

The Effectiveness of the African Union Human Rights Architecture in the Protection of Internally Displaced Women in Nigeria from Sexual Violence

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Abstract

Internal displacement has a profound negative impact on the fundamental human rights of female IDPs because of being uprooted, which has a devastating effect on their livelihood. The gravity of the problems associated with IDPs and the lack of availability of redress for violations of their fundamental freedoms raises questions as to the extent to which the regional human rights corpus provides any protection. In attempting to ascertain the viability of the normative and institutional frameworks of the AU, as presently constituted, to protect this vulnerable population at the continental level, the central question that this paper set out to answer is: What hope does the AU human rights framework hold for the 'the long-suffering, abused and violated' displaced women in Nigeria. To facilitate the discussion, this paper will proceed in three parts. The foremost practical step to launching this analysis will be an appraisal of the African Charter on Human and Peoples' Rights in Africa (also known as the Banjul Charter). The second part looks at the jurisprudence of the Commission to point out precedents that could enhance the protection of these vulnerable women. The third part of this paper considers what the recently merged court, the African Court of Justice and Human Rights (ACJHR), portends for internally displaced women in Nigeria. This paper concludes by assessing the viability of the African Union's human rights institutions in providing protection for female internally displaced persons in Nigeria from sexual violence.

Keywords:

Internal displacement, Sexual violence, Women, African Charter, African Commission, African Court of Justice and Human Rights

1. Introduction

This paper assesses the viability of the African Union's human rights institutions in providing protection for female internally displaced persons in Nigeria from sexual violence. Understanding the African Union (AU) human rights architecture is necessary to properly appraise the level of protection available. The country has risen to the top of African nations plagued with the problem of protracted displacement due to Boko Haram's

terror campaign. However, factors such as the high rate of sexual violence against women are just as significant as the number and location of internally displaced persons (IDPs).

Internal displacement has a profound negative impact on the fundamental human rights of female IDPs, as a result of being uprooted, which has a devastating effect on their livelihood.¹ Their precarious existence and stark vulnerability necessitate provision for their physical and material protection, including humanitarian assistance, under human rights and humanitarian law. The plight of IDPs and the life-threatening conditions under which they live necessitates an urgent, more robust and comprehensive response to the problem of internal displacement.

The gravity of the problems associated with IDPs and the lack of availability of redress for violations of their fundamental freedoms raises questions as to the extent to which the regional human rights corpus provides any protection.² In attempting to ascertain the viability of the normative and institutional frameworks of the AU, as presently constituted, to protect this vulnerable population at the continental level, the central question that this paper set out to answer is: What hope does the AU human rights framework hold for the ‘the long-suffering, abused and violated’³ displaced women in Nigeria?

This paper investigates the AU’s existing normative and institutional frameworks to ascertain whether any effective solution for IDP issues is already available within the AU framework. To facilitate the discussion, this paper will proceed in three parts.

The foremost practical step to launching this analysis will be an appraisal of the African Charter on Human and Peoples’ Rights in Africa (also known as the Banjul Charter)⁴. The intention is to provide a brief contextual background on the framing and understanding of human rights protection for women under the auspices of the AU. Underpinning this contextualisation is the logic that how this foundational human rights instrument addresses issues relating to women could hold the key to a comprehensive legal and institutional solution to the protection challenges faced by internally displaced women in Nigeria. The second part examines the difficulties posed by some mechanisms of the African Commission on Human and Peoples’ Rights (ACHPR or Commission), as the implementing body of the Charter, to the full realisation of Charter rights by internally

¹ M Maru “The Kampala Convention and its contribution in filling the protection gap in international law” (2011) 1/1 *Journal of Internal Displacement* 96

² See MM.Schmiechen “Parallel lives, uneven justice: an analysis of rights, protection and redress for refugee and internally displaced women in camps” *Saint Louis University Public Law Review* (2003) 22/ 2 *The Protection of Children's Rights Article 16 Under International Law* (Volume XXII, No. 2), p. 509.

³ See KSA Ebeku “A new dawn for African women - prospects of Africa’s protocol on women’s rights” (2004) *Sri Lanka Journal of International Law* 1683 at 1685.

⁴ African Charter on Human and Peoples' Rights. (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

displaced women in Nigeria. This part also looks at the jurisprudence of the Commission, to point out precedents that could enhance the protection of these vulnerable women.

The third part of this paper considers what the recently merged court, the African Court of Justice and Human Rights (ACJHR), portends for internally displaced women in Nigeria. Discussions in this part will include the nature of the relationship between the Commission and the Court, particularly on whether the Court should exclusively take over the protection mandate under the Charter. At the same time, the Commission concentrates on the promotional mandate to avoid 'competition' between the two bodies.

2. The Plight Of Internally Displaced Women In Nigeria

Internal displacement is a longstanding issue in Nigeria. Internal displacement has defined Nigerian national life for the past 60 years.⁵ Beginning in 1967, the Nigerian civil war, which endured for more than three years, resulted in significant relocation. The contradicting data render it challenging to determine the number of individuals displaced during this period. Anecdotal sources estimate that, throughout the war, about 2 million people were displaced within and beyond the borders.⁶ In addition to conflict, many natural calamities such as flooding, desertification, and forceful evictions have caused significant displacement in Nigeria. Flooding is the most prevalent phenomenon, occurring regularly in heavily populated regions and informal settlements, particularly in low-lying locations and river basins. The flooding is frequently ascribed to two causes: excessive precipitation that surpasses the capacity of watercourses and the discharge of water from dam reservoirs.

Conflict-induced displacement is the primary cause of the escalating issue of internal displacement in Nigeria. The magnitude of internal displacement caused by conflict is alarming. The brutality of Boko Haram, characterised by mass abductions, sexual violence, indiscriminate killings, enslavement, and suicide bombings, has led to a significant increase in the population of internally displaced persons (IDPs).

The extent of population displacement in Nigeria has risen significantly during the previous two decades.⁷ There have been rises in the circumstances leading to displacement and in the population of displaced individuals. The predominant cause of conflict-induced displacements in Nigeria is the persistent assaults by the Boko Haram sect in the northeastern region, along with the government's counter-insurgency efforts. The kidnapping, sexual enslavement, coerced conscription, and other grave human rights crimes inherent in the Boko Haram struggle have impacted numerous women, children, and their family members. While displacement is not a novel phenomenon in Nigeria, the

⁵ O. Ibeanu, 'Exiles in their own Home: Conflicts and Internal Population Displacement in Nigeria', *Journal of Refugee Studies*, Volume 12, No. 12, Issue 2, 1999, pp. 161–179, at 161. Available at: <https://doi.org/10.1093/jrs/12.2.161>. Last accessed 26/10/2024.

⁶ FKMohammed, 'The Causes and Consequence of Internal Displacement in Nigeria and Related Governance'. Working Paper, FG 8, April 2017, SW Berlin, p. 9.

⁷ O. Ibeanu, (n. 5) 174.

magnitude of relocation caused by the Boko Haram insurgency and governmental counteractions is unparalleled.

Boko Haram has also carried out a number of attacks specifically targeting women, with reports of the group raiding communities and abducting women and girls.⁸ Boko Haram has employed rape for multiple objectives, including torture, the subjugation of local communities, victim humiliation, and the assertion of supremacy over local populations.

Despite being underreported, violence against women, girls, and children—including sexual violence, trafficking, and other types of gender-based violence—are prevalent in these camps and quasi-camps. Women frequently resort to survival sex in return for sustenance, mobility, and other commodities to fulfil their fundamental necessities. Simultaneously, several at-risk homes have turned to early marriage and child labour.⁹ The absence of structured management in numerous new camps and informal communities facilitates the perpetration of atrocities and complicates monitoring by scholars and the state.

