

# **African Court of Justice and Human Rights: Emerging Jurisprudence**

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**Kariuki Muigua**

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**Abstract**

*The history of the African continent has been characterised by rampant violation of human rights. During the colonial period, the colonial masters not only encouraged and facilitated slave trade but also engaged in exploitation of Africa's natural resources which were always exported to the colonial masters' home countries to the detriment of the African people who would be left poor and desolate. The post-colonial period was expected to see an empowered people who would enjoy growth and development of their countries and have their human rights not only protected but also actively promoted in order to preserve the people's dignity. However, in most African states, the opposite was true. The post-independence governments took over from the colonial masters and continued with their legacy in what came to be referred as neo-colonialism. They continued to plunder the continent's natural wealth and used it for their own selfish interests. The people were not only rendered poorer but also had their democratic rights and space violated all the more. In a commendable move to change this, the African Union set up the African Court on Human and Peoples' Rights (later on renamed to African Court of Justice and Human Rights) and the African Commission on Human and Peoples' Rights to promote a culture of respect for human rights in the Continent. However, these two bodies are yet to achieve this.*

*This paper critically discusses and explores the emerging jurisprudence on the court's role, and its effectiveness in discharging its mandate, in comparison with what has been happening in other regional courts on human rights across the world. However, this paper is mainly concerned with the Court's jurisdiction in relation to the protection of human rights. This paper is informed by the fact that despite the existence of the African court for the last several years, cases of human rights violations especially by governments in many African states continue to be reported.*

**1. Introduction**

The African Court of Justice and Human Rights, formerly known as the African Court on Human and Peoples' Rights (the African Court) was established under Article 1 of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*<sup>1</sup>, adopted by Member States of the then Organisation of African

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\* *PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law; CASELAP.*

## *African Court of Justice and Human Rights: Emerging Jurisprudence*

Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998 and which Protocol came into force on 25 January 2004.<sup>2</sup> With its seat in Arusha, Tanzania, the African Court is one of the two bodies set up by the African Union to monitor human rights violations in the continent and it complements the work of the African Commission on Human and Peoples' Rights (African Commission).<sup>3</sup> The Court's jurisdiction is on all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights, (the Charter), the Protocol and any other relevant human rights instrument ratified by the States concerned, which are specifically classified into two types of jurisdiction: contentious and advisory.<sup>4</sup> Article 28 of the Protocol provides that:

*The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:*

- a) the interpretation and application of the Constitutive Act;*
- b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;*
- c) the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;*
- d) any question of international law;*
- e) all acts, decisions, regulations and directives of the organs of the Union;*
- f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;*
- g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;*
- h) the nature or extent of the reparation to be made for the breach of an international obligation.*

This paper critically discusses and explores the emerging jurisprudence on the court's role, and its effectiveness in discharging its mandate, in comparison with what has been happening in other regional courts on human rights across the world. However, this paper is mainly concerned

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<sup>1</sup> Organization of African Unity (OAU), *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998.

<sup>2</sup> 'African Court on Human and Peoples' Rights' <<https://en.african-court.org/>> accessed 18 June 2020.

<sup>3</sup> 'African Court on Human and Peoples' Rights' <[african-court-human-and-peoples-rights.html](#)> accessed 19 June 2020.

<sup>4</sup> 'Welcome to the African Court' <<https://en.african-court.org/index.php/12-homepage1/1208-welcome-to-the-african-court1>> accessed 18 June 2020.

with the Court's jurisdiction in relation to the protection of human rights. This paper is informed by the fact that despite the existence of the African court for the last several years, cases of human rights violations especially by governments in many African states continue to be reported.<sup>5</sup>

## **2. African Court of Justice and Human Rights: the Mandate, Vision and Mission**

It is worth noting that while the African Court was established by the *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 1998, the Protocol, together with the Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique, have since been replaced by the *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008<sup>6</sup>. The new Protocol merged the African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Court of Justice of the African Union established by the Constitutive Act of the African Union, into a single Court and established as "The African Court of Justice and Human Rights"<sup>7</sup>. The *Protocol on the Statute of the African Court of Justice and Human Rights* received its last signature on February 04, 2019 out of the required 15 signatures for it to enter into force.<sup>8</sup> The Protocol and the Statute annexed to it was to enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States.<sup>9</sup>

