



ACCESSIBILITY OF JUSTICE INSTITUTIONS TO INDIVIDUALS AND GROUPS UNDER
THE LEGAL FRAMEWORK OF THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM:
AN ECONOMIC AND GEOGRAPHICAL SURVEY

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ABSTRACT

Material legal instruments on Africa's regional human rights promotion and protection system vest numerous substantive human and peoples' rights in African individuals and groups, respectively, against African states. These instruments also establish some justice institutions to enforce the rights. However, certain factors make the institutions inaccessible to most individuals and groups. These factors include poverty, geographical distance, and some of the instruments' provisions which aid the first two mentioned factors. Consequently, justice through these institutions eludes the individuals and groups upon failure or non-existence of local remedies. This article examines the substantive rights guaranteed individuals and groups under the system. It analyses, from economic and geographical perspectives, the extent of accessibility of the institutions meant to enforce the rights. It suggests reforms, such as amending the accessibility-impeding provisions of the instruments, decentralizing the system's justice institutions, and creating a permanent legal aid scheme for indigent individuals and groups.

Keywords: Substantive Rights, Justice Institutions, Human Rights.

1. INTRODUCTION¹

Since the 1960s, when many states in the African region attained political independence, the idea of regional (continental) promotion and protection of human rights have always featured prominently in the region's interstate co-operation. Thus, in 1963, upon formation of the region's pioneer international organization, the Organization of African Unity ("OAU"), one of the organization's fundamental purposes was "To promote international co-operation, having due regard to the ... Universal Declaration of Human Rights."² However, at this stage of the region's political history, the idea of a regional human rights promotion and

¹ This introduction is similar to the introduction to my previous article titled 'Access to Justice Mechanisms for Individuals and Groups under the African Regional Human Rights System: An Appraisal' (2015) 8:1-2 African Journal of Legal Studies 115 at 116-118.

² *Charter of the Organization of African Unity*, 1963, 479 UNTS 39 ("OAU Charter"), Article II(1)(e). See also Isanga, J.M., 'The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?' (2013) 11:2 Santa Clara Journal of International Law 267 at 269-273.

protection system for Africa was to take cognizance of some unique factors. Among these factors were Africa's heterogeneous population; cultural diversities; and, the communal lifestyles of African people. Others included freedom struggles and fights by various minority ethnic groups against allegedly oppressive and marginalizing national governments in the hands of the majority groups; and, prevalent political crises and persecution arising from incessant extra-constitutional change of governments across the region.

Against this backdrop, the inventors of Africa's regional human rights system designed a human rights promotion and protection system that does not only guarantee individual rights. The system also protects the collective rights of peoples and communities who live and/or act as groups. This is the origin of the "human and peoples' rights" phrase in the African regional human rights vocabulary.

Similar to the practice of some other regional (continental or transcontinental) interstate organizations³ that have adopted regional human rights instruments,⁴ the OAU (later renamed African Union – "AU")⁵ has adopted various human rights instruments for the African region. It has done this in consonance with the peculiar African regional factors earlier mentioned, and in conformity with guiding norms in relevant universal international human rights instruments.⁶ Together, these African regional instruments form the legal regime of the African regional human rights system. The instruments include: the *African Charter on Human and Peoples' Rights*⁷ ("African Charter" or "Charter"); *Convention Governing the Specific Aspects of Refugee Problems in Africa*⁸ ("African Refugee Convention"); and, *African Charter on the Rights and Welfare of the Child*⁹ ("African Child Rights Charter"). Others are: the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*¹⁰ ("African Women's Rights Protocol") and the *African Youth Charter*.¹¹

³ E.g., the Council of Europe ("COE") and the Organization of American States ("OAS").

⁴ See the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, ETS 5 ("European Convention"); and, *American Convention on Human Rights*, 1969, 1144 UNTS 123 ("American Convention"). See also Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Facilitator's Guide on Human Rights for Judges, Prosecutors and Lawyers* (New York: United Nations, 2011) at 71–110.

⁵ On 11 July 2000, the OAU adopted the *Constitutive Act of the African Union*, 2000, OAU Doc CAB/LEG/23.15 ("AU Constitutive Act"). This Act came into force on 26 May 2001. Article 33 of the *AU Constitutive Act* changed the OAU's name to the African Union ("AU") and repealed the *OAU Charter*, *supra* note 2. Also, Articles 5-6 of the *AU Constitutive Act* renamed the OAU Assembly of Heads of State and Government the AU Assembly. See, e.g., Maluwa, T., 'The Transition from the Organization of African Unity to the African Union' in Yusuf, A.A. and Ouguerouz, F. (eds.), *The African Union: Legal and Institutional Framework: A Manual on the Pan-African Organization* (Leiden: Martinus Nijhoff, 2012) 25. Thus, in this article, any original reference in any instrument or material to the former names would now appear in the new names. The *AU Constitutive Act* inherits and extends the OAU's human rights agenda by providing that part of the AU's objectives is to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments." See *AU Constitutive Act*, *supra* note 5, Article 3(h).

⁶ E.g., the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, UN Doc A/810 (10 December 1948); *International Covenant on Civil and Political Rights*, 1966, 999 UNTS 171 ("ICCPR"); *International Covenant on Economic, Social and Cultural Rights*, 1966, 993 UNTS 3 ("ICESCR"); *Convention on the Elimination of All Forms of Racial Discrimination*, 1966, 660 UNTS 195; *Convention on the Elimination of All Forms of Discrimination against Women*, 1979, 1249 UNTS 13 ("CEDAW"); *UN Convention on the Rights of the Child*, 1989, 1577 UNTS 3; and, *UN Convention Relating to the Status of Refugees*, 1951, 189 UNTS 150.

⁷ 1981, OAU Doc CAB/LEG/67/3 rev 5; (1982) 21 ILM 58.

⁸ 1969, 1001 UNTS 45.

⁹ 1990, OAU Doc CAB/LEG/24.9/49.

¹⁰ 2003, AU Doc CAB/LEG/66.6.

