

Formulating the Key Aspects of the Human Right to Adequate Housing: The Scenario under African Human Rights System

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Abstract

These days, one may observe great disparities in the formulation of the key aspects of the human right to adequate housing under universal and regional human rights systems. In particular, the sum totality of the disparities in African human rights system led to differences in definition, interpretation, realization and a lack of adequate housing for the majority of urban population in the region. The article argues that there is a normative gap in the African human rights system when compared to universal and other regional human rights systems in formulating the key aspects of the human right to adequate housing. The article concludes that the African human rights system does not properly set the key aspects of the human right to adequate housing even though it adopted the three in one approach, when compared to the universal and other regional human rights systems which do not adopt the same approach.

1. Introduction

The human right to adequate housing is an evolving and at the same time controversial issue in global and regional human rights

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systems. This right was recognized as one of the economic, social and cultural rights which is the component of the right to an adequate standard of living under international human rights law. It has practical importance to make reference to the jurisprudence of the Committee on the Economic, Social and Cultural Rights under the International Covenant on Economic, Social, and Cultural Rights to understand what is meant by 'adequate housing'. According to UN Committee's *General Comment number 4*, UN Doc.12/13/1991, (1991), Paragraph 8, adequate housing means the right to live somewhere in security, peace and dignity comprising: legal security of tenure; availability of services, materials and infrastructure; affordable housing; habitable housing; accessible housing; fitting location; culturally adequate housing. This is the authoritative interpretation of the adequate housing. Hence, adequate housing implies beyond the physical structure of the house the elements of which mainly relate with the human dignity.

Despite the central place of this right within the global legal system, scholarly researches reveal that, over a billion people are not adequately housed; millions live in health threatening conditions or in other conditions which do not uphold their human rights and their human dignity at different parts of the globe. These facts are attributable to the non-compliance of States with internationally set standards of adequate housing and the disparities that exist among regional human rights system in giving emphasis on the key aspects of the human right to adequate housing. The sum totality of these regional disparities led to disparities in definition, interpretation, realization and a lack of adequate housing for the majority of urban population at different corners of the world.

This article will focus on assessing the key aspects of the human right to adequate housing under African human rights system in a

bite comparison with that of universal human rights system. For the purpose of this article, the key aspects of the human right to adequate housing include: normative contents; duties of States; the constituents of violations of the human right to adequate housing; remedies upon the materialization of violations; monitoring the implementation of the housing right; and jurisprudential development on the human right to adequate housing in African human rights context.

The article argues that there are great disparities between the African human rights and universal one in formulating the key aspects of the human right to adequate housing. The article concludes that the African human rights system does not properly set the key aspects of the human right to adequate housing even though it adopted the three in one approach, when compared to the universal human rights system which does not adopt the same approach. The article also argues that the act of reading housing rights into general property right is not desirable as the former one deserves the status of fundamental human right which principally related with human dignity.

For the sake of convenience, the article is divided into six sections. Under section one, the normative frameworks of the human right to adequate housing that include the hard laws; soft laws; and other valuable human rights instruments which touch housing right shall be scrutinized. The next section discusses the state duties towards the human right to adequate housing. Section three shall scrutinize what acts of commission or omission constitute violations of the human right to adequate housing. Section four discusses the possible remedies where the violations of the right under consideration materialize. Section five duly probes the effectiveness of tracking system that can be categorized as the monitoring organs and monitoring mechanisms for the implementation of the right. The last section shall examine the

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dilemma of the justiciability issue and the desirability of reading housing right into general property right. Finally, the article winds up with conclusions.

2. Normative Frameworks

One may encounter difficulty to define the concept 'normative'. By taking its root word 'norm' one may define it as generally accepted principles that are normal in certain society. By the same token, 'normative' is meant to setting standards which is considered normal in a community. It follows, therefore, that normative content otherwise normative framework in a sense means setting acceptable standard of the human rights to adequate housing in African human rights arena. Hence, this section of the article tries to scrutinize the extent to which the African human rights system focuses on the human right to adequate housing through its normative frameworks. These normative frameworks may include: the hard laws; soft laws; and other valuable human rights documents.

A. African Charter on Human and Peoples' Rights

The regional African human rights system is based on the African Charter on Human and Peoples' Rights.¹ Normatively, the African Charter is an innovative human rights document which substantially departs from the narrow formulations of other regional and universal human rights instruments² in incorporating all generations of human rights in a single human rights instrument. Furthermore, the advantage of African Charter is that, under its *Articles 60 and 61*, the African Human Rights Commission has the mandate to go beyond the charter rights to look at international standards so as undertake its mandate. It follows therefore that, there is hardly a right at international level

¹.Makau Mutua, *the African Human Rights System: A Critical Evaluation*, State University of New York at Buffalo Law School, p.1

².Ibid,

that cannot be subject to protection in the African system at least in theory.

When we come to the issue under consideration, the African Charter on Human and Peoples' Rights makes no specific mention of the right to adequate housing. But, reference can be made to other provisions of the Charter within the meaning of African Commission's jurisprudence which include: *Articles 14*(right to property), *16*(right to right to health) and *18(1)* (right to family life, women, children and persons with disability). But, this article counter argues whether it is sound to equate housing right with that of general property right which shall be addressed under section six, item '*jurisprudential development*' of the human right to adequate housing. However, this does not amount to denial of the natural link among housing right and right to health, right to life, right to family, women, children and others.

B. The Additional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)

The African Women's Protocol is the first African regional human rights treaty to provide specifically for a range of women's rights including housing right. The significance of the African Women's Protocol was borne out of the fact that guaranteeing of women's rights constitutes one of the major problems within the African States. This fact can be inferred from concluding observations on the periodic reports of many African State parties to the UN Convention on the Elimination of All forms of Discrimination against Women (herein after CEDAW.)³ This similar concern has been magnified in the preamble of this Protocol that:

³.Concluding Observations of the CEDAW Committee on Guinea, 31 July 2001, A/56/38 at Paras 97-144 ('The Committee expresses concern about the existing gap between the *de jure* and *de facto* equality of women and men and the persistence of customary practices that continue to discriminate against

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Despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.”⁴

Substantively, the Protocol covers a broad spectrum of women's rights, among which is the right to adequate housing. Accordingly, Article 16 of the Protocol provides “*Women shall have the right to equal access to housing and To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.*”⁵ Unlike the universal and other regional human rights systems which grant the housing rights to ‘everyone’,⁶ this instrument protects the housing rights of specific group of persons- women

women’ (Para. 120)); Concluding Observations of the CEDAW Committee on Egypt, 2 February 2001, A/56/38 at paras 312–58 (‘The Committee notes with concern that the persistence of cultural stereotypes and patriarchal attitudes impedes progress in the implementation of the Convention and the full enjoyment of their human rights’ (Para. 332)); Concluding Observations of the CEDAW Committee on South Africa, 30 June 1998, A/53/38/Rev.1 at paras 100–37 (‘The Committee ... notes with concern the continuing recognition of customary and religious laws and their adverse effects on the inheritance and land rights of women and women's rights in family relations’ (par. 117)); and Concluding Observations of the CEDAW Committee on Ethiopia, 9 May 1996, A/51/38 at Paras. 134–63 (‘In addition to the deep-rooted cultural obstacles, the Committee was concerned with still existing discriminatory laws at the national level, as well as persistent discrimination in the family...(and) the issue of widespread female genital mutilation as well as the incidence of violence against women and girls and the insufficiency of measures to eradicate it’ (Pars. 147–8))

⁴. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003, entered into force in 2005., 11th Statement in the preamble.

⁵. Id, Article 16

⁶. Look at for instance *Art.25(1) of the Universal Declaration of Human Rights*, adopted and proclaimed by the United Nations General Assembly in Resolution

C. The African Charter on the Rights and Welfare of the Child

This regional human right document under its *Article 10* entitled “*Protection of Privacy*” provides that “*No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence...⁷*. But, the rationale behind this provision seems procedural protection than setting substantive norms and normative contents of housing right. Hence, the article contends that, this instrument lacks substantive norm pertaining to housing right of children in Africa.