As far as the mandate of the African Court is concerned, the Court was established to complement and reinforce the functions of the African Commission on Human and Peoples' Rights (the African Commission – often referred to as the Banjul Commission), which is a quasi-judicial body charged with monitoring the implementation of the Charter.<sup>10</sup> In the case of *Femi*

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<sup>5</sup> 'Responding to Human Rights Violations in Africa in: International Human Rights Law Review Volume 7 Issue 1 (2018)' <[https://brill.com/view/journals/hrlr/7/1/article-p1\\_1.xml?language=en](https://brill.com/view/journals/hrlr/7/1/article-p1_1.xml?language=en)> accessed 24 June 2020; Wachira, George Mukundi. *African Court on Human and Peoples' Rights: Ten years on and still no justice*. London: Minority Rights Group International, 2008.

<sup>6</sup> African Union, *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008.

<sup>7</sup> Article 2, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

<sup>8</sup> 'Protocol on the Statute of the African Court of Justice and Human Rights | African Union' <<https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>> accessed 19 June 2020.

<sup>9</sup> 'List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court Of Justice And Human Rights' <[https://au.int/sites/default/files/treaties/36396-sl-protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights.pdf](https://au.int/sites/default/files/treaties/36396-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf)> accessed 19 June 2020.

<sup>10</sup> 'Mandate, Vision, Mission & Values' <<https://en.african-court.org/index.php/about-us/mandate-vision-mission-values>> accessed 19 June 2020.

## *African Court of Justice and Human Rights: Emerging Jurisprudence*

*Falana v African Commission on Human and Peoples' Rights (jurisdiction)* (2015), the relationship between the two institutions was put to test and the African Court held that it could not compel the African Commission on Human and Peoples' Rights to refer a case submitted by the complainant before the African Commission to the Court. The Court as stated, *inter alia*:

*The relationship between the Court and the Respondent is based on complementarity. Therefore, the Court and the Respondent work as independent yet mutually reinforcing partner institutions with the aim of protecting human rights on the whole continent. Neither institution has the mandate to compel the other to adopt any measures whatsoever.*<sup>11</sup>

Regarding who can bring a case before the Court, in the case of *Femi Falana v African Union (jurisdiction)* (2012) 1 AfCLR 118, a Nigerian national, brought this case against the African Union alleging violation of his rights as a result of Nigeria's failure to make a declaration under Article 34(6)<sup>12</sup> of the Protocol. The Court, by a majority of seven to three votes, held that since the AU is not a party to the Protocol, it could not be subject to its obligations and the Court therefore lacked jurisdiction. This question had previously been dealt with in *Michelot Yogogombaye v The Republic of Senegal*, 2008, where the Court held that "[t]he effect of the foregoing two provisions, read together, is that direct access to the Court by an individual is subject to the deposit by the Respondent State of a declaration authorizing such a case to be brought before the Court."<sup>13</sup>

The Court was established with the mission of enhancing the protective mandate of the African Commission on Human and Peoples' Rights by strengthening the human rights protection system in Africa and ensuring respect for and compliance with the African Charter on Human and Peoples' Rights, as well as other international human rights instruments, through judicial decisions.<sup>14</sup>

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<sup>11</sup> Para. 16, *Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction)* (2015) 1 AfCLR 499.

<sup>12</sup> The requirement for the Federal Republic of Nigeria to deposit the declaration required under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

<sup>13</sup> Para 34, *Michelot Yogogombaye v The Republic of Senegal*, Application No 001/2008.

<sup>14</sup> 'Mandate, Vision, Mission & Values' <<https://en.african-court.org/index.php/about-us/mandate-vision-mission-values>> accessed 19 June 2020.

The vision of the Court is to ensure an African continent with a viable human rights culture.<sup>15</sup> This is in line with the objectives and aspirations of the *African Charter on Human and Peoples' Rights* (Banjul Charter)<sup>16</sup>.

