Jimma University Journal of Law

ISSN 2074-4617

Volume 6 **December 2014**

Published once annually by the School of Law, CLG, JU

In this issue:

Jimma University Journal of Law

Volume 6 **December 2014**

Disclaimer

The ideas in this journal don’t represent the Editorial Board or the School of Law or Jimma University. They are solely of the authors’.

About the Law School

The Law School commenced its academic work on the 19th of December 2002 as the Faculty of Law of Jimma University. Later, the Faculty of Law and the Faculty of Humanities and Social Sciences were merged to form the College of Social Sciences and Law in 2009. As of 2014, it has been restructured as College of Law and Governance and it is joined by Department of Governance and Development Studies.

The Law School has been producing high-caliber and responsible graduates since its inception in 2002. For the first year, it accepted 158 advanced diploma students who graduated three years later. Then, the School has been accepting and teaching students in four first degree programs, namely, in the regular, evening, summer, and distance programs. Thus far, it has graduated thousands of students in these programs. Moreover, the Law School launched one LL.M program in 2012/2013 and currently it is offering **LL.M** in **Commercial and Investment Law** and **LL.M** on **Human Rights and Criminal Law**. These are two years programs. Indeed, the School is now conducting a feasibility study to open new postgraduate programs.

In addition to its teaching jobs, the Law School has been publishing its law journal, **Jimma University Journal of Law**. It is a journal published at least once in a year. Besides, there are research works that the academic members of the School conduct although they are usually not published.

Finally, the Law School is making its presence in the community felt by rendering legal services to the indigent and the vulnerable parts of the society (such as children, women, persons with disabilities, persons with HIV/AIDS, and old persons) in Jimma town and Jimma Zone through its Legal Aid Centre. Currently, the Centre has six branches and they are all

doing great jobs to facilitate the enjoyment of the right of access to justice for the indigent and the vulnerable groups. Of course, the also helps equip our students with practical legal skill before they graduate.

At the Moment, the School has the following full-time and visiting staff for its undergraduate and postgraduate programs.

Full-time Staff Profile

S.N	Name	Qualification	Specialization and/or area of interest
1.	Alemu Meheretu	LL.B, LLM, PhD Candidate	Human Rights and Criminal Justice
2.	Arjun Ahire	LLB, LL.M, PhD	Constitutional law
3.	Aytenew Debebe	LL.B, LLM	Human rights law
4.	Birhanu Beyene	LL.B, LLM, (Asst. professor)	Business law, Globalization and Commercial Dispute Resolution
5.	Cherer Aklilu	LL.B, LL.M, MA	Gender Studies, Health Law
6.	Dejene Girma	LL.B, LLM, PhD	Environmental law, Human rights, Criminal Law
7.	Gashahun Lemessa	LL.B, LLM, MA PhD candidate	Trade and Investment Law, Public Administration(International Dev't)
8.	Getachew Redae	LL.B, LLM	Business Law
9.	Getahun Alemayehu	LL.B, LLM, PhD Candidate	Human rights, International Law, International organizations
10.	Kassahun Molla	LL.B, LLM	Public international Law
11.	Kassaye Muluneh	LL.B, LL.M	International law and the Law of international Organization
12.	Legesse Tigabu	LL.B, LLM	Comparative Constitutional Law
13.	Marshet Tadesse	LL.B, LL.M, PhD candidate	Criminal law and criminology
14.	Manaye Abera	LL.B, LL.M	International Business Law

15.	Raveendran Nair	LL.B, LL.M, PhD candidate	Law of crimes
16.	Shimelis Mengistu	LL.B, LLM	Public Law, Law and economics
17.	Sintayehu Demeke	LL.B, MA	Development studies
18.	Tadesse Simie	LL.B, LLM, PhD candidate	Criminal justice
19.	Wagari Negassa	LL.B, LLM	International Investment Law
20.	Yosef Alemu	LL.B, LLM	Taxation and public finance
21.	Abiy Alemu	LL.B, LL.M	International Law
22.	Bisrat Teklu	LL.B, LL.M candidate	Business Law
23.	Temam Mohammed	LL.B, LL.M candidate	Business Law
24.	Markos Debebe	LL.B, LL.M candidate	Constitutional Law

Visiting Staff for LL.M Programs

1.	Biruk Haile	PhD
2.	Ermias Ayalew	Asst. Prof
3.	Fikermarkos Merso	PhD
4.	Solomon Abay	PhD
5.	Tilahun Teshome	Professor

Challenges and Prospects of the African Court of Justice and Human Rights

Ogwezzy MichaeL. C (PhD)[♣]

Abstract

The idea to merge the African Court of Human and Peoples Rights with the African Court of Justice to form a new judicial body called African Court of Justice and Human Rights was initiated by the then Chairperson of the African Union and former President of Nigeria; Olusegun Obasanjo in 2004. The major arguments of President Obasanjo for merging the two courts included cost savings and a need to rationalise pan-African institutions. Four yeas after the protocol was adopted, the court still lacks the minimum number of 15 States ratifications for it to enter into force. This again is a reflection of the unwillingness of African leaders to fast track human rights promotion and protection in the continent. The Protocol of this court appears to entrench sweeping powers on the Court to try all cases involving human rights violations in the continent and this will mean an abrupt end for the era of impunity for political leaders in Africa. Even though the protocol is yet to receive the minimum number of ratifications, the court have already started functioning based on the transition arrangement enshrined in Article 1 of the merger protocol. This paper therefore will espouse the challenges and prospects of the merged African Court of Justice and Human Rights.

1. Introduction

The adoption of the Protocol of the African Court of Human and Peoples Rights with the African Court of Justice in 2008 (hereinafter merger protocol) herald a new dawn in the history of human rights promotion and

[♣] LL.B, (Ibadan) B.L, LL.M, (Nigeria) ML.D, (DELSU) MASIO/LL.M, (ZH/Switzerland) (Ph.D), Lecturer I, Department of Public International Law, Faculty of Law, Lead City University, Lagos-Ibadan Expressway, Toll Gate Area, Ibadan, Oyo State-Nigeria, Email address: ogwezzym@yahoo.com, Tel: +234 8035460865.

protection in Africa. This assertion is out of place considering the mandate or responsibility expected to be shouldered by this court.

The desire to create this court was born out of the fact that the existence of the African Court of Human and Peoples Rights[1] and the African Court of Justice[2] was a duplication of functions and waste of scares resources as the functions of both Courts can be carried out by a well structured and streamlined Court.[3] Besides, the argument of scarce resources, it was observed that the protocol establishing both courts, though different in their formations and functions as one was adopted to settle states disputes and the other for human rights in accordance with the provisions of the Constitutive Act of A.U[4] and the African Charter on Human and Peoples Rights.[5] Both had areas of common jurisdiction not totally different from each other. According to Michelo Hansungule, "there was a genuine fears of real duplicity in the functions of both courts if the A.U went ahead with

[1]Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ougadougou, Burkina Faso, June 1998, OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2

[2]The Protocol of the Court of Justice of the African Union was duly adopted by the 2nd Ordinary Assembly Session on 11 July, 2003. The functions of the Court include: collection of documents and undertake studies and researches on human and peoples' rights matters in Africa; lay down rules aimed at solving the legal problems relating to human and peoples' rights; ensure protection of human and peoples' rights; and interpret all the provisions of the Charter. See, African Union., "African Court of Justice", Available online at <http://www.au.int/en/organs/cj> accessed 11 August, 2013.

[3]The idea of amalgamating the two courts was based on overlaps in competence, which has led to a degree of uncertainty within the African community of states, as well as the desire to alleviate the strain on financial resources led to this merger. The formal process of amalgamation was completed with the acceptance of the Protocol on the African Court of Justice and Human Rights on 1 July, 2008 at the 11th General Assembly of the AU in Sharm El-Sheikh.

[4]Constitutive Act of the African Union, adopted by the Assembly of Heads of State and Government of the Union, Lome, Togo, 11 July, 2000, entered into force on 26 May, 2001.

