??01 African  
452 Charter, Art.58 (2). 102 See D. A. Ijalaye, 'The Relationship between the Rule of Law and the Rule of God',  
453 *Ado-Ekiti Law Review*, 1999, at 35; R v. Chancellor of the Univ. of Cambridge (dr. Bentley's case), 1723 1  
454 Stra.557. 103 A. Saffari , *supra* note 21, at 302.

455 **10 Global Journal of Human Social Science**

456 Volume XII Issue W XII Version I( D D D D ) A 2 64

457 Year abandoned, 104 paper tiger, et cetera 105 though it has also been argued that some of the criticism have  
458 been over-exaggerated. "While most of these statements regarding the specific weakness of the Commission are  
459 generally factual," according to C. A. Obiora, "the seriousness of the deficiencies is all too-often over stated." ??06  
460 The African Commission itself had confessed in *Malawi African Association v. Mauritania*, 107 that it has no  
461 power to enforce its decisions but merely to pronounce on allegation of violations of the human rights protected  
462 by African Charter. The Commission's lack of power to make authoritative determination(s) of specific human  
463 and peoples' rights abuses is a fundamental flaw, which renders its decisions worthless and ineffective. 108 Thus,  
464 decisions of the Commission attract little, if any, compliance from Governments of Member States. A typical case  
465 that buttresses this point is *International Pen (on behalf of Ken Saro-Wiwa Jr. & Ors) v. Nigeria*, 109 where  
466 in disregard of the Commission's order for stay of execution, the Federal Military Government of Nigeria, under  
467 Late General Sani Abacha, went ahead to execute Ken Saro-Wiwa and others. The Act of Nigeria's Government  
468 rendered all the Commission's efforts to prevent irreparable damage caused to the complainants worthless. In a  
469 situation like this, the Commission is helpless; it cannot do more than expressing its grievances. ??10 In a similar  
470 vein, lack of remedies for violations of the rights enshrined in the Charter is one of the African Commission's

471 substantive and structural impediments. The Commission itself had reminded that due to lack of provisions on  
472 compensation for human rights violations in the African Charter, victims find themselves without remedy. 111  
473 104 Y. Dankofa , supra note 73. 105 V. D. M Anne Pieter, supra note 75; Anthony A., supra note 48; N.J.  
474 ??ssessment,’ 8 Transnat'l Comtempt. Probs. 359, 1998 at 365, quated in Steiner &Alston, supra note 56, at  
475 929, where he asked: “one question? is whether the decisions of the Commission are effective? Any temptation  
476 to dismiss the Commission as a worthless institution today must be regarded as premature, ill-informed or both”.

477 109 Supra note 36. 110 Saro-Wiwa's case id., para 114-115. In Saro-Wiwa's case, the Commission lamented:  
478 ”This blot on the legal system of Nigeria? will not be easy to erase. To have carried out the execution in  
479 the face of pleas to the contrary by the Commission and world opinion is something, which we pray will never  
480 happen again. That it is a violation of the Charter is an understatement”. ??11 Eleventh Annual Activity Report  
481 (1997-1998), PAU DOC./OS/43 (XXIII).

482 With lack of remedies for violations of the rights under the Charter, individuals may definitely be reluctant to  
483 petition the Commission even if they are in financial position to pursue their cases before the Commission after  
484 exhaustion of local remedies. This is because rights and remedies cannot exist in vacuum.

## 485 **11 d) Inadequate Funding and Resources**

486 Another major problem of the Commission is inadequate funding and resources. These problems, which are  
487 bluntly tagged ”lack of money,” ”lack of funds” and lack of ”financial means and staff,” are endemic. ??12  
488 Consequently, African Commission is not capable of performing most of its tasks. That the Commission faces  
489 problem of funding is not mindblowing, ”given the depressed state of African economies.” ??13 It will, however, be  
490 unrealistic, frankly speaking, to argue that this is the sole reason for this impediment. The financial predicament  
491 of the African Commission is also connected with the fact that African States were in the habit of defaulting their  
492 financial obligations to the OAU and now to the AU. ??14 Similarly, the Commission has structural shortage of  
493 staff. That over two decades of its existence, the Commission has not built its permanent site; but still operates  
494 in a rented apartment in Banjul, the Gambia, is enough cogent evidence establishing its lack of resources, ??15  
495 In order to achieve its promotional mandate, the Commission, with only eleven Commissioners, divided Africa  
496 into regions with each Commissioner promoting human rights in three to five countries. But in view of the size of  
497 African continent and financial predicament, attempts by the Commissioners to cover these countries allocated  
498 to them have not been fruitful.