On the other hand, the International Convention on the Rights of the Child/herein after CRC/ protects the child’s housing right under its two articles:

Article 16 (1) states “*No child shall be subjected to arbitrary or unlawful interference with his or her...home or...“and Article 27 (3)* states that “*States Parties in accordance with national conditions and within their means shall take appropriate measures ... particularly with regard to nutrition, clothing and housing*”.⁸

217A (III) on 10 December 1948, that provides: “*Everyone has the right to a standard of living adequate for ... himself and his family, including food, clothing, housing and ... and Art.11(1) of the International Covenant on Social, Economic, and Cultural Rights which reads: “the States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and ...*

⁷. African Charter on the Rights and Welfare of the Child adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU on 11 July 1990, Addis Ababa, Ethiopia, Reference document: OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999, Article 10

⁸. *International Convention on the Rights of the Child*, adopted by the United Nations General Assembly in resolution 44/25 on 20 November 1989, entered into force on 2 September 1990, Articles 16 (1) and 27 (3)

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The first one is procedural protection alike that of African human rights system than substantive definition of the right. Actually, the second provision provides a bite strong substantive right to adequate housing though left the implementation to situations in individual states which weaken the very spirit of the provision. The practical justification is that the states usually insist on the resource availability to enforce socio-economic rights in general and housing rights in particular.

D. Protocol on the Protection and Assistance of Internally Displaced Persons in Africa

This instrument provides under its *Article 4(f)* that member States “ensure the safe location of internally displaced persons, in satisfactory conditions of dignity, hygiene, water, food and shelter,...having regard to the special needs of women, children, the vulnerable, and persons with disabilities;”⁹The causes for displacement can be development-induced displacement (large scale development projects); armed conflicts; situations of generalized violence; violations of human rights; natural or human made disasters.¹⁰ The signatories also made cross-reference to African international obligations under its preamble.¹¹ However, it lacks normative content about what housing right should entail.

E. Convention Governing the Specific Aspects of Refugee Problems in Africa

This convention under its *Art.2(5)* stipulates that “where a refugee has not received the right to reside in any country of asylum, he

⁹. Protocol on the Protection and Assistance to Internally Displaced Persons, 30th Nov 2006, Article 4(f)

¹⁰. Id., Article I(4 and 5)

¹¹. Conscious of the call made by the United Nations Secretary-General in 2005 for the Member States of the United Nations to accept the Guiding Principles on Internal Displacement as the basic international norm for protecting internally displaced persons, and to commit themselves to promote the adoption of these principles through national legislation, paragraph 5

may be granted temporary residence in any country of asylum in which he first presented himself as a refugee"¹² However, the convention fails to convey what the normative contents of the residence should be and it is permissive provision that contradicts the prevalent existing international norm of the right to adequate housing. For instance, International Convention Relating to the Status of Refugees *under its Article 21* protects specific group in strong legal sense which states: "*As regards housing, the Contracting States... shall accord refugees lawfully staying in their territory ...*"¹³

Furthermore, the African Union (AU) Constitutive Act shows a serious departure from the Charter of the Organization of African Unity (OAU) according prominence to human rights in the continent.¹⁴ It provides long list of human rights under its *Article 13*, but has forgotten the already forgotten right-the human right to adequate housing. By the same token, Declaration on Democracy, Political, Economic and Corporate Governance has not touched upon housing right even though the New Partnership for Africa's Development (hereinafter NEPAD) is new initiatives that address every aspect of human life in Africa. It only provides for "allocation of appropriate funds to social sector..."¹⁵ Rather, it focuses on peace and security and it does not define what

13. Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Heads of African State and Government in Addis Ababa on 10 September 1969, entered into force on 20 June 1974, *Article 2(5)*

¹³.International Convention Relating to the Status of Refugees, adopted by the United Nations General Assembly in resolution 429(V) on 28 July 1951, entered into force on 22 April 1954, Article 21

¹⁴.Vincent O. Nmehielle, "the African Union and African Renaissance:" A New Era for Human Rights Protection in Africa? Singapore Journal of International & Comparative Law ,(Vol. 7 pp 412–446), 2003 P.433

¹⁵.Declaration on Democracy, Political, Economic and Corporate Governance, 6th Summit of the New Partnership for Africa's Development (NEPAD) Heads of State and Government Implementation Committee, AHG/235 (XXXVIII), Abuja, Nigeria, (9 March 2003), *Article 20*

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constitutes a social sector. The Addis Ababa Document on Refugees and Forced Population Displacement in Africa also provides that “*the international community, the United Nations, the United Nations High Commissioner for Refugees, and other relevant organizations, should support and assist host Governments ... In particular, to:(ü) provide food, water, shelter,...*”¹⁶ Alike, the universal instruments¹⁷ this document inspires to protect the minimum core of housing right-the right to shelter which the state parties under any economic circumstance are expected to fulfill.

In general, normatively the African human rights system failed to define the human right to adequate housing of ‘everyone’, unlike that of the universal one which defined housing right as “everyone’s” right. It also lacks normative framework on housing rights in African Charter on which the entire system was based for definition, promotion, protection and enforcement of human rights including housing. What if the housing rights have been defined in the African Charter? Would it be peoples’ right or ‘everyone’s’ right? Actually, peoples’ rights can be defined into ‘everyone’s’ right’.

On the other hand, the attempt to inculcate the housing right through different protocols and other instruments subjects to controversy since the African Human Rights Commission did not make single reference in its jurisprudences of housing rights upon entertaining housing issues. It follows therefore that, the issue of normative standard on housing rights seems unsettled issue under

¹⁶.Addis Ababa Document on Refugees and Forced Population Displacement in Africa, Adopted by the OAU/ UNHCR Symposium on Refugees and Forced Population Displacements in Africa 8 - 10 September 1994, Addis Ababa, Ethiopia, *Recommendation 8*

¹⁷.Look at for instance, *Article 25 of the UDHR, and Article 11(1) of ICESCR* which provide the notion of the human right to adequate housing and at the same time states duties to recognize and take measures for its implementation.

African human rights system as the African charter remained without touching, the ever evolving concern throughout the globe. However, thanks to the African Human Rights Commission through its innovative approach tried to close the gap in the SERAC case which the author tries to address under section six of this article.

At the opposite spectrum, the universal human rights system gives deep concern on the human right to adequate housing through hard laws, soft laws like declarations and other international think tanks. For instance, Declaration on Social Progress and Development, under its Part II, *Article 10 (f)* provides that: “*Social progress and development shall aim :...(f) The provision for all, particularly persons in low income groups and large families, of adequate housing ...*”¹⁸. The other instance is Declaration on the Rights of the Child provides that “*the child shall enjoy the benefits of social security. The child shall have the right to adequate nutrition, housing ...*”¹⁹. There are also different General Comments/ Recommendations/ Statements; International Resolutions and Recommendations; International Conference Papers and Reports adopted by UN organs like the Committee on Economic, Social and Cultural Rights (hereinafter CESCR) for the promotion and protection of the rights in the covenant including housing rights.

¹⁸ Declaration on Social Progress and Development, under its Part II, Article 10 (f) provides that: “*Social progress and development shall aim :...(f) The provision for all, particularly persons in low income groups and large families, of adequate housing ...*”

¹⁹ Declaration on the Rights of the Child, proclaimed by the United Nations General Assembly in resolution 1386(XIV) on 29 November 1959, Paragraph 4; See also Declaration on the Elimination of All Forms of Racial Discrimination, was proclaimed by UNGA resolution 1904 (XVIII) of 20 November 1963, Article 3(1);

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3. State Duties in the Absence of Universal Norm

The African Charter provides State duties under its *Article 1* to recognize the rights, duties and freedoms enshrined in the Charter and to adopt legislative or other measures to give effect to them. It also provides general duties under its *Articles 27 through 29*. However, it is difficult to infer state duties on the human right to adequate housing from the normative frameworks as the African Charter does not provide housing right. Similarly, some argue that the language of duties in the Charter is controversial, even though the African Charter takes the view that individual rights cannot make sense in a social and political vacuum, unless they are coupled with duties.²⁰ On the contrary, one may not be quite sure whether the duty imposed on individuals are relevant for the promotion and protection of housing right as it has been missed from the grand document of the system.