[5]The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981).

the task of establishing distinct judicial bodies or otherwise for the continent".[6]

At the Summit of the Eleventh Ordinary Session of the AU held in Sharm El-Sheikh, Egypt, in July 2008, the Assembly of Heads of State and Government formally adopted the resolution that provided for the political basis for the merger Protocol establishing the new Court (hereinafter merged court).[7] Established under Article 2 of the Protocol, the new Court is governed by two main instruments, i.e. the Protocol and the Statute of the African Court of Justice and Human Rights itself. This is a distinctive additionality to prevailing practice where an institution is usually established by only one instrument often a Protocol rather than two.[8] This newly created court is intended to comprise two sections: a general section and a section for human rights. A total of sixteen judges will work there, whereby each chamber will have eight judges.[9] The Protocol in question will, however, enter into force only once the 15th instrument of ratification treaty has been deposited. At present, only three states, namely Mali, Libya and Burkina Faso have taken this step. Thus, it is likely to be quite some time before the amalgamation is actually

[6]See also Michelo Hansungule, "African Courts and the African Commission on Human and Peoples' Rights" at 235, available online at <http://www.kas.de/upload/.../Human_Rights_in_Africa/8_Hansungule.pdf>, accessed 16 August, 2013.

[7]Decisions Assembly/AU/Dec.45 (III) and Assembly/AU/Dec.83 (V) of the Assembly of the Union, adopted respectively at its Third (6-8 July, 2004, Addis Ababa, Ethiopia) and Fifth (4-5 July, 2005, Sirte, Libya), Ordinary Sessions, to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into a single Court. Available, online at www.africa-union.org; Accessed 10 August, 2013.

[8]The African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Court of Justice of the African Union established by the Constitutive Act of the African Union, are hereby merged into a single Court and established as "The African Court of Justice and Human Rights".

[9]Protocol on the Statute of the African Court of Justice and Human Rights adopted by the Eleventh Ordinary Session of the Assembly, held in Sharm EL-Sheikh, Egypt, 1st July, 2008 (yet to enter into force). Article 16 – 19.

implemented. The positive process of the fusion of the two courts is thus currently running in parallel to the development of the ACHPR. The Protocol of the ACHPR therefore remains decisive until it has been replaced by the new protocol.

At this point, this article will be segregated into three parts for clear understanding of the issues to be espoused. Part one will deal with an overview of the Protocol establishing the African Court of Justice and Human Rights. Part two will treat the possible challenges to be faced by the Merged Court while Part three will inquire into the prospects and sustainability of the merged Court.

PART I

2. An Overview of the Protocol Establishing the African Court of Justice and Human Rights

Jurisdictions of the Court

In accordance with articles 29 and 53 of the merger protocol, the Africa Court of Justice and Human Rights is empowered to act in both judicatory and advisory capacity.

Judicatory Powers: The court has personal, mandatory or compulsory jurisdiction, and every state automatically acknowledges it immediately upon ratification of the Protocol. It also has discretionary or optional jurisdiction, for which a corresponding additional declaration of recognition of jurisdiction is required.[10]

[10]Andreas Zimmermann and Jelena Bäumler, "Current Challenges facing the African Court on Human and Peoples' Rights" *KAS International Reports* 7/2012 at. 42-43. Available online <http//:www.kas.de/wf/doc/kas_20018-544-2-30.pdf?100630122123>, accessed 10 August, 2013.

Mandatory Jurisdiction or Jurisdiction *Ratione Personae*

The Court's mandatory or compulsory jurisdiction applies, according to article 28, if the proceedings are brought by State Parties to the present Protocol; the AU Assembly, the Parliament and other organs of the Union authorized by the Assembly; a staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.[11] Other entities so authorised to submit cases for determination by the merged court include State Parties to the protocol; the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organizations accredited to the Union or its organs;[12] African National Human Rights Institutions; individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol.[13]

Article 53 of the statutes of the merged Court provides that matters may also be referred to the court by a state acting as a third party intervener if it considers that it has interest in a case in which it was not initially involved and it provide thus: "should a Member State or organ of the Union consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. It shall be for the Court to decide upon this request". Sub-paragraph 3 states that: "in the interest of the effective

[11]Protocol on the Statute of the African Court of Justice and Human Rights, *above n*. 9. Article 29.

[12]*Ibid*., The Union of the Arab Maghreb, (UAM), the Economic Community of West African States, (ECOWAS), the West African Economic and Monetary Union, (WAEMU), the Economic and Monetary Community of Central Africa, (EMCCA), the Economic Community of Central African States, (ECCAS), the Common Market of Eastern and Southern Africa, (COMESA), the Southern African Development Community, (SADC), the Southern African Customs Union, (SACU), the Indian Ocean Community, (IOC), the East African Community, (EAC) and the Community of Sahel-Saharan States more commonly known by the acronym (CEN-SAD).

[13]*Ibid*., Article 30.

administration of justice, the Court may invite any Member State that is not a party to the case, any organ of the Union or any person concerned other than the claimant, to present written observations or take part in hearings" subsequently, Article 29(2) provides that: "In the interest of the effective administration of justice, the Court may invite any Member State that is not a party to the case, any organ of the Union or any person concerned other than the claimant, to present written observations or take part in hearings".

Optional or Discretionary Jurisdiction (Clause)

The new African Court of Justice and Human rights also has optional or discretionary jurisdiction, for which a corresponding additional declaration of recognition of jurisdiction is required. This jurisdiction applies in suits filed by individuals and by non-governmental organizations; these two groups can bring a case before the court only if the accused state has made a declaration accepting the competence of the Court to receive such cases.[14]

Article 30 (b) provides for optional jurisdiction clause in relation to cases submitted by individuals or Non-Governmental Organisations with observer status with the African Commission on Human and Peoples Rights. In other case, the court can recognise individuals and NGOs petition directly in accordance with Section 30 (f). Such Individuals or relevant Non-Governmental Organizations must have been accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol which states that; "any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the

[14] *Ibid*.

Court to receive cases under Article 30 (f)[15] involving a State which has not made such a declaration".

It was argued that the statutes of the African Court System, is in line with the procedural law of other human rights systems which also restrict the individual rights of access to international human rights organs. Whether at the level of the United Nations or other regional human rights system for the protection of human rights, the individual rights of appeal is generally the subject of optional clause, and the organs competent to examine individual petition is made subject to the state having declared its recognition of this competence.[16] It would have been more respectful of the rights of individuals and NGOs if at the very least it was incumbent on the state which does not recognise the competence of the court to make a declaration to that effect. The new judicial framework for the African Court of Justice and Human Rights would have been optimum had the individuals been granted easy and direct access to the new court.

Even if states do not refuse or decline to make a declaration in line with Article 30 (f) subject to the provision of Article 8 of the statutes of the merged Court, the fear of the risk could be overcome only if the African Commission on Human and Peoples Right which is entitled to submit cases to the court were to assert its protective mandate for human rights

[15]Individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol shall also be entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned.

[16]Association for the Prevention of Torture (APT): The African Court on Human and Peoples Right, Presentation, analysis and Commentary: the protocol to the African Charter on Human and Peoples Rights Establishing the Court, Occasional Papers, Geneva, January, 2000, at 4. Available online at http://www.apt.ch accessed, 18 August, 2012.

by adopting a much more protective stance than heretofore by instituting these cases on behalf of the individuals and NGOs.