499 or inadequate resources. The problem of inadequate resources is also connected with the shear size of African  
500 continent. ??16 In a similar vein, a commentator has pointed out that the problems of inadequate funding  
501 and resources have affected the Commission’s ”communications and interaction with NGOs, dissemination of  
502 documents, and responses to requests for information of decisions”. ??17 The African Commission, at its various  
503 Sessions, had brought to the fore the effect of these problems. For example, in its Interim Report to the Sixty-  
504 Seventh Ordinary Session and the OAU Council of Ministers in February 1998, the Commission revealed in extenso  
505 that it was incapable of carrying out some of its activities despite their importance because of lack of financial,  
506 human and material resources it needed to A Year ensure smooth running. ??18 The report of the Commission  
507 further revealed that there was no provision for human rights protection and promotion activities, which constitute  
508 the cornerstone of the Commission’s mandate in the budgetary appropriation for the Commission. ??19 In an  
509 effort to overcome this obstacle, the Commission decided at the Session to operate a separate account into which  
510 voluntary donations might be paid, for the purpose of achieving its promotional mandate. The Commission  
511 has also resorted to seeking helps in acquiring facilities it needs for effective performance. ??20 The report of  
512 the Commission has also shown that it has received donations and financial supports from institutions such as  
513 European Union (EU), Wallengberg Institute of Human and Humanitarian Law, the UNCHRand others. 121 e)  
514 Lack of Compliance with Periodic Reporting Obligation by State Parties

## 515 **12 Global**

516 It is our submission that this method cannot sustain a dual human rights enforcement mechanism in Africa.

517 One of the obligations, which a state may undertake to the international community, is the reporting obligation.  
518 Under international human rights law, reporting is a device used in ensuring a government’s accountability  
519 of human rights to its own people on one side and to the international community on the other side. ??22  
520 Various reporting mechanisms exist under the UN human rights instruments ranging from the CERD, ICCPR,  
521 ICESCR, CEDAW, CAT and CRC. Reporting under each of these instruments is done to a Committee the  
522 instrument has established; and in all cases, the State Parties are required to submit reports on measures they  
523 have taken to implement the particular Convention to the Secretary-General of the UN, who in turn makes them  
524 available to the particular Committee. The Committee examines the reports and makes suggestions and general  
525 recommendations, which are taken to the General Assembly. ??23 At the regional level, Article 57 of the Revised  
526 European Convention provides to the effect that the Secretary-General of the Council of Europe has the right  
527 to request from any High Contracting Party any explanation of the manner in which its internal law issues the  
528 effective implementation of any of the provisions of the European Convention. ??24 Under this system, the  
529 Secretary-General has the responsibility of making such request and there is a corresponding obligation on the  
530 State Party to furnish the report.

## 14 RECOMMENDATIONS

---

531 State Parties to the Inter-American Convention under take to furnish the Inter-American Commission with  
532 such information, which the Commission might request from them with regard to the manner their domestic law  
533 ensures the effective application of any provisions of the Convention. Also, under this system, once the request  
534 is made by the Commission, the State Party must furnish it. ??25 Although, it has been stated that reporting  
535 procedure is the backbone of the mission of the African Commission, On the contrary, Article 62 of the African  
536 Charter, which is the reporting obligation provision, merely states:

537 Each State Party shall undertake to submit in every two years, from the date the present Charter comes into  
538 force, a report on legislative or other measures taken with a view to giving effect to the rights and freedoms  
539 recognized and guaranteed by the present Charter.