In addition, *Article 62* of the Charter provides that member states are obliged to submit reports every two years on legislative and other measures they adopted in order to give effect to the provisions of the African Charter. But, in the wordings of *Makau Mutua*, the Charter does not say to what body the reports are to be submitted, whether, how, and with what goal the reports should be evaluated, and what action should be taken after such evaluation.²¹ To alleviate this practical gap, the African Commission has drawn up national periodic report guidelines²² to help states submit

²⁰. Supra Note 2, Makau Mutua P.8

²¹. Ibid

²². Guidelines for National Periodic Reports under the African Charter, Information concerning the right to housing could include: the principal laws, administrative regulations and collective agreements designed to promote the right to housing, and relevant court decisions, if any; measures taken, including specific programs, subsidies and tax incentives, to expand housing construction to meet the needs of all categories of the population, particularly low-income families; information on the use of scientific and technical knowledge and of international cooperation for developing and improving housing construction,

reports that are clear and detailed enough which resembles the UN treaty bodies. This is the first human right document in African human rights system context that provides detailed information on housing rights to be inculcated in the national periodic report.²³ The African Charter also imposes duty on states to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the Charter, and to see to it that these freedoms and rights as well as corresponding obligations are understood.

But, this article remains concerned whether these general and specific duties are relevant for the protection and promotion of housing right in Africa since the African Charter missed the same. So, unlike the universal human rights system which imposes on States *to take appropriate steps to ensure the realization of this right ...*,²⁴ the African system remains silent about the duties of States on housing right.

In addition, there are topologies of States duties which are incorporated in the *Maastricht Guidelines*,²⁵ that describe State

including safety measures against earthquakes, floods and other natural hazards, para.34

²³. Information concerning the right to housing could include: the principal laws, administrative regulations and collective agreements designed to promote the right to housing, and relevant court decisions, if any; measures taken, including specific programmes, subsidies and tax incentives, to expand housing construction to meet the needs of all categories of the population, particularly low-income families; information on the use of scientific and technical knowledge and of international cooperation for developing and improving housing construction, including safety measures against earthquakes, floods and other natural hazards; para.34. See also Article 25 of the Charter to infer additional duties of states.

²⁴. *International Covenant on Economic, Social and Cultural Rights*, adopted by United Nations General Assembly in resolution 2200A(XXI) on 16 December 1966, entered into force on 3 January 1976, Article 11(1)

²⁵. *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, (1986), Part II, Article 6. For instance, the right to housing is violated if the State engages in arbitrary forced evictions within the meaning of duty to

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parties' duties under International Covenant on Economic, Social, and Cultural Rights (hereinafter ICESCR) into duty to respect, protect and fulfill human rights, housing right inclusive. These are equally important to all rights the failure of which amounts to violation of economic, social and cultural rights (hereinafter ESCR) including housing.

Further, the Committee on Economic, Social and Cultural rights general comments on the right to adequate housing and housing-related issues provide authoritative guidance on the provisions of ICESCR pertaining to duties of States, in particular, its general comment number 1(duty of states to report);²⁶ general comment number 3(the nature of states duties);²⁷ general comment number 4 (the right to adequate housing);²⁸ general comment number 7(forced eviction in the context of housing right)²⁹ general comment number 9(on the domestic application of the Covenant);³⁰ and general comment number 16(equality of men and women in the context of economic, social and cultural rights

respect. The obligation to protect requires States to prevent violations of such rights by third parties. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.

²⁶ .UN Committee on Economic, Social and Cultural Rights, *General Comment No.1, Reporting by States Parties*, UN.Doc.E/1989/22, (1989)

²⁷ .UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3, The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, (1991)

²⁸ . UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4, The Right to Adequate Housing (Article 11 Para.1)*, UN Doc. E/1992/23,(1992)

²⁹ . Committee on Economic, Social, and Cultural Rights, *General Comment No.7, the Right to Adequate Housing*, (Article 11(1)-Forced Eviction, UN Doc.E/1998/22(1998)

³⁰ .UN Committee on Economic, Social and Cultural Rights, *General comment No.9, the domestic application of the Covenant*, UN.Doc. E/C.12/1998/24,(1998)

including housing)³¹ are important jurisprudence those substantiate the realization of housing right worldwide.

These days, the human right to adequate housing is an evolving concern throughout the world and regional human rights fora. As indicated in the preceding paragraph, the international community gave maximum concern for the realization of the right through different valuable legal documents like hard laws, soft laws and different jurisprudences, like general comments, declarations, resolutions and international think tanks which substantiate state duties. As far as the human right to adequate housing under the universal human rights system in comparison to regional systems is concerned, the author communicated other article to publication media entitled “The New Dawn in the Housing Right under the Universal Human rights System”. What is more, the European human rights system seems strong enough to the extent of having common regional regulations that specifically stipulates state duties. From the African human rights perspective, it is quite difficult to find such type of gap filling concerns to address state duties pertaining to housing right. The extent of jurisprudential development on the housing rights in the African regional context will be dealt in detail fashion under section six of this article.

4. Constituents of Violations of the Human Right to Adequate Housing

As far as the violations of human rights are concerned, inference can be made from state duties illustrated under Section two above. So, where a state party fails to recognize the rights, duties and freedoms enshrined in the Charter and fails to adopt legislative or other measures; fails to report; fails to promote and ensure human

³¹ .UN Committee on Economic, Social and Cultural Rights, *General Comment No. 16*, the Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, Thirty-fourth session, Geneva, 25 April-13 May 2005(2005)

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rights; fails to guarantee judicial independence, it is apparent violation of human rights. But, one may not be quite sure whether these constituents of violations are applicable to the human right to adequate housing as the entire protection, interpretation and promotion of human rights in Africa are based on the African Charter on Human and Peoples' Rights which missed the right at stake.

However, some texts express concerns that urban beautification; renewal schemes; private companies; and dam projects are prevalent sources of violations of housing right and land rights next to conflict and war especially in relation to forced evictions.³² These latter grounds of violations are confirmed by the jurisprudence of the African Commission on human and peoples' rights as will be addressed under section six of this article. On the contrary, the universal human rights system, through its jurisprudence of the *Maastricht Guidelines* on Violations of Economic, Social and Cultural Rights provides a great deal of clarity as to which 'acts of commission' and 'acts of omission'³³ would constitute violations of the ICESCR, including housing right.

A further point is that, the CESCR issued through its jurisprudential mandate two general comments so as to alleviate both conceptual and practical problems of housing right violations. For instance, the committee considers that instances of forced eviction are *prima facie* incompatible with the requirements of the ICESCR and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of

³².Joseph Schechla et al...Housing and Land Rights Crisis!, Violations Escalating Around the World, Habitat International Coalition(HIC),*and Housing and Land Rights Network(HLRN)*, 2008, p.8

³³.Supra Note 26,*Maastricht Guidelines*, Articles 14(a-g) acts of commission and 15(a-j) acts of omission

international law.³⁴ The committee also concerned that forced evictions occur in both peacetime and in the context of armed conflict.³⁵ The UN Commission on Human Rights in 1993 concluded that “forced evictions are a gross violation of human rights, in particular the right to adequate housing.”³⁶ According to the findings of NGO report, the data available on forced evictions and contained in the Violation Database (hereinafter VDB) indicate that more than 78 million people remained evicted and forcibly displaced globally as of 6 October 2008.³⁷ Hence, it seems difficult to grasp what constitutes violations of the human right to adequate housing under African human rights system.

5. Remedial Actions for Violations of Housing Right

This component designed to understanding human rights in general and housing right in particular where a violation of its normative content or a violation against a state duty takes place. Questions relating to the domestic application of international human rights standards must be considered in line with two principles of international law.³⁸ The first is reflected in *Article 27* of the Vienna Convention on the Law of Treaties that states:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’ and the second one is in Article 8 of the UDHR which states ‘everyone has the right to an effective remedy by the competent national tribunals for acts violating the

³⁴. Supra Note 29, *General Comment No. 4*, paragraph, 18.

³⁵. Supra Note 30, *General Comment No.7*, paras.5-6

³⁶. U.N Commission on Human Rights, Forced Eviction, UNDocE/CN.4/RES/1993/77, Adopted at 67th meeting, 10 March 1993, Para. 1,

³⁷. Habitat International Coalition (HIC), and Housing and Land Rights Network (HLRN), *Housing and Land Rights Crisis! Violations Escalating around the World*, 2008, p.7

³⁸. Vienna Convention on the Law of Treaties Article 27 and Article 8 of Universal Declaration of Human Rights

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fundamental rights granted him by the constitution or by law'.³⁹

On the other hand, the second international principle pertaining to the right to a remedy for victims of violations of international human rights and humanitarian laws are contained in numerous international instruments other than the one indicated above. For instance, *Article 2(3) (a-c)* of the International Covenant on Civil and Political Rights (hereinafter ICCPR)⁴⁰ and *Article 6* of the International Convention on the Elimination of All Forms of Racial Discrimination provide for two mechanisms of safeguarding human rights, effective protection and effective remedy⁴¹. Furthermore, *Article 14(1 and 2)* of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides for redress and reparation as aspects of remedy.⁴² Unlike these international human rights instruments, the ICESCR does not provide for remedies for the violations of economic, social, and cultural rights including housing.