The development of shutting out individuals and NGOs from having direct access to the new court was orchestrated by a group of states including Egypt and Tunisia and this idea seems to have been motivated mostly by distrust for human rights NGOs. The African Commission has long permitted NGOs to bring cases under the African Charter, even where they are not directly affected by the alleged violation (in other words, unlike in the European Court of Human Rights, standing is not restricted to 'victims'). This reflects the fact that victims and their families are often precluded from bringing cases on their own behalf because of illiteracy and poverty, fear of reprisals or the enormous scale of some human rights violations on the continent. In practice, NGOs have become the main complainants at the African Commission.[17] It is necessary to note that the jurisdiction of the court is limited ostensibly so as not to unduly violate the sovereignty of member states.[18]

Subject Matter Jurisdiction or Jurisdiction *Ratione Materiae*

Under this sub-section dealing with the Courts Jurisdiction *ratione materiae*, that is the subject matter jurisdiction, based on the facts available to the court, the court has competence to rule on cases in which one of the contracting parties is accused of breaching human rights. Article 28 of the statute provides that the Court shall have jurisdiction

[17]Sonya Sceats., "Africa's New Human Rights Court: Whistling in the Wind?" March 2009, IL BP 09/01, The Royal Institute of International Affairs, 2009, at, 9-10. Available online at http//:www.chathamhouse.org.uk accessed 13 August, 2013. See also, Michael .C Ogwezzy; "Promotion and Protection of Human Rights in Africa: Examining the Jurisprudence of the African Court of Justice and Human Rights", *Alexandra University, Faculty of Law, Journal for legal and Economics Research*, December, 2012

[18]N Barney Pityana, "Reflections on the African Court on Human and Peoples Rights", (2004) 4 *African Human Rights Law Journal* at 128. Available online at http://uir.unisa.ac.za/bitstream/handle/10500/408/ju_ahrlj_v4_n1_a9.pdf?sequence=1, accessed on 20 August, 2013

over all cases and all legal disputes submitted to it in accordance with the Statute which relates to: the *interpretation and application* of the Constitutive Act; the validity of other Union treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity; the A.U Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned; any question of international law; all acts, decisions, regulations and directives of the organs of the Union; all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court; the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; the nature or extent of the reparation to be made for the breach of an international obligation.[19]

It is interestingly striking to note that suits under the statutes of the African Court of Justice and Human Rights can be based both on a breach of the Banjul Charter, the Constitutive Act of the AU and on contravention of any other treaty on the protection of human rights that the state in question has ratified.[20] At the African level in particular, this includes the Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on the Rights of Women in Africa. In addition, on a universal level, this includes the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and various other international human rights treaties whether adopted within the framework of the UN such as Convention

[19]Protocol on the Statute of the African Court of Justice and Human Rights *above n.* 9. Article 28 (a)-(h).
[20]Andreas Zimmermann and Jelena Bäumler, *above n.* 10., at 44-45.

against Torture[21] or within the framework of specialised institutions for instance the ILO and UNESCO.[22]

In comparison, pursuant to Article of the Protocol on the African Court of Justice,[23] it is responsible for disputes based on the application and interpretation of the constitutional act of the AU and treaties concluded under the auspices of the AU. All public international law disputes also fall within the jurisdiction of the court while the African Court of Justice may first and foremost be responsible for conflicts between states concerning the interpretation of treaties and conventions of the AU.

Sections of the Court

The Court shall have two Sections; a General Affairs Section composed of eight Judges and a Human Rights Section composed of eight Judges making a total of sixteen judges of the Court.

(i) The General Affairs Section

In line with the provisions of Section 17 of the statutes of the Court of Justice and Human Rights', the General Affairs Section shall be competent to hear all cases submitted under Article 28 of this Statute save those concerning human and/or peoples' rights issues.[24] Therefore, the

[21]OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45; Charter on
the Rights and Welfare of the Child, ILM 28 (1989) 1448; African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Doc/OS/34c/(XXIII) Annex; International Covenant on Civil and Political Rights, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

[22] Association for the Prevention of Torture (APT): *above n.*16., p.5

[23]See Article 29 (2) of the Protocol. The provisions governing the Council of Ministers are set forth in Articles 10-13 OAU Charter. http://www.africa-union.org > Documents > Treaties, Conventions & Protocols. This Protocol never entered into force before the merger of both Courts in 2008 because not enough states ratified it.

[24]*Ibid*., Article 17(1).

human rights section will not deal with cases involving general affairs since this has been settled.[25]

(ii) Human Rights Section

The Human Rights Section shall be competent to hear all cases relating to human and/or people's rights violations by a state party. State Party here is construed to mean state officials or persons acting on behalf of the state like political actors.[26] Article 18 deals with referral of matters to the Full Court When a Section of the Court is seized with a case, it may, if it deems it necessary refer that case to the Full Court for consideration.[27]

Composition and Qualifications of the Panel of Judges of the Merged Court

The merged Court is made up of sixteen Judges who are nationals of States Parties and it shall not, at any one time, have more than one judge from a single Member State and each geographical region of the Continent, as determined by the Decisions of the Assembly, shall, where possible**,** be represented by three Judges except the Western Region which shall have four Judges. Though upon recommendations of the Court, the Assembly, may review the number of Judges. This is subject to the provisions of Article 3 of the statutes of the Court of Justice and Human Rights.[28]

The statute to the Protocol provides that jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human rights and general international law can be considered for the position of a judge. In addition to personal

[25]*Ibid*., Article 28 (a)-(h).
[26]*Ibid*., Article 17(2).
[27]See also, Michael .C, Ogwezzy; "Promotion and Protection of Human Rights in Africa: Examining the Jurisprudence of the African Court of Justice and Human Rights", Unpublished Paper, 2012, at 9-10
[28]See Article 3 of the Statute to the Merger Protocol of the African Court of Justice and Human Rights and the Court of Justice of the African Union 2008, *op. cit.*

qualifications, the goal of having a balanced composition plays a crucial role: the judges must represent the five major African regions (South, West, East, North and Central), the various African legal systems of Islamic law, Common and Civil law, African customary law and South African Roman-Dutch law, as well as ensuring that African traditions are taken into account.[29]

The principle of geographical representation is now one of the conditions for composing the Court, as stated in paragraph 3 of Article 3 of the Statute of the new Court.[30] So each geographical region of the Continent, as determined by the decisions of the Assembly shall, where possible**,** be represented by three Judges except the Western Region which shall have four Judges.[31] Each State Party may present up to two candidates and shall take into account equitable gender representation in the nomination process.[32] Only AU states that have ratified the protocol have a right to nominate candidate judges to constitute the bench of the court. Article 4 of the statutes specifically provides that the Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in international law and/or, human rights law.[33]

Election of the Judges to the Merged Court

Article 7 of the protocol laid down the conditions for the election of the judges and it provides that the Judges shall be elected by the Executive Council, and appointed by the Assembly. They shall be elected through

[29]Andreas Zimmermann and Jelena Bäumler, "*above n.* 10, at 41.
[30]See also Michelo Hansungule, *above n.* 6, at. 241.
[31]Protocol on the Statute of the African Court of Justice and Human Rights, *above n.* 9, Article 3(3).
[32]*Ibid*., Article 5(2).
[33]*Ibid*., Article 4 .

secret ballot by a two-thirds majority of Member States with voting rights, from among the candidates provided for in Article 6 of this Statute. Candidates who obtain the two-thirds majority and the highest number of votes shall be elected. However, if several rounds of election are required, the candidates with the least number of votes shall withdraw. The Assembly shall ensure that in the Court as a whole there is equitable representation of the regions and the principal legal traditions of the Continent. In the election of the Judges, the Assembly shall ensure that there is equitable gender representation.[34]

Hansungule analysed this provision in comparison with the provisions in the other Protocols of replaced Courts under the African system and further explained that contrary to the previous arrangements under the African Court on Human and Peoples Right and the Court of Justice, the election of Judges is now the responsibility of the Executive Council and not the Summit of Heads of State and Government, as was the case in the two replaced Courts. Although past treaties provided for the Heads of State and Government to conduct the elections, in practice, this was performed by their ministers in the Executive Council. The Executive Council will elect the Judges while the Assembly execute the appointments of the successful parties submitted to them by the Executive Council. As regards the right to vote, it is not enough simply to be a state party to the Protocol and Statute. In addition, the state party concerned must be entitled at the time of the election to 'voting rights'. Based on Article 23 of the Constitutive Act, some member states have lost their voting rights for a number of reasons, including failure to implement decisions of the AU and its organs, and being in default in the payment of their subscriptions.[35]