¹¹ 2006, available online

at <http://www.au.int/en/sites/default/files/AFRICAN_YOUTH_CHARTER.pdf>.

The foregoing instrument vest African individuals and groups, respectively, with various categories (generations) of substantive human and peoples' rights against African states. These categories or generations of rights are: first generation ("civil and political") rights, second generation ("economic, social and cultural") rights, and third generation ("group", "collective" or "solidarity") rights.¹² When any of these substantive human and peoples' rights is violated by an African state, the affected individual or group, as the case may be, is required to, first, seek redress in the local justice system of the violating state to enforce the violated right. Upon failure or non-existence of local remedies, however, the individual or group can resort to two main justice institutions within Africa's regional human rights system to obtain justice.¹³ These two institutions are the African Commission on Human and Peoples' Rights¹⁴ ("African Commission", "Commission" or "ACHPR") and the African Court on Human and Peoples' Rights¹⁵ ("African Court", "Court", or "ACtHPR"). The African Commission possesses quasi-judicial powers, while the African Court is vested with judicial powers, under their respective enabling legal instruments. Nevertheless, due to poverty and the distant locations of these institutions and their sittings, the institutions remain inaccessible to most African individuals and groups. These two factors are invigorated by some provisions of the institutions' respective enabling instruments. Consequently, the hope of the individuals and groups to eventually obtain justice through these institutions often dashes.

This article first presents a short historical introduction to the African regional human rights system, and briefly highlights the scope of the substantive human and peoples' rights that the system's legal framework guarantees African individuals and groups, respectively. Furthermore, it appraises, from both economic and geographical perspectives, the extent of accessibility of the system's existing justice institutions to African individuals and groups for the legal enforcement of the aforesaid human and peoples' rights. Finally, the article suggests some reforms that are necessary for accessibility of the system's justice institutions to its intended beneficiaries – African individuals and groups.

¹² David Harris fully explains the meanings and legal implications of these generations of rights. See Harris, D., *Cases and Materials on International Law, 1st South Asian ed.* (London: Thomson Reuters, 2011) at 536. See also Shaw, M.N., *International Law, 6th ed.* (Cambridge: Cambridge University Press, 2008) at 268–269.

¹³ For further readings on the institutions, see, e.g., Mbondenyi, M.K., 'Institutional Mainstreaming and Rationalization' in Ssenyonjo, M. (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (Leiden: Martinus Nijhoff, 2012) 421; Mbondenyi, M.K., *International Human Rights and their Enforcement in Africa* (Nairobi: Law Africa Publishing, 2011) at 93–121.

¹⁴ See the *African Charter*, *supra* note 7, Article 30.

¹⁵ See the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) ("African Court Protocol" or "ACtHPR Protocol"), Article 1.

2. OVERVIEW OF THE LEGAL REGIME OF THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM¹⁶

Under the principal human rights treaties of some other regional human rights systems of the world, the focus is mainly on the protection of civil and political rights.¹⁷ However, in the African system, the *African Charter*, in addition to protecting civil and political rights, also promotes and protects the economic, social and cultural rights of African individuals, as well as the group/collective/solidarity rights of African groups.¹⁸ The *Charter* further requires African states parties to observe and respect these rights as a matter of duty.¹⁹ Under the *African Charter*, African individuals are guaranteed a long list of civil and political rights without distinction as to race, ethnic group, colour, gender, language, religion, political or any other opinion, national and social origin, fortune, birth, or any other discriminatory factor.²⁰ The rights include: equality before the law and equal protection of the law;²¹ rights to life and to human dignity;²² liberty and personal security;²³ fair hearing and fair trial;²⁴ and freedom of conscience, the profession and free practice of religion.²⁵ Others are: freedoms of information,²⁶ association,²⁷ assembly²⁸ and movement;²⁹ free participation in national government;³⁰ equal access to national public service, public property, and public services (utilities);³¹ and, right to property.³²

The economic, social and cultural rights that the *Charter* confers on African individuals³³ are: rights to work under equitable and satisfactory conditions and to equal pay for equal work;³⁴ and, right to enjoy the best attainable state of physical and mental health.³⁵ Others are: rights to education,³⁶ free participation in cultural life,³⁷ and family protection.

¹⁶ A similar analysis was drawn up in my previous article: 'Access to justice mechanisms for individuals and groups under the African regional human rights system: An appraisal', *supra* note 1 at 118–120.

¹⁷ E.g., the *European Convention*, *supra* note 4 and the *American Convention*, *supra* note 4. See also Andreadakis, S. 'The European Convention on Human Rights, the EU and the UK: Confronting a Heresy: A Reply to Andrew Williams' (2013) 24(4) *European Journal of International Law* 1187 at 1188–1189.

¹⁸ See, e.g., Acheampong, K.A., 'Reforming the Substance of the African Charter on Human and Peoples' Rights: Civil and Political Rights and Socio-economic Rights' (2001) 1:2 *African Human Rights Law Journal* 185 at 194–203.

¹⁹ *African Charter*, *supra* note 7, Part I.

²⁰ *Ibid.*, Article 2.

²¹ *Ibid.*, Article 3. For an expatiation on this right, see Mapaure, C., 'Decoding the Right to Equality: A Scrutiny of Judiciary Perspicacity over 20 Years of Namibia's Existence' (2010) 2:2 *Namibia Law Journal* 31 at 32–58.

²² *African Charter*, *supra* note 7, Articles 4–5. These two rights are more elaborately analyzed in Viljoen, F. and Odinkalu, C., *The Prohibition of Torture and Ill-treatment in the African Human Rights System: A Handbook for Victims and their Advocates* (Geneva: World Organization Against Torture, 2006) at 36–57.

²³ *African Charter*, *supra* note 7, Article 6.

²⁴ *Ibid.*, Article 7.

²⁵ *Ibid.*, Article 8.

²⁶ *Ibid.*, Article 9.

²⁷ *Ibid.*, Article 10.

²⁸ *Ibid.*, Article 11.

²⁹ *Ibid.*, Article 12.

³⁰ *Ibid.*, Article 13(1).

³¹ *Ibid.*, Article 13(2)–(3).