540 126 irregular submissions of reports or outright non-submission, is a problem that African Commission has  
541 always complain about. ??27 That quite a number of State Parties do not submit their periodic reports as required  
542 by the African Charter makes it difficult for the Commission to make assessment of human rights situations in  
543 those States. ??28 Even though the African Commission was constituted in 1987, the first State Report was  
544 submitted to it by Libya in January 1990 and two years later only additional eight State Parties submitted their  
545 initial reports. In acknowledging this problem, the General-Assembly of the OAU at its 29 th Ordinary Session  
546 in Cairo from 28-30, 1992, adopted the resolution of the Commission on "Over Due Reports," which, inter alia,  
547 urged State Parties to the African Charter, which had not yet submitted their reports to submit them without  
548 delay and requested that States should report not only on the legislative or other measures taken to give effect  
549 to each of the rights and freedoms recognized and guaranteed by the African Charter but also on the problems  
550 encountered in giving effect to these rights and freedoms. But this effort rested on futility. State reporting under  
551 the African Charter system has not been revamped. Year did not submit their reports and only 12 States had no  
552 over-due reports. The Commission cannot compel Member States defaulting to comply with obligations because  
553 it does not have judicial power to do so. ??30 The problem of non-compliance with State reporting by State  
554 Parties is compounded by the fact that even if the reports are submitted, they are normally inadequate due to  
555 their brevity. ??31 Worse still, even with the brief reports submitted, the Commission hardly have enough time  
556 to examine them thoroughly because it sits only twice a year and its agenda in each Session covers protective,  
557 promotional and administrative matters, which must be covered within 10 days. Sometimes the Commission is  
558 frustrated by the absence of representatives of States, which furnished reports for examination. For example,  
559 during its 18 th Session, the Commission scheduled to examine the reports of four States -Tunisia, Mozambique,  
560 Mauritius and Seychelles, but only Tunisia sent representatives. On the same vein, at the 20 th Ordinary Session  
561 of the Commission in Cotonou, Benin from 23 rd October to 6 th November 2000, the Commission did not  
562 examine the reports submitted by Namibia and Ghana because representatives of these countries did not turn  
563 up. At the 21 st Ordinary Session of the Commission, the State reports of Sudan and Zimbabwe were available  
564 only in English version. Consequently, the non-English Commissioners were automatically eliminated from the  
565 examination process. ??32 This buttresses the lack of political will and commitment of African leaders to the  
566 cause of human rights. "If States' adherence to the mandatory reporting is anything to go by," it is noted, "then  
567 a lot has to be done to encourage State Parties to undertake this important obligation." ??33 IV.

## 568 13 Observations

569 Our efforts in this article centered on the operation and performance of African Commission on Human and  
570 Peoples' Rights in 207, when it was constituted. Having considered the various functions, failures and achievements  
571 of the Commission, we observed that some criticisms leveled against it are over-exaggerated. We noted with facts  
572 that the Commission has recorded some achievements in both its promotional, protective and interpretational  
573 functions. We further pointed out that the problem of noncompliance with the decisions of the Commission has  
574 been predicated on the reason that the Commission has no legal standing to issue authoritative and binding  
575 decisions; and this has seriously undermined the Commission as an effective and meaningful human rights  
576 enforcement mechanism in Africa.

577 In identifying both the substantive and procedural problems of the African Commission in this article, we  
578 observed that while such problems as confidentiality of the Commission's work, lack of enforcement power and  
579 remedial provisions can be tackled by amendment of the African Charter; others such as obligations of State  
580 Parties, including financial and State reporting obligations cannot be cured by amendment of the Charter only  
581 because they require political will on the part of State Parties.

582 It is also our observation that since its inception, African Commission has resorted to seeking donations from  
583 various institutions in acquiring facilities it needs for effective performance; and this is because most African  
584 States do not comply with their financial obligation. We declared that with the establishment of African Human  
585 Rights Court, in addition to the African Commission, this method cannot sustain a dual human rights enforcement  
586 mechanism in Africa.

587 V.

## 588 14 Recommendations

589 There is need to review and amend of the African Charter. Some deficiencies of African Commission such as  
590 confidentiality of the Commission's work, lack of enforcement powers and remedial provisions, claw-back clauses

591 and absence of derogation clauses, can only be effectively overcome if there is a substantial amendment of the  
592 African Charter. This is very important because the Charter is the primary source of African Commission and  
593 African Human Rights Court/ the Human Rights Section of the African Court of Justice and Human Rights.  
594 This step would have been taken before the establishment of African Human Rights Court. But it is never too  
595 late; there is need for immediate reformulation of the Charter; better sooner than later.

