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Enforcement and Implementation Mechanisms of the African Human Rights Charter: A Critical Analysis

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Abstract
The paper critically analyses the problem confronting the enforcement and implementation of human rights under the Banjul Charter. Although the Charter human rights are comprehensive and far-reaching, concrete and meaningful realization of the provisions has been bogged down by ineffective enforcement. The paper examines these problems within the context of existing theories and practice of international human rights law by nations. It proposes certain measures that will enhance the effective enforcement and implementation of the Charter provisions.

1.0 Introduction.

The concept of human rights has become universal. Its normative standards have not only been adopted in a number of notable international treaties and conventions[1], its scope and contents have also witnessed periodic changes and expansion[2].

However, enforcement and implementation of human rights norms embodied in these international instruments remains a challenge. In most cases, enforcement methods and mechanisms are weak and ineffective[3]. A learned scholar captures the position as follows:

> *There has been little concrete progress in the direction of establishing effective machinery to protect individual rights beyond the points of proclaiming conceptions, attempting definitions, making pragmatic statements in declarations, establishing organs with limited powers of promotion, investigation of the aims and ideals to be realized*[4].

Although this observation was made more than four decades ago, it appears the statement remains valid till today.

From the European Convention on Human Rights and Fundamental Freedoms (1950), the Inter-American Human Rights Convention (1969) to the African Charter on Human Right and Peoples Rights (the Banjul Charter) 1986, there are problems bordering on the efficacy and efficiency of human Rights enforcement.

The focus of this paper is to examine critically issues of human rights enforcement and implementation under the African Charter on Human and Peoples Rights. It will examine theories on the obedience to international law and by extension, international human rights law. It will then analyze the methods and mechanisms of enforcement of human rights under the Banjul Charter.A comparative analysis of similar provisions of some regional human rights systems will be made.

2.0 Enforcement of International Human Rights Law- Theory and Practice.

Enforcement of international human rights law in the municipal or domestic legal systems of sovereign states has, most times, been viewed with skepticism[5]. skeptics are quick to refer to widespread violations of human rights provisions embodied in a number of international instruments[6]

They contended that human rights violations that have taken place in many places such as Bosnia, Cambodia, Iraq, Sierra leone, Nigerian, Burundi etc. are ample evidence of non-legal character of transnational human rights[7]. The violations committed by more powerful nations such as Russians activities in chachya,

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[1] These include International Covenant on Civil and Political Rights (ICCP), the International Convention on Economic, Social and Cultural Rights (ICESCR), The European Convention on Human Rights and Fundamental Freedoms (1950) the inter-American Human Rights Convention (1964) the African Charter on Human and Peoples Rights (1986) e.t.c.

[2] ".. the first generation of Civil and Political Rights and the second of social, economic and cultural rights have themselves grown and expanded in a more or less parallel way "see Cees Flinterman (1990) ``Three Generations of Human Rights`` in Human Rights in a Pluralistic world In Berling et al eds; p.76

[3] E.O Esiemokhai, *Towards* Adequate *Defence of Human Rights in Africa* 13,*Ferfassung&Recht* in Ubersee 151-156

[4] J.G Starke,The Development of International Law, Oxford University Press,(1972)P.11.

[5] Akin Oyebode, *International Law and Politics* 1st ed. Boblabey Publishers Ltd.,Lagos (2013) p.42

[6] For more on this, see Glavian Williams, *International Law and the Controversy* surrounding the word "Law", 22 B.Y. IC 146, Language and the Law (1945) 61, L.Q. R. 71 46

[7] Koh Harold Hangju, "How is International Human Rights Law Enforced?" Indiana Law Journal, vol. 74 (1999), p.1398.

American invasion of Iraq and China`s continuing repression after Tienenmen Square[1]. The conclusion thus reached is that "international human rights law is not enforced[2]". It has also been said that transnational human rights norms are not enforceable "because human rights norms are vague and aspirational, because enforcement mechanisms are toothless, because treaty regimes are notoriously weak and because national government lacks the economic self-interest or the political will to restrain their own human rights violations[3]".