Article 3 of the Protocol provides that the Court shall consist of sixteen (16) Judges who are nationals of States Parties. However, upon recommendation of the Court, the Assembly, may, review the number of Judges.<sup>17</sup> In addition, the Court should not, at any one time, have more than one judge from a single Member State.<sup>18</sup> Each geographical region of the Continent, as determined by the Decisions of the Assembly shall, where possible, be represented by three (3) Judges except the Western Region which shall have four (4) Judges.<sup>19</sup>

### **3. Effectiveness of African Court of Justice and Human Rights: Prospects and Challenges**

From the colonial times, the African continent has been awash with cases of human rights violations, by both governments and private persons. The human rights violations manifested in several forms including slavery, (neo)- colonialism, apartheid, and multidimensional (extreme) poverty.<sup>20</sup> The violations were perpetrated during colonialism where Africa's human and material resources were 'largely exploited for the benefit of outside powers'.<sup>21</sup> However, even after independence, the African independent Governments continued with the same violations as the leaders sought to unjustly enrich themselves to the detriment of the masses.<sup>22</sup> Indeed, this state of affairs was one of the concerns that led to the setting up of the Court. The African court

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<sup>15</sup> 'Mandate, Vision, Mission & Values' <<https://en.african-court.org/index.php/about-us/mandate-vision-mission-values>> accessed 19 June 2020.

<sup>16</sup> African Union, *African Charter on Human and Peoples' Rights* (Banjul Charter), adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

<sup>17</sup> Article 3 (1), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

<sup>18</sup> Article 3 (2), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

<sup>19</sup> Article 3 (3), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

<sup>20</sup> Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)', *International Human Rights Law Review*, Volume 7: Issue 1 (2018) <[https://brill.com/view/journals/hrlr/7/1/article-p1\\_1.xml?language=en](https://brill.com/view/journals/hrlr/7/1/article-p1_1.xml?language=en)> accessed 19 June 2020.

<sup>21</sup> *Ibid*, p.2.

<sup>22</sup> 'Africa's Imperial Presidents: Immunity, Impunity and Accountability in: *African Journal of Legal Studies* Volume 5 Issue 2 (2012)' <[https://brill.com/view/journals/ajls/5/2/article-p91\\_1.xml?language=en](https://brill.com/view/journals/ajls/5/2/article-p91_1.xml?language=en)> accessed 21 June 2020; Richard Joseph, 'The Democratic Challenge in Africa' (Working Papers from Seminar on Democratization Atlanta, GA: Carter Center ... 1994) <<https://www.cartercenter.org/documents/1220.pdf>> accessed 21 June 2020; Ogbeyi, Michael M. "Political leadership and corruption in Nigeria since 1960: A socio-economic analysis." *Journal of Nigeria studies* 1, no. 2 (2012) <[http://www.unh.edu/nigerianstudies/articles/Issue2/Political\\_leadership.pdf](http://www.unh.edu/nigerianstudies/articles/Issue2/Political_leadership.pdf)> accessed 21 June 2020.

was meant to promote the rule of law and end impunity for rights violators.<sup>23</sup> For long, the fight for democracy and respect for human rights was mostly left to a handful of civil society activists in most countries across the Continent.<sup>24</sup> The question of independence of judicial systems and the rampant impunity witnessed in many African states also informed the decision to set up the African Court as an enforcement arm of the African Union.<sup>25</sup> It has also been argued that ‘many African judges are unwilling or unable to rule against their governments, because they are dependent on the ruling parties for their positions, lack the authority to enforce their rulings or, in some cases, may face arrest or assault for challenging government actions.’<sup>26</sup> Indeed, it has been argued that one of the reasons the negotiations for the setting up of the African Court took longer than anticipated was the fact that ‘there was not yet sufficient political will among the African states to submit to the jurisdiction of a court’.<sup>27</sup>

Since independence, several human rights treaties have been adopted in Africa to strengthen the protection of rights of vulnerable groups including refugees, children, women, youth, internally displaced persons, and older persons.<sup>28</sup> One of the mandates of the African Court is *the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned.*<sup>29</sup>

Africa has suffered under racial discrimination, slavery as perpetrated by the colonial masters before and after independence. While some states’ courts such as South African courts have

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<sup>23</sup> ‘Human Rights Move up on Africa’s Agenda | Africa Renewal’ <<https://www.un.org/africarenewal/magazine/july-2004/human-rights-move-africas-agenda>> accessed 19 June 2020.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid; See also ‘Judiciary: Fighting Graft Needs Muscles | Africa Renewal’ <<https://www.un.org/africarenewal/magazine/august-2016/judiciary-fighting-graft-needs-muscles>> accessed 23 June 2020; ISSAfrica.org, ‘Chapter 5: The Judiciary’ (*ISS Africa*) <<https://issafrica.org/chapter-5-the-judiciary>> accessed 23 June 2020; R Nugent, ‘Judicial Independence under Threat?’ <<https://www.gcbsa.co.za/law-journals/2000/firstterm/2000-firstterm-vol013-no1-pp37-38.pdf>> accessed 19 June 2020.