[34]*Ibid*., Article 7.
[35]See Michelo Hansungule, *above n.* 6, at 242-243

Independence of Judges of the Merged Court

The judges are elected in an individual capacity from among jurist-consult of high moral character and of recognised practical, judicial or academic experience in the field of human rights law. They undertake to discharge their duties faithfully and impartially and the independence of the judges shall be fully ensured in accordance with international law. The Court shall act impartially, fairly and justly. In performance of the judicial functions and duties, the Court and its Judges shall not be subject to the direction or control of any person or body.[36] To further reinforce faith in the independence of the Judges and the Court, Article 13 forbids conflict of interest in the performance of the official duties of the elected judges and it provides thus: "the functions of a Judge are incompatible with all other activities, which might infringe on the need for independence or impartiality of the judicial profession. The judges enjoy diplomatic immunities and privileges necessary for them to discharge their duties; "The Judges shall enjoy, from the time of their election and throughout their term of office, the full privileges and immunities extended to diplomatic agents in accordance with international law. The Judges shall be immune from legal proceedings for any act or omission committed in the discharge of their judicial functions. The Judges shall continue, after they have ceased to hold office, to enjoy immunity in respect of acts performed by them when engaged in their official capacity".[37] In another circumstance, "where a particular judge feels he/she has a conflicting interest in a particular case, he/she shall so declare. In any event, he/she shall not participate in the settlement of a case for which he/she was previously involved as agent, counsel or lawyer of one of the parties, or as a member of a national or international Court or Tribunal, or a Commission of enquiry or in any other capacity. If the President considers that a Judge should not participate in a particular case, he/she shall notify the judge concerned. Such notification from the President shall, after

[36]Protocol on the Statute of the African Court of Justice and Human Rights, *above n.* 9, Article 12(1) (2) and (3).
[37]*Ibid*, Article 15(1)-(3).

agreement by the Court, exclude that Judge from participating in that particular case. Judge of the nationality of a State Party to a case before the full Court or one of its Sections shall not have the right to sit on the case."[38]

However, the African Court of Justice and Human Rights differs from the two other regional courts as regards independence of the Judges on the grounds that a judge will not hear a case involving the State of which he is a national as provided under article 14(3) of the merged Protocol. Much unlike the Inter-American system, the State concerned may appoint an *ad hoc* judge to hear the case if there is no permanent judge seating in the Court. In the European system, the judge who is a national of the State concerned automatically participates in the case.[39]

As far as professional ethics are concerned, the judges may not carry out any activity which is incompatible with the demands of office or which might interfere with their independence or impartiality.[40]

Judgement of the Court and its Mode of Execution

The Court shall render its judgment within ninety (90) days of having completed its deliberations and all judgments shall state the reasons on which they are based, contain the names of the Judges who have taken part in the decision signed by them and certified by the Presiding Judge and the Registrar. Upon giving due notice to the parties, the judgement is read in open court. The reason for the judgement must be embodied in the judgement of the court and it shall be transmitted to the Member States and the Commission. The Executive Council shall also be notified of the

[38]*Ibid*, Article 14(1)-(4).
[39]See Sidiki Kaba, "10 keys to Understand and Use the African Court on Human and Peoples' Rights, A User's Guide for Victims of Human Rights Violations in Africa and Human Rights Defenders", FIDH, November, 2004 at 30.
[40]Association for the Prevention of Torture (APT), *above n.* 16, at. 6.

judgment and shall monitor its execution on behalf of the Assembly.[41] With respect to judgements, the Statute provides that decisions are to be taken by a majority of Judges, with a casting vote by the Presiding Judge in the event of "an equality of votes". This provision is made in addition to the rights provided to Judges in Article 44 to have dissenting opinions.[42] Other conditions, such as the duty on the Court to render judgement within 90 days of having completed deliberations, the requirement that Judges are to state the reasons on which their judgements are based, and the obligation to notify the parties of the judgement in the case are a rendition of the 1998 Ouagadougou Protocol. However, there is one particular innovation, namely that Article 43(6) mandates the Executive Council, which is also to be notified of the judgement, "to monitor its execution on behalf of the Assembly". This is a direct response to the frustrations over unimplemented African Commission recommendations or decisions. Article 43(6) is a *mutatis mutandis* extract of its equivalent in the European Convention on Human Rights.[43]

Article 46 provides that "the decision of the Court shall be binding on the parties" and that such decision is final. Furthermore, in an innovative manner, the Statute provides that the parties shall comply with the judgement made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution. Paragraphs 4 and 5 enjoin the Court to report to the Assembly any party that fails to comply with the judgement, and the Assembly is mandated to

[41]Statutes of the merger Protocol of the African Court of Justice and Human Rights., *above n*. 18. Article 43(1)-(5).

[42]*Ibid*., Article 44. It provides that if the judgment does not represent in whole or in part the unanimous opinion of the Judges, any Judge shall be entitled to deliver a separate or dissenting opinion.

[43]See, Ovey, Claire & Robin White, *European Convention on Human Rights* 3rd edn. New York: Oxford University Press Inc., 2002 at 420-436. See also Michelo Hansungule, *above n.* 6, at 247.

punish the defaulting party-including by the imposition of sanctions as provided in Article 23(2) of the Constitutive Act of the AU.[44]

More still on execution of the judgement of the merged Court, the Council of Ministers of the AU is responsible for monitoring execution of the judgment on behalf of the Assembly, in its annual report to the AU Assembly; the Court must specify instances of non-compliance. Although the Executive Council (Council of Minister) is monitoring the execution of judgments on behalf of the Assembly,[45] the compliance of states with legally binding decisions will mostly depend on their level of political commitment and the participatory role of civil society.[46] Hence the execution of the Court's Judgement is basically voluntary.[47] The Court has delivered up to the present time four out of nine judgments, and the first one came in December 2009.[48]

[44]Article 46(3) Statute of the merger Protocol of the African Court of Justice and Human Rights 2008.

[45]See Article 43 and 46 Statute of the merger Protocol of the African Court of Justice and Human Rights 2008..

[46]F. Viljoen, "African Court on Human and Peoples' Rights (ACtHPR)", in Wolfrum R. (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2009, available online at <http://www.mpepil.com>, accessed 14 August, 2013.

[47]The Protocol Creating the Court of Justice foresees the possibility for the Conference to sanction Member States failing to abide by a Court's decision; the Protocol concerning the African Court on Human and People's Rights does not give any constraining force to the Court's decisions. The new Protocol of the merged Court allows then the extension and outreach of the sanctions to the field of human rights. The merged Court also has the power to order specific remedies, including compensation. (See, Stephanie Dujardin "For a Rapid Operational Start of the African Court of Justice and Human Rights" E.U-Africa, e-alert.... Contribution to Editorial, No.3/November, 2006, at 3 available online at http://www www.fes.de/cotonou/.../ngo/.../E-ALERT_EN_08JANUAR07.PDF> accessed 14 August, 2013).

[48]European Parliament., "The Role of Regional Human Rights Mechanisms", Directorate-General for External Policies, Policy Department, November, 2010 at 71, available online at <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN> accessed 17 August, 2013

It is necessary to state that even if the judgement of the court is final, an application for revision of a judgment may be made to the Court based upon discovery of a new fact of such nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, provided that such ignorance was not due to negligence. The proceedings for revision shall be opened by a ruling of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the revision admissible on this ground. The Court may require prior compliance with the terms of the judgment before it admits proceedings in revision which shall be made within six months up on the discovery of the new fact and no application may be made after the lapse of ten years from the date of the judgment.[49]

Advisory Opinion of the Court

By virtue of Article 53 of the protocol to the merged Court of Justice and Human Rights, the Court has the jurisdiction or power to give advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions or any other organ of the Union as may be authorized by the Assembly.[50] To buttress the format of the Courts jurisdiction on advisory opinion, the protocol provides further that such request for an advisory opinion shall be in writing and shall contain an exact statement of the question upon which the opinion is required and shall be accompanied by all relevant documents and such a request for an advisory opinion must not be related to a pending application before the African Commission or the African Committee of Experts.[51] Article 55 dealing with method of delivery of advisory opinion provides that, "the Court shall deliver its

[49]Protocol on the Statute of the African Court of Justice and Human Rights, *above n.* 9, Article 48

[50]*Ibid*, Article 53.

[51]*Ibid*, Article 53(2)-(3).

advisory opinion in open court, notice having been given to the Chairperson of the Commission and Member States, and other International Organizations directly concerned".[52]

Though examples from the International Court of Justice (ICJ), other courts in other jurisdictions have shown that advisory opinions are generally not binding but the gap in this provision of Article 53 is that, it did not state, whether the advisory opinion of the court is binding or not on the parties upon which the advisory opinion was given. In practice, however, such opinions when given by the court could serve as a reference for a dynamic and progressive interpretation of the African Charter on Human and Peoples Rights and other human rights instruments as stipulated under its subject matter jurisdiction under Article 28 of the merged protocol.