However, Professor Harold Hongju Koh has argued that the contention that international human rights norms are unenforceable is unteneable as the notion stems from misunderstanding or the working of law at the level of international relations. As he put it:

> *Here in Indiana, the law against burglary may be under enforced, they may be imperfectly enforced, but they are enforced, through a well understood domestic legal process of legislation, adjudication, and executive action. That process involves prosecutors, statutes, judges, police officers and penalties that interact, interpret legal norms and work to internalize those norms into value sets of citizens like ourselves. But if we are willing to give that answer to the question how is domestic law enforced? Why not similarly answer the question whether international human rights law is enforced? I will argue that in much the same way, these international norms of international human rights law are under-enforced, but they are enforced through a complex, little understood legal process that I call transnational legal process*[4]

The writer went on to identify the components of transnational legal process to include three phases of institutional interaction whereby global norms of international human rights law are debated, interpreted and ultimately internalized by domestic legal systems[5]. Though he admitted the process often witnessed spectacular failures[6], it sometimes recorded success too[7]. He concluded that international human rights law are enforced through transnational legal process of institutional interaction interpretation of legal norms and attempts to internalize these norms into domestic legal systems[8].

Although profession Harold Koh himself admitted that transnational legal process sometimes recorded failures, the process of debating, interpreting and internalizing international human right law seems to be of little value as no significant positive impact has been made on human rights situation in most domestic jurisdictions. Most international legal rights instruments continue as mere paper work. This process alone, in the absence of coercive mechanism, seems incapable of achieving any effective enforcement of international human rights law.

3.0 Theoretical Underpinnings .

Some theories have been advanced on how transnational legal process promotes national obedience to international human rights law. The theories seek to explain the workings of international law and how it generally influences or gets integrated into the domestic legal systems of sovereign states. There are explanations of power, self-interest or national choices; liberal theory based on rule-legitimacy or political identity; communitarian theory and legal process explanations state-to-state level (horizontal) or international legal process explanation and transnational legal process theory international-to-national level or 'vertical' process.

Power and self-interest have often been put forward as the basis for the obedience to international law by sovereign states. The realists who subscribe to this view include Thomas Hobbes and in contemporary times, there are George Kennan, Hans Morgenthan and Kenry Kissinger[9]. They asserted that nations never truly "obey" international how. They only comply with it because someone else makes them. Under this view, nations can be coerced or induced to follow certain rules or indeed to bargain in the shadow of certain incentives. In the end, the critical factor is neither altruistic or normative, only realist values of power and coercion[10].

Self-interest rationales have also been advanced as explanation for why nations may choose rationally

[1] Id.
[2] Id.
[3] Id.
[4] Id. At p. 1399
[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Kenneth W. Abott, "Mordern International Relations Theory :A Prospectus forInternational Lawyers" 14 YALE J" INT. L 1989 p. 385.;Kenneth W.Abbott, The Trading Nation`s Dilemma:The Functions of International Trade,26 HARV.INJ`L L.J.501(1985);Kenneth Abbott, `Trust But Verify`:The Production of Information in Arms Control Treaties and other International Agrement,26 CORNELL INT`L L.J (1983).
[10] Koh Harold Hongju, "How is International Human Rights Law Enforced" op.cit p 1402.

to follow certain global rules. Nations may decide to cooperate around certain rules which lead to establish what international relations call "regimes" governing arrangements in which certain governing norms, rules, and decision making procedures come to predominate because the nations in their long-term self-interests have calculated that they should follow a presumption favouring compliance with the rules[1]. Self-interest rationale explains why complex global rules have emerged in a whole variety of international areas in which the nations have established regimes structured around legal rules born of self-interested cooperation.

A number of developments in international relations have been explained on the basis on power and self-interest. For instance it explains why Iraq ultimately respected the borders of Kuwait. Other nations of the world actually came in and drove out Saddam Hussein who was then the leader of Iraq[2].