On the contrary, all the above human rights documents do not provide international remedies. It is undeniable that international remedies are complementary to national ones. That is to mean the primary arena for the enforcement of human rights remains that of domestic law. That is why in most international procedures the

³⁹. *Article 27* of the Vienna Convention on the Law of Treaties

⁴⁰. *International Covenant on Civil and Political Rights*, adopted by the UN General Assembly in resolution 2200 A (XXI) of 16 December 1966 at New York, entered into force on 23 March 1976, Article 2(3)(a-c)

⁴¹. *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted by the UN General Assembly in resolution 2106 A (xx) of 21 December 1965 at New York, entered into force on 4 January 1969, Article 6

⁴². *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the UN General Assembly in resolution 39/46 of 10 December 1984 at New York, entered into force on 26 June 1987, Article 14(1&2); See also UN CESCR, General Comment No.9, Para.3

exhaustion of local remedy becomes a prerequisite to initiate international proceedings. To fill the gap of provision of remedies in the ICESCR, the *Maastricht Guidelines* were devised and asserted that:

*Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.*⁴³

In addition, to address such evolving substantive and procedural justice, the United Nations has developed the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Laws.⁴⁴ This document also provides for scheme of arrangement for the reparation for harm suffered.⁴⁵

The CESCR also adopted a General Comment number 9 dealing with the domestic application of the rights enumerated in the ICESCR that provides "... *the obligation upon each State party to use all the means at its disposal ... Thus ... appropriate means of redress, or remedies must be available to any aggrieved individual or group, ...*"⁴⁶ Furthermore, the Committee on socio-economic rights provided long list of component elements of the right to

⁴³. Supra Note 34, *the Maastricht Guidelines*, Para. 22

⁴⁴.United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN.Doc.A/RES/60/147, (2006).For instance, look at among others Part I, Principle 1 which stipulates obligation to respect means to ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from: Treaties to which a State is a party; Customary international law; The domestic law of each State.

⁴⁵.Ibid, that include restitution, principle 19;compensation, principle 20;rehabilitation, principle 21; satisfaction, principle 22;and guarantee for non-repetition, principle 23

⁴⁶.Supra Note 31, General comment No.9, Para.2

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adequate housing as being at least consistent with the provision of domestic legal remedies actually depending on the legal system.⁴⁷ Hence, by reading the international human rights instruments, guidelines, principles, the jurisprudence of the CDESCR, the victims of housing violations can have two remedies: national, where it fails, international even though the extent of implementation is potentially different.

When we come to African human rights system, the issue of remedy remains controversial. According to some scholar, neither the Charter nor the Commission provides for enforceable remedies or a mechanism for encouraging and tracking state compliance with decisions as the publication of the African Commission's decisions takes place only after they have been submitted to the AU Assembly and endorsed accordingly.⁴⁸ But, the writer of this article is not quite sure whether the African human rights Commission failed to provide enforceable remedies. It is palatable evidence to see the jurisprudences of the commission especially at the end of its every decision that usually provides for enforceable remedies against the states parties to the case. Rather, it is sound to argue that the normative framework of the system does not provide for enforceable remedy.

6. Monitoring of the Human Right to Adequate Housing

The concern of monitoring has two aspects: the monitoring organs that are empowered to scrutinize the realization of the human right

⁴⁷.Supra Note 35, *General Comment No. 4* paragraph, 17.They include but not exhaustive, legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; legal procedures seeking compensation following an illegal eviction; complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; allegations of any form of discrimination in the allocation and availability of access to housing; and complaints against landlords concerning unhealthy or inadequate housing conditions.

⁴⁸. Supra Note 21, Makau Mutua, p.18

to adequate housing and the monitoring system. This later concern is a litmus paper through which the States parties are checked against. The following sub-sections address the types of monitoring organs and the efficacy of the African human rights system in checking states performance of enforcing human rights in general and housing right in particular.

A. Monitoring Organs

The African Union is based on the Constitutive Act which enumerates the nine principal organs of the AU. They include the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Economic, Social and Cultural Council, the Specialized Technical Committees and the Financial Institutions.⁴⁹ But, this article prefers to discuss only the monitoring roles of two organs of the Union for relevancy purpose: the African Commission on Human and Peoples' Rights and the African Court of Human and Peoples' Rights.

I. The African Commission on Human and Peoples' Rights

The African Charter (hereinafter ACHPR) is implemented by the African Commission which is established under Article 30 of the Charter. The African Charter provides for the African Commission with three principle functions: examining state reports that *Articles 62 and 47* of ACHPR stipulate, considering communications alleging violations of human rights from both individuals and States parties which *Articles 47 and 55* ACHPR provide and interpreting provisions in the African Charter that *Article 45(3)* ACHPR manifests. These functions have resemblance with other regional and universal human rights

⁴⁹.Constitutive Act of the African Union, Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government 11 July, 2000 - Lome, Togo, *Article 5(1)*

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bodies. *Nmehielle* appreciates that, the most attractive function of the Commission, was the assumption of jurisdiction over individual complaints under *Article 55* of the Charter even though that provision deals with “*other communications*”. That is to mean, the Commission assumed power to receive individual petitions, communications, or complaints which the Charter does not specifically refer to.⁵⁰

However, the potential of African tracking system of human rights remains controversial. For instance, *Claude* argues that the African Commission is a quasi-judicial body and the states’ track record of enforcing its decisions has been poor. This has been hampered by some constraints. Among the constraints *Claude* mentions some: its recommendations are not legally binding since they cannot be published without permission from the AU Assembly of Heads of State and Government; the African Commission’s lack of visibility on the continent to the wider public and its inadequate resources.⁵¹ To alleviate such practical problems, the African Commission has taken some steps which have the potential to increase its impact on states. Pursuant to the Revised Rules of Procedure of the African Commission, the commission appointed thematic Special Rapporteurs, following the practice of the UN Commission on Human Rights.⁵² It has also created thematic working groups such as the Working Group on Economic, Social and Cultural Rights in Africa; the Working Group on the Death Penalty; or the Working Group on the

⁵⁰. Supra Note 15, Vincent O. Nmehielle, p.423

⁵¹. Claude Cahn, Slums, the Right to Adequate Housing and the Ban on Discrimination, the Equal Rights Trust Review, vol.1(2008), accessed from: www.equalrightstrust.org, on 18 July 2013, p.4

⁵². Olivier De Schutter, International Human Rights Law: Cases, Materials, Commentary, Cambridge University Press, 2010, web site www.cambridge.org, last visited October 14, 2013, p.948 .On issues such as prisons and conditions of detention in Africa; human rights defenders in Africa; refugees and displaced persons in Africa; or the rights of women in Africa

Situation of Indigenous Peoples/Communities in Africa⁵³ based on the same rules of procedure.

The AU Constitutive Act also tried to establish the Executive Council composed of Ministers of Foreign Affairs which resembles the European Committee of Ministers under its *Article 10*, which is empowered it to coordinate and take decisions on policies and monitor the implementation of policies formulated by the AU General Assembly in areas of common interest to the Member States as per *Article 13* of the same. However, among the long list of the human rights of common interest housing right has been missed.

It follows therefore that, unlike that of the universal human rights system, there is no indication of the promotion and protection of the housing right, by the instrumentality of these special procedures in the African regional system. That is to mean, where the universal system has special rapporteur on the right to adequate housing which is effective through its mission and annual reports, the African regional human rights system has no such special procedures. For instance, report document of the special rapporteur on the right to adequate housing provides that the special procedures are a way for the Human Rights Council to be constantly engaged on an issue of concern throughout the year. These special procedures are most commonly either an individual, called a 'special rapporteur,' a 'representative' or an 'independent expert', or a group of individuals, called a 'working group'.⁵⁴ Although their mandates vary, they usually monitor, examine and report publicly on human rights situations in either specific

⁵³. Ibid, Olivier De Schutter

⁵⁴. UN HABITAT and Office of Higher Commissioner for Human Rights(OHCHR), Indigenous Peoples' Right to Adequate Housing: A Global Overview, United Nation Housing Rights Report No.7, 2005)(<http://www.unhabitat.org/>),Last visited July 13, 2013, p.162

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countries or on major thematic human rights issues worldwide.⁵⁵ This report details that, the Special Rapporteur's methods of work include conducting country missions;⁵⁶ investigating issues of concern; reviewing communications from individuals or groups alleging violations of the right to adequate housing and intervening, when appropriate, with Governments in connection with alleged violations; and reporting annually to the General Assembly and the Human Rights Council.⁵⁷ Accordingly, unlike the African human rights system, the special rapporteurs on adequate housing⁵⁸ have played a major role in defining the human right to adequate housing, monitoring and in researching the problems of inadequate housing worldwide under the universal system.