³² *Ibid.*, Article 14.

³³ On this class of rights under the *Charter*, see Odinkalu, A.C., 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' (2001) 23:2 *Human Rights Quarterly* 327.

³⁴ *African Charter*, *supra* note 7, Article 15.

³⁵ *Ibid.*, Article 16.

³⁶ *Ibid.*, Article 17(1).

The *Charter*, in an unprecedented manner, further guarantees all groups of African peoples an array of collective (“peoples’”) rights.³⁸ One interesting right in this category is the right to equality of all peoples. By virtue of this right, all African peoples are equal, enjoy the same respect and have the same rights. Thus, nothing shall justify the domination of a people by another.³⁹ Other peoples’ rights in the *Charter*’s regime include: right to existence and self-determination;⁴⁰ right to free disposal of collective wealth and natural resources;⁴¹ right to economic, social and cultural development;⁴² right to national and international peace and security;⁴³ and right to general satisfactory environment favourable to development.⁴⁴

The *African Refugee Convention*,⁴⁵ which specifically deals with the refugee situation and problems in Africa,⁴⁶ also confers certain special rights on African individuals and peoples who are refugees in other African states. First, the *Convention* guarantees African refugees the right to non-refoulement.⁴⁷ Accordingly, no state party to the *Convention* shall subject a refugee to measures such as rejection at the frontier, return or expulsion, which would compel him/her to return to or remain in a territory where his/her life, physical integrity or liberty would be threatened for the reasons originally leading to his/her refugee situation.⁴⁸ Besides, the *Convention* vests refugees with the right to non-discrimination, which entails that states parties have a duty to accord all the *Convention*’s rights to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.⁴⁹ There is also the right to voluntary repatriation,⁵⁰ guaranteeing that no refugee shall be repatriated against his will. Furthermore, the *Convention* accords refugees the right to travel documents, by virtue of which states parties shall issue to refugees lawfully staying in their territories documents to travel outside the territories in appropriate situations.⁵¹ Finally, the *Convention* imposes a duty on states parties to respect the foregoing rights in all refugee and asylum matters.⁵²

With regard to African children (persons below the age of 18 years), the *African Child Rights Charter*⁵³ vests them with special rights and requires African states, as a matter of duty,

³⁷ *Ibid.*, Article 17(2).

³⁸ See, e.g., Baldwin, C. and Morel, C., ‘Group Rights’ in Evans, M. and Murray, R. (eds.), *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986-2006*, 2nd ed. (Cambridge: Cambridge University Press, 2008) 244.

³⁹ *African Charter*, *supra* note 7, Article 19.

⁴⁰ *Ibid.*, Article 20.

⁴¹ *Ibid.*, Article 21.

⁴² *Ibid.*, Article 22.

⁴³ *Ibid.*, Article 23.

⁴⁴ *Ibid.*, Article 24.

⁴⁵ *Supra* note 8.

⁴⁶ *Ibid.*, preamble. Paragraphs (1)–(2) of Article I defines a “refugee” for purposes of the Convention. A detailed critical reflection on the legal protection of this class of people in Africa is provided in D’Orsi, C., *Asylum-Seeker and Refugee Protection in Sub-Saharan Africa: The Peregrination of a Persecuted Human Being in Search of a Safe Haven* (New York: Routledge, 2015) at 85–114.

⁴⁷ For further readings on this right, see, e.g., Gil-Bazo, M., ‘Refugee Protection under International Human Rights Law: From Non-refoulement to Residence and Citizenship’ (2015) 34:1 *Refugee Survey Quarterly* 1 at 5–31; D’Angelo, E.F., ‘Non-refoulement: The Search for a Consistent Interpretation of Article 33’ (2009) 42 *Vanderbilt Journal of Transnational Law* 279; Duffy, A., ‘Expulsion to Face Torture? Non-refoulement in International Law’ (2008) 20:3 *International Journal of Refugee Law* 373; Droege, C., ‘Transfers of Detainees: Legal Framework, Non-refoulement and Contemporary Challenges’ (2008) 90:871 *International Review of the Red Cross* 669.

⁴⁸ *African Refugee Convention*, *supra* note 8, Article II(3).

⁴⁹ *Ibid.*, Article IV.

⁵⁰ *Ibid.*, Article V.

⁵¹ *Ibid.*, Article VI.

⁵² *Ibid.*, Articles II(1),(2),(4)–(6); IV; V and VI.

⁵³ *Supra* note 9.

to ensure the realization of these rights. The principal rights under this *Charter's* regime, which are apparently self-explanatory, are rights to: survival; name and nationality; freedom of expression; freedom of association; freedom of thought, conscience and religion; privacy, leisure, recreation and participation in cultural activities; special measures of protection for handicapped children; and, right to health. Others are rights to: protection against child labour, child abuse and torture; special treatment in criminal proceedings; parental care and protection; and, protection against harmful social and cultural practices.⁵⁴

In recognition of the special circumstances of women in Africa, the *African Women's Rights Protocol*,⁵⁵ inter alia, confers on African women a range of special rights. These rights, which are exclusive to African women, are in addition to the general rights that they are guaranteed under the *African Charter*.⁵⁶ These special rights under the *African Women's Rights Protocol*⁵⁷ include rights to: dignity; life, integrity and security of the person; marital equality; access to justice and equal protection before the law; participation in the political and decision-making process; peace; and, education and training.⁵⁸ Others are: economic and social welfare rights; health and reproductive rights; rights to: food security; adequate housing; positive cultural context; healthy and sustainable environment; sustainable development; inheritance; and, widow's rights.⁵⁹

With a view to ensuring respect for these special rights of African women, the *Protocol* requires states parties to: ensure the implementation of the *Protocol* at the national level; adopt all necessary budgetary and allied measures for the full and effective implementation of the *Protocol's* rights; and, provide for appropriate remedies to any woman whose rights under the *Protocol* are violated.⁶⁰ Besides, states parties to the *Protocol* assume a list of duties to facilitate the full enjoyment of the *Protocol's* rights. The duties include: elimination of all forms of discrimination against women; elimination of all forms of harmful practices negatively affecting the human rights of women; and, protection of women in armed conflicts.⁶¹ Others are: special protection of elderly women; special protection of women with disabilities; and, special protection of women in distress.⁶²