There are also the liberal theories on why nations obey international law and by extension international human rights law. They are based on the principles of "rule legitimate and those of national "political identity" The two theories derive their analysis from Immanuel Kant's pamphlet in 1795,Perpetual Peace.

Rule legitimacy theorists assert that nations do feel some sort of internal "Compliance Pull" towards certain rules that they feel are legitimate. When rules are perceived to be legitimate on account of the rule meeting certain procedural standards or due process, nations tend to obey the rule. They are normatively pulled towards the rule by its legitimacy[3]. There is also the "political identity" view pressed very strongly by members of the liberal school. They posit that whether or not nations comply with international law depends crucially on the extent to which their political identities are based on liberal democracy. Adherents of this view opined that "promoting democracies that participate in the new global market place is the right thing because we know that these democracies are less likely to go to war"[4] To these theorists the key variable for whether a nation will or not obey international law is whether they can be characterized as "liberal" in identity, i.e having certain democratic attributes such as a form of representative government, civil and political rights and an independent judicial system dedicated to the rule of law.[5] On this view it has been said that the European system of human rights works because it is composed of liberal democracies who share reasons for collective obedience.[6]

The communitarian theorists, on other part, argued that nations obey international law because of the values of the international society of which they are a part. Accordingly, membership in a community promoted a sense of strong attachment to it and helps to define how one views the obligation of that community. For example, when one becomes a member of a church, he decides that he will now conduct his life differently, for example the governments of Russia, Ukraine came under communitarian pressure to obey the European Convention on Human Rights because they have all become members of the Council of Europe[7]

Finally, there is the legal process explanation on the enforcement of international law, nay transnational human rights norms. This is based on the impact or influence of legal norms formulated at the "horizontal' nation state level within inter-governmental process on the domestic legal systems of nations[8]. At another level of "vertical" transnational process, there are discussions and arguments by governments, inter governmental organizations, non-governmental organizations and private citizens on why nations should obey these norms – international human rights law[9]. Through this vertical dynamic, international rules that are developed at government-to-government level gradually worked their way down and become internalized into domestic legal structure.[10]

It has been said that none of these theories, standing alone, could explain why nations obey international law but that all the five theories-power self interest, liberal theories, communitarian theory and legal process theory work together to explain obedience to international law by nations. They are complimentary conceptual lenses that give richer explanation of why international law does or does not occur in particular cases[11]. An attempt will now be made to analyze enforcement methods and mechanisms of the African human rights system, the Banjul Charter. It will suggest which of the theories should drive enforcement and implementation of the Charter human right norms.

4.0 Enforcement Mechanisms of the African Human Rights Charter.

There are three critical organs involved in human rights enforcement under the African human rights system.

[1] Id.
[2] Id.
[3] Thomas M. Frank, *The Power of Legitimacy Among Nations* P.24
[4] Koh Harold Hongju, "How is international Human Rights Law Enforced"? op.cit
[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Id.
[11] Id.

The General Assembly of Heads of State andGovernment, the African human Rights Commission and the African Court of Justice and Human Rights.

4.1 The General Assembly of Heads of State and Government

The General Assembly of Heads of State and Government is the highest decision-making body under the Charter.[1] It receives reports of human right violations from the African human Rights Commission. It thereafter directs the Commission to conduct an in-depth study of such cases and report its findings and recommendations to the General Assembly.

The work of the General Assembly here is mere discussion and nothing near enforcement. Compliance with the recommendations is at the mercy of the state involved in human rights violation who may choose to ignore them. Commenting on the role of the General Assembly in this regard, Nwabueze Ben said:

> *Where the Assembly of Heads of State considers the Commission's report, nothing is said on what action it is to take on it, whether it can or should by resolution, accept or reject it. Presumably, it is precluded from doing more than just note the report because of the principle of non-interference in the internal affairs of member states enshrine in Article II of the A.U. charter, the Silence of the Charter on the role of the Assembly of heads of state and government is considered an impediment of the effectiveness of the system of protection by Institutes by the Charter*[2]

The General Assembly is thus weak and ineffective. It is not effective in enforcing human rights norms of the Charter. It is hamstrung by the principle of non-interference in the internal affairs of member states. The silence of the Charter on the role of the General Assembly in this regard is also a serious problem.