The issue of violence against women in displacement camps in Nigeria seems to persist unabated, despite recent heightened awareness.¹⁰ Sexual violence against women is forbidden by Nigerian law. Nonetheless, the reality is that it is frequently obscured or implicitly sanctioned by both officials and victims.¹¹

3. African Charter On Human And Peoples' Rights

The section identifies the provisions of the African Charter that hold the prospect of benefiting Africa's internally displaced women. Despite the scrutiny to which the Charter has been subjected, the provisions of the African Charter relating to internally displaced women have largely been unexplored by scholars. Therefore, this part examines which provisions of the Charter could be leveraged to promote a more workable rights narrative¹² for IDP women in Nigeria. This will be achieved by analysing the support that regional

⁸ United Nations Office for the Coordination of Humanitarian Affairs, 'About OCHA Nigeria', 12 July 2021. Available at: <https://www.unocha.org/nigeria/about-ocha-nigeria> Last accessed 26/10/2024. UK Home Office, 'Country Policy and Information Note. Nigeria: Islamist Extremist Groups in Northeast Nigeria, July 2021, p. 39. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003788/NGA_-_Islamist_extremist_groups_in_North_East_Nigeria_-_CPIN_-_v3.0_FINAL_Gov_UK_.pdf. Last accessed 26/10/2024.

⁹ Available at: <<https://www.unocha.org/nigeria/about-ocha-nigeria>>. Last accessed 21/07/2024.

¹⁰ J Ugwas, 'Sexual Abuse Thrives in Nigeria's IDP Camps with no Recourse for Victims'. OCHA Services, 28 May 2021. Available at: <https://reliefweb.int/report/nigeria/sexual-abuse-thrives-nigeria-s-idp-camps-no-recourse-victims>. Last accessed 26/10/2024..

¹¹ United Nations, Violence Against Women Fact Sheet. Available at: <<https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>> Last accessed 06/11/2024.

¹² DO Ngira "The implication of an African conception of human rights on the women rights movement: a bottom-up approach to women's human rights protection" (2018) *East African Law Journal* 128 at 147.

and continental rights enforcement mechanisms contained in the African Charter could provide protection for this population of concern.¹³ The emphasis will be that there is a need for the exploration of creative and practical steps to plug the identified loopholes in the Charter to expand its reach in providing protection to conflict-induced internally displaced women in Nigeria. The central argument here is that regional human rights protection mechanisms are able to meet the shortfall in the protection and assistance provided by national law. Particular attempts are made to gauge the extent to which the Charter provides effective protection for conflict-induced internally displaced women in Nigeria.

The Preamble sets the tone of the Charter. It expresses the intention of parties to the African Charter to be conscious of their duty to eradicate “all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions”.¹⁴ To carry out these goals, the African Charter contains many provisions protecting individual human rights in general. Article 2 of the African Charter states that:

... every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social in origin, fortune, birth or other status.

Despite this protection, however, women in Africa still suffer from specific social as well as other limitations like economic discrimination, educational barriers and political underrepresentation. The Charter provides for an expansive interpretation of its provisions relating to women by directing the ACHPR to “draw inspiration from international law on human and peoples’ rights”.¹⁵ When read in light of these human rights instruments, the African Charter’s substantive provisions protecting the human rights of women seem to be more elaborate than those contained in other regional human rights treaties.¹⁶

¹³ L Juma, “The narrative of vulnerability and deprivation in protection regimes for the internally displaced persons (idps) in africa: an appraisal of the Kampala Convention” (2012) 16 *Law Democracy & Development* 220 at 211.

¹⁴ African Charter on Human and Peoples’ Rights, (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986), para. 8 of Preamble. Available at: <<https://www.achpr.org/legalinstruments/detail?id=49>>. Last accessed 21/07/2024. The Charter has been largely criticised for the rights it provides, which are limited by the use of claw-back clauses. These provide leeway for states to detract from their obligations under the Charter. These claw-back clauses permit states an almost unbounded discretion to restrict their treaty obligations or the rights guaranteed by the African Charter. The obvious implication is the uncertainty of human rights protection under the Charter.

¹⁵ Article 60 of the African Charter.

¹⁶ Neither the European Convention on Human Rights nor the American Convention on Human Rights contain similar provisions.

Contrary to the belief that the potential of the Charter alone to improve women's human rights in sub-Saharan African nations is minimal,¹⁷ this article argues that a broad interpretation of the relevant provisions could be used to prevent gross violations of the rights of women in Nigeria and other African nations who are state parties to the Charter. The African Charter, with some tweaking, could achieve the intended objectives of protection and assistance for internally displaced women in Nigeria.¹⁸ Article 7 of the Charter provides for the right of an individual to have their grievance heard by the court, including the right of recourse "to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force". Article 26¹⁹ requires states to ensure the independence of courts and to allow for establishing and improving appropriate national institutions charged with promoting and protecting Charter rights. This is key if effectual protection is to be guaranteed to internally displaced women in Nigeria.

Article 18 (3) of the African Charter states that "the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions". Thus, Nigerian courts, in construing the applicability of the Convention on the Elimination of Discrimination Against Women (CEDAW)²⁰ and the Maputo Protocol²¹, can reference the provisions of the African Charter by holding that they are applicable by virtue of Section 18 (3). These treaties, although not incorporated into Nigerian law, could be employed to aid interpretation. Nigeria adopts a dualist system, which bars the direct implementation of international norms before they are incorporated into national law. This implies that the Nigerian body of national laws does not benefit from the progressive development of its laws through international provisions on human rights.

¹⁷ NS Rembe, 'The system of protection of human rights under the African charter on human and peoples' rights: problems and prospects', *Human and Peoples' Rights Monograph Series*, No. 6, Institute of Southern African Studies, National University of Lesotho, 1991. See also R Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, Virginia Journal of International Law association, 1982.

¹⁸ GM Musila, 'The rights to effective remedy under the African charter on human and peoples' rights' *African Human Rights Law Journal* (2006) 6 443.

¹⁹ *States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.*

²⁰ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is an international legal instrument adopted in 1979 and came into effect in 1981. It requires countries to eliminate discrimination against women and girls in all areas of life, including Political, Economic, Social, Cultural, and Civil.

²¹ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol on Women's Rights, is a women's human rights instrument adopted in 2003 to protect the rights of African women and girls. The Protocol provides comprehensive rights for women and girls in Africa. It covers a broad spectrum of civil, political, economic, social, cultural, and environmental rights and is considered one of the most progressive human rights instruments globally.

Indeed, there are instances where Nigerian judges have referred to non-incorporated treaties ratified by Nigeria to assist in interpreting relevant Nigerian laws. One example is the Court of Appeal case of *Mojekwu v. Ejikeme*,²² where the *Nrachi Nwanyi*, a custom of the eastern region of Nigeria, was struck out as being repugnant. The *Nrachi Nwanyi*²³ custom permits a man who has no son or few sons to keep one of his daughters to stay unmarried and bear male successors. In some cases, this is done against the will of the girl. She may not also have the opportunity of choosing the men to have the children with, as some families go to the extent of choosing men they perceive as capable of bearing male seeds. This custom, which normalises prostitution, is debasing to women psychologically and physically.²⁴ Justice Niki Tobi cited the CEDAW in arriving at his decision that the *Nrachi Nwanyi* custom was repugnant and should be abolished²⁵. Also, in *Mojekwu v. Ejikeme*, the Nigerian Court of Appeal relied on the African Charter's provisions to invalidate a customary practice that barred the daughters of a deceased man from inheriting his property.²⁶ While delivering judgement, Justice Niki Tobi stated thus:

Nigeria is an egalitarian society [...] [h]owever, there are customs, all over which discriminate against the womenfolk, which regard them as inferior to the men folk. That should not be so as all human beings, male and female are born into a free world and are expected to participate freely without any inhibition on grounds of sex. Thus, any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy. The *Oli-ekpe* custom,²⁷ which permits the son of the brother of a deceased person to inherit his property to the exclusion of his female child, is discriminatory and, therefore, inconsistent with the doctrine of equity [...] Article 18 of the African Charter on Human and Peoples' Rights specifically provides for the elimination of discrimination against women.²⁸

Under this interpretation, the African Charter could adequately address several serious problems, like sexual violence and discrimination, facing internally displaced women in

²² *Mojekwu & others v Ejikeme & others* (2000) 5, NWLR 402.