The *African Youth Charter*,⁶³ guarantees African youth or young people⁶⁴ a special class of rights and imposes on African states a corresponding duty to respect the rights. The rights include those to: non-discrimination; freedoms of movement, expression and association; freedom of thought, conscience and religion; protection of private life; protection

⁵⁴ These rights are fully enumerated in Articles 2–30 of the Charter. See also generally Imoh, A.T., 'Realizing Children's Rights in Africa' in Imoh, A.T. and Ansell, N. (eds.), *Children's Lives in an Era of Children's Rights: The Progress of the Convention on the Rights of the Child in Africa* (New York: Routledge, 2014) 1; Grover, S.C., *Children Defending their Human Rights under the CRC Communications Procedure: On Strengthening the Convention on the Rights of the Child Complaints Mechanism* (Berlin: Springer-Verlag, 2015) 27; Olowu, D., 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 127.

⁵⁵ *Supra* note 10.

⁵⁶ *Supra* note 7. An extensive literature on the regime of rights under the African Women's Rights Protocol is provided in Viljoen, F., 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11.

⁵⁷ *Supra* note 10.

⁵⁸ *Ibid.*, Articles 3, 4, 6, 8, 9, 10 and 12.

⁵⁹ *Ibid.*, Articles 13-21.

⁶⁰ *Ibid.*, Articles 25-26.

⁶¹ *Ibid.*, Articles 2, 5 and 11.

⁶² *Ibid.*, Articles 22-24.

⁶³ *Supra* note 11.

⁶⁴ The *Charter's* Preamble defines youth or young people as persons between the ages of 15 and 35 years.

of the family; property; social, economic, political and cultural development; participation in all spheres of society; and, education and skills development. Other rights of African youth under this *Charter* are rights to: sustainable livelihood and youth employment; health; special treatment in criminal proceedings; rights to: live anywhere in the world; leisure, recreation, sportive and cultural activities; special protection for girls and young women; and, special care for mentally and physically challenged youth.⁶⁵

From the above analysis, it is apparent that the scope of substantive human and peoples' rights which relevant legal instruments⁶⁶ guarantee African individuals and groups under the African regional human rights system is quite extensive. However, one issue that calls for determination is the extent to which the justice institutions established under the system to enforce the foregoing rights are accessible to the individuals and groups that they are created to protect. The next part of this article deals with this issue.

3. AFRICAN REGIONAL HUMAN RIGHTS JUSTICE INSTITUTIONS: ACCESSIBILITY TO AFRICAN INDIVIDUALS AND GROUPS

Human rights justice institutions must be physically accessible to the beneficiaries of the particular human rights protection system before the system can achieve its protective goals. This part examines the physical accessibility to individuals and groups of the two principal justice institutions of the African regional human rights system, i.e., the African Commission and the African Court, respectively. Accessibility of these institutions is approached from two perspectives: economic and geographical.

3.1 *Economic Perspective*

From this perspective, emphasis is on the cost implications for African individuals and groups of accessing the Commission and the Court. For the American Bar Association Rule of Law Initiative (ABA ROLI):⁶⁷

When analyzing the cost of using a justice institution, you should consider both 'direct' and 'opportunity' costs. Direct costs are fees citizens must pay to use the justice institution, such as payment to a legal

⁶⁵ *African Youth Charter*, *supra* note 11, Articles 1-28.

⁶⁶ The foregoing represents only the system's major human rights instruments. There are many other legal instruments within the system that, in special cases, touch on human rights protection within the region. These include: the *African Convention on the Conservation of Nature and Natural Resources*, 1968, OAU Doc CAB/LEG/24.1; *Convention for the Elimination of Mercenarism in Africa*, 1977, OAU Doc CM/817 (XXIX) Annex II Rev 1; *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa* (1991) 30 ILM 773; and, *OAU Convention on the Prevention and Combating of Terrorism*, 1999, available online at <<http://www.refworld.org/docid/3f4b1f714.html>>. Others are: the *African Union Convention on Preventing and Combating Corruption*, 2003, available online at <http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING-COMBATING_CORRUPTION.pdf>; *African Union Non-Aggression and Common Defence Pact*, 2005, available online at <http://www.au.int/en/sites/default/files/AFRICAN_UNION_NON_AGGRESSION_AND_COMMON_DEFENCE_PACT.pdf>; and, *African Charter on Democracy, Elections and Governance*, 2007, available online at <http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GVERNANCE.pdf>.

⁶⁷ American Bar Association Rule of Law Initiative (ABA ROLI), *Access to Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations* (Washington DC: American Bar Association, 2012) at 20.

representative, a charge to file a case... An opportunity cost is the income citizens lose when they spend time bringing a case before the justice institution rather than earning money... Victims of gender-based violence in eastern Democratic Republic of Congo must overcome direct and opportunity costs to bring claims against perpetrators... Their direct costs include case filing and processing fees... Opportunity costs are the result of court's inaccessibility. Because courts are located so far away, victims miss out on days of work to travel and attend hearing.

Against this backdrop, and in view of the high level of poverty in Africa,⁶⁸ it is apt to examine how far relevant legal instruments of the African regional human rights system have alleviated the economic plight of individuals and groups trying to access the aforementioned justice institutions. For the quasi-judicial institution (African Commission), the *African Charter*⁶⁹ and the *Rules of Procedure of the African Commission on Human and Peoples' Rights*⁷⁰ ("ACHPR Rules") do not provide for filing, processing and allied official fees for human rights communications filed by individuals and groups at the Commission. The effect of this is that filing and processing of human rights enforcement cases at the Commission is free.⁷¹ This is a great incentive for African individuals and groups to access this institution. Again, Rule 104 of the *ACHPR Rules*⁷² provides for some legal aid for indigent individual and group complainants as follows: "The Commission may, either at the request of the author of the communication or at its own initiative, facilitate access to free legal aid to the author in connection with the representation of the case"; and "free legal aid shall only be facilitated where the Commission is convinced:

- a) That it is essential for the proper discharge of the Commission's duties, and to ensure equality of the parties before it ; and
- b) The author of the communication has no sufficient means to meet all or part of the costs involved."