⁵⁵.Miloon Kothari, Economic, Social and Cultural Rights, Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mission to Peru, E/CN.4/2004/48/Add.1,11 February 2004, P.45

⁵⁶. For instance, at the invitation of the Government, the Special Rapporteur conducted a mission to Canada from 9 to 22 October 2007. The visit focused on four areas: homelessness; women and their right to adequate housing; Aboriginal populations; adequate housing and the possible impact of the 2010 Olympic Games on the right to adequate housing in Vancouver, look at his mission report- Human Rights Council Tenth session, Agenda item 3, A/HRC/10/7/Add.3 ,17 February 2009.He has also carried out many missions and visits to countries such as Romania, Mexico, Afghanistan, Kenya, Brazil, Iran, Cambodia, Australia, Spain and South Africa. Look at also mission report to Peru, E/CN.4/2004/48/Add.1,11 February 2004

⁵⁷.Supra Note 56,Miloon Kothari

⁵⁸.In 1993, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities under the Commission on Human Rights, appointed a Special Rapporteur on promoting the realization of the right to adequate housing- Mr. Rajindar Sachar who prepared four detailed reports and concluded his work in August 1995.In 2000, the Commission on Human Rights appointed Mr. Miloon Kothari of India as Special Rapporteur of the Commission whose mandate focuses on adequate housing as a component of the right to an adequate standard of living. His successor, Raquel Rolnik of Brazil, was appointed in 2008 by the Human Rights Council ,in United Nations Housing Rights Program Report No. 1, Housing rights legislation, Review of international and national legal instruments, Series of publications in support of the Global campaign for Secure Tenure No. 05, Kenya, Nairobi, 2002, (<http://www.unhabitat.org/unhrp/pub>), last visited July 10,2013, P.10

II. African Court of Human and Peoples' Rights

The universal human rights system has no judicial controlling organ on the human rights in general and housing right in particular. The only monitoring organ on the human right to adequate housing right is that the CESCR established under the ICESCR which plays the quasi-judicial power. On the contrary, both the European⁵⁹ and the inter-American⁶⁰ human rights systems give the impression that a human rights court is an indispensable component of an effective regime for the protection of human rights.⁶¹ On the other hand, the African regional system has deficiency as it lacks strong judicial system and both the norms in the African Charter and the African Commission itself have been regarded as weak and ineffectual. Such practical gap was intended to be filled by the African Human Rights Court since the commission is chronically under-resourced and independence has also been a problem.⁶² But, it is difficult to find the jurisprudence of the court on human rights in general and housing rights in particular where there are vast bad opportunities for the violation of human rights. The second reason might be those under section 'C' below.

⁵⁹.The permanent European Court of Human Rights was established by Protocol No. 11 to the European Convention that came into force on 1 November 1998 which has substantially changed European human rights system.

⁶⁰.The Inter-American Court of Human Rights came into being in 1979 following the entry into force of the American Convention on Human Rights (herein after ACHR). The Court is the supreme judicial organ established by the American Convention and exercises both contentious (*Article 61* of ACHR) and advisory jurisdiction (*Article 64* of ACHR).

⁶¹.Dankwa,V.Flinterman, C., &Leckie, S. "Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", *Human Rights Quarterly*, 705-708,Vol. 20(3), (1998) ,in Laurie-Ann S. Jackson,p.34

⁶².Sonya Sceats, *Africa's New Human Rights Court: Whistling in the Wind?* The Royal Institute of International Affairs(2009),accessed from:www.chathamhouse.org.uk,on Nov 10,2013,p.4

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III. African Court of Justice and Human Rights

Through passage of time, the African Court of Justice and Human Rights/Permanent Court/ was necessitated. The grand reason was due to the project designed to merge the two courts. Accordingly, in July 2004 the African Union (herein after AU) Assembly agreed to merge the two courts.⁶³ So, the merged court is supposed to be the principal judicial organ of AU which would have two sections: disputes on breaches of States' obligations and a human rights section.⁶⁴ However, the judicial system is not functional, since sufficient numbers of African States are yet to ratify the protocol that merged the two courts.

Hence, unlike the Universal human rights system which has a bit strong quasi-judicial organ and Inter-American and European regional human rights systems which have strong judicial organs, the lack of strong judicial organ and the absence of express normative framework of the housing right in the grand Charter put negative impetus on the definition, promotion, protection and jurisprudential development of housing right in the context of African human rights system.

B. Monitoring Mechanisms

Alike that of the universal human rights system, the African human rights system has two monitoring mechanisms: reporting and complaint mechanisms.

I. National Periodic Reports

Upon considering a national periodic report, the Commission on Human and Peoples' Rights communicates its comments and

⁶³.Supra Note 52, Claude Cahn, Slums, p.60, accordingly, the protocol establishing a merged court called African Court of Justice and Human Rights was finally adopted by the AU Assembly at the 11th AU Summit in June-July 2008, the earlier protocols are replaced by this new protocol, but the liquidation of the former court has been suspended.

⁶⁴.Supra Note 63, Sonya Sceats, p.7

general observations containing recommendations to the state in question which follows the pattern of universal human rights bodies.⁶⁵ But, unlike the universal one, the one who goes through the comments and general observations of the commission may encounter difficulty to find a single touch of housing right. Most of the common concerns of comments and general observations focus on: Prohibition of torture, cruel, degrading or inhuman punishment and treatment; Issue of HIV/AIDS; domestication and ratification of international human rights instruments; prison conditions that violate international standards and African Charter; failure to promote the culture of respect of human rights; peace and security; and failure to involve more NGOs and civil society actors and other partners in the process of implementing regional and international instruments; inadequate measures to fight poverty, and to cater corruption; abolition of corporal punishment as it constitutes a violation of *Article 5* of the African Charter; and the continued existence of child soldiers.⁶⁶ So, one who goes

⁶⁵. Supra Note 49, Makau Mutua, ,p.21

⁶⁶.Comments to Sudan's 4th and 5th Periodic Report to the African Commission on Human and Peoples' Rights) April 2012;Concluding Observations and Recommendations on the Consolidated 2nd to 10th Periodic Report of the United Republic of Tanzania, Adopted at the 43rd Ordinary Session of the African Commission on Human and Peoples' Rights held from 7 to 22 May 2008, Ezulwini, Kingdom of Swaziland; Concluding Observations on the Periodic Report on Cameroon, presented to the 39th Ordinary Session African Commission on Human and Peoples Rights, held in Banjul, The Gambia from 11-25 May, 2005.); Concluding Observations on the Consolidated Report of the Democratic Republic of Congo (DRC), at the Commission's 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November, 2003);Concluding Observations of the African Commission *on Human and Peoples' Rights* on the Initial Report of the Republic of Kenya, *adopted at its 41st Ordinary Session held in Accra, Ghana from 16- 30 May 2007*); Concluding Observations and Recommendations on the Eighth Periodic Report of the Republic of Rwanda (2002-2004), Adopted at the 42nd Ordinary Session of the ACHPR held from 14 November to 28 November 2007, Brazzaville, Republic of Congo);Concluding Observations of the African Commission on the Initial Report of the Republic of Seychelles, at 39th ordinary session in Dakar, Senegal; Concluding observations and recommendations on the First Periodic Report of the Republic of South Africa, Adopted at the 38th Ordinary

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through the comments and general observations of the African human rights commission may not apparently grasp the concerns of the human right to adequate housing under the tracking system of African human rights.