²³ The *Nrachi* custom of the *Nnewi* people enables a father to keep one of his daughters perpetually unmarried under his roof to raise children, especially males, to succeed him. Any such daughter took the position of a man in the father's house and was entitled to inherit her father's property. Any children born to the woman would automatically be part of the father's household and accordingly entitled to inherit.

²⁴ UP Okeke, 'A case for the enforcement of women's rights as human rights in Nigeria' Available at: <http://www.wunrn.org/news/2010/04_10/04_05_10/040510_nigeria.htm#_ftnref34>. Last accessed 19/08/2021.

²⁵ *Mojekwu v. Ejikeme* [2000] 5 NWLR 402 at 436 para. H.

²⁶ Article 18

²⁷ By the *li-ekpe* custom, a man who died without sons is considered to have died without an heir. It does not matter if he had a wife and/or daughters. His closest male relative would become heir and inherit his property.

²⁸ *Mojekwu v. Mojekwu* [1997] 7 NWLR 283 at 304 – 305, per Niki Tobi, JCA, pp. 28 – 35, para. D – B.

Nigeria today. The AU's Convention on the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention) authorises the AU to intervene in a member state in the event of grave circumstances, such as war crimes, genocide, or crimes against humanity.²⁹ The AU can also intervene to restore peace and security, to create favourable conditions for finding durable solutions to the problem of internal displacement.³⁰ Article 8 (3) stipulates that "[t]he African Union shall support the efforts of the state parties to protect and assist internally displaced persons under this Convention". Notwithstanding the failure of Nigeria to incorporate the Maputo Protocol, Kampala Convention and CEDAW into domestic law after ratification, it is arguable that the two instruments are applicable in Nigeria, on the basis that the African Charter is domesticated and thus becomes part of the applicable laws. There are still other examples where the African Charter was interpreted to achieve justice for Nigerian women and holds the same prospect for internally displaced women.

The African Charter has also been relied upon by Nigerian courts to invalidate some obnoxious laws accentuating the country's insufficient protection or promotion of environmental justice.³¹ For instance, in *Gbemre v. Shell*,³² the plaintiff, Gbemre, sued Shell, the Attorney General of Nigeria, and the Nigerian National Petroleum Corporation (NNPC) to put an end to gas flaring. The court held that the existing gas flaring laws were "inconsistent with the Applicant's right to life and/or dignity of human person"³³ as guaranteed by the Nigerian Constitution and the African Charter. In 2019, the Nigerian Supreme Court ruled in *Centre for Oil Pollution Watch (COPW) v. Nigerian National Petroleum Corporation*³⁴ that the right to the environment is justiciable in Nigeria, citing Article 24 of the African Charter and other Nigerian statutes. Although the statement was made *obiter*³⁵, it nonetheless has implications for the justiciability of socio-economic rights in Nigeria. This is the first time the Nigerian Supreme Court has ruled that the right to the environment is subject to legal protection in Nigeria. The ruling represents a paradigm shift in the Supreme Court's approach to environmental and climate change-related concerns. This precedent binds lower courts and the whole Nigerian judiciary, which could lead to an increase in successful climate change litigation in Nigeria. In COPW, the Supreme Court liberalized the age-old, restricted standing rule by

²⁹ Article 8 (1), African Union for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Available at: <<https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>>. Last accessed 22/07/2024.

³⁰ *Ibid.*, Article 8 (2).

³¹ EO Ekhaton, 'Women and the Law in Nigeria: A Reappraisal', *Journal of International Women's Studies*, 2015, 16 (2), 285-296 at 293. Available at: <<http://vc.bridgew.edu/jiws/vol16/iss2/18>>. Last accessed 21/07/2024.

³² *Gbemre v Shell Petroleum Development Company of Nigeria Ltd. And Others*, FHC/B/CS/53/05 (2005) AHRLR 151. Available at: https://journals.sagepub.com/doi/pdf/10.1177/004711789401200203?casa_token=_K9fOK0YCR0AAAAA:KC45Mvp5bSbn7RrgvlwmDgEe1X4Rp1Z44KKz-nUurxaTR064MPmDb1yEc6WFgV1H_RngV6bEM4SMkw. Last accessed 28/10/2024..

³³ *Gbemre v. Shell Petroleum Dev. Co. Nigeria et al.*, at 30.

³⁴ [2019] 5 NWLR 518

³⁵ Short for *obiter dictum* which means a statement made in passing.

incorporating environmental public interest litigation.³⁶ Individuals can rely on the Charter provisions directly to protect the rights derived therein.

In the light of these examples, the African Charter seems quite likely to lead to an improvement on the human rights of Nigeria's internally displaced women. In fact, it appears that the Charter could eventually provide the necessary impetus for the eradication of sexual violence against internally displaced women in Nigeria. However, according to Ekhaton, there should also be an effort made by the various NGOs and groups to enlighten Nigerian citizenry on the relevance and merits of the African Charter.³⁷ The way the African system is structured, the black letter alone has not and will not achieve much particularly, considering that human rights norms are still largely perceived as Western impositions. Litigation, as the major tool of redress, will not be sufficient. The frustration met by those women who are brave enough to speak up demonstrates the difficulty in relying wholly on litigation. Notwithstanding this, it is still important that enlightenment programmes on the rights of women and the implications of sexual abuse be given priority.

In spite of the optimism expressed, there is apprehension that the African Charter's procedural shortcomings in the interpretation and enforcement of its provisions may very well prevent African women from fully realising their substantive human rights, chief among which is the use of claw-back clauses.³⁸ The African Charter guarantees individual rights, but, at the same time, tempers these rights with duties to the community and the traditional family structure. For instance, Article 18 provides for the elimination of every discrimination against women and their protection. The provision begins by stating that "[t]he family shall be the natural unit and basis of society".³⁹ As a consequence, it further provides that "[t]he state shall have the duty to assist the family, which is the custodian of morals and traditional values recognised by the community".⁴⁰ In so doing, according to Ekhaton, the Charter presents serious conceptual and practical difficulties, because African women who seek to be free from the bonds of traditional social, religious and legal systems appear to be further entrapped by this provision.⁴¹ As limiting as this appears, it could be positively construed as to the advantage of internally displaced women. As noted earlier

³⁶ U. Etemire, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight' 15 (2) Carbon & Climate Law Review 158-170 CCLR - Carbon & Climate Law Review: The Future of Climate Change. Available at: https://cclr.lexxion.eu/data/article/17395/pdf/cclr_2021_02-008.pdf . Last accessed 02/07/2024.

³⁷ EO Ekhaton, 'The impact of the African Charter on Human and Peoples' Rights on domestic law: a case study of Nigeria', *Commonwealth Law Bulletin*, 41:2, 253-270 at 270. DOI:10.1080/03050718.2015.1049633.

³⁸ The Charter has been largely criticised in rights it provides are limited by the use of claw-back clauses. These provide leeway for states to detract from their obligations under the Charter. These claw-back clauses permit states an almost unbounded discretion to restrict their treaty obligations or the rights guaranteed by the African Charter. The obvious implication is the uncertainty of human rights protection under the Charter.