This legal aid provision, no doubt, can potentially improve the Commission's accessibility. However, the first major concern with the provision is that the Commission's facilitation of access to the legal aid for the complainant is discretionary. Thus, the fact that an indigent complainant requests such aid, or that his or her poverty is apparent to the Commission, may not necessarily influence the Commission to grant the aid if, in the Commission's view, the aid is not "essential for the proper discharge of the Commission's duties". Again, given that the activities of the Commission are subject to the overriding political influence of the AU Assembly⁷³, it is a reasonable fear that the aid may not be granted

⁶⁸ United Nations, *Rethinking Poverty: Report on the World Social Situation 2010* (New York: United Nations, 2009) at 20; United Nations, *Economic Report on Africa 2010: Promoting High-level Sustainable Development to Reduce Unemployment in Africa* (Addis Ababa: United Nations Economic Commission for Africa, 2010) at 7.

⁶⁹ *Supra* note 7, Articles 41 and 44.

⁷⁰ 2010, Articles 19–21, available online at <http://www.achpr.org/files/instruments/rules-of-procedure2010/rules_of_procedure_2010_en.pdf>.

⁷¹ See generally Egyptian Initiative for Personal Rights, *Filing a Communication Before the African Commission on Human and Peoples' Rights: A Complainant's Manual* (Cairo: Egyptian Initiative for Personal Rights, 2013). See also African Commission on Human and Peoples' Rights, 'The African Commission on Human and Peoples' Rights Information Sheet No. 2: Guidelines for the Submission of Communications', available online at <http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf>. Accessed 13 May 2016.

⁷² *Supra* note 71.

⁷³ See the *African Charter*, *supra* note 7, Articles 58–59.

to an indigent individual or group commencing a case at the Commission against a powerful state that has a controlling influence in the AU Assembly.

3.2 Economic Accessibility of the African Court

As earlier noted, the system's judicial institution is the African Court (ACtHPR). It was created by the *ACtHPR Protocol*.⁷⁴ It should also be noted that recently, the AU created a new judicial institution with a human rights enforcement mandate for the region. This is the African Court of Justice and Human Rights (ACJHR). The ACJHR is a proposed merger between the pre-existing ACtHPR and the AU Court of Justice⁷⁵ (AUCJ) – AU's principal judicial organ. It is also proposed to take over the respective jurisdictions of these two pre-existing separate courts.⁷⁶ The ACJHR's enabling legal instruments, which are intended to eventually replace both the *AUCJ Protocol*⁷⁷ and the *ACtHPR Protocol*,⁷⁸ are the *Protocol on the Statute of the African Court of Justice and Human Rights*⁷⁹ ("ACJHR Protocol") and the *Statute of the African Court of Justice and Human Rights*⁸⁰ ("ACJHR Statute") annexed to it. However, the *ACJHR Protocol* and its annexed *ACJHR Statute* are not yet in force. The ACtHPR, therefore, continues to be the African regional human rights system's current judicial institution. Thus, this part of this article is principally based on its enabling instrument, the *ACtHPR Protocol*,⁸¹ with some necessary reference to some provisions of the ACJHR's enabling instruments.

Like the African Commission's relevant instruments noted above, the *ACtHPR Protocol*⁸² and the *African Court on Human and Peoples' Rights Rules of Court*⁸³ ("ACtHPR Rules") also do not provide for filing and processing fees.⁸⁴ This also facilitates accessibility of the ACtHPR to African individuals and groups.

Besides, as regards general costs of conducting cases before the Court, the *ACtHPR Rules* provide that "Unless otherwise decided by the Court, each party shall bear its own costs."⁸⁵ However, Rule 31 of these *Rules* provides for a legal aid policy for poor applicants. It states that "Pursuant to article 10(2) of the Protocol, the Court may, in the interest of justice and within the limits of the financial resources available, decide to provide free legal representation and/or legal assistance to any party."⁸⁶ Article 10(2) of the *ACtHPR Protocol* states that "Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require."⁸⁷

⁷⁴ *Supra* note 15.

⁷⁵ The AUCJ was created under Article 18 of the *AU Constitutive Act*, *supra* note 5. It has no human rights jurisdiction. Its enabling legal instrument is the *Protocol of the Court of Justice of the African Union*, 2003, Assembly/AU/Dec.20(II)-Doc.EX/CL/59(III) (AUCJ Protocol).

⁷⁶ The *pros* and *cons* of these proposals are analyzed in Juma, D., 'Lost (or found) in Transition? The Anatomy of the New African Court of Justice and Human Rights' (2009) 13 *Max Planck Yearbook of United Nations Law* 267.

⁷⁷ *Supra* note 76.

⁷⁸ *Supra* note 15.

⁷⁹ 2008, Assembly/AU/Dec.196(XI).

⁸⁰ *Ibid.*

⁸¹ *Supra* note 15.

⁸² *Ibid.*, Article 32. See also the *ACJHR Protocol*, *supra* note 80, Article 26(2).

⁸³ 2010, available online

at <<http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20...>

⁸⁴ See also African Court on Human and Peoples' Rights, 'How to file a case', available online at <<http://en.african-court.org/index.php/27-filing-a-case/106-how-to-file-a-case>>. Accessed 13 May 2016.

⁸⁵ *ACtHPR Rules*, *supra* note 84, Rule 30. See also the *ACJHR Protocol*, *supra* note 80, Article 52(1).

⁸⁶ See also the *ACJHR Statute*, *supra* note 80, Article 52(2).

⁸⁷ Emphasis added.