Furthermore, as it holds true in other regional human rights systems, a major problem that hampers the effectiveness of monitoring through reporting mechanism in Africa human rights system is the sheer failure of states to submit their reports when due; even when states do submit reports, they frequently fail to send competent representatives to present such reports; the African Commission lacks any effective follow-up mechanism on its recommendations, as no clear device exists to ensure or monitor what the affected state does with the recommendations; and finally the low level of understanding of economic, social and cultural rights among state parties and civil society groups, the integrative human rights approach has been a retarded experience within the African regional system are the major factors.⁶⁷ That is to say, the follow up mechanism by the monitoring organs and civil society in Africa give more focus on civil and political rights. Thus, reporting mechanism of monitoring human rights in general and housing right in particular is not promising these days in Africa. Hence, there should be a paradigm shift towards developing constructive dialogue⁶⁸ and forwarding expert

Session of the ACHPR held from 21 November to 5 December 2005 in Banjul, The Gambia);Conclusive Observations on the Periodic Report of the Republic of Sudan *Presented to the 35th Ordinary Session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia, from 21st May to 4th June 2004*;Final Observations on the Presentation of the First Periodic Report of the Republic of Togo to the 31st Ordinary Session of ACHPR 2-16 May 2002, Pretoria, South Africa)

⁶⁷. Dejo Olowu, *An Integrative Rights-Based Approach to Human Development in Africa*, Pretoria University Law Press (PULP), (2009), (www.pulp.up.ac.za), Last Visited 14 November 2012, P.61

⁶⁸.Supra Note 27, *General Comment No.1, Para 2*. In addition to the reporting mechanism, the CESCR strives to develop a “constructive dialogue” with States

assistance⁶⁹ alike the universal trend through providing professional advisory services program designed to assist in the preparation of reports.

However, it does not mean that the universal human rights system achieved the maximum perfection through the reporting system in realizing housing right. That is to mean, States have regularly been late or failing in submitting their reports to the human rights treaties expert bodies for which *Schutter* identified two grand reasons: administrative incapacity including a lack of specialist expertise or lack of political will, or a combination of both.⁷⁰ So, the willingness of states parties to put such findings on the ground has great disparity throughout. Secondly, since the monitoring mechanism through reporting utilizes simple calling and shaming techniques of enforcement, that might be common problem throughout.

Parties submitting periodic reports outlining the legislative, judicial, policy and other measures which they have taken to ensure the enjoyment of the rights contained in the ICESCR.

⁶⁹. Harmonized Guidelines on reporting (Harmonized Guidelines on Reporting under the International Human Rights Treaties, including Guidelines on a Common Core Document and treaty-specific targeted documents (HRI/MC/2005/3, 1 June 2005)) which provides the elimination of reporting and its replacement by detailed questions to which answers must be given; the preparation of a single consolidated report to satisfy several different requirements; and the much wider use of a more professional advisory services program designed to assist in the preparation of reports.

⁷⁰. *Supra* Note 53, Olivier De Schutter, P.803. But, various solutions are devised, according to this author which include: the elimination of reporting and its replacement by detailed questions to which answers must be given; the preparation of a single consolidated report to satisfy several different requirements; and the much wider use of a more professional advisory services program designed to assist in the preparation of reports that is provided under harmonized guidelines on reporting (Harmonized Guidelines on Reporting under the International Human Rights Treaties, including Guidelines on a Common Core Document and treaty-specific targeted documents (HRI/MC/2005/3, 1 June 2005))

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II. Activity Report

The African commission on human and peoples' rights is empowered to issue activity report that must get the prior consent of Assembly of Heads of State and Government for its publication as per *Article 59(3)* of the ACHPR. So, alike that of its comments and general observations which should pass through the same scrutiny for its publication, both the activity report and its comments and general observations are equally less important to develop fertile jurisprudence for the realization of housing rights, unlike that of universal human rights system, which has autonomous publication.

III. Complaints

The African Commission on human and peoples' rights is empowered to entertain both individual and inter-state complaints. As far as the individual communications are concerned, they may be filed not only by the direct victims of the violation or by their duly mandated representatives, but also by any individual or organization as per *Article 55* of ACHPR.

In practice, most communications filed with the Commission on the issue of housing right were authored by non-governmental organizations of northern origin.⁷¹ On the other hand, in certain activity report of the Commission, it was indicated that the Commission has given observer status for fourteen NGOs most of which are African origin.⁷² The African NGOs seem to give due

⁷¹.For instance, the land breaking case of SERAC initiated by the Social and Economic Rights Action Center (SERAC), & the Center for Economic and Social Rights (CESR), Vs. Nigeria, the later is a New York-based, non-governmental organization devoted to the promotion of economic and social rights on a global scale; In the case of Centre on Housing Rights and Evictions vs. The Sudan, Communication No.296/05, the initiator is a Washington based NGO having observer status with the African Commission.

⁷².African Commission on Human and Peoples' Rights (ACHPR), 25th Activity Report that covers the period May – November 2008, in Abuja, the Federal Republic of Nigeria, Para.57.

account to civil and political rights than to socio-economic rights including housing. Concerning the universal one, it is difficult to talk on the complaint mechanisms since the protocol that created the system is recent. That is to say, on 10 December 2008 the General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the General Assembly adopted resolution A/RES/63/117, on 10 December 2008. Hence, after 5 May 2013 when the Optional Protocol to the ICESCR entered into force, the CESCR would have three additional monitoring mechanisms: Individual Complaint, interstate communications and inquiry procedure which are envisaged under the Optional Protocol Articles 2, 10 and 11, respectively.

7. Jurisprudential Development/Development of Case Law/

This section is more concerned with the issue of the justiciability of economic, social and cultural rights in general and housing right in particular. But, before indulging into the issue whether housing right is justiciable or not, it is convenient to define what is meant by justiciability. Justiciability is concerned with the amenability of a cause or matter to litigation. For instance, a determination that a claimed right is recognizable in courts or quasi-judicial bodies, using the normal procedures of litigation.⁷³ *James* argues that, traditionally, there has been hostility towards the judicial enforcement of socio-economic rights since they involve complex resource allocation so that best suited for decision by the democratically elected law makers.⁷⁴ This author admits, however that the argument is traditional which the current jurisprudence does not promote.

⁷³.Modibo Ocran, "Socio-Economic Rights in the African Context: Problems with Concept and Enforcement," Loyola University Chicago International Law Review, Review Symposium,(Volume 5, Issue 1, Feb. 15, 2007),p.4

⁷⁴.Asha P James, *the Forgotten Rights - The Case for the Legal Enforcement of Socio-Economic Rights in the UK National Law*, (2007), p.4

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By the same token, *Brennan* contends that the rampant criticisms of socio-economic rights have often focused on courts' inability to play such an important role in the adjudication and enforcement of socio-economic rights.⁷⁵ *Verma* strengthens this line of argument in that while it is argued in theory that ESCRs are not justiciable, there is sufficient case law to demonstrate otherwise and to illustrate the potential for future legal action against the violation of the same.⁷⁶ *Nowak* substantiates the above arguments in a universal sense that human rights treaties and conventions are living instruments, constantly developed through the jurisprudence of the international courts and expert bodies responsible for international monitoring which have given the initial standards dynamic interpretations far beyond their original meanings, adapting their provisions to current situations.⁷⁷

Furthermore, *Ssenyonjo* supports this argument in that, unlike *Article 2* of the ICCPR, *Article 2* of the ICESCR is weak with respect to implementation.⁷⁸ According to *Ssenyonjo*, to remedy such legal gap the groups of experts in international law adopted

⁷⁵. Mariette Brennan, "to Adjudicate and Enforce Socio-Economic Rights:" South Africa Proves that Domestic Courts are Viable Option, OUTLJJ, (Vol. 9 No 1, 2009), p.81)

⁷⁶. Shivani Verma, Justiciability of Economic, Social and Cultural Rights Relevant Case Law, International Council on Human Rights Policy, Review Meeting, Rights and Responsibilities of Human Rights Organizations, Geneva (15 March 2005),p.13.This author by making reference to various reports of Commission on Housing Rights and Evictions(COHRE) and brings the practical instances of the justiciability of ESCR. According to this author, evictions have been prevented in the Dominican Republic and compensated in Serbia Montenegro.

⁷⁷. Manfred Nowak, Human Rights: A Handbook for parliamentarians, UN High Commissioner for Human Rights and Inter-Parliamentary Union, No.8(2005),(www.ohchr.org) and (www.ipu.org), last visited April 23, 2013,P.20

⁷⁸. Manisuli Ssenyonjo, "Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law," The International Journal of Human Rights, (Vol. 15, No. 6, August 2011), (<http://www.tandfonline.com/loi/fjhr20>),last visited June 11,2013,p.976

the *Limburg Principles* on the implementation of the ICESCR in 1986 and the *Maastricht Guidelines* on Violations of Economic, Social and Cultural Rights in 1997. The author adds that the CESCR has also, in numerous General Comments⁷⁹ and statements, spelt out the content of state obligations, developed historic jurisprudence and individual/group rights under the ICESCR. Furthermore, the committee has used the general comments as a means of developing a common understanding of the norms by establishing a prescriptive definition and normative contents of the human right to adequate housing.⁸⁰ These general comments have jurisprudential values in the current situations of the world. For instance; the African commission on human and peoples' rights which is the regional quasi-judicial organ⁸¹ sites these documents while rendering decision as if they are binding.