³⁹ Article 18 (1).

⁴⁰ Article 18 (2).

⁴¹ EO Ekhaton, (n. 35) p. 456.

in this article internally displaced women continue to need and maintain strong family connections, especially as uprooted people in unfamiliar environments, where they are exposed to all manner of abuse and violence.

4. The African Commission On Human And Peoples' Rights

Article 30 of the African Charter established the African Commission as the implementing institution of the Charter. The Commission is endowed with the basic mandate to “promote Human and Peoples’ Rights and to ensure their protection in Africa”.⁴² The Commission has the responsibility to interpret the Charter and monitor state parties’ compliance with the provisions of the Charter. It does this by receiving and considering reports concerning the measures that state members have instituted to implement the Charter.⁴³ Further to that, the Commission has the duty to “[p]erform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government”.⁴⁴ The Charter empowers the Commission to “formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms”.⁴⁵ In applying the Charter’s provisions, the Commission is authorised to draw inspiration from several sources of international law, including “instruments adopted by the United Nations” and “international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine”.⁴⁶ The combined effect of these provisions is the power to apply international standards in the discharge of the Commission’s mandate.

This unarguably broadens the scope of protection available to Nigeria’s internally displaced women, at least in theory. The implication of this provision is that where municipal and regional laws are silent or do not provide sufficient protection, “international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine”,⁴⁷ can be applied.

Internally displaced women are often victims of sexual violence and exploitation and require the restoration of their dignity. The extent to which the victims of sexual violence in displacement camps in Nigeria can benefit from the available mechanisms of the AU Commission is an underlying concern of this section. A critical question to be addressed here, therefore, is whether the African Commission constitutes an effective forum of recourse for female victims of sexual violence in Nigeria’s camps for IDPs.

It is trite under international law that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context

⁴² African Charter, Article 30.

⁴³ *ibid*, Article 62.

⁴⁴ *Ibid*, Article 45 (4).

⁴⁵ *ibid*, Article 45 (1) (b).

⁴⁶ *ibid*, Article 61.

⁴⁷ *Ibid*, Article 61.

and in the light of its object and purpose”.⁴⁸ Therefore, the use of the term ‘ensure’ in Articles 30⁴⁹ and 45(2)⁵⁰ of the African Charter could be interpreted to mean an obligation on the part of the Commission to interpret the Charter effectively.

In relation to internally displaced women in Nigeria, this implies that the Commission is duty-bound to interpret the Charter in a way that justice will be served to them when they are subjected to sexual violence or other forms of human rights violations. This is in line with the reasoning of the Inter-American Court of Human Rights in its decision in *Velásquez-Rodríguez v. Honduras*.⁵¹ The case involved serious human rights breaches, such as the Honduran government’s systematic practice of forcible disappearances. The Inter-American Court stated, in this case, that:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.⁵²

According to this decision in *Velásquez-Rodríguez*, Article 1 (1) of the American Convention creates two state obligations. States must first respect the “rights and freedoms recognised by the Convention” and then “ensure the free and full exercise of those rights”. The second obligation was defined by the Inter-American Court as follows:

This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.⁵³

In this case, the court was required to interpret Article 1 of the American Convention on Human Rights, which requires state parties to “ensure, to all persons subject to their

⁴⁸ Article 31 (1) of the Vienna Convention on the Law of Treaties. Available at: <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>. Last accessed 21/07/2024..

⁴⁹ “An African Commission on Human and Peoples’ Rights, hereinafter called “the Commission”, shall be established within the Organization of African Unity to promote human and peoples’ rights and ensure their protection in Africa”.

⁵⁰ “Ensure the protection of human and peoples’ rights under conditions laid down by the present Charter.

⁵¹ *Velásquez-Rodríguez v Honduras*, Inter-American Court of Human Rights (IACrHR), 10 September 1996, Available at: <https://www.refworld.org/cases,IACRTTHR,3ae6b66d18.html>. Last accessed 28/10/2024..

⁵² *Ibid*, para. 176.

⁵³ *Ibid*, para. 166.

jurisdiction”,⁵⁴ the free and full exercise of the rights guaranteed by the Convention. It imposes an affirmative duty on the states to employ all necessary measures to remove any impediments to individuals exercising their rights and liberties.⁵⁵

This interpretation by the Inter-American Court is compatible with Article 46 of the African Charter, which authorises the Commission to resort to any appropriate method of investigation. While the Charter does not define what the appropriate methods are, it does empower the Commission to lay down its own rules of procedure.⁵⁶ This is an opportunity for the Commission to strengthen protection. Thus, the Commission could employ new ways to fill in gaps in order to fulfil its objective as the implementing body of the Charter.⁵⁷ Whether the Commission has effectively appropriated this provision for the improvement of human rights standards is not clear in general. The Commission has yet to decide a case involving internally displaced women in Nigeria or any specific case on sexual violence against them; however, the analysis in this article remains necessary to determine its potential and utility in the protection of this vulnerable group.

4.1 The Exhaustion of Local Remedies Being Conditional to International Remedies

Article 56 (5) of the African Charter provides that “communications relating to human and peoples’ rights referred to in Article 55 received by the Commission, shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged”. The jurisprudence of the Commission shows that, for a remedy to be considered effective, substantive as well as procedural benchmarks must be met. In this framework, in *Jawara v. The Gambia*, the African Commission set out the three elements of a remedy: availability, effectiveness and sufficiency.⁵⁸ Accordingly, the Commission clarified further that a remedy is considered available if the petitioner can pursue it without impediment.⁵⁹ Further to that, such remedy is deemed effective if it offers a prospect of success and it is found sufficient if it is capable of redressing the complaint.⁶⁰ The Commission has repeatedly stated that domestic avenues of recourse adopted must “vindicate a right”.⁶¹ In fact, the Commission is of the view that, to meet the sufficiency threshold, the path to obtaining such corrective measures should not be obstructed by procedural obstacles. Thus, there is an unmistakable connection between the findings

⁵⁴ Article 1, American Convention on Human Rights. Available at: https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf. Last accessed 28/10/10/2024

⁵⁵ G. Smith, ‘The Interface Between Human Rights and Police Complaints in Europe’, in T. Prenzler and G. den Heyer (eds.) *Civilian Oversight of Police: International Perspectives* (CRC Press).

⁵⁶ CA Odinkalu, ‘The Individual Complaints Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment’, (1998) 8, *Transnat’l L & Contemp Probs*, 359, at 372.

⁵⁷ VO Orlu Nmehielle, ‘Toward an African Court of Human Rights: Structuring and the Court’, (2000) 6, *Ann Surv Int’l & Comp L*, 27, at 32.

⁵⁸ *Jawara v Gambia* (Communication No. 147/95, 149/96) [2000] ACHPR17; (11 May 2000). Available at: <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2000/17>. Last accessed 21/07/2024.

⁵⁹ *Ibid.*, paras 31, 32, 34, 35 and 74.

⁶⁰ NJ. Udombana, ‘So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights’, *The American Journal of International Law*, January 2003, vol. 97, No. 1, pp. 1–37 at 22.

⁶¹ *Ibid.*, 33.

regarding the exhaustion of local remedies and the functional state of the state parties to the Charter's national judicial and legal systems.⁶²

The Commission has declared communications inadmissible because of failure to exhaust local remedies.⁶³ Then again, the approach has its limitations. The admissibility jurisprudence of the African Commission has adopted the position that national mechanisms that meet the effectiveness criterion for admission must be judicially sanctioned.⁶⁴ As a result, non-judicial remedies, including those of a quasi-judicial nature,⁶⁵ will be insufficient.⁶⁶ It is generally accepted that the judicial process is often protracted in every jurisdiction. Most often, for petitioners to exhaust all available local remedies as provided by the African Charter, they must engage in long litigation process in domestic courts. Therefore, time is an element that deserves special mention, as a component of an effective remedy.