<sup>27</sup> Zimmermann, Andreas, *Current Challenges Facing the African Court on Human and Peoples’ Rights*, Konrad Adenauer Stiftung., 2010 <[https://www.kas.de/c/document\\_library/get\\_file?uuid=1933766c-dbe1-d244-ef61-47dcb64ce9bb&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=1933766c-dbe1-d244-ef61-47dcb64ce9bb&groupId=252038)> accessed 19 June 2020.

<sup>28</sup> Manisuli Ssenyonjo, ‘Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples’ Rights (1987–2018)’, *International Human Rights Law Review*, Volume 7: Issue 1 (2018), p.3 <[https://brill.com/view/journals/hrlr/7/1/article-p1\\_1.xml?language=en](https://brill.com/view/journals/hrlr/7/1/article-p1_1.xml?language=en)> accessed 19 June 2020.

<sup>29</sup> Article 28 (c), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

made considerable steps in strengthening the rule of law and respect for human rights, other countries have done little or nothing towards achieving the same<sup>30</sup>, hence the need to strengthen the African court's jurisdiction in protecting the human rights of African people. However, the African Court faces a number of challenges as discussed in this paper that must first be addressed in order to enhance its efficiency in discharging its mandate in protection of human rights.

### **3.1 The Complementary Role of the Court and the African Commission on Human Rights: the Relevance of the two Bodies and the Jurisdiction of the African Court**

The African Commission is supposed to receive and consider cases ('communications') alleging human rights violations by any State party to the African Charter and make quasi-judicial 'recommendations'. The jurisdiction of the Commission is compulsory and automatic as it extends to all States parties to the African Charter.<sup>31</sup>

Notably, while the African Commission on Human and Peoples' Rights (African Commission) task is to protect and uphold human rights, it is not a judicial, but rather a supervisory body, with no prosecutorial powers over states for breaching human rights.<sup>32</sup> The choice of a non-judicial a Commission instead of a court was informed by, inter alia, that the selection of a non-judicial procedure was more in keeping with African tradition.<sup>33</sup> However, the African Court has since been established and it operates on the understanding that its role and that of the Commission are complementary. The African Court of Justice and Human Rights is now designated as the main judicial organ of the African Union with its prosecutorial powers.<sup>34</sup>

Some of the main achievements of the African Commission since its inception have been listed as including the development of standards on the various provisions of the African Charter through: decisions on admissibility of communications mainly concerning exhaustion of domestic remedies; decisions on merits of communications; adoption of resolutions,

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<sup>30</sup> 'Factors of the Rule of Law' (*World Justice Project*) <<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019/factors-rule-law>> accessed 24 June 2020; Abebe, Daniel. "Does international human rights law in African Courts make a difference." *Va. J. Int'l L.* 56 (2016): 527.

<sup>31</sup> Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)', *International Human Rights Law Review*, Volume 7: Issue 1 (2018), p.4 < [https://brill.com/view/journals/hrlr/7/1/article-p1\\_1.xml?language=en](https://brill.com/view/journals/hrlr/7/1/article-p1_1.xml?language=en)> accessed 19 June 2020.

<sup>32</sup> Zimmermann, Andreas, *Current Challenges Facing the African Court on Human and Peoples' Rights*, Konrad Adenauer Stiftung., 2010 < [https://www.kas.de/c/document\\_library/get\\_file?uuid=1933766c-dbe1-d244-ef61-47dcb64ce9bb&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=1933766c-dbe1-d244-ef61-47dcb64ce9bb&groupId=252038)> accessed 19 June 2020.

<sup>33</sup> *Ibid*, p. 2.