It has also been observed that member states are unwilling to accuse one another of human rights violations and would rather choose to mutual cover and protect themselves[3]. The effect is that collective resolve to promote and enforce human rights is weakened. Effective enforcement is sacrificed on the altar of political solidarity.

4.2 The African Human Rights Commission

The mandate of the Commission as stated in Article 45, inter alia is to "ensure the protection of human and peoples' rights under the conditions laid down by the Charter[4]

A writer opined as follows in respect of the mandate of the Commission.

The African Commission`s ability to execute its decisions has been a disaster. There is nothing to show what it has done to execute its decisions…[5]

The Commission is not an enforcement organ per se. It has no mandate of enforcement of any kind within the whole gamut of its mandate.[6] It performs largely supervisory role, the success of which depends on the willingness of member-states in cooperate with the Commission.

4.3 The African Court of Justice and Human Rights

The African Court of Justice and Human Rights has no enforcement mechanism whatsoever. Although the Protocol setting up the Court gives access to State-parties to the Protocol, the African Commission on Human and Peoples Rights, the African Union, certain governmental bodies in the African Continent, individuals and non-governmental organizations , parties to the Protocol, compliance with the decisions or judgments of the Court is at the mercy of the Executive Council of the African Union (made up of Ministers of Foreign Affairs). The President of the Court and Justice of the Supreme Court of Ghana, Sophia Akuffo shed some light on how the Court's decisions/ judgment are treated.

Usually real enforcement of the Court's judgment is not always by the Court itself so enforcement can always be an issue. But under the Protocol setting of the Court the body that is responsible for monitoring compliance is the Executive Council of the African union (make up of Ministers of Foreign Affairs). it reports to the Assembly of Heads of States. What are the Court does is that we report to the A.U on our activities. And we are specifically required to report on a non-compliance. We actually report on all cases we have finished and non-compliance. Another way we report is that, as soon as we deliver a judgment we do not only serve the parties, we also serve the A.U and such judgment are expected to be disseminated among A.U. member- states [7]

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[1] Id.
[2] Ben Nwabueze, *Constitutional* Democracy in *Africa*, Spectrum Books Ltd Ibadan, pub.Nigeria,p.83
[3] Vincent O. Orlu Nmelielle, *The African Human Rights System*: *Its Laws*, *Practice and Institutions*
[4] Article 45(2)
[5] Kidanemeriam Fekadeselassie, *Enforcement of Human Rights under Regional Human Rights Mechanisms*: *A Comparative Analysis*
[6] Article 45 (1-4)
[7] Interview with Eric Ikhite, The NATION, Tuesday December 31, 2013 p.32

The Court functions more like an administrative body than a judicial organ. Its decisions/judgments are simply sent to the Council of Ministers of the African Union for enforcement. The Council like the General Assembly, hardly makes any concrete measures to enforce the decisions/ judgment of the Court.

State reporting under the Banjual Charter

State reporting is a major human rights enforcement method of the Charter.[1] It refers to communications made by a state to a specified treaty or charter body regarding the reporting states compliance with treaty obligations from time to time.[2]

Article 62 of the Banjul Charter states:

> *Each state party shall undertake to submit every two years, from the date the present charter comes into force, a report on the legislative measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter.*

It is assumed that state reporting will through publicity impact positively on the human rights of the reporting state. No state wants to be seen as deviating from the standards of international law. [3] Publicity thus serves as a catalyst for prompting international community to respond to the deviant state.