When we come to the African human rights system, the African Charter on Human and Peoples' Rights provides for a comprehensive guarantee of the full range of human rights, including economic, social, and cultural rights alongside civil and political rights, without drawing any distinction between justiciability which makes all rights subject to a right of individual complaints.⁸² On the contrary, the African Commission did not develop comprehensive jurisprudence under the African Charter on ESCR. That is to mean from the perspective of plenty of factors which potentially contribute to the violation of the housing right, one cannot find case laws on the same issue. For instance,

⁷⁹.For instance look at, *General Comments No.4* (the right to adequate housing), *General Comment No. 7*(forced eviction in the context of housing right), and *General Comment No.16*(equality of men and women in the context of economic, social and cultural rights including housing)

⁸⁰.Supra Note 64,Claude Cahn,Slums, ,p.60

⁸¹.Look at the Social and Economic Action Rights Centre(SERAC)vs. Federal Republic of Nigeria, Communication No.155/96,at 30th ordinary session held in Banjul, the Gambia from 13th to 27th October 2001,*Para. 63*

⁸².Supra Note 79,Manisuli Ssenyonjo, p.973

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the prevalent existence of war, conflict, violent actions by the government forces while dealing with the civil war, persistent conflict among different ethnic groups have had the probability of increasing case laws on housing.

Nonetheless, in the *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, the African Commission demonstrated the practical application of the principle that the African Charter provisions on ESC rights are justiciable.⁸³ In that case, the African Commission ruled that the military government of Nigeria has massively and systematically violated the right to adequate housing of members of the Ogoni community guaranteed under *Article 14* (the right to property) and implicitly recognized by *Articles 16* (right to health) and *Article 18* (right to family) of the African Charter on Human and Peoples' Rights, by destroying their houses and other structures.⁸⁴

By the same token, in the *Endorois case*, the African Commission on Human and Peoples' Rights relied on the substantive content of the right to adequate housing and has held that there is an implied right to adequate housing and related prohibition on forced eviction in *Article 14* (right to property), *Article 16* (right to enjoy the best attainable standard of physical and mental health) and *Article 18(1)* (right of the family to be protected by the State) of the African Charter.⁸⁵

⁸³. Ibid Manisuli Ssenyonjo

⁸⁴. *Social and Economic Action Rights Centre (SERAC) and the Center for Economic and Social Rights vs. Federal Republic of Nigeria*, Communication No.155/96, at 30th ordinary session held in Banjul, the Gambia from 13th to 27th October 2001

⁸⁵. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No.276 / 2003 at Para. 200, in Shivani Verma, *Justiciability of Economic, Social and Cultural Rights Relevant Case Law*, International Council on Human Rights Policy, Review Meeting, Rights and Responsibilities of Human Rights Organizations, Geneva 15 March 2005, Para. 375

Furthermore, in the case of *Centre on Housing Rights and Evictions vs. The Sudan*, the complainant avers that, the Government of Sudan has violated the right to adequate housing implied in *Articles 14, 16 and 18(1)* of the African Charter by *not respecting* the right to adequate housing by being complicit in the forced evictions and destruction of housing in the Darfur region and by *not protecting* the residents of those communities from forced eviction and housing destruction at the hands of third parties including the Janjaweed.⁸⁶

However, from the perspective of the prevailing practical situations in Africa like conflict and war that would have raised plenty of housing cases, one can dare to argue that there is limited number of cases on housing right in Africa as compared to the European human rights system⁸⁷ where there is sustainable peace and security. In addition, as indicated in the preceding paragraphs, under the universal human rights system there is plenty of jurisprudence developed by the CESCRC on the human right to adequate housing though it lacks judicial system. This does not mean that the African monitoring system and African NGOs are totally weak in promoting and protecting other human rights. This article admits that there are considerable cases on civil and political rights initiated by the African NGOs and entertained by African Commission.

⁸⁶. Centre on Housing Rights and Evictions (a Washington based NGO having observer status with the African Commission) vs. The Sudan, Communication No.296/05,Para.12

⁸⁷. Magdalena Sepulveda... (et al), Human Rights Reference Handbook, University for Peace, Ciudad Colon, Costa Rica,(3rd Rved,2004),(www.upeace.org)., last visited July 14,2012,p.277. According to these authors, the protection of the human right to housing may be achieved through the European Convention on Human Rights, as the European Court has adopted an integrated approach when dealing with different components of this right in which case, the European Court has ruled on the right to housing in more than 100 cases until 2004

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On the other spectrum of the jurisprudential development on housing right in Africa, this article appreciates the innovative act of the commission as it read the housing right into general property right. Thus, one can easily grasp that the African human rights commission successfully read the human right to adequate housing into the African charter on human and peoples' rights though the later failed to articulate the same. Actually, this is not unique to African jurisprudence. It holds true for Inter-American human rights system which usually reads housing right into general property right. For instance, *Melish* argues that right to property enshrined under *Article 21* of the Inter-American Convention on Human Rights can be used to protect certain aspects of the right to housing, the right to land, the right to legal protection against the destruction of crops, livestock, and other belongings, and the right to basic welfare entitlements provided under domestic law.⁸⁸

Once again, this article appreciates the innovative decision of the African Commission on Human and Peoples' Rights rendered and its effort to fill the legal gap under the African human rights system to promote and protect housing right in Africa. However, the article counter argues that the reading of the housing right into general property right may amount to underestimating the latter. The justification is that the definitional aspect of the human right to adequate housing has excluded the right to property from housing as the latter is wide in scope capable of engulfing other rights like social, economic, cultural; civil and political rights; and developmental rights. *Ismail* defines housing right in integrated way in that at international level, the right to housing possesses

⁸⁸.Tara Melish, Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims, Orville H. Schell Jr. Center for International Human Rights Yale Law School,(2002), (www.cdes.org),on 14 November 2003,p.320.

inherent aspects that link it to many other existing rights, such as those relating to privacy and family life, development, health, work, assembly and association, the rights of the child, the rights of women, freedom of movement, the right to property or land, the right to an adequate standard of life and the right to environmental hygiene.⁸⁹

On the other hand, housing, like health or education, is not a commodity acquired if someone has money and lacking if she/he does not.⁹⁰ Rather, it is the fundamental right of everyone, rich and poor, and subsequently everyone has the right to culturally adequate housing—housing in accordance with his or her culture.⁹¹ *Lewis* and *Skutsch* substantiate this line of argument in that as a human right, housing is an entitlement and should not be viewed as simply a commodity.⁹² One can grasp from the above definitions that we cannot separately define any human right from housing right, unlike property right which has general nature capable of incorporating all things which can be owned or possessed.

In addition, the distinction between the human right to adequate housing and property right are subject to further scholarly argument. Accordingly, *Marc Uhry* argues that there is an

⁸⁹. Mohamed Iqbal Ebrahim Ismail, The Integration of Housing Rights into the Informal Settlement Intervention Process: An International Review, A research report submitted to the Faculty of Engineering and the Built Environment, University of the Witwatersrand, Johannesburg, in Partial Fulfillment of the Requirements for the Degree of Master of Science in Building in the Field of Housing, Johannesburg, (2005), p.52.

⁹⁰. Gil Gan-Mor, Real Estate or Rights: Housing Rights and Government Policy in Israel, An English Summary of the Association for Civil Rights in Israel's Report on the Right to Housing (ACRI) (July 2008), p.6

⁹¹. Ibid, Gil Gan-Mor

⁹². James R. Lewis, & Carl Skutsch, Human Rights Encyclopedia, Sharpe Reference, Vol.1 (2001), (<http://www.freebooksource.com>), last visited July 14, 2011, p.744

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essential distinction between the right to housing and right to property.⁹³ According to this author, housing is both essential to survival - a fundamental right - and a commodity, which is a protection for occupiers against the threats that the absolute owner of housing can exercise.⁹⁴ On the contrary, property right is inseparably linked with ownership right which endows the owner absolute right which in turn places the occupier in a position of weakness in dealing with an owner who has the right to do anything.⁹⁵ Secondly, it can also be argued that the right to adequate housing threatens the right to property as the latter has separate legal provision under international human rights law⁹⁶.