Having undertaken a detailed examination of the jurisprudence of the merged court, this article will turn to the second part which will understudy the challenges that the court will face in the course of its operations.

Part II

3. Challenges to Be Faced by the Merged Court

The challenges facing the merged courts of Justice and Human rights are numerous and breath-taking.

A. The African Commission continues to retain its important role in promoting human rights in Africa and will continue to monitor state compliance with the African Charter via routine reporting and other processes including special rapporteurs. Moreover, so long as direct access to each of the merged court remains difficult for individuals and NGOs, the Commission as against the merged Court will continue to be a first port of call for human rights cases against states. It will also be the main forum for cases against states which are not parties to

[52] *Ibid*, Article 55.

the agreements which set up the merged courts, thereby witling the relevance or importance of the merged court and weakening the development of its jurisprudence.[53]

Other challenges include:

B. Ratification of the Protocol Establishing the Merged Courts: The success of the court will depend on the will of the states to adhere to the protocol by ratifying it.[54] while all AU member states have ratified the African Charter, and are thus subject to oversight by the African Commission, to date ratification of the Protocol to the Statute to the African Court of Justice and Human Rights, has been carried out by only three States, namely Libya, Mali and Burkina Faso, out of a total of 54 African states and twenty-two signatures have been received in addition to the three ratifications accessions and deposits.[55] Therefore a ratification campaign is urgently required to ensure AU-wide coverage for the merged court.

C. *Awareness of the Merged Court at the Continental Grassroots Level*: Due to the enormous size of Africa in geographical and population terms coupled with widespread illiteracy, it therefore means that the awareness of the merged court at the grassroots level will prove very challenging. Hence it is important that the courts hold sessions outside Tanzania and undertake promotional visits to member states;

[53] *Ibid*., at 12-14.

[54] Association for the Prevention of Torture (APT) *above n.* 16, at. 8.

[55] On the Status of ratification of the Protocol to the Statute to the African Court of Justice and Human Rights, only three (3) States, namely Libya, Mali and Burkina Faso, has ratified the protocol as at August 2010 and till date. Out of a total of 54 African states. 22 Signatures have been received in addition to the three ratifications accessions and deposits. Available online at http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87%3Aratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7%3Aafrican-union&Itemid=12&lang=en accessed, 15 August, 2013

however, the awareness raising efforts of civil society and National Human Rights Institutions (NHRIs) will almost certainly be pivotal.[56]

D. *Lack of Resources*: African states have a poor record of providing adequate funding to the continent's human rights institutions and this may become a problem for the merged courts with dual chambers that will attract and be saddled with high case load. [57]

E. *Rules of Procedure and Determination of the Judges*: The effectiveness of the court will to a certain extent depend on the skill and clear sightedness with which the rules of procedure are drawn up and the determination shown by the persons elected to the post of judges who will bear the great responsibility and heavy burden of setting the African Court of Justice and Human Rights in motion.[58]

F. *Problem of Compliance with their Judgments of the Merged Court*: A true test of the success of the merged court will be the level of state compliance with their judgments. Of course, there is a seemingly effective monitoring process which has been created for the merged courts by virtue of Article 46 of the protocol of the statutes to the merged court and Article 23(2) of the Constitutive Act of the African Union.[59] However, their effectiveness ultimately hinges on the political willingness of African states, acting through the Council of Ministers on behalf of the AU Assembly, to impose sanctions where necessary. This can be expected to cause problems for the courts given their dependency on the AU Assembly to compel execution of their judgments.[60]

---

[56]Sonya Sceats, *above n.* 17.

[57]*Ibid*.

[58]Association for the Prevention of Torture (APT), *above n.*16, at. 8.

[59]Constitutive Act of the African Union, adopted by the Assembly of Heads of State and Government of the Union, Lome, Togo, 11 July, 2000, entered into force on 26 May, 2001.

[60]According to Frans Viljoen and Lirette Louw, "a leading study on the African Commission revealed that the lack of any effective follow-up system had been a key cause of low compliance with the admittedly non-binding recommendations of this body However, this same study also concluded that it is political rather than legal factors that are most likely to determine compliance levels. Herein lies the major dilemma

G. *Context of Egregious Human Rights Violations*: There is much scepticism about the ability of the merged Court to deliver solutions when confronted with large-scale human rights abuses like torture, rape, human trafficking and genocide. Clearly the merged court will only be able to deal with a few of such cases under its human rights section. Moreover, there are no guarantees that the most serious cases will reach the court because even if the victims of grave abuses know about the existence of the court, they (and even if any NGO supporting them) will probably lack standing before the court. For many victims, this will merely compound a pre-existing situation of powerlessness and their inability or disinclination to submit their persons to the ordeal of litigation.[61]

The next subsection will appraise the prospects of the merged court in its desire to promote and protect human rights in the continent.

Part III

4. Prospects of the Merged Court

With the establishment of African Court Justice and Human Rights with power to give binding decisions against a State that embark on violation of human rights and the power to award effective remedies to victims of

confronting both of Africa's new continental human rights courts: while African states are clearly willing to create pan-African institutions designed to safeguard human rights, they may lack the political will to submit themselves to true scrutiny by these bodies, as battles over access suggest, or to reform their practices when these are found to have violated human rights. Of course this problem is not unique to Africa, as demonstrated by the challenge of securing compliance by states such as Russia and Turkey with judgments of the European Court of Human Rights". (See generally., Frans Viljoen and Lirette Louw, "State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004", *American Journal of International Law* Vol. 101:1 (2007), 1–34).

[61]Sonya Sceats., *above n.*17.

human rights violations, there is at least a glimmer of hope that African States have taken the universality concept seriously.[62]

Notwithstanding the fact that some provisions of the Statute of African Human Rights Court and Protocol of the merged Court are severely criticized, at least on paper and in theory, African human rights system has been placed on the same pedestal with the European and Inter-American human rights systems. The establishment of the two Courts represents the third instalment in attempts since Second World War to create Human Rights Court at the regional level;[63] the first being the European Court of Human Rights in 1950, followed by the Inter-American Court of Human Rights in 1979. At present, the European human rights system has only a permanent Human Rights Court.[64] The Inter- American system operates both Human Rights Court and Human Rights Commission which is almost *pari materia* with the African human rights system though with a General section. It is, therefore, gratifying to say African States have adhered to the universal norm of establishing efficient human rights judiciaries at regional level to address continental human rights problems.

A. *Rendering Likely Enforceable Judicial Decisions*: Even though the African commission still retains its important role in promoting human rights in Africa and will continue to monitor state compliance with the African Charter via routine reporting and other processes including special rapporteurs. The fact is that the orders of the commission lacks enforceability as they are not judicial decisions, the merged Court will provide a veritable opportunity for the promotion

[62]Timothy F. 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. Version 1.0, January, 2012 at 72-73.
[63]Sonya Sceats., *above n.*17.
[64]See Juliane K., "The Protection of Fundamental Rights under German and International Law", 8 *African Journal of Inter'l & Comp. Law*, 1996, at 360.

and protection of human rights in Africa since its decision will be binding on the parties before the court.

B. *Wider Judicial Jurisdiction*: The fact that the jurisdiction of the court has been widened by virtue of Article 28 of the merger protocol means that the court will have the opportunity to deal with matters not just related to the interpretation of the African Charter on Human and Peoples Right but other international human rights treaties that would have been entered into by member states. Though this status is not unrelated with its dual mandate achieved from the merger protocol in which the structure of the new Court was defined in the Statute under Article 16 to have two Sections: a General Affairs Section and a Human Rights Section.