Secondly, state reporting provides an opportunity for a reporting state to reflect on her human rights situation.[4]

State reporting under the Banjul Charter has not achieved much success. African states have not been diligent on timely reporting.[5] They have also not provided relevant and sufficient information in their state reporting. [6] In previous years, many states have defaulted in submitting their state reports. These include Bostwana, Central African Republic, Cote D'ivoire, Dj,bouti, Equitorial Guinea, Ethiopia, Eritrea, Gabon, Guniea Bissau, Liberia, Madagasca, Malwi, Niger Sao Tome Principle, Sierra Leone, Somalia and Zambia.[7] Some reports submitted also tell below the standard template.[8]

State reporting mechanism thus is not satisfactory enough to make for effective implementation and enforcement of the Banjul human rights. States are inconsistent in submitting reports and where they do, they are not in conformity with the template provided by the Commission. There are also no punitive measures prescribed where state default or where the submitted reports fall below the requirements.

Under the Inter-American human Rights system, the Inter-American Commission is vested with the power to request state report from member-states regarding their human rights situation.[9] Unlike the Banjul Charter there are also provisions for country report under the Inter-American human rights system. There Inter-American Commission is vested with broad powers in relation to country report.[10] The Commission uses these powers often and aggressively such that the use of state report option has been relegated.[11]

4.4 Individuals/Corporate Body Complaint Mechanism

The Banjul Charter makes provisions for individuals and non-governmental organizations to file complaints of human rights violations against their host governments with the African Human Rights Commission. The provisions are obviously meant to enhance human rights enforcement and implementation in the respective jurisdictions of member-states. Article 55 provides:

> *Before each session, the secretary of the Commission shall make a list of the communications other than those of states parties to the present Charter and transmit them to the members of the commission, who shall indicate which communications should be considered by the Commission.*

The Charter prescribes certain conditions to be fulfilled by individuals and non-governmental organizations before they can file complaints with the Commission. These are: disclosure of author's identity, compatibility of the communications with provisions of the Charter, use of non-insulting language against the respondent state, its institutions or the African Union, exclusive dependence (reliance) on media for the alleged violation, exhaustion of domestic remedies, submission of the communication within a reasonable time after final decision of the domestic organs, cases not dealt with and settled before and that the state whose individual

[1] Article 62 of the Banjul Charter
[2] Mark Freeman & Gibran Van. Art, International Human Rights Law, 20O4, p. 386.
[3] Jack Doneely, *International Human Rights* (2nd ed.1998) p. 75
[4] Id.
[5] See www.achpr.org official website of the African Human Rights Commission, visited on January 10 2014.
[6] Id.
[7] Id.
[8] Id.
[9] Cecilia Medina "The Role of Country Reports in the Inter-American System of Human Rights" NQAR, (197) 459; Article 43 Inter-American Human Rights Convention.
[10] Id
[11] Id

is petitioned against must have made a declaration accepting the jurisdiction of the Commission[1]

These conditions are cumbersome and do not make for easy access to the Commission. No wonder only a few of such complaints have been successfully filed with the Commission. Most of such complaints were struck out for the lack of jurisdiction.[2]

The individual complaint mechanism of the Banjul Charter is patterned after that of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Under the Convention, the strategy appears also not to be an effective enforcement mechanism. In this respect, Lazius Wildhaber opined as follows:

> *The mechanism of individual application is to be seen as the means by which defects in nation protection of human rights are defected with a view to correcting them and thus raising the general standard of protection of human rights… thus the court has consistently confirmed that it is not empowered to order consequential measures. It establishes the existence of violation and the process of giving effect to that finding is left to the Committee of Ministers of the Council of Europe. Peer pressure being the most likely way to ensure proper execution of the judgment for what is after all an international Court.*[3]

4.5 A Critique of the Enforcement Mechanisms of the Banjul Charter

Enforcement and implementation is a very critical process of any human rights system. Although the substantive human rights provisions of the Banjul Charter is very comprehensive and far-reaching, very little has been achieved in terms concrete realization of its provisions.