Again, this legal aid policy appears to be a big boost to the Court's accessibility to African individuals and groups. However, the question arises as to how far the policy can take the countless indigent individuals and groups who suffer serious human rights violations in the hands of states in all parts of Africa. The first thing to note in this regard is that this legal aid is not a legal right. It is at the Court's discretion. As such, it is not automatic, even upon proof of acute poverty. Thus, an extremely poor individual or group rights violation victim may still not get it. Furthermore, unlike the practice in some municipal legal systems where there are permanent and official legal aid agencies ready to render free legal services to the poor,⁸⁸ there is no official legal aid body from which the African Court can assign legal representation to poor individual and group applicants. Although there is the Africa Legal Aid (AFLA) which, inter alia, is devoted to promoting and protecting individual and collective human rights in Africa and challenging the impunity of gross human rights violators on the continent, this entity is only a private NGO. It has no legal obligation to render such services whenever needed.⁸⁹

Also, rule 31 of the *ACtHPR Rules*⁹⁰ clearly states that the legal aid is available to a party, inter alia, "within the limits of the financial resources available" to the Court. It is well known that African states have a poor record of funding their regional human rights institutions, and that one major challenge that has always bedeviled the effectiveness of these institutions is insufficient funding.⁹¹ It is, therefore, difficult to imagine how the Court with inadequate funds for its routine operations could afford free legal aid for indigent individuals and groups appearing before it. Thus, the Court's legal aid policy may exist only in theory, and not in practice.

3.3 Comparative Reference to the European and Inter-American Practices

The practices in the European and Inter-American regional human rights systems in this regard may be somewhat different. For the European system, the Council of Europe has adopted some special legal aid instruments to benefit indigent individuals and groups appearing before the European Court of Human Rights ("European Court").⁹² Notwithstanding this practice, it still appears that legal aid administration in the European system, like in its African counterpart, is more problematic than successful. According to Luke Clements:

... in Western Europe, there is a problem that an impecunious applicant can only obtain legal representation if a lawyer can be found who is prepared to act out of the goodness of his or her heart. Council of Europe Legal Aid ... is so low in Western European terms as to exclude the possibility of representation for economic motives. In Eastern and Central Europe there is

⁸⁸ E.g., the Legal Aid Council of Nigeria - established pursuant to the *Legal Aid Act*, 2011, available online at <http://www.legalaid.council.gov.ng/docs/legal_aid_act_2011.pdf>.

⁸⁹ See Africa Legal Aid, 'About Us', available online at <<http://www.africalegalaid.com/about-us>>. Accessed 12 May 2016.

⁹⁰ *Supra* note 84.

⁹¹ See, e.g., Yerima, T.W., 'Comparative Evaluation of the Challenges of African Regional Human Rights Courts' (2011) 4:2 *Journal of Politics and Law* 120 at 125. See also Sceats, S., 'Africa's New Human Rights Court: Whistling in the wind?' (2009) Chatham House Briefing Paper, p. 13, available online at <<http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp0309sceaats.pdf>>. Accessed 11 May 2016.

⁹² E.g., *Council of Europe Committee of Ministers Resolution on Legal Aid and Advice*, 1978, COE/COM Res. (78)8 (2 March 1978); *European Agreement on the Transmission of Applications for Legal Aid*, 1977, ETS 92; *European Convention*, *supra* note 4, Article 6; *Statute of the European Commission for the Efficiency of Justice*, 2002, COE/COM Res (2002) 12 (18 September 2002).

the problem of too few lawyers with sufficient practical experience of Strasbourg procedures and/or prepared to act.⁹³

In the Inter-American system, the OAS General Assembly has established the “Legal Assistance Fund of the Inter-American Human Rights System” for indigent individuals and groups to access the system’s justice institutions. The Fund has two separate accounts – one for the Inter-American Commission of Human Rights (“Inter-American Commission”), and the other for the Inter-American Court of Human Rights (“Inter-American Court”). The Fund is financed by voluntary contributions.⁹⁴ The Inter-American Commission and the Inter-American Court have approved their respective Rules for administering this Fund,⁹⁵ and the Fund is already disbursing legal aid funds in the Americas.⁹⁶ From the economic perspective, therefore, the Inter-American system appears to afford better accessibility of justice institutions to poor individuals and groups than the African and European systems. The African system, therefore, has a good lesson to learn from its Inter-American counterpart.

4. GEOGRAPHICAL PERSPECTIVE

From this perspective, the topical issue is the physical accessibility of African human rights justice institutions and their sessions to African individuals and groups whose human or peoples’ rights, as the case may be, are violated by African states. Where the institutions and their sessions are located far away from the predominantly poor individuals and groups, they would find it almost impossible to access the institutions for justice. Before the African Court started operation, for example, the concern was expressed that “... It is very important that the African Court has its seat in a large African city which is readily accessible to all parties, both in terms of transportation and communication...”⁹⁷ The level of geographical accessibility of each of the two institutions under review is now considered in turn.

4.1 African Commission’s Geographical Accessibility

Regarding the African Commission, Rule 28(1)-(3) of the *ACHPR Rules*⁹⁸ provides that the Commission’s sessions shall only be held at its headquarters in Banjul, Gambia, unless another state party to the *African Charter* invites it to hold a session in its territory. However, it

⁹³ Clements, L., ‘Striking the Right Balance: The New Rules of Procedure of the European Court of Human Rights’ (1999) 3 *European Human Rights Law Review* 267 at 269. See also the Public Interest Law Institute, *Making Legal Aid a Reality: A Resourcebook for Policy Makers and Civil Society* (Budapest: Public Interest Law Institute, 2009).

⁹⁴ See Organization of American States General Assembly’s (OASGA’s) *Resolution on Establishment of the Legal Assistance Fund of the Inter-American Human Rights System*, AG/RES.2426 (XXXVIII-O/08) (3 June 2008).

⁹⁵ The *Rules of the Inter-American Commission of Human Rights on the Legal Assistance Fund of the Inter-American Human Rights System*, 2011, available online at <http://www.corteidh.or.cr/docs/instrumentos/reglam_ento_victimas_comision_eng.pdf>; and, *Rules for the Operation of the Victim’s Legal Assistance Fund of the Inter-American Court of Human Rights*, 2010, OASPC Res CP/RES. 963 (11 November 2009).