<sup>34</sup> Article 2 (1), *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008.

principles/guidelines, general comments, model laws and advisory opinions; special rapporteurs and working groups to deal with thematic human rights issues; consideration of State reports and conducting on-site visits; and referral of communications (unimplemented interim measures, serious or massive human rights violations, or Commission's admissibility and merits finding) to the African Court.<sup>35</sup>

Notably, the *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008 introduced two chambers in the newly constituted Court after the merger, to have two (2) Sections; a General Affairs Section composed of eight (8) Judges and a Human Rights Section composed of eight (8) Judges.<sup>36</sup>

Article 29 of the Protocol outlines the entities which are eligible to file cases at the Court as follows: State Parties to the present Protocol; the Assembly, the Parliament and other organs of the Union authorized by the Assembly; a staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.<sup>37</sup> However, the Court shall not be open to States, which are not members of the Union. The Court shall also have no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol.<sup>38</sup> In addition to the foregoing, the following entities are also entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned: State Parties to the present Protocol; the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organizations accredited to the Union or its organs; African National Human Rights Institutions; Individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol.<sup>39</sup>

Without prejudice to its competence to rule on issues of compensation at the request of a party by virtue of paragraph 1(h), of Article 28 of the present Statute, the Court may, if it considers

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<sup>35</sup> Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)', *International Human Rights Law Review*, Volume 7: Issue 1 (2018), p.7.

<sup>36</sup> Article 16, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

<sup>37</sup> Article 29 (1), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

<sup>38</sup> Article 29 (2), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

<sup>39</sup> Article 30, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

## *African Court of Justice and Human Rights: Emerging Jurisprudence*

that there was a violation of a human or peoples' right, order any appropriate measures in order to remedy the situation, including granting fair compensation.<sup>40</sup>

The decision of the Court is binding on the parties. Subject to the provisions of paragraph 3, Article 41 of the Statute, the judgment of the Court is final.<sup>41</sup> However, the Court may either interpret or revise its own judgment at the request of a Party.<sup>42</sup>

It has been noted that unlike its regional counterparts—the Inter-American Court of Human Rights or the European Court of Human Rights (the Inter-American Court and the European Court, respectively)—the African Court does not restrict itself to considering human rights violations exclusively under the regional human rights system under which it was established.<sup>43</sup>

In *Chacha v Tanzania (admissibility)* (2014), the African Court reiterated that ‘*as long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter*’.<sup>44</sup> Some commentators have argued that the effect of the above is that the Court’s authority to issue binding decisions on “any other relevant human rights instrument ratified by the States concerned” means that its jurisdiction extends beyond applying and interpreting just the African Charter.<sup>45</sup> The implication of this is that the African Court not only has potentially greater powers than any adjudicatory body established under any of the international bill of rights but with non-prosecutorial powers but also the Court’s broad adjudication powers would mean that where a particular right is not covered in the African Charter, a citizen of a Member State falling within the Court’s jurisdiction still could be protected if that right is contained in another international human rights treaty ratified by a member state.<sup>46</sup> The challenge would arise in enforcement of such rights in the member state if it does not recognise the rights in question in

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<sup>40</sup> Article 45, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

<sup>41</sup> Article 46, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

<sup>42</sup> Articles 47 & 48, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

<sup>43</sup> Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, ‘The Unique Jurisdiction of the African Court on Human and People’s Rights: Protection of Human Rights Beyond the African Charter | Emory University School of Law | Atlanta, GA’ (*Emory University School of Law*) <<http://law.emory.edu/eilr/content/volume-33/issue-2/articles/jurisdiction-african-court-human-rights-beyond-african-charter.html>> accessed 24 June 2020.

<sup>44</sup> Para. 113, *Chacha v Tanzania (admissibility)* (2014) 1 AfCLR 398; See also Application Number 001/2012 *Frank David Omary and Others v United Republic of Tanzania* and Application Number 003/2012 *Peter Joseph Chacha v United Republic of Tanzania; Thomas v Tanzania (merits)* (2015) 1 AfCLR 465.

<sup>45</sup> Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, ‘The Unique Jurisdiction of the African Court on Human and People’s Rights: Protection of Human Rights Beyond the African Charter | Emory University School of Law | Atlanta, GA’ (*Emory University School of Law*), p. 207.