596 Although, the interpretation of socio-economic and peoples' rights enshrined in the African Charter is an  
597 onerous task, the African Commission should take bold step in the interpretation of these rights taking examples  
598 from its decisions in the cases of SERAC v.Nigeria. 134 134 Supra note 57.

599 To achieve this, the Commission should engage in a vibrant, holistic and creative interpretation of the African  
600 Charter; and fill gaps where necessary and reconcile what scholars thought are irreconcilable under the African  
601 Charter for the interest of justice.

602 It is also importantly recommended that Members of the AU should endeavour to provide essential and  
603 adequate resources to the African Commission to enable it carry out more effective functions. The current practice  
604 under which the Commission relies on donations from other international organizations should be discouraged.

## 605 15 Year

606 To overcome the problem of ignorance of the activities of African Commission and the existence of African  
607 Human Rights Court, it is strongly recommended that African Commission should carry out elaborate public  
608 awareness campaign of its mandate. The contentious jurisdiction of African Human Rights Court and the nature  
609 of the Court as a mechanism with binding enforcement powers should be brought to the knowledge of the public  
610 through the mediums of television, radio, newspapers, magazines and public lectures. The Commission should  
611 not concentrate its public awareness campaign in urban areas alone but also in rural areas.

612 Similarly, there is need for sustained continuing legal education through seminars, conferences, symposia, et  
613 cetera on international human rights in general and African human rights system in particular. To achieve  
614 human rights awareness campaign, there is also need for African Commission to work in collaboration with the  
615 various human rights Commissions or Committees established by various African States. The of bodies charged  
616 with continuing legal education in domestic forum should not be ignored. In Nigeria, for example, the National  
617 Judicial Institute in charge of continuing legal education for judges should be effectively utilized.

618 To avoid conflict of interpretational jurisdiction of the African Commission and African Human Rights Court,  
619 it is recommended that the African Commission should concentrate on its promotional mandate, leaving the  
620 interpretational functions to African Human Rights Court or the merged Court. In the long run, African  
621 human rights system should concentrate on African Human Rights Court as the only human rights enforcement  
622 mechanism and abolish the African Commission, following the present European system, where a single human  
623 rights enforcement mechanism helps in speedy trials and avoids delay in the administration of justice.

624 In the African human rights system, the abolition of the Commission will not only aid in quick dispensation  
625 of justice but also, to some extent, help in relieving the system of its financial predicament which it has plunged  
626 into since it was constituted in 1987. But this step can only be possible if individuals and NGOs are given direct  
627 access to the African Human Rights Court and later the African Court of Justice and Human Rights. So, the  
628 immediate measure is to make the Commission more effective by tackling its present predicaments. This is very  
629 significant because if the Commission is left to stand on ramshackle foundation, the African Human Rights Court  
630 can never realize its potential and purpose. The African Human Rights Court and African Commission should,  
631 therefore, not see themselves as rivals but partners in progress in the African human rights movement.

632 State Parties to the African Charter should also be upright in nominating Commissioners to the African  
633 Commission. This should be based purely on merit devoid of political, religious or tribal sentiments. Although,  
634 knowledge of international law is not a requirement for appointment of a judge and a Commissioner of the Court  
635 and the Commission respectively, we suggest that this should be a condition sine qua non for both nomination  
636 and appointment of Commissioners.

## 637 16 VI.

## 638 17 Conclusion

639 In the light of the plethora of problems that besieged the African Commission, it is obvious that African human  
640 rights system was built on a shaky foundation; and unless it is anchored on strong and solid foundation, the  
641 efforts made so far to revamp African human rights system would be an exercise in futility. "A jurisdiction  
642 that is built on sand," a scholar said, "is obviously not anchored on a concrete foundation?" 135 On the whole,  
643 there is a lot to be done to make the African Human Rights Commission more effective. With the establishment  
644 of African Human Rights Judicial bodies it is hoped that if these recommendations are followed, the African  
645 Commission, as a human rights institution Africa, will give meaning and positive effect to the African Charter  
646 and other international, regional and sub-regional human rights instruments ratified by African States.