In *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDH) v. Zambia*,⁶⁷ the Commission noted that the exhaustion of the local remedies rule does not require complainants to exhaust any local remedy found to be unavailable or ineffective on a practical level.⁶⁸ The local remedies rule invariably applies to available and effective remedies, but additionally, in accordance with Article 56 (5) of the Charter, this applies to local remedies whose procedure is not unduly prolonged. Therefore, the lengthy periods taken by claims before courts in Nigeria may not meet the threshold of effective judicial procedures. Furthermore, the Commission does not consider the indigence of a complainant as a viable rationale for bypassing the exhaustion of local remedies rule.⁶⁹ In its view, making this exception would result in a flood of claims being brought directly to the Commission on the basis of the complainants' indigence.⁷⁰ This is despite the fact that, for the majority of potential litigants in Africa, the financial aspect of litigation remains a significant impediment to initiating legal proceedings before domestic courts. Even when victims are provided with free legal services, the lengthy legal process discourages them. This is especially true in light of the fact that most African states lack adequate or non-

⁶² H. Onoria, 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies Under the African Charter', *African Human Rights Law Journal*, 3, 2003, pp. 1–24 at 10.

⁶³ Communication 86/93, *Ceesay v The Gambia* (Ceesay case), para 4. Available at: <https://achpr.au.int/en/decisions-communications/m-s-ceesay-gambia-8693>. Last accessed 28/10/2024.

⁶⁴ GM Musila, 'The Rights to Effective Remedy Under the African Charter on Human and Peoples' Rights', (2006) 6, *African Human Rights Law Journal*, p. 447.

⁶⁵ Appear like a court or judge yet does not constitute a judicial entity. Quasi-judicial bodies, although non-judicial authorities, are capable of interpreting law.

⁶⁶ GM Musila (n 66), 450.

⁶⁷ Communication 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (Zambian expulsion case), Tenth Annual Activity Report, para 11. Available at: <https://ihrda.uwazi.io/en/document/oiv7o1kua5nqgcbv6etgldi?page=1>. Last accessed 21/07/2024.

⁶⁸ Para. 11.

⁶⁹ See Communication 207/97, *Africa Legal Aid v The Gambia*, Fourteenth Annual Activity Report, para 33. Available at: <https://achpr.au.int/en/decisions-communications/africa-legal-aid-gambia-20797>. Last accessed 06/11/2024.

⁷⁰ H Onoria, 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies Under the African Charter', *African Human Rights Law Journal*, 3, 2003, pp. 1–24 at 13.

existent legal aid systems. Against this backdrop, in *Africa Legal Aid v. The Gambia*,⁷¹ the Commission rejected the argument that the victim's financial inability should justify an exemption from the requirement to exhaust local remedies. Given that the majority of cases brought before the Commission were initiated by NGOs, the Commission's reasoning appears to imply that the issue of the complainant's indigence should not arise in such communications and presupposes that the NGOs are financially secure. However, in Nigeria, most of the NGOs working for the restoration of the dignity of women and to combat impunity conduct their activities without the necessary resources and the physical integrity and lives of their members are often at risk; therefore, the victims rarely benefit from legal aid as expected. Besides, the Commission is yet to provide an answer to a situation where an individual who is indigent to be exempted from the requirement to exhaust local remedies personally brings a communication.⁷² This is relevant because poverty is another barrier that limits the ability of most IDPs who are victims of sexual violence to seek legal services.

In response to critics, the Commission began to include the names of states against which communications had been filed from its Seventh Annual Activity Report. This was in a separate annexure, in which it stated its findings and recommendations in instances where it discovered Charter violations.⁷³ Following adoption by the AU Assembly, these reports were published and made available to the public. The strategy was to publicly name states that violated the Charter in order to convince states to take the Commission's recommendations seriously. Then again, if not adequately enforced by the Commission, this move may not yield many results. This is why Wachira and Ayinla suggest that the Commission adopt a strategic follow-up approach within its structure. More importantly, according to the two scholars, the Commission's findings of Charter violations should be accompanied by a description of the appropriate remedies.⁷⁴

In spite of the criticisms outlined, there still exists some hope that the mechanisms of the Commission have considerable potential to offer redress to internally displaced women who face sexual violence in Nigeria. This is particularly true if we analyse the New Rules of Procedure of the Commission adopted at its 27th extraordinary session.⁷⁵ The 2020 Rules

⁷¹ Communication 207/97, *Africa Legal Aid v The Gambia*, (n. 72)

⁷² *Ibid.*

⁷³ Seventh Activity Report of the African Commission on Human and Peoples' Rights in Africa, 1993–1994, Thirtieth Ordinary Session, 13–15 June 1994, Tunis, Tunisia. Available at: <<http://hrlibrary.umn.edu/africa/ACHPR2.htm>>. Last accessed 21/07/2024.

⁷⁴ GM Wachira and A Ayinla, 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: a possible remedy', *AHRLJ*, Volume 6, No. 2 (2006), 465 – 493 at 476. Available at: <<https://www.ahrlj.up.ac.za/wachira-g-m-ayinla-a>> . Last accessed 02/02/2024.

⁷⁵ Final Communiqué of the 27th Extraordinary Session of the African Commission on Human and Peoples' Rights, Banjul, Republic of the Gambia. Held from 19 February to 4 March 2020. Available at: <<https://www.achpr.org/sessions/info?id=318>>. Last accessed 21/07/2024.

of Procedure⁷⁶ clarify the Commission's status and mandate to give full effect to Article 45 of the African Charter, which states the functions of the Commission. This rule reiterates the autonomous nature of the Commission.⁷⁷ The various competencies of the Commission, such as interpreting the African Charter and its own decisions and ensuring the operation of its secretariat, are also highlighted.⁷⁸ New Rule 27 further makes sessions available to the public through live transmissions. Rule 101 provides for investigating measures that may be adopted in the consideration of communications in order to clarify the facts. These are welcome developments but, as self-evident as it appears, the truth remains that the potential for improvement in human rights protection can only be realised with implementation. It could be helpful if, in addition to these innovative rules, the African Commission adopted a standard approach to its findings, identifying violations, recommending remedies, and establishing a time limit for implementation. Hopefully, the Commission's collaboration with the newly established African Court of Justice and Human Rights will persuade states to comply by implementing the provisions aimed at the protection of vulnerable populations. This paper argues that it will help contribute to the promotion and enhancement of the rule of law in Africa.

5. The African Court Of Justice And Human Rights

The debate⁷⁹ on the legal basis of the recommendations of the African Commission intensified the call for the establishment of a court for the realisation of human rights enforcement. This is a direct result of the gaps already identified in the previous section: submitting a communication to the Commission cannot result in a legally binding decision and force a state to comply with its decision; enforce legally binding judicial-type remedies that may be awarded, such as injunctions or monetary damages; immediately change domestic laws; or provide a quick remedy.⁸⁰ According to Michelo Hansungule, it was this state of affairs that made victims of human rights violations receive both the African Court on Human and Peoples' Rights (ACTHPR)⁸¹ and the African Court of Justice (ACJ)⁸² as welcome and important additions to the Commission.⁸³ The African Court on Human and

⁷⁶ Rules of Procedure of the African Commission on Human and Peoples' Rights of 2020. Available at: <<https://www.achpr.org/legalinstruments/detail?id=72>>. Rule 3. Last accessed 21/07/2024.

⁷⁷ Rule 3 (1).

⁷⁸ Rule 3 (3), (4) and (6).