<sup>46</sup> *Ibid*, p. 208.

its domestic laws, for instance, in the case of lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) rights.<sup>47</sup>

Notably, while the Court has power to issue binding decisions, within the African human rights system, the Court's powers cannot be considered unique: the Commission has the same jurisdiction on human rights issues, but its decisions are not binding.<sup>48</sup> This raises the question of how to separate the jurisdiction of the two institutions especially regarding serious cases which can be handled by either of the two bodies. This is because, while the Commission may decide to hear and determine a case itself instead of referring it to the Court, the question of enforcement comes into play. It really matters because it would mean that where the Commission decides to hear the case, the parties thereto may be denied the chance to enjoy real justice as the state parties are not obligated to enforce the same since the Commission's decisions are not binding. The challenge is complicated even further by the fact that while the Commission has automatic jurisdiction on all African States by virtue of their membership to the African Charter, the membership to the Court is by ratification and an optional declaration for member states to allow their citizens and NGOs to have direct access to the Court, as discussed below.<sup>49</sup>

### **3.2 The Challenge of Access to the African Court**

Notably, the Protocol allows direct access to the Court by individuals or indirectly through a referral of a case to the Court by the African Commission. The concept of 'access' may be understood as the competence to approach a human rights system in order to: obtain a remedy (in a contentious case); be represented as victim (personally or through a legal representative) before the Court (in contentious proceedings); solicit an advisory opinion, and contribute to Court

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<sup>47</sup> Ibid, p. 208.

<sup>48</sup> Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, 'The Unique Jurisdiction of the African Court on Human and Peoples' Rights: Protection of Human Rights Beyond the African Charter | Emory University School of Law | Atlanta, GA' (*Emory University School of Law*), p.204.

<sup>49</sup> "The Subject Matter Jurisdiction of the African Court of Human and Peoples' Rights" <<https://www.icj.org/wp-content/uploads/2015/04/MENA-Arab-Court-Memo-Monageng-Advocacy-2015-ENG.pdf>> 24 June 2020; Juma, Dan. "Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper?." *Available at SSRN 1391482* (2007); Series, SALC Handbook. "Justice for all: Realising the Promise of the Protocol establishing the African Court on Human and Peoples' Rights." <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Justice-for-all-Realising-the-Promise-of-the-Protocol-establishing-the-African-Court-on-Human-and-Peoples-Rights-1.pdf> <24 June 2020; Abebe, Daniel. "Does international human rights law in African Courts make a difference." *Va. J. Int'l L.* 56 (2016): 527.

proceedings as *amicus curiae*.<sup>50</sup> With some African governments feeling that individuals should not have direct access to the Court, some state parties have invoked their right to withdraw the declaration allowing individuals to have direct access to the Court.<sup>51</sup> This is because such declarations are optional and state parties may opt out any time, provided that the effect of such withdrawal takes comes into force a year after.<sup>52</sup> This is what happened in the case of Rwanda in 2016 when it withdrew its declaration to give access to African Court for Rwandan individuals and Non-Governmental Organisations (NGOs), which it had made in 2013.<sup>53</sup> It is reported that the case of *Ingabire Victoire Umuhoza v. Republic of Rwanda*<sup>54</sup> triggered the decision.<sup>55</sup> In this case, a claim had been made against Rwanda by a leading opposition politician, Victoire Ingabire, who had alleged her imprisonment for genocide denial was unfair and politically motivated.<sup>56</sup>

Rwanda's decision was later followed by Tanzania which withdrew its resolution for direct access in 2019. Tanzania's Minister for Foreign Affairs and East African Cooperation signed the notice of withdrawal on 14 November 2019, and the African Union Commission received it on 21 November 2019.<sup>57</sup> Some commentators have attributed this decision to the Court's many

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<sup>50</sup> Viljoen, Frans. "Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights." (2018), p. 2

<[https://repository.up.ac.za/bitstream/handle/2263/65342/Viljoen\\_Understanding\\_2018.pdf?sequence=1&isAllowed=y](https://repository.up.ac.za/bitstream/handle/2263/65342/Viljoen_Understanding_2018.pdf?sequence=1&isAllowed=y)> accessed 23 June 2020.

<sup>51</sup> "Victim of Its Commitment ... You, Passerby, a Tear to the Proclaimed Virtue": Should the Epitaph of the African Court on Human and Peoples' Rights Be Prepared? – EJIL: Talk! <<https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/>> accessed 24 June 2020.

<sup>52</sup> 'Declarations Recognizing the Jurisdiction of the Court as Compulsory | International Court of Justice' <<https://www.icj-cij.org/en/declarations>> accessed 24 June 2020.