Figure 1:

It is the threefold mandate of the African Commission that this sub-topic considers in turn.

- a) Promotional Functions

Figure 2:

[Note: 21 A. Saffari., 'The Enforcement of Human Rights in Africa with Reference to Tanzania,' 8 Rev. of the Afric. Comm. on Hum. & Peoples' Rights, (1999) at 301. 22 African Charter Art.45(4). 23 U.O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague Martinus Nijhoff Publishers, 1997) at 66 at 381.]

Figure 3:

---

2 58

Volume XII Issue W XII Version I

D D D D ) A

(

Global Journal of Human Social Science

University Press, 2007), at 110-114.

36 See International Pen ( on behalf of Ken Saro-Wiwa Jr), v. Nigeria,  
supra .

[Note: 37 National Human Rights Commission was established by Decree 22 of 27 th September 1995, (now National Human Rights Commission Act, CAP 244 LFN 1990, now CAP.N46 LFN 2004 (hereinafter National Commission). 38 Ibid., 2 nd para. to to preamble. 39 Statute of the African Court of Justice and Human Rights, *infra*, note 177, Art. 30(e).]

Figure 4:

Volume XII Issue XII Version I

D D D D )

(

Human Social Science

Journal of

Global

[Note: 45 Y. Akinseye-George , *supra* note 41, at 170. 46 47 U. Umozurike *supra* note 35 at 71; Philip A. *supra* note 29 at 230-231.]

Figure 5:

2 60

Volume XII Issue W XII Version I

D D D D ) A

(

Global Journal of Human Social Science

57

See SERA& Anorv. Nigeria,availableat

[Note: <http://www.wip.at.za/humanrts/africa/comcases/155-96.html> 58 Murray R., "On-Site Visits by the African Commission of Human and Peoples Rights: A Case Study and Comparison with the Inter-American Commission on Human Rights", 11 African Society of Inter'l and Comp. Law Proc. 10 th Annual Conf. (1998), at 461. 59 See Final Communiqué of the 37 th Ordinary Session of the African Commission.]

Figure 6:

Human Rights Library, available at

[Note: [www.umn.edu/human/bibliog/africanpathfindier.html](http://www.umn.edu/human/bibliog/africanpathfindier.html). For detailed discussion on the Special Rapporteur, see .UEssien, *supra* note 32 at 100-102.64 African Charter, Art. 45(3).]

Figure 7:

107 Comm. Nos.54/91, 98/93, 164/97,210/981 1999-2000.

108 Odinkalu C. A., 'The Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary

Figure 8:

[Note: 128 *Id.* 129 Annual Activity Report (1998) Vol.1, AFCHPR, at 107.]

Figure 9:

**18 Global Journal of Human Social Science**

647 1 2 3 4 5 6 7 8 9

648

---

<sup>1</sup>Comprising of practicing lawyers and teachers of law, from 23 African Nations as well as 9 countries of other Continents. See T. O.,

<sup>2</sup>African Charter on Human and Peoples' Rights, June 27 1981, Doc.OAU/CAB/LEG/67/3/Rev.5. 21 ILM 52, ('982) (hereinafter African Charter or Charter). 19 *Id.*, Arts.30 and 45. 20 Art.64(1) of the African Charter provides that: "After the coming into force of the present Charter, Members of the Commission shall be elected in accordance with the relevant Articles of the Charter".

<sup>3</sup>© 2012 Global Journals Inc. (US)

<sup>4</sup>© 2012 Global Journals Inc. (US) 20

<sup>5</sup>Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, adopted by the UNGA Res.44/128 of 15Dec.1989 (entered into force on 11 July 1991), Art.5 (Individual Complaints) with respect to the States Parties to the First Optional to the ICCPR adopted on 16 Dec. 1966.54 African Human Rights Court Protocol, Arts.5(3) and 34(6). Cf. Protocol of the merge Court, Art. 8; Statute of the merged Court, 30(f). 55 Inter-American Convention, Art.44. The Article, however, states to

<sup>6</sup>Over Two Decades of African Commission on Human and Peoples' Rights: Flying or Fledgeling