⁷⁹ F. Viljoen and L. Louw, 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation', *Journal of African Law*, (2004) 48, pp. 1 – 22. Available at: <https://www.jstor.org/stable/pdf/27607906.pdf?refreqid=excelsior%3A4b97f9ea17410df1853df38d695e8a1e> Last accessed 06/11/2024. In this regard, see also Chidi Odinkalu (n.58); Nsongurua J. Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights', (2003) 97, *The American Journal of International Law*, 1.

⁸⁰ The African Commission on Human and Peoples' Rights Brochure, p. 7. Available at: <https://www.somo.nl/wp-content/uploads/2018/07/ACHPR-brochure-final.pdf>. Last accessed 07/10/2024.

⁸¹ The Protocol establishing the African Court on Human and Peoples' Rights came into force on 25 June 2004 after it was ratified by the 15th State. Available at: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>. Last accessed 12/10/2024.

⁸² The Protocol of the Court of Justice of the African Union was adopted on 1 July 2003 and entered into force on 11 February 2009. Available at: <https://au.int/en/treaties/protocol-court-justice-african-union>. Last accessed 12/10/2024.

⁸³ M. Hansungule, "African courts and the African Commission on Human and Peoples' Rights", p. 234. Available at:

Peoples' Rights was the AU's response to complaints about the Commission's weak protective mandate.⁸⁴

The lengthy process of establishing a court,⁸⁵ which took 17 years after the inauguration of the Commission,⁸⁶ could be attributed to the philosophical stance that traditional African justice is essentially conciliatory. The provisions of the Organisation of African Unity (OAU) Charter 1963⁸⁷ were clear on the obligation of member states to general internal legal principles and, as such, they are to adhere to "[t]he sovereign equality of all Member states" and "[n]on interference in the internal affairs of states".⁸⁸ Any disputes between the states were to be resolved by negotiation, mediation or arbitration.⁸⁹ The belief among the stakeholders and drivers of the instrument that underpinned this was that "African states will respond more positively to a mediatory approach [...] than an adjudicative approach".⁹⁰ However, mediation alone was insufficient to address the continent's massive human rights violations, necessitating the need for victims to have access to judicial process on demand. Despite the widely accepted explanation that this reflected African traditions of compromise rather than confrontation, the real reason for preferring mediation may have had more to do with the widespread reluctance among member states to subordinate themselves to a supranational judicial organ.⁹¹

<https://www.researchgate.net/publication/237680063_African_courts_and_the_African_Commission_on_Human_and_Peoples'_Rights>. Lasted accessed 22/07/2024.

⁸⁴ A. Uwazuruike, *Human Rights Under the African Charter*, Palgrave Macmillan, 2020, p. 161.

⁸⁵ The Protocol establishing the African Court on Human and Peoples' Rights came into force on 25 June 2004 after it was ratified by the 15th State.

⁸⁶ The African Commission on Human and Peoples' Rights was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia.

⁸⁷ The Organisation of African Union Charter was adopted in Addis Ababa, Ethiopia, on 25 May 1963 and entered into force on 13 September 1963. It was replaced in 2001 by the Constitutive Act of the African Union (AU) when the AU succeeded the OAU. Available at: https://au.int/sites/default/files/treaties/7759-file-oau-charter_1963.pdf. Last accessed 06/11/2024.

⁸⁸ Art III Organization of African Unity (OAU), *Charter of the Organization of African Unity*, 25 May 1963. Available at: <<https://www.refworld.org/docid/3ae6b36024.html>>. Last accessed 12/06/2024.

These principles are foundational principles of the UN Charter regime of international law (see Preamble to the UN Charter and Art. 2 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. Available at: <<https://www.un.org/en/about-us/un-charter>>. Last accessed 12/06/2024.

⁸⁹ Rebecca Wright, 'Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights', (2006) 24, Berkeley J Int'l L, 463, at 467.

⁹⁰ Cited by R. Wright, *ibid* at 474. The author relied on a letter of which she had a copy on file: "Letter from Edwin Maepé, International Metalworkers Federation, to Ahmed Haggag, Assistant Secretary General of the OAU and to International Jurists", Switzerland (Sept. 26, 1995).

⁹¹ Information Document Prepared for the United Nations Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Monrovia, 10-21 Sept. 1979, HR/LIBERIA/1979/BP.3 25, prepared by Osita C. Eze. Two other preparatory documents were prepared: Information Document Prepared for the United Nations Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Monrovia, 10-21 Sept. 1979, HR/LIBERIA/1979/BP.1, prepared by T.O Elias; Information Document Prepared for the United Nations Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Monrovia, 10-21 Sept. 1979, HR/LIBERIA/1979/BP.2, prepared by Keba M'baye cited in Chidi Anselm Odinkalu, 'From Architecture to Geometry: The Relationship between the African Commission on Human and Peoples' Rights and Organs of the African Union', (2013) 35, Hum Rts Q, 850, at 868.

The ACHPR was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights⁹² which was adopted on June 9, 1998 in Ouagadougou, Burkina Faso by Member States of the then Organization of African Unity. After 15 Member States ratified the Protocol in January 2004, it entered into force. Article 3 of the Protocol extends jurisdiction to "all cases and disputes submitted to it concerning the interpretation and application of the Charter", the Protocol and other human rights instruments that states have ratified. In addition, Article 4 confers upon the Court the authority to issue advisory opinions on "any legal matter relating to the Charter or other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission." Article 56 of the African Charter requires the Court to consider a number of elements while determining admissibility. This includes considering whether a communication was submitted within a reasonable period after the alleged violation/s and whether domestic remedies have been exhausted, save in circumstances where processes would excessively extend the matter. When considering the admissibility of direct communications submitted by individuals and non-governmental organizations, the Court may seek the advice of the African Commission.

The African Commission or other African intergovernmental organizations, States who have lodged (or against whom has been lodged) a complaint with the Commission, and States whose citizen has been the victim of a violation of human rights may apply to the Court. The Court may allow other states that are parties to the Court's Protocol and have an interest in a matter to participate in its proceedings.⁹³ Individuals and NGOs with Observer Status may also file complaints directly with the African Commission, but only against those nations that have accepted the Court's jurisdiction to hear complaints from these entities.⁹⁴ In cases before the court, there is a written phase, and there may also be an oral phase of proceedings during which the parties may present evidence and summon witnesses. The Protocol stipulates that once a matter has been heard, judges must give a verdict within 90 days of concluding deliberations.

If the Court determines that an applicant's rights have been violated, it may mandate reparative measures. Article 27 of the Protocol also permits the Court to order provisional measures in cases of "extreme gravity and urgency, and when necessary to avoid irreparable harm." Member States subject to the Court's jurisdiction are obligated to comply with judgments in all cases in which they are parties within the Court's specified timeframe. States are also responsible for ensuring the execution of Court decisions. Article 31 of the Protocol requires the Court to note in its report to the Assembly any State that fails to comply.⁹⁵

⁹² Available at: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>. Last accessed 06/11/2024.