Thirdly, from the view point of property law, the constituents of ownership of property right include *usus*, *fructus*, and *abusus* (the right to use, the right to collect the fruits, and the right to destroy the same respectively). So, the third constituent part of property may not protect the occupiers of houses.

A further point is that, property consists of luxurious interests unlike that of housing right in that a range of economic interests fall within the scope of the right to property, including movable or

⁹³. Marc Uhry, The impact of European Law on the Right to Housing: the Example of the Right to Property, the Magazine of FEANTSA-the European Federation of National Organizations with the Homeless AISBL, Autumn 2008, p.17

⁹⁴. Ibid, Marc Uhry,

⁹⁵. Ibid, Marc Uhry, according to this author, the concept of absolute right of ownership originated from 'Roman law' whereas that of derived right was from 'British law.'

⁹⁶. For instance look at the Universal Declaration of Human Rights (Article 17) and other human rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5 (d) (v)) and the Convention on the Elimination of All Forms of Discrimination against Women (Article 16(h)), although absent from the two Covenants. The right to property is also enshrined in the American Convention on Human Rights (Article 21), the African Charter on Human and Peoples' Rights (Article 14), and the Charter of Fundamental Rights of the European Union (Article 17).

immovable property, tangible or intangible interests.⁹⁷ On the contrary, housing right is fundamental human right the lack of which challenges human dignity. So, if a person fails to purchase a 'share' which is intangible economic interest in the property, the government has no legal duty to provide the same. But, where the right at stake is housing, the government has immediate duty to provide at least a minimum 'shelter' for this disparate person.

By the same token, the right to adequate housing can take a variety of forms, including rental, accommodation, cooperative housing, lease, owner-occupation, emergency housing or informal settlements.⁹⁸ Hence, housing right protects both the owners and non-owners of the house as it is a place where to live in peace and dignity, including non-owners of property.⁹⁹ However, it is not to deny that both property and housing rights are real properties alike that of land.

It follows, therefore, that the commission's interpretation of housing right to property right or the act of reading the human right to adequate housing into general property right might not be sound. Rather, the commission would have used *Article 22* of the African Charter which specifically conveys rights of peoples' economic, social and cultural development where one can easily infer the right to adequate housing through the instrumentality of

⁹⁷.Monica Carss-Frisk, The right to Property, A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights, Human rights handbooks, No. 4, Council of Europe, Strasbourg Cedex , (2001), (http://www.coe.int/human_rights),last visited on 15 November 2013,p.10.

⁹⁸.Work of the Global Land Tool Network (GLTN), facilitated by UN-Habitat, aims to take a more holistic approach to land issues by improving global coordination, including through the establishment of a continuum of land rights, rather than just focus on individual land titling in Office of the United Nations High Commissioner for Human Rights (OHCHR) and UN-Habitat Fact Sheet, The Right to Adequate Housing, Fact Sheet No. 21/Rev.1, Geneva, Switzerland, November 2009, p.4.

⁹⁹.Ibid, Global Land Tool

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Article 11 of the ICESCR. What is more, the commission would have used other international legal *corpus* by invoking *Articles 60 and 61* of the African Charter on Human and Peoples' Rights that could have enabled it to render sound decision. It is important to quote *Article 60* of the charter which would have given ample opportunity for the African human rights commission to make reference to other relevant international human rights instruments that supposed to fill the gap. Accordingly, *Article 60* of the Charter under the topic "*Sources of Law*" provides that:

The Commission shall draw from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

The charter considers the above principles as principal sources of law. Similarly, *Article 61* of the Charter provides for the use of "*subsidiary sources of law*" which stipulates:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by Member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.

Thus, nothing hinders the African human rights commission from making reference to international human rights instruments and international jurisprudences so as to fill the gap by the instrumentality of these two provisions.

These all disparities are attributable to the deficiency of the charter since it failed to define the housing right. This issue is more amplified by *Olowu*, under topic '*a tale of curious and fatal omissions*' in which case the working group established by the African Commission considered the enumerated and protected ESCRs in the African Charter and some unremunerated rights deemed incorporated into the African Charter which includes the rights to housing, food, water and social security.¹⁰⁰ So, the absence of housing right from the Charter on the one hand and the act of reading housing right into the general property right on the other implies the poor drafting process of the same which in turn contributed for less development of jurisprudence in African human rights context and has negative impetus on the principle of the universality of the human right to adequate housing.

¹⁰⁰.Dejo Olowu, *A critique of the African Commission's Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter*, Community Law Centre (University of the Western Cape), ESR Review,(Vol. 11 No. 3 2010), from (www.communitylawcentre.org.za/clc-projects/socioeconomic-rights/esr-review-1), last visited 17 November 2013, P.8 At its 36th Ordinary Session in Dakar, Senegal, in December 2004 (Resolution78.ACHPR/Res.73 (XXXVI) 04, 07 December 2004).See also, Pretoria Declaration on Economic, Social and Cultural Rights in Africa 2004, Adopted in a seminar in Pretoria, south Africa in September 2004 at which representatives of the commission, 12 African states national human rights institutions and NGOs participated which was adopted by the commission at the 36th session in December 2004, *Article 5* that reads the right to property in *Article 14* of the charter relating to land and housing entails among other thing the following, Para. 8 equal access to housing and to acceptable living conditions in a healthy environment.

8. Conclusion

This article has discussed the six key aspects of the human right to adequate housing under the African regional human rights system. These key aspects include: the normative frameworks; state duties; constituents of violations; remedial actions upon the materialization of violations; monitoring organs and monitoring systems; and jurisprudential development on the human right to adequate housing. The article has compared and contrasted the African regional human rights system with that of the universal one and on certain issues of importance with that of European and Inter-American human rights system, taking into account these key aspects of the human right to adequate housing. Accordingly, the article appreciated the big disparity amongst the four systems of human rights in setting standards; imposing duties on states; identifying what constitutes violations; providing remedies; tracking system; and realizing the human right to adequate housing through jurisprudence. This does not mean, however, that the African human rights system must be equal with the universal, the European, and the Inter-American human rights systems which are the oldest and advanced, in all aspects of setting human rights standards and realizing the same. This article is inspiring for the transformation of African human rights system into advanced one and for the extension of best practices into the system.

The article concluded that the universal human rights system did the maximum effort to formulate the key aspects of the housing rights so as to boost the situations of the same worldwide. However, the effort remained futile for two grand reasons. The system had no complaint mechanisms at the very inception of the ICESCR that comprehensively defined the housing right. Second, the jurisprudence of the CESCER like general comments, concluding observations, and statements could not penetrate into the individual states parties due to the status given to the same-soft

laws and the deficiency of enforcement mechanisms that remained on the mere calling and shaming.

When we come to the European human rights system, the system completely dehydrated the quasi-judicial organs from the system and has substituted by single supreme judicial organ- the European Court of Human Rights, except for the execution of the judgment of the same which is monitored by the Committee of Ministers. So, the system is successful in putting the human right to housing on the ground through its continuous legal reform usually through protocols that played dual purposes-either to read new rights in the system or/and for structural readjustment. The Inter-American human rights system is half way in promoting and protecting housing right. It has both judicial and quasi-judicial organ so as to protect, promote, and realize the human right to adequate housing. But, it is not sufficient as most of the states in the region are under economic prosperity and the oldest human rights system on the one hand, and in some parts of the region war and conflict are prevalent where housing right can easily be violated.

As far as the African human rights system is concerned, the housing right was a missed right. Thanks to the jurisprudence of the African commission on human and peoples' rights, which broadly interpreted and read the housing right into the system, one can now talk about the same on the continent. But, the article remained concerned with the approach of the commission specially the act of reading the human right to adequate housing into general property right. Rather, the commission would have invoked *Article 22* of the Charter that specifically deals with socio-economic rights of African people. The commission would have also invoked *Articles 60 and 61* of the charter those explicitly provide the sources of laws for the realization of human rights on land of African.

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Secondly, such approach has put the universality concept of human right to housing in dilemma since the African human right system failed to incorporate the same into its grand human right document, the value of which the international community is celebrating these days. So, the article concluded that the formulation of the key aspects of the human right to adequate housing in Africa seems loose; while an array of possibilities of violations of housing right are prevalent.