   According to Michelo Hansungulu, "a unique feature is the inclusion of "All acts, decisions, regulations and directives of the organs of the Union". Another singular facet is the inclusion of "agreements State Parties may conclude among themselves" as long as they confer jurisdiction on the Court. Bilateral agreements between states parties may probably now be amenable to the Court's jurisdiction. With regard to "or any other legal instrument relating to human rights ratified by the States Parties concerned", the intention is to reach out to those treaties not specifically mentioned in the Statute and to treaties and instruments yet to be adopted.[65]

C. *Development of an African Human Rights Jurisprudence*: According to Yerima, one remarkable feature of African Human Rights Court and also the merged Court is that the Court would be able to give decisions on some areas which are distinct features of African Charter. In pointing out the imperative need for the development of African Human Rights Jurisprudence, a commentator stated that "human

[65] See also Michelo Hansungule, *above n.* 6, at 244.

rights protection in any region requires regional human rights jurisprudence.[66] African human rights system needs it most, due to the restricted formulation of many rights in African Charter and the need to inspire domestic Courts."[67] Apart from guaranteeing the traditional first generation rights civil and political rights, which all other international, regional and municipal human rights instruments have guaranteed and/or recognized, the African Charter places the civil and political rights on the same pedestal with socio-economic rights;[68] "and that civil and political rights cannot be dissociated from economic, social and cultural rights." Although, the interpretation of socio-economic rights would definitely be one of the serious challenges for merged African Court, ultimately, it would aid in the development of African human rights jurisprudence.[69]

Again the fact that the jurisdiction of the merged court is based on a large range of legal instruments, which complement the African Charter and fill in possible gaps were there exist constitutes a real move forward vis-à-vis the two others regional Courts. An applicant can submit a case before the merged African Court by invoking the violation of a Human Rights provision part of a convention ratified by the concerned State[70], which guarantee a larger scale of rights than

[66] Timothy F. Yerima, *above n.* 62, at 73.

[67]V. Frans, "Some Arguments in Favour of and against an African Court on Human and Peoples' Rights", *The African Society of Inter'l & Comp. Law Proc.* 10th Ann. Conf. 1998, at 27.

[68]See Udombana N." The Role of Courts in making Economic, Social and Cultural Rights Justciable in Nigeria" *Fountain Quarterly Law Journal*, August 2004, at160- 174; Fon Coomas (ed.), Justiciability of Economic and Social Rights: An Experience from Domestic Systems (Belgium: Enter Sentia Publishers), 2006.

[69] Timothy F. Yerima, *above n.* 62.

[70]The OAU Convention governing the specific aspects of refugee problems in Africa: adopted on 10 September 1969, entered into force on 26 June 1974, The African Charter on the Rights and Welfare of the Child: adopted in July 1990, entered into force on 29 November 1999, the OAU Convention on the prevention and combating of terrorism: adopted on 14 July, 1999, entered into force on 15 January 2004, The Convention on the Prevention and Punishment of Genocide, 1948, the International Covenant on Civil and

those of the Charter, notably in the field of the protection of women's rights or economic and social rights.[71]

D. *Publicity and Transparency*: The Protocol of the merged court provides that it shall conduct its proceedings in public unless the Court, on its own motion or upon application by the parties, decides that the session shall be closed and this will be in exceptional circumstances.[72] The merged court also has the mandate to explain the reasoning behind its judgments, the Parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States and the Commission.[73] There is also the opportunity to review same when the need arises and the court may also request prior compliance with the terms of the judgment before it admits proceedings in revision.[74] By reporting its activity openly, the Court is more likely to attract media attention and exposure as well as generate more interest and awareness[75] thereby heralding a new era of transparency and accountability in prosecuting states actors who operate with impunity. It is crucial to reiterate that under the African Commission, measures taken with respect to procedures of the Commission remain confidential until such time as the Assembly of

---

Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Convention on the Elimination of all Forms of Racial Discrimination, 1965, the Convention on the Elimination of all Forms of Discrimination against Women, 1979, the Convention against Torture and Other Cruel, Inhuman and Degrading Punishment and Treatment, 1984, and the International Convention on the Rights of the Child, 1989.

[71]See Sidiki Kaba, "10 keys to Understand and Use the African Court on Human and Peoples' Rights, A User's Guide for Victims of Human Rights Violations in Africa and Human Rights Defenders", FIDH, November, 2004 at 37.

[72]Protocol on the Statute of the African Court of Justice and Human Rights, *above n.* 9. Article 39

[73]*Ibid*., Article 43(2) and (5)

[74]*Ibid*., Article 48(3)

[75] Yemi Akinseye-George, "New Trends in African Human Rights Law: Prospects of an African Court of Human Rights", 10 *University of Miami International and Comparative Law Review* 159, 172 (2002).

Heads of State and Government decides.[76] Imperatively, the fear of public condemnation will ideally deter future human rights abuses by states actors. The Protocol of the merged court further provides that if "the Court finds that there has been a violation of human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."[77]

Yerima captured this scenario in the following manner; "The Courts would conduct proceedings in open Court, though secret proceedings could be held in exceptional cases; judgments of the Courts and reasons for the judgments of the African Court on Human & Peoples' Rights within the African Union" must be read in an open Court ; and there is room for dissenting opinion. The Court themselves are required to submit report of their work during the previous year specifying cases in which a State fails to comply with their Court's judgment. This procedure, no doubt, will attract more publicity; it will give room to assess the role of ... the Merged Court in the development of the jurisprudence of human and peoples' rights, which under the Commission system, is considered, "a herculean task". The activities of the Court being in secret would definitely attract media attention to expose States that embark on flagrant violation of human rights. The significance of such publication cannot be underestimated: it is "a particularly effective means of putting pressure on government" or a "potent weapons against human rights denials" and it is also a device to "mark out the violator."[78]

[76]African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U Doc CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October, 1986. Article 59 (1).
[77]Protocol on the Statute of the African Court of Justice and Human Rights, *above n.* 9. Articles 46 and 45 respectively.
[78]Timothy F. Yerima *above n.* 62.

E. *Establishing Judicial Precedents for Sub-Regional Judiciaries, Quasi-Judicial Commissions, and Domestic Courts*: The decisions emerging from the African Court of Justice and Human rights in the near future will serve as a source of judicial precedents for other regional human rights judiciaries addressing human rights problems and treaty based offences or violations considering the fact the double barrel African Court will develop Jurisprudence from both sections of the court. The decisions will serve as precedents for other regional courts and quasi-judicial commissions in Africa and elsewhere, while same decisions will serve as persuasive precedents for domestic courts. Furthermore, with established principles of *stare decisis* on these decisions, there will be uniformity in regional and domestic legislations in Africa. This is important because the provisions of African Charter have been incorporated in the municipal laws of some African countries that practiced dualism system;[79] and having been incorporated, the provisions of the Charter become part of domestic law with international flavour that "possesses 'greater vigour and strength' than any domestic Statute.[80]

It is pertinent to state that there are certain areas of law which are not covered by the African Charter or other international human rights instruments that are applicable in Africa but which a case might arise begging for urgent attention. A judge of a Municipal Court might look

[79] For example, Nigeria since 1983 incorporated the provisions of the African Charter into its Municipal Law in compliance with Section 12 of the constitution of the Federal Republic of Nigeria 1979 (now 1999) known as African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10 Laws of the Federation of Nigeria (LFN) 1990. (now Cap. A9, LFN 2004).

[80]See *General; Sani Abacha & 3 Ors. v. Chief Gani Fawehinmi* (2000) 2 SCNQR 489 at 496 per M.E. Ogundore JSC at 514. See also the decision in *Jonah Gbemre v. Shell Petroleum Development Corporation of Nigeria Ltd and Or.,* (Suit No FHC/ B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November, 2005). See *Communication 225/98 CLO v. Nigeria,* See also *Communication 60/91 Constitutional Rights Project v. Nigeria.*, see also *Communication 155/96 - Social and Economic Rights Action Center v. Nigeria*.

up to the cases decided by the merged Court to tackle the problem at hand. By so doing, the hands of domestic judges would not only be strengthened; but might also justify decisions that could checkmate the violating States.[81]

F. *Greater Judicial Independence from the A.U Assembly*: The Protocol provides several assurances that the judges of the Court will be neutral decision-makers. First, the Court itself decides which communications to consider. This stands in contrast to the Charter in that the required communications previously had to be submitted to both the secretary general of the African Union (AU) and to the chairman of the Commission. Second, the Protocol requires the recusal of any judge who: (a) is a national of any state party to the case to be heard; or (b) has previously taken part in the case in any capacity. Finally, the Court will establish its own rules of procedure setting forth a list of activities in which judges may not engage due to potential incompatibility with judicial duties. The judges' independent judgments as well as the Court's independence from the Assembly in deciding which cases to hear are potentials that could be make the merged courts promising for litigating human rights abuses by African States.[82]

5. Conclusion

Considering the expanded jurisdiction of the African Court of Justice and Human Rights with the possession of a human rights section and a general affairs section, the court has the prospect of addressing various legal issues that will beset the continent in the near future in terms of violations of human rights and general international law applicable to states that are parties to the protocol to the merged court. It is not out of place that the

[81]Timothy F. Yerima, *above n.*62.