⁹³ Article 5(2)

⁹⁴ Article 5(3)

⁹⁵ The African Court on Human and Peoples' Rights. available at:

However, before the two continental courts could properly become operative, they were replaced by the African Court of Justice and Human Rights (ACtJHR).⁹⁶ The idea to merge the African Court of Human and Peoples' Rights with the African Court of Justice to form this new judicial body was initiated in 2004, with financial cost-saving as the primary motivation. Article 1 states:

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998 in Ouagadougou, Burkina Faso and which entered into force on 25 January 2004, and the Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique are hereby replaced by the present Protocol and Statute annexed as its integral part hereto, subject to the provisions of Article 5, 7 and 9 of this Protocol.⁹⁷

Article 2 on the court's establishment provides that:

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 the 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 are hereby merged into a single Court and established as 'The African Court of Justice and Human Rights'.⁹⁸

The aforementioned provisions raise a number of difficult issues. For example, what does the term 'replace' mean in Article 1? Do states' ratifications and accession to both protocols become null and void? Fortunately, Chapter II of the merger Protocol, entitled 'Transitional Provisions', allows for the continuation of the current mode of operation until the new Protocol takes effect.⁹⁹ This, understandably, necessitated the provision in Article 4 protecting incumbent judges: "[t]he term of office of the Judges of the African Court on Human and Peoples' Rights shall end following the election of the Judges of the African Court of Justice and Human Rights". Also, the new Protocol addressed the issue of pending cases in Article 5, which provides for the transfer of cases before the African Court on Human and Peoples' Rights that have not been resolved prior to the new Protocol's entry into force to the "Human Rights Section of the African Court of Justice and Human Rights on the understanding that such cases shall be dealt with in accordance with the Protocol to

<https://www.justiceinitiative.org/publications/african-court-human-and-peoples-rights>. Last accessed 29/06/2024

⁹⁶ Protocol on the Statute of the African Court of Justice and Human Rights, Adopted 1 July 2008. Available at <<https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>>. Last accessed 11/10/2024

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

the ACHPR on the establishment of the African Court of Justice and Human Rights”.¹⁰⁰ The African Court has jurisdiction over cases involving not only the Charter and its Protocol,¹⁰¹ but also the interpretation and application of any other pertinent human rights instrument ratified by the member state in question.¹⁰² In essence, even if a specific right is not covered by the African Charter, a citizen of a state subject to the Court’s jurisdiction may still be protected if the right is included in another international human rights treaty.

The intent appears to be to include those treaties and instruments not specifically mentioned in the Protocol on the Statute of the African Court of Justice and Human Rights, as well as those yet to be adopted. Not only does the Court have the discretion to consider relevant human rights treaties other than the Charter, it also has an obligation to do so. This raises another dilemma: if the remedy available under another treaty is different than the remedy available under the Charter, or if the Charter itself contains no grounds for a human rights claim, the Court should consider the possibility of finding a violation under another applicable human rights framework. An applicant can submit a case before the Court by invoking the violation of a human rights instrument that guarantees a larger scale of rights than those of the Charter, notably in the area of the protection of women’s rights and IDPs.

The only caveat to this is that the concerned state must have ratified the said instrument being relied upon. Nigeria, for instance, has ratified several human rights instruments, including the CEDAW,¹⁰³ the Maputo Protocol,¹⁰⁴ the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention),¹⁰⁵ among others. However, Nigeria is yet to incorporate these into municipal law, rendering them non-applicable and impotent for the protection of the affected groups. This could provide the latitude for these treaties to come into effect in Nigeria, albeit that they have not yet been incorporated into national law.

Another development is that cases coming before the Court will entail publicity, not the confidentiality and secrecy that characterise the activities of the Commission. Article 39 of the Protocol provides that a “hearing shall be public, unless the Court, on its own motion

¹⁰⁰ Ibid.

¹⁰¹ Article 3 of the protocol provide thus: “the jurisdiction of the court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.” See *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*. Available at: <<http://hrlibrary.umn.edu/instreet/protocol-africancourt.pdf>>. Last accessed 22/07/2024. See also Yakare-Oule Jansen Reventlow and Rosa Curling, ‘The Unique Jurisdiction of the African Court on Human and Peoples’ Rights: Protection of Human Rights beyond the African Charter’, (2019) 33, *Emory Int’l L Rev*, 203, at 219.

¹⁰² Article 7, *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*. Available at: <<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>> Last accessed 11/12/2024.

¹⁰³ Available at: <<https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>>. Last accessed 11/12/2024.

¹⁰⁴ Available at: <<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>>. Last accessed 22/07/2024

¹⁰⁵ Available at: <<https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>>. Last accessed 22/07/2024..

or upon application by the parties, decides that the session shall be closed”.¹⁰⁶ The merged court also has the mandate to explain the reasoning behind its judgements, which must be read in an open court.¹⁰⁷ The parties to the case shall be notified of the judgement of the Court and it shall be sent to the member states and the Commission.¹⁰⁸ Even where a decision of a court is an advisory opinion and, therefore, not binding, it can be argued that it still attracts far-reaching publicity and promotes compliance.

The significance of the publication of the decisions of the Court should not be underestimated. With regard to Nigeria’s IDPs, it constitutes a particularly effective means of putting pressure on the government, which seems complacent about the situation of internally displaced women and the abuse they face. Apart from serving as a weapon against all forms of gender-based violence, it is also a device to mark out violators.¹⁰⁹ This is critical in addressing sexual violence and abuse against vulnerable women, who have been made to feel that it is futile to seek justice against the perpetrators for several reasons. By reporting its activity openly, the Court is more likely to attract the attention of the media and exposure. Furthermore, it will elicit more interest and awareness, thereby birthing a new era of transparency and ending the impunity of the perpetrators of such heinous crimes against internally displaced women.

Furthermore, pressure through publicity is found in Article 57 of the Court’s enabling instrument. It provides that “[t]he Court shall submit to the Assembly an annual report on its work during the previous year. The report shall specify, in particular, the cases in which a party has not complied with the judgement of the Court”.¹¹⁰ This might appear to be a formal process, but it can also serve as a powerful weapon of compliance. In our opinion, this procedure will attract more publicity; it will allow for an examination of the Court’s role in the development of African human and peoples’ rights jurisprudence.

The expanded jurisdiction of the Court, which is constituted by a human rights section and a general affairs section, has the prospect of addressing a variety of legal issues that will confront the Continent in the near future, including human rights violations and issues of general international law that apply to member states. However, the element of *locus standi*¹¹¹ has a great capacity to limit access to the Court, and, as such, to damage any likelihood of benefits for internally displaced women in Nigeria. Therefore, the limitations on individuals and NGOs from bringing direct applications before the court, except for citizens of states that have made such a declaration, is a setback for the merged court once

¹⁰⁶ Article 39, Protocol, (n. 99).

¹⁰⁷ Article 43 (4), Protocol, (n. 69); See also: MC Ogwezzy, “Challenges and Prospects of the African Court of Justice and Human Rights”, 2014 6, Jimma U JL, p. 27.

¹⁰⁸ Article 43 (4), Protocol, (n. 99).

¹⁰⁹ TF. Yerima, “New Trends in the African Human Rights System: Prospects of African Regional Human Rights Courts”, Global Journal of Human Social Science, volume 12, Issue 2, January 2012, p. 62.

¹¹⁰ See note 99

¹¹¹ *Locus standi* is the right or capacity to bring an action or to appear in a court.

it becomes effective. According to Michael Ogwezy, this will be an obstacle in the fight against impunity for human rights violations by African leaders and state actors.¹¹² Also, in the opinion of Rebecca Wright, this limitation on *locus standi* will diminish “what power the Court might have over states by making it less accessible to those most likely to bring cases”.¹¹³

States are generally not enthusiastic about subjecting themselves to international tribunals, and, as such, there is likely to be a reluctance to sign the Protocol’s required declarations. This limitation contradicts the rationale behind the internationalisation of human rights and the development of the regional human rights system, which is to serve as a complementary layer for supranational protection. This is why Makau Mutua’s view that the Court should “completely take over the protective mandate under the Charter, sparing the Commission the task to focus on the promotional mandate”¹¹⁴ will create a problem for individual access. According to Mutua, the Court was not contemplated as part of the African Charter at the drafting stage, which is why the Commission is provided with both promotional and protective mandates, which gives it a quasi-judicial status. He suggests that now that the Court has been established, the African Charter should be revised to avoid a duplication of efforts.¹¹⁵

The African Commission’s protective function should be abolished and transferred entirely to the ACtJHR when it will enter into force. According to Mutua, the Commission should be tasked solely with promotional duties. This, he believes, will avoid conflict or ‘competition’ between the two institutions, thereby enhancing cooperation and mutual reinforcement.¹¹⁶ However, stripping the African Commission of its protective mandate would deprive a large number of individuals of the ability to file complaints at the regional level. This happens because the Commission continues to be the sole forum for redressing human rights violations against individuals in states, including those that are not parties to the ACtJHR Protocol but still constitute a majority of states. Additionally, the Commission will continue to be the first instance forum for individual plaintiffs from states that do not permit direct access to the Court for individuals and non-governmental organisations pursuant to Article 8 (3) of the ACtJHR Protocol. Individual cases will be brought to the ACtJHR in two ways, according to Article 8 (3) of the Protocol: directly by individuals or through states that have made a prior declaration. As of 2016, only eight states had signed the declaration, with Rwanda’s withdrawal reducing that number to seven. The other route is when the African Commission refers a case to the Court following its consideration of

¹¹² MC Ogwezy, “Challenges and Prospects of the African Court of Justice and Human Rights”, 2014 6, *Jimma U JL*, p. 30.