⁹⁶ See Organization of American States, ‘*Press Release: Legal Assistance Fund Enters into Force*’, 1 March 2011, available online at <http://www.oas.org/en/iachr/media_center/PReleases/2011/017.asp>. Accessed 9 May 2016.

⁹⁷ Padilla, D., ‘An African Human Rights Court: Reflections from the Perspectives of the Inter-American System’ (2002) 2:2 *African Human Rights Law Journal* 185 at 192.

⁹⁸ *Supra* note 71.

appears that states parties are unenthusiastic in hosting the Commission's sessions. Consequently, the Commission rarely sits outside its headquarters.⁹⁹

This implies that an individual or group rights violation victim who resides outside Gambia and seeks justice from the Commission must, most likely, travel to Gambia, together with his/her/its witnesses and legal representatives, whenever their physical presence is needed before the Commission. Again, at present, there is no regional policy of free movement of individuals and groups from one African state to another. Such policy only currently exists in the West African sub-region.¹⁰⁰ This means that most individuals and groups who wish to access the Commission for justice must, first, obtain the Gambian entry visas for themselves, witnesses and legal team. Otherwise, justice may perpetually elude them.

Statistics show that many African individuals and groups live below the poverty line.¹⁰¹ Thus, where these individuals and groups have *locus standi* (right or capacity to bring an action or appear before a judicial or quasi-judicial tribunal) before the Commission but must undergo extreme logistic, geographical and allied difficulties to physically access the Commission, their said *locus standi* may become meaningless. As Peter Kiplangat Cheruiyot laments:

Our people struggle to even take a single case to the Kenyan courts – the community has to sell the few possessions they have to gather enough money to institute proceedings in court – and have often lost. How can we possibly imagine taking a case to the African Commission on Human and Peoples' Rights all the way in The Gambia – and even if we win it has no meaning in Kenya because no one will ensure it is respected.¹⁰²

4.2 African Court's Geographical Accessibility

For the African Court, the *ACtHPR Protocol*¹⁰³ provides in Article 25(1) that “The Court shall have its seat at the place determined by the Assembly from among states parties to this *Protocol*. However, it may convene in the territory of any member state of the AU when the majority of the Court considers it desirable....” Besides, Rule 16 of the *ACtHPR Rules*¹⁰⁴ states that “The sessions shall normally take place at the seat of the Court. However, the Court may, pursuant to Article 25(1) of the *Protocol*, decide to sit in the territory of any other member state of the African Union.” The Court's seat is in Arusha, Tanzania.¹⁰⁵ Its session history shows that all its 33 ordinary sessions so far, except seven, were held in Tanzania.¹⁰⁶

The above analysis shows that it is only in rare cases that the Court would consider sitting outside Tanzania. Thus, any individual or group, together with his/her/its witnesses and legal

⁹⁹ See African Commission on Human and Peoples' Rights, 'Sessions', available online at <<http://www.achpr.org/sessions/>>. Accessed 12 May 2016.

¹⁰⁰ See, e.g., the *Economic Community of West African States Protocol Relating to Free Movement of Persons, Residence and Establishment*, 1979, A/P.I/5/79 (“ECOWAS Free Movement Protocol”). This *Protocol* operates only within the West African sub-region.

¹⁰¹ See Chandy, L. *et al.* 'Africa's Challenge to End Extreme Poverty by 2030: Too Slow or Too Far Behind?' (29 May 2013) Brookings Up Front, available online at <<http://www.brookings.edu/blogs/up-front/posts/2013/05/29-africa-challenge-end-extreme-poverty-2030-chandy>>. Accessed 8 May 2016.

¹⁰² Quoted in Wachira, G.M., 'African Court on Human and Peoples' Rights: Ten Years On and Still No Justice' (September 2008) Minority Rights Group International Report at 11.

¹⁰³ *Supra* note 15.

¹⁰⁴ *Supra* note 84.

¹⁰⁵ See African Court on Human and Peoples' Rights, 'African Court in Brief', available online at <<http://en.african-court.org/index.php/about-us/court-in-brief>>. Accessed 13 May 2016.

¹⁰⁶ See African Court on Human and Peoples' Rights, 'Calendar of Sessions', available online at <<http://en.african-court.org/index.php/sessions/calendar-of-sessions>>. Accessed 13 May 2016.

team, residing outside Tanzania and wishing to physically access the Court must, in most cases, procure the Tanzanian entry visas (or those of another distant hosting state) and travel to that state. Otherwise, justice will elude them.¹⁰⁷ In *Mkandawire v Malawi*,¹⁰⁸ the Applicant who was resident in Malawi had to travel to Mauritius (despite complaining about the inconveniences) to attend the Court's oral hearing of his case. In the end, the Court dismissed his case as inadmissible.

Having explored all the above, it is, at this juncture, needed to suggest relevant reforms. The reforms, which are necessary for a more result-oriented development of the African regional human rights system, are treated in the next part of this article.

5. RELEVANT REFORMS

On the whole, the foregoing discussion shows that from both economic and geographical perspectives, accessibility of justice institutions to individuals and groups under the African regional human rights system is currently in a problematic state. In order to reform the system from these two viewpoints, certain steps should be considered. First, like in some African municipal legal systems¹⁰⁹ and the European and Inter-American regional systems, the AU should establish an official and permanent legal aid scheme or agency to offer *pro bono* (free) legal services to indigent individuals and groups seeking redress from the African system's justice institutions. This will facilitate accessibility of the institutions to many individuals and groups whom poverty would otherwise have denied the benefits of the institutions. This will also serve as a check on the impunity with which African states violate the rights of individuals and groups within their respective territories.