<sup>53</sup> 'Rwanda's Withdrawal of Its Special Declaration to the African Court : Setback for the Protection of Human Rights' <<https://www.fidh.org/en/region/Africa/rwanda/joint-civil-society-statement-on-rwanda-s-withdrawal-of-its-article>> accessed 24 June 2020.

<sup>54</sup> *Umuhoza v Rwanda* (003/2014) [2018] AfCHPR 21; (24 November 2017).

<sup>55</sup> 'Rwanda Withdraws Access to African Court for Individuals and NGOs | International Justice Resource Center' <<https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>> accessed 24 June 2020; *Umuhoza v Rwanda* (003/2014) [2018] AfCHPR 21; (24 November 2017).

<sup>56</sup> 'Rwanda Withdraws Access to African Court for Individuals and NGOs | International Justice Resource Center' <<https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>> accessed 24 June 2020.

<sup>57</sup> Nicole De Silva, 'Individual and NGO Access to the African Court on Human and Peoples' Rights: The Latest Blow from Tanzania' (*EJIL: Talk!*, 16 December 2019) <<https://www.ejiltalk.org/individual-and-ngo-access-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania/>> accessed 23 June 2020.

judgments against Tanzania over the years.<sup>58</sup> Notably, Tanzania remains a member of the African Court.

The decision by member states to lock out individuals and the civil society from direct access to the court threatens the courts mandate to protect human rights. This is because of the African Court's 30 member states, it is reported that only 10 (Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania, and Tunisia) have ever made the declaration under Article 34(6) of the African Court's Protocol accepting the competence of the Court to receive cases from individuals and NGOs.<sup>59</sup> With the withdrawal of Rwanda and Tanzania, only eight countries have so far afforded their individual citizens and NGOs this possibility. The adverse effect of the states' decision not to make such declarations on the effectiveness of the Court is evidenced by the fact that since the Court's creation in 2006, this direct access has proven to be the Court's main pipeline of cases, giving the Court the opportunity to help victims of human rights violations who exhausted local remedies and went to the regional level to seek justice. Statistics as of September 2019 show that of the 238 applications it has received, individuals made 223 applications, and NGOs made 12 applications.<sup>60</sup>

As already observed, the African Court on Human and Peoples' Rights is meant to complement the role of the African Commission on Human and Peoples' Rights in protecting fundamental rights across the continent. However, with states denying their citizens and NGOs direct access to the Court and the Commission only having referred about three cases to the Court, the effectiveness of the Court is greatly reduced. The fact that the Commission does not have prosecutorial powers as the Court makes the role of protecting fundamental rights in the continent even weaker. It also demonstrates the African governments' lack of political will to support the work of the Court and the Commission and thus raises fundamental questions regarding their willingness and commitment to promote the rule of law and protection of human rights. Their membership to the Court's jurisdiction (such as that of Rwanda and Tanzania) is thus seen as a mere formality with no intention of allowing it to exercise its authority in their territories.

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<sup>58</sup> Ibid; See *Ally Rajabu and Others v. United Republic of Tanzania* concerning Tanzania's mandatory death sentence for murder convictions.

<sup>59</sup> Nicole De Silva, 'Individual and NGO Access to the African Court on Human and Peoples' Rights: The Latest Blow from Tanzania' (*EJIL: Talk!*, 16 December 2019).

<sup>60</sup> Ibid.

#### **4. Emerging Jurisprudence on Regional Human Rights Courts: Lessons for the African Court of Justice and Human Rights**

As already pointed out, while the African Court has the mandate to decide cases on the Charter and its Protocol, and also any other relevant human rights instrument ratified by the Member State concerned, this unique mandate is not directly matched by either of the Court's regional counterparts: the European Court of Human Rights or the Inter-American Court of Human Rights.<sup>61</sup>

##### **4.1 Inter-American Court of Human Rights**

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights are the two bodies established by the Organization of American States to monitor human rights in the Americas.<sup>62</sup> Article 106 of the *Charter of the Organization of American States* (A-41) establishes the Inter-American Commission on Human Rights, whose principal function is to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. Specifically, in the exercise of its mandate, the Commission has the following functions and powers: to develop an awareness of human rights among the peoples of America; to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights; to prepare such studies or reports as it considers advisable in the performance of its duties; to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights; to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request; to take action on petitions and other communications pursuant to its authority under the provisions of

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<sup>61</sup> Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, 'The Unique Jurisdiction of the African Court on Human and People's Rights: Protection of Human Rights beyond the African Charter | Emory University School of Law | Atlanta, GA' (*Emory University School of Law*), p.206.