[82]See Carolyn Scanlon Martorana, "The New African Union: Will It Promote Enforcement of the Decisions of the African Court of Human and Peoples' Rights?" *The Geo. Wash. Int'l L. Rev*. Vol. 40, 2008, at. 599-601.

limitations placed on individuals and NGOs from bringing direct application before the court except that such states have made a declaration to that effect is a setback for the merged court and a great hurdle for quick realisation of justice against impunity by African Leaders or states actors. It is still doubtful the relationship, cooperation and delimitation of competences between merged court and other judicial bodies of regional and sub-regional communities will need to develop over time. The hope remains that the amalgamation of the two courts of the AU will lend new impetus to the further development of a supranational court system in Africa.[83] Though, it is not unexpected that one of the greatest challenges that will face the merged court is how to deal with issues of diversity in the African continent. In contrast to its sister courts in Europe and the Americas, the African Court of Justice and Human Rights will face the difficult task of dealing with a considerably more heterogeneous group of members.[84]

[83]Andreas Zimmermann and Jelena Bäumler, *above n.*10, at. 53.
[84]*Ibid*., at. 52.

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

Berhanu Mosissa Wakjira*

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

* LL.B, LL.M (Studied Human Rights Law at Addis Ababa University, School of Law and Governance Studies, Currently Full Time Lecturer at Ambo University, School of Law's Free Legal Aid Center Coordinator, initially recruited by Ambo College at Department of Cooperatives to handle law common courses and who initiated the idea of launching law school and successfully did, former head department of law at Ambo University, worked at different government career *inter alia* Zone public prosecutor at Oromia Regional State, West Shoa Zone. The author can be reached at: berhanumo2008@yahoo.com.

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

dilemma of the justiciabilty 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 instruments[2] 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

> *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)

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 "e*nsure 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;"*[9]The 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,*Article1(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*

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 instruments[17] 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);(

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 guidelines[22] 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

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)

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

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 remedy[41]. 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

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 CESCR, 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)*

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 Africa[53] 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

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 housing[58] 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 European[59] and the inter-American[60] 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

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

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 dialogue[68] 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

assistance[69] 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 *Schutte*r 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))

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

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, QUTLJJ, (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 Comments[79] 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 organ[81] 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

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 system[87] 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 CESCR 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

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

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 law [96].

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

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 CESCR 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.

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.

Ratification of the Optional Protocol on the Involvement of Children in Armed Conflict (2000) by Ethiopia: What is the Added-Value?

Yitages Alamaw Muluneh*

Abstract:

In armed conflicts in different parts of the world, the involvement and recruitment of children seem to be inevitable part of the story. In order to stop involvement of children in armed conflict, the UN has come up with Optional Protocol on the Involvement of Children in Armed Conflict in 2000. The Federal Democratic Republic of Ethiopia (FDRE, hereinafter) has ratified the Optional Protocol.[1] This writer sees the important values the Optional Protocol has added to the already existing human (child) rights system as the ratification of the Optional Protocol by the FDRE has enabled the country to import these added values to the existing domestic human rights system per Art.9(4) of its Constitution. The government failed to fix 18 years under the new Defence Forces law and hence to work towards establishing 18 as minimum requirement age under the law. Thus the ratification imports a law that cures this defect. The writer argues that the persisting challenges are the absence of proper birth registration and absent or defective procedures for age verification. The researcher further argues that the Ethiopian recruitment procedure is not reliable. He argues also that incorporation of substantive provisions as to cross-border recruitment, training and use of child soldiers, and provisions relating to specific problems to girl child soldiers or indirect participation should be soldiered on.

* Yitages Alamaw Muluneh (LL.B, LL.M, Senior Public Prosecutor; formerly, Practicing Senior High Court Judge, and Lecturer of Law and Director of Moot Court Centre (Jimma University)).

[1] Proclamation No.826/2014, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts Ratification Proclamation, Federal Negarit Gazette, 20th Year No.20.

1. Introduction

There are armed conflicts in different parts of the world today. The involvement and recruitment of children into these conflicts seem to be an inevitable part of the story. It is estimated that some 250,000 to 300,000 children are today involved in more than 30 conflicts worldwide.[2] In order to stop the involvement of children in armed conflict, international, regional and national efforts have been aggressively taken since, at least, 1940s. These subsequent efforts finally culminated in the UN Optional Protocol on the Involvement of Children in Armed Conflict (2000). Given the various conventions and efforts discussed below what is the need for this Optional Protocol? Does it add any value? This issue would be discussed in this article. However, this work will be limited to the discussion of the protection of children from recruitment and participation in armed conflicts as provided for under international instruments specifically dealing with children. As mentioned above, the work particularly focuses on the appraisal of the added-value of the Optional Protocol on the Involvement of Children in Armed Conflict (Optional Protocol) on the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). What new additions are made to the already existing protections under the CRC and the ACRWC by the Optional Protocol? Is there any additional protection offered by this Optional Protocol so as to praise its adoption by FDRE and to lobby for its ratification by other states in the world?

In doing so, the work will be divided into five sections. The first section gives a brief survey of the reasons for child soldiers' recruitment, its consequences and efforts made to stop the involvement of children in

[2] United Nations General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/60/335, 7 September 2005, p.1; Eben Kaplan, Child Soldiers Around the World, available at, http://www.cfr.org/human-rights/child-soldiers-around-world/p9331#, visited on 27/3/2014; Children of Conflict, available at http://www.bbc.co.uk/worldservice/people/features/childrensrights/childrenofconflict/, visited on 27/3/2014.

armed conflicts. The second section deals with the protection of children from recruitment into and participation in armed conflict as provided under the CRC. The third section deals with the protection of children from recruitment into and participation in armed conflict under the ACRWC. The fourth section will be devoted to discussion on the Optional Protocol and evaluation of the added- value of same to the CRC and ACWRC. Finally, a brief conclusion and recommendation will be made.

2. Brief Overview of reasons for Child Recruitment, consequence of their participation, and the overall international response

The involvement of children in these armed conflicts is multi-dimensional. They are used not only as fighters in frontlines like adult soldiers but also as spies, messengers, sentries, porters, servants, sexual slaves and human shields.[3] Though the problem is most critical in Africa and Asia, children are used as soldiers by both armed groups and governments in a number of countries in America, Europe and the Middle East.[4] Internationally, though more than 130 states, in line with the recommendations of expert international human rights bodies, have set their minimum armed forces recruitment age at 18 or above, states like the UK, Iran, North Korea and Zimbabwe do recruit children at 16 years of age and the US recruits at the age of 17.[5]

[3] The Roméo Dallaire Child Soldiers Initiative, *Child Soldiers: A Handbook for Security Sector Actors*, 2nd Ed., 2013, Canada, pp.25-29.
[4] Action for the Rights of Children, *Child Soldiers: Critical issues*, 2002, p.4.
[5] Coalition to Stop the Use of Child Soldiers, *Catch 16-22 Recruitment and retention of minors in the British Armed Forces*, 2011, UK, p.1; Child Soldiers International, *Report to the Committee on the Rights of the Child in advance of the United States of America's second periodic report on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, April 2012, UK, p.5; United States Code, Title 10, Subtitle A, Part II, Chapter 31, section 505(a), enacted by act Aug. 10, 1956, updated January 2012, available at http://www.law.cornell.edu/uscode/text/10, visited on 27/03/2014.