¹¹³ Rebecca Wright, ‘Finding an Impetus for Institutional Change at the African Court on Human and Peoples’ Rights’, (2006) 24, *Berkeley J Int’l L*, 463, at 479.

¹¹⁴ MMutua, ‘The African Human Rights System: A Critical Evaluation’, p. 31. Available at: <http://hdr.undp.org/sites/default/files/mutua.pdf>. Last accessed 28/10/2024.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

a communication, as the Commission has direct access to the Court pursuant to Article 30 (b) of the ACTJHR Statute.

States that have not ratified the Protocol have no choice but to approach the Commission. If the Commission's protective mandate is closed, it will have a detrimental effect on individuals from those states. The two scenarios above demonstrate that the African Commission will continue to be a tribunal of last resort and a tribunal of first instance in individual cases, respectively.¹¹⁷ According to Viljoen, even when the Commission and the Court share jurisdiction, the Commission may be the most appropriate mechanism for resolving complaints in some instances.¹¹⁸

It is important to recall that the concept of regional human rights systems is to provide an external mechanism at an intermediate level between the national and international systems. The purpose is to provide remedy or protection for individuals and vulnerable groups from human right violations. The Court must, therefore, be accessible to individuals and perceived to be independent of the state in principle. While it is recognised that the Court will have discretionary jurisdiction over these contentious cases, once lodged, there should be no restrictions on how an individual seeks redress, as long as the individual has exhausted all available local remedies or can demonstrate that they are unavailable.

Against this backdrop, a case can be made that the instrument establishing the merged Court should be amended to give NGOs and individuals direct access to the Court. All in all, the African Court must be allowed to operate efficiently and without impediments if it is to help bring about the much-needed rule of law across Africa, contribute to the protection and promotion of human rights and fundamental freedoms and fight impunity.

Most importantly, the success of the merged court will depend on the will of the states to abide by the Protocol on the Statute of the African Court of Justice and Human Rights by ratifying it. Article 9 (1) of the ACTJHR Protocol provides that: "[t]he present Protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States". One of the fears may be that, since the Protocol of this court empowers it to try all cases involving human rights violations on the continent, it will bring an end to Africa's era of political impunity. At the time of this research,¹¹⁹ only 33 AU states out of 55 have signed.¹²⁰ Only eight states have ratified it. Nigeria also signed the Protocol on 22 December 2008 but has yet to ratify it.

¹¹⁷ FD Alemu, *The African Court of Justice and Human Rights: An Opportunity to Strengthen Human Rights Protection*, Grin Publishing, 2014, p. 52.

¹¹⁸ F. Viljoen, *International Human Rights Law in Africa*, Oxford University of Press, 2007, p. 473.

¹¹⁹ October 2024

¹²⁰ Available at: <<https://au.int/sites/default/files/treaties/36396-sl-PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf>>. Last accessed 12/10/2024

Making the benefits of the court realisable for internally displaced women is mostly dependent on the willingness of Nigeria, in this instance, to embrace the core values of the African human rights system that the court is intended to serve. Although the principle of *stare decisis*¹²¹ does not hold much sway in international law,¹²² it is expected that the decisions of the African Court will be of persuasive authority in domestic jurisprudence of the countries that are not party to it. Potentially, the domestic courts will be strengthened in the application and interpretation of international law as a result. Above all, there will be a measure of guarantee that there will be redress for IDPs and deterrence to the perpetrators. Accordingly, this will promote and strengthen the Nigerian human rights mechanism by guaranteeing citizens state protection and redress under these mechanisms.

6. Conclusion

The conclusion of this article's analysis is that if effective mechanisms were to be in place at the regional level of the AU, human rights protection could become realisable for the vulnerable internally displaced women in Nigeria. However, this has to be achieved by ensuring implementation and compliance by national governments. Without this transition, the AU cannot expect to live up to its obligation to respect, protect, and fulfil the rights to which IDPs are entitled in Nigeria and elsewhere on the continent. The present practice is that governments that have defaulted or fallen short of their Charter obligations are cautioned. However, no effective monitoring or enforcement steps are taken, and this has resulted in governments' apathy and impunity towards the perpetrators of abuse. If the present state of affairs continues, there may be no hope for remedy for the growing number of victimised internally displaced women who suffer sexual violence in their supposed places of refuge. Therefore, a more proactive and holistic strategy is required to help them deal with the twin traumas of displacement and sexual violence.

The Commission's combination of fact-finding, diplomatic and public advocacy competencies could benefit the IDPs in Nigeria. This is critical for internally displaced women, who seem overlooked in spite of the pervading sexual violence in the camps. The Commission's norms and standards, developed with the assistance of Special Rapporteurs,¹²³ need to be made more accessible and known to these vulnerable and marginalised women. This is particularly so, given that most of the camps for IDPs in Nigeria are located in rural areas. Additionally, there is a need for an increase in the publicity of the plight of female IDPs and the threats of sexual violence they face. It is hoped that more publicity will prompt the Nigerian Government to take this problem more seriously and address it effectively.

¹²¹ This is a Latin phrase that means "to stand by things decided,". It is a legal principle that directs courts to adhere to previous judgments (or judgments of higher courts) while resolving a case with similar facts.

¹²² Article 59 of the Statute of the International Court of Justice "The decision of the Court has no binding force except between the parties and in respect of that particular case". Available at: <https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf>. Last accessed 22/07/2024.

¹²³ The African Commission has also established several special mechanisms to address specific human rights issues on the continent.

Despite this new laudable dimension to the African human rights system in the form of the African Court, it is clear that states contribute significantly to the system's functioning by adhering to judgments against them. The change that the Court brings is the finality of its judgements and their binding force on states, unlike the Commission's recommendations. The Protocol to the Court provides for the transmission of the Court's judgments to other AU member states¹²⁴ as well as the Council of Ministers¹²⁵, which is charged with monitoring their execution on behalf of the Assembly of Heads of State and Government. It further requires the Court to submit to the Assembly reports detailing instances in which a state has failed to comply with a Court judgment. In our opinion, all of these developments are positive and should serve to increase compliance.

The reality is that the majority of individual complaints will likely first appear before the Commission and then before the ACtJHR when it comes into force. This two-tiered, lengthy justice process may result in delays in the new system. Cases being delayed indefinitely, which is one of the Commission's primary concerns, is likely to undermine the merged court's efficiency. As a result, it will be beneficial to harmonise the Commission's and the Court's rules of procedure in order to resolve this potential conflict. Hopefully, if the identified flaws are addressed, the merged Court will strengthen the regional system and assist it in fulfilling its human rights protection promise.

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¹²⁴ Article 29(1)

¹²⁵ Article 29(2)