The General Assembly of Heads of State and Government lacks the political will to enforce the Charter provisions. In a metaphorical language, the organ is a toothless dog that barks but cannot bite. The body simply publishes the names of states that have violated the Charter provisions without more.[4] It relies on peer pressure to compel compliance just the same situation under the European human rights system.[5] There are no enabling provisions under the Banjul Charter which empower the General Assembly to impose punitive measures on member-states in breach of human rights violations. This lacuna has rendered the body incapable of effectively enforcing the charter provisions.

The General Assembly has also been adjudged ineffective because of its tendency to refrain from accusing one another of human rights violation in the spirit of African solidarity[6] The principle of non-interference in the internal affairs of member- states is also an obstacle in the way of effective human rights enforcement.[7]

It is been said that the African Human Rights Commission[8]does not have the mandate to remedy human rights violations through individual petition and that the Commission can receive individual complaint to the extent that they reveal massive violations of human rights[9].

The ultimate power of the African Commission is limited to making recommendation to the General Assembly of Heads of State and Government.[10] it does not have any credible enforcement mechanism.[11]

The African Court of Justice and Human Rights, though now fully functional, is still confronted with the problem of enforcing its decisions. The body functions more like an administrative body then a judicial organ. It sends its decisions to the Council of Ministers of the African Union for enforcement[12]. The Council, like the General Assembly does practically nothing with the decisions

5.0 Recommendation /Conclusion

The inauguration of the African Charter on Human and Peoples' Rights in 1986 raised the prospect of full and meaningful realization of human rights in all its ramifications- civil and political rights, economic, social

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[1] Article 56, Banjul Charter

[2] These include, Femi Falana v The African Union, Appl. No 001/2011, Delta international Investment S.A., Mr Agade Longe & Mrs M. de Longe v The Republic of South Africa, App 002/2012; Michebt Yogogombaye v. the Republic of Senegal, Appl No. 005/2011 Emmanuel Joseph Uko & others v The Republic of South Africa Appl. No.004/2012 and Amir Adam Timan v the Republic of South Africa, Appl. No 005/2012.

[3] Luzius Wildhaber, ``Constitutional Future for the European Court of Human Rights``, 23 Hum. Rts L.J (2002) p.161

[4]

[5] Luzius Wildhaber, ``A Constitutional Future for the European Court of Human Rights``, 23 Hum. Rts L.B. (2002) p.161

[6] Vincent D. Orlu Nmeliele*, The African Human Rights Systems: Its Law, Practice and Institutions, op.cit*

[7] Ben Nwabueze*, Constitutional Democracy in Africa, op.cit*

[8] Wolfgang Benedick ,``The African Charter and Commission on Human and Peoples' Rights: How to make it more Effective`` II N QHR 25, 1993

[9] Id.

[10] Vincent O. Orlu Nmeliellie, The African Human Right System. Its Laws Practice and Institutions, op.cit

[11] Frans Viljoen,`` A Human Rights Court for Africa and Africans``,30 Brook J.int`L,115.

[12] See the Interview of the President of the Court, Sophia Akuffor with Eric Ikhite, The Nation Tuesday, December 31, 2013, p.32

and cultural rights and other rights. The realization of these rights, however, has been bogged down by ineffective enforcement and implementation mechanisms. The General Assembly of Heads of State and Government needs to show more commitment to issues of human rights. The body should be empowered to impose punitive measures in form of economic and even coercive sanctions on member-states in breach of its human rights norms. The Charter should be amended along this line. Member-states should henceforth eschew the spirit of "African brotherhood" which has prevented them from accusing one another of human right violations.[1]

State reporting mechanism should be strengthened and be made bi-annual. Independent bodies like the non-governmental organizations should also be required to file annual or bi-annual report on human rights situation of their host states . This will enhance objective assessment of human rights situation of member-states.

The decisions of the African Court of Justice and Human Rights should be implemented without being referred to the Council of Ministers who as political appointees are incapable of any meaningful and concrete enforcement. These measures have become imperative so that human rights provisions under the Charter will not continue to be a mirage.

[1] Vincent O. Orlu Nmellielle, The African Human Rights System: Its Laws Practice and Institutions op.cit

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