<sup>7</sup>C. A. Odinkalu, *supra* note 108. 113 M. O. U., Gasiockwu, *supra* note 24, at 190.114 The Council of Ministers of the OAU (now Executive Council of AU) had expressed its "serious concern about the increasing areas of contributions, thus undermining the capacity of the secretariat to carry out approved programmes and activities". See N. J. Udombana N.J., *supra*, note 131 at 862.115 *Ibid.* 116 A. Phiip., *supra* note 29 at 233. 117 *Ibid* Over Two Decades of African Commission on Human and Peoples' Rights: Flying or Fledgeling

<sup>8</sup>See Eleventh Annual Activity Report(1997)(1998), PAU Doc. DOC/Os/43 (XXIII).119 *Ibid.*120 See Third Annual Activity Report, African Commission on Human and Peoples' Rights, Annual Activity Report 114 (1998).121 N. J. Udombana., *supra* note 57, at 133. 122 K. Quashigah., *supra* note 9.123 SeeCERD, ICCPR, ICESCR, CEDAW, CAT, CRC, European Convention, Art.57.

<sup>9</sup>K. Quashigah , *supra* note 9. 131 A. Saffari, *supra* note 21, at 301. 132 K. Quashigah, *supra* note 9. 133 A. Philip, *supra* note 29 at 237.

---

649 [Anthony] , E Anthony . p. 48.

650 [UN Charter, Art. 96. See T. O. Elias ()] , *Lagos: Nig. Institute of Advanced Legal Studies* UN Charter, Art. 96.  
651 See T. O. Elias (ed.) 1989. p. . (United Nations Charter and the World Court)

652 [Ekiti ()] , Uni-Ado Ekiti . *Fac. of Law* 2004. p. .

653 [Yerima (ed.)] *African Charter on Human and Peoples' Rights in Comparison with other International and*  
654 *Regional Human Rights Instruments*, T F Yerima . I. Ibidabo-Obe .and T.F (ed.) (For detailed discussion,  
655 see)

656 [Udombana ()] 'at 45, where he stated: "this interpretational mandate is an important, albeit severely underused,  
657 power of the Commission giving the ambiguity of so many of the Charter's provisionsparticularly regarding  
658 the legal scope of provisions related to group rights, duties, and economic, social and cultural rights forum'  
659 N J Udombana . *Towards the African Court on Human and Peoples' Rights: Better Late than Never*, (Lagos)  
660 2003. 2000. 1999. Malthouse Press Ltd. 68. (AHRLR. See also Dauda Jawara v. The Gambia-147/96  
661 and 149/96 (consolidated)

662 [Idubor R. ; U and Umozurike ()] 'at 79 ('a particularly effective means of putting pressure on government'. O  
663 Idubor R. ; U , Umozurike . *The Significance ofb the africn Charter on Human and Peoples' Rights*, U K  
664 Awa, Y Osinbajo (ed.) (Benin) 2000. Newera Pubs. 2 p. 51. (Perspectives on Human Rights)

665 [Bola ()] Bola . *Contemporary International Law and Human Rights*, 1991. 1 p. 3.

666 [Yerima (ed.)] *International Law, Human Rights and Developmen*, Yerima (ed.)

667 [Over Two Decades of African Commission on Human and Peoples' Rights: Flying or Fledgeling] *Over Two*  
668 *Decades of African Commission on Human and Peoples' Rights: Flying or Fledgeling*,

669 [Machowski (ed.)] *Peoples' Rights as a New Form of Human Rights*, J Machowski . G. B.Emmanuel and B. A.  
670 (ed.)

671 [Quashigah] K Quashigah . *Gasiokwu*, *supra* 24 at 198 ("publicity is a major weapon against human rights  
672 breaches and provisions that have the tendency, 9.

673 [Scott ()] Scott . <http://www.asil.org/insight000910> *The African Court on Human and Peoples Rights*,  
674 Sept.19 (2006. 10. (The American Society of Inter'l Law)

675 [Ankumah ()] *The Emergency provision of the African Charter on Human and Peoples' Rights*', 4 *Revision of*  
676 *African Commission on Human & Peoples' Rights*, E Ankumah . 1994. p. 49.