Looking into the national recruitment legislation of FDRE, it is possible to conclude that military service is not compulsory in Ethiopia.[6] With respect to recruitment of members of the defence forces, however, there is no specific age limit fixed. The law simply states that the Ministry of National Defence 'may, in accordance with its criteria issued from time to time, recruit persons fit and willing for military services.'[7] However, the criteria issued have defined a minimum recruitment age of 18 years as seen in call up notices. The FDRE Constitution states that children will 'not be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to [their] health or well-being.'[8]As FDRE is party state to ILO Convention 182[9] (thus it is part of the law of the state)[10] and since the human rights part of the FDRE Constitution is to be interpreted in light of the international human rights agreements the country adopted,[11]it is understandable that recruitment of children (persons less than 18) into the defence forces is prohibited in Ethiopia. This is what the interpretation of the Constitution dictates. This was confirmed by the UN Special Representative of the Secretary-General for children and armed conflict. Upon visits to Ethiopia in 2002, the UN Special Representative of the Secretary-General for children and armed conflict reported that 'no systematic recruitment and use of child soldiers had been taking place during the conflict in either Ethiopia or Eritrea', and recommended ratification of the Optional

[6] It is possible to read this from the term 'willing' under the law and the practice in place. Proclamation No.809/2013, The Defence Forces Proclamation, Federal Negarit Gazette, 20th Year No.7, Art.5 (1).

[7] Ibid. The national reserve force recruitment law also does not fix 18 years of age. See Proclamation No.327/2003, Establishment of the National Reserve Force Proclamation, Federal Negarit Gazette, 9th Year No.47.

[8] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazeta*, Year 1 No.1, (FDRE Constitution), Art.36 (?).

[9] Proclamation No.335/2003, The Convention Concerning Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Ratification Proclamation, Federal Negarit Gazette, 9th Year No.55.

[10] Id, Art.9 (4).

[11] Id, Art.13.

Protocol.[12] Accordingly, Ethiopia has ratified the Optional Protocol in 2014.

When one inquires into the reasons why children are recruited into armed groups or government armed forces, there are various reasons for it. These reasons are also complex. Some children are 'driven into armed forces by poverty, alienation and discrimination.'[13] Moreover, many other children 'join armed groups because of their own experience of abuse at the hands of state authorities.'[14] The other reason for recruitment of children is the shortage of adults and 'special quality' they possess as compared to adults. These special qualities are that children can easily be used in battles; they can easily be manipulated; they are adventurous; they are quick to learn fighting skills; they do not compete for the leadership role; they are less costly; and, they pose a moral challenge for enemies.'[15]

The recruitment may also be voluntary or forced. But the voluntariness of child recruitment is doubtful especially in Africa as children are driven to armed group and armed forces due to poverty, discrimination and abuse, to mention few, not out of free will.[16] A recruitment resulting from such factors can hardly be said voluntary in the strict sense.

The effect of conflict on children is enumerable let alone when they are involved in it. Involvement of children in conflict has been said to have many disastrous consequences on their physical and moral wellbeing. To mention such effect in simple language, various studies find out that the involvement of children in armed conflicts deprives of their childhood.[17]

---

[12] Child Soldiers Global Report 2004 with Respect to Ethiopia, p.1.
[13] Action for the Rights of Children, at note 3 above, p.4.
[14] Ibid.
[15] Id, p.8; Abraham, S. 'Child Soldiers and the Capacity of the Optional Protocol to Protect Children in Conflict,' *Human Rights Brief*, Volume 10 Issue 3, p.4.
[16] Machel, G. Impact of armed conflict on children, available at, http://www.un.org/rights/introduc.htm, accessed on 29/10/13.
[17] Ibid.

This makes regulation of recruitment of child soldiers very important as it has to do with protecting the wellbeing of the new generation. Accordingly, various attempts to regulate this problem of child participation in armed conflicts have been made at different levels.

At international level, the attempt to protect children during armed conflicts dates back to the 1940s, at least. The protection of children under a binding international instrument has been provided for the first time under the Geneva Conventions of War in general and the Fourth Geneva Convention in particular.[18] This Convention provides that the Occupying Power may not, in any case, enlist children in formations or organizations subordinate to it.[19] In 1970s, two Additional Protocols to the Geneva Conventions were adopted and these Additional Protocols have provided for the protection of children during armed conflicts. The First Additional Protocol provided for prohibition of recruitment of children below fifteen years of age into armed forces and protected children of this age from direct participation in hostilities.[20] The Second Additional Protocol also provided for similar protection except that it is applicable towards non-international armed conflicts. It provides that

[18] Mezmur, B.D. 'Children at both ends of the gun: Child soldiers in Africa,' in *Children's rights in Africa: A legal perspective*, Sloth-Nielsen, J. (ed.), Ashgate publishing company, England, 2008, pp.200-201.

[19] Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, (Geneva Convention IV), Art.50, second para.

[20] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, Article 77(2). It reads: 'The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.' This protection extends to children fall into the hands of adversary. Sub-article (3) of the same article provides that 'If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.'

'[c]hildren who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.'[21]

These international agreements were followed by the Convention on the Rights of the Child, 1989 (CRC). The CRC has been adopted as a comprehensive convention on the rights of the child under the auspices of the United Nations and has also provided for the primary and secondary protection for certain category of children from taking direct part in hostilities.[22] By the same token, the African counterpart of the CRC, the African Charter on the Rights and Welfare of the Child, 1990, (ACRWC) has provided for primary protection for all children from taking direct part in hostilities and recruitment.[23]

Subsequently, in 1993, the World Conference on Human Rights was held in Vienna.[24] This Conference resulted in the Vienna Declaration and Programme of Action. With respect to the rights of the child 'The Conference calls on the Committee on the Rights of the Child to study the question of raising the minimum age of recruitment into armed forces.'

[21] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977, Article 4(3)(c). For interesting discussion on the protection of child soldiers under the Geneva Conventions and their Additional Protocols, see Wells, S. L. 'Crimes against child soldiers in armed conflict situations: Application and limits of international humanitarian law,' *Tulane Journal of International and Comparative Law*, Vol.12, 2004.

[22] Convention on the Rights of the Child, adopted by the UN General Assembly, Res. 44/25, 20 November 1989, (CRC), Article 38(2) (3). Article 38(3) also puts States Parties, '[i]n recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.'

[23] African Charter on the Rights and Welfare of the Child, adopted by the Sixteenth Ordinary Session of the OAU Assembly of Heads of State and Government, Res. 197 (XVI), Monrovia, 17–20 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990),, 1990, (ACRWC), Art.22 (2). Article 22 (2) provides: 'States Parties to the present Charter shall … refrain, in particular, from recruiting any child.'

[24] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, GENERAL A/CONF.157/23, Vienna.

Thus participant states have declared that there is a need to raise the minimum age of recruitment into armed forces.

The year 1996 was remarkable in that concern of child soldiers became among the leading concerns in the UN. Hence, Graça Machel was mandated by the United Nations to study the impact of armed conflict on children. She came up with prominent report. As part of the reports' recommendations, the General Assembly established the mandate of the Special Representative of the Secretary General for Children and Armed Conflict.

As part of the effort to deal with the tragic and growing problem of children involved in armed Forces and groups, the NGO Working Group on the Convention on the Rights of the Child and UNICEF conducted a symposium in Cape Town (South Africa) from 27 to 30 April 1997. The symposium was intended to bring together experts and partners to develop strategies for preventing recruitment of children, in particular for establishing 18 as the minimum age of recruitment, and for demobilizing child soldiers and helping them reintegrate into society. The symposium culminated in the Cape Town Principles and Best Practices.[25] These Principles and Best Practices recommend actions to be taken by governments and communities in affected countries to end violation of children's rights.

After this came the Rome Statute on International Crime (1998). This Statute also protects children below fifteen years of age from recruitment and participation in hostilities. The ICC exercises jurisdiction over the most serious crimes of concern to the international community as a whole. It has jurisdiction in accordance with its Statute with respect to the

[25] The NGO Working Group on the Convention on the Rights of the Child and UNICEF, Cape Town Principles and Best Practices, adopted at the symposium on the prevention of recruitment of children into the armed forces and on demobilization and social reintegration of child soldiers in Africa, 27-30 April 1997, Cape Town, South Africa, preamble.

following crimes: The crime of genocide; Crimes against humanity; War crimes; and the crime of aggression.[26] For the purpose of the ICC Statute, 'war crimes' means: Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the acts against persons or property protected under the provisions of the relevant Geneva Convention including in particular '[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.'