Furthermore, the seats of both the African Commission and the African Court should be decentralized. Apart from their respective headquarters, the AU should open up divisions of the Commission and the Court, respectively, in, at least, the five sub-regions of the continent.¹¹⁰ By so doing, accessibility of these institutions will be made easier for African individuals and groups who, in most cases, must otherwise travel to the institutions' respective headquarters to conduct their cases. Such sub-regional divisions would allow most individuals and groups in each sub-region to benefit from each sub-region's free movement policy, if any, while accessing the Commission. It will, in some cases, obviate the challenges of obtaining entry visas described above. For example, if a judicial division of the African Commission or the African Court is in Nigeria, an individual or group from any other West African state does not need a Nigerian entry visa to access the Commission or the Court, as the case may be.¹¹¹

¹⁰⁷ It is, however, noteworthy that the geographical impediment to accessibility of regional human rights justice institutions arising from centralization of the institutions' seats and sessions is not peculiar to the African system. See *European Court of Human Rights Rules of Court*, 2013, Rule 19, available online at <[http://www.echr.coe.int/Docu me nts/Rules_Court_ENG.pdf](http://www.echr.coe.int/Docu%20me%20nts/Rules_Court_ENG.pdf)>; Council of Bars and Law Societies of Europe, *The European Court of Human Rights: Questions & Answers for Lawyers*, 2014, available online at <http://www.echr.coe.int/Documents/Guide_ECHR_lawyers_ENG.pdf>. Accessed 11 May 2016. It also exists in the Inter-American system. See *Rules of Procedure of the Inter-American Commission of Human Rights*, 2013, Article 14(2), available online at <<http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>>; *American Convention*, *supra* note 4, Article 58(2).

¹⁰⁸ Appl. No. 003/2011 (ACtHPR, 29 June 2013) (unreported).

¹⁰⁹ E.g., Nigeria's Legal Aid Council, *supra* note 89; Ghana's Legal Aid Scheme (established pursuant to the *Legal Aid Scheme Act*, GL 1997, No 542); and, Kenya's Legal Aid Scheme. See also The Danish Institute for Human Rights, *Access to Justice and Legal Aid in East Africa: A Companion of the Legal Aid Schemes Used in the Region and the Level of Cooperation and Coordination between the Various Actors* (Copenhagen: Danish Institute for Human Rights, 2011).

¹¹⁰ East African, West African, Central African, North African, and Southern African, sub-regions.

¹¹¹ See *ECOWAS Free Movement Protocol*, *supra* note 101.

In order to achieve the immediate preceding reform, there is the need for an upward review of the current numbers of quasi-judicial officers of the Commission and judicial officers of the Court, respectively. By Article 31 of the *African Charter*,¹¹² the Commission, at present, comprises 11 members. This number is re-echoed in Rule 4(1) of the *ACHPR Rules*.¹¹³ In a similar vein, article 11(1) of the *ACtHPR Protocol*¹¹⁴ states that the African Court shall consist of 11 judges. These instruments can be amended to substantially increase the number of members for the Commission and that of judges for the Court. Once this increase is implemented, there is no doubt that there will be enough members and judges, as the case may be, to preside over the sub-regional divisions of the Commission and the Court, respectively, earlier suggested.

Also, the *African Charter*¹¹⁵ should be amended to include a substantive right to free movement of people across Africa. This, if done, will have some obvious advantages. First, in the present regime of almost-centralized sitting of both the Commission and the Court, it will save African individuals and groups the rigours of obtaining entry visas to attend the sessions of the institutions at their respective headquarters or other distant states. Second, upon creation of the sub-regional divisions for these two institutions, as suggested above, this right to free movement will enable individuals and groups a visa-free access to and from the sub-regional venues of the institutions' sessions. This will be most valuable in those African sub-regions where there are not yet sub-regional free movement policies similar to that of West Africa mentioned above.

Finally, in addition, or in the alternative, the legal provisions permitting the Commission and the Court, respectively, to sit in the territories of states other than their permanent host states¹¹⁶ should be frequently invoked. In a geographically and demographically vast region like Africa, with many poor citizens, a rotational hosting of the Commission and Court's sessions, respectively, by African states will facilitate the institutions' geographical accessibility to individuals and groups. To this end, efforts should be made to ensure that the sessions of the Commission and the Court, respectively, are evenly rotated among all states parties to their respective enabling instruments. This will give individuals and groups a better opportunity to access any of the institutions whenever it sits in the individuals' or group's state of residence. It will spare them the troubles of obtaining visas for entry into distant states hosting the institution's sessions.

6. CONCLUSION

The legal framework of the African regional human rights system guarantees African individuals and groups a wide scope of substantive human and peoples' rights, respectively. The rights, which vary from first generation (civil and political) through second generation (economic, social and cultural) to third generation (group, collective, or solidarity) rights, are protected under numerous relevant legal instruments in operation within the system. The system also has in place two principal justice institutions to enforce these rights upon violation by African states and when local remedies have failed or are not existent. The institutions are the African Commission on Human and Peoples' Rights (quasi-judicial institution) and the African Court on Human and Peoples' Rights (judicial institution). Nevertheless, owing to some factors, these institutions remain inaccessible to most African individuals and groups,

¹¹² *Supra* note 7.

¹¹³ *Supra* note 71.

¹¹⁴ *Supra* note 15.

¹¹⁵ *Supra* note 7.

¹¹⁶ See *ACHPR Rules*, *supra* note 71, Rule 28(1)–(4); *ACtHPR Protocol*, *supra* note 15, Article 25(1); *ACtHPR Rules*, *supra* note 84, Rule 16.

and justice through the institutions, therefore, becomes elusive to these affected individuals and groups. Among the factors are serious poverty among most African individuals and groups, the distant location of the institutions in the host states of their headquarters, and the sitting of the institutions almost exclusively at their headquarters. Provisions made in the enabling instruments of the respective institutions to overcome these challenges are not effective enough or, in some cases, have not been well implemented. This situation calls for reforms in the system. The reforms, which will entail amendment of some of the system's existing legal instruments, include creation of an official and permanent legal aid scheme or agency within the system, and decentralization of the system's principal justice institutions by creating their divisions in all the sub-regions of Africa. Another relevant reform is the creation of a substantive right to free movement across Africa for African individuals and groups. Finally, the provisions in the enabling legal instruments of the system's principal justice institutions which permit the institutions to also sit in the territories of states parties other than their permanent host states should be more frequently invoked.

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