<sup>62</sup> 'Inter-American Court of Human Rights' <[inter-american-court-human-rights.html](http://inter-american-court-human-rights.html)> accessed 24 June 2020.

Articles 44 through 51 of this Convention; and to submit an annual report to the General Assembly of the Organization of American States.<sup>63</sup>

Notably, the Inter-American Court of Human Rights is the judicial organ of the Inter-American human rights system, with a mandate that is more limited than that of the Commission because the Court may only decide cases brought against the Organization of American States (OAS) Member States that have specifically accepted the Court's contentious jurisdiction and those cases must first be processed by the Commission.<sup>64</sup> However, only States parties and the Commission may refer contentious cases to the Court.<sup>65</sup>

#### **4.2 The European Court of Human Rights**

The *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>66</sup> establishes the European Court of Human Rights to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.<sup>67</sup> The jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.<sup>68</sup> In addition, the Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.<sup>69</sup> However, such opinions must not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.<sup>70</sup>

Notably, the Convention provides that 'any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High

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<sup>63</sup> Article 41, *American Convention on Human Rights*, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

<sup>64</sup> 'Inter-American Human Rights System | International Justice Resource Center' <<https://ijrcenter.org/regional/inter-american-system/>> accessed 24 June 2020.

<sup>65</sup> Article 61, Organization of American States (OAS), *American Convention on Human Rights*, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

<sup>66</sup> Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, European Treaty Series-No. 5, Rome, 4.XI.1950.

<sup>67</sup> *Ibid*, Article 19.

<sup>68</sup> *Ibid*, Article 32.

<sup>69</sup> *Ibid*, Article 47(1).

<sup>70</sup> *Ibid*, Article 47(2).

Contracting Party’.<sup>71</sup> Of significant relevance is the provision that ‘*the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right*’.<sup>72</sup>

While the Convention provides that the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken<sup>73</sup>, the European Court practice departs from the African Court’s approach that requires that the concerned party state must have made a declaration to allow its individual citizens or NGOs to directly access the Court. The European Court goes further to make a provision to the effect that the High Contracting Parties must undertake not to hinder in any way the effective exercise of this right of individuals’ and NGOs’ direct access to the Court<sup>74</sup>.

## **5. Conclusion and Way Forward on the Future of the African Court and Commission**

As the African Court establishes its jurisprudence, it may require revisiting the emerging issues of the extent of its jurisdiction by consideration and a balancing of the scope of rights as intended by the drafters of the Charter with those protected by other human rights treaties.<sup>75</sup> In addition, there is a need for the African Union Member States to revisit the Protocol and the Charter especially in the case of the requirement for countries to make declarations allowing individuals and NGOs to have direct access to the African Court as a way of showing their commitment to fight human rights violations in the Continent. They need to borrow a leaf from the European Union’s approach to the same. The current approach that allows states to opt in and out of making such declarations is arguably self-defeating in achieving the mandate of the African Charter and Protocol on protecting the human rights of Africans. The Court must be allowed to build its jurisprudence and legacy on comprehensive protection of human rights in the continent without fear of sabotage or reprisal from the member states.

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<sup>71</sup> Ibid, Article 33.

<sup>72</sup> Ibid, Article 34.

<sup>73</sup> Ibid, Article 35 (1).

<sup>74</sup> Ibid.

<sup>75</sup> Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, ‘The Unique Jurisdiction of the African Court on Human and People’s Rights: Protection of Human Rights beyond the African Charter | Emory University School of Law | Atlanta, GA’ (*Emory University School of Law*), p.208.

## *African Court of Justice and Human Rights: Emerging Jurisprudence*

The jurisdiction of the African Commission may also need to be reconsidered by either giving it prosecutorial powers over certain cases or by making it part of the African Court's human rights division in order to ensure that all their decisions can be enforced against member states. While the Commission has played a significant role in exposing instances of human rights violations in many African States, reparation for such victims will remain a dream as long as direct access to the Court is hampered and the Commission's role is reduced to that of making recommendations. If the African continent is to shed the longstanding tag of impunity and violation of human rights, then the above concerns must urgently be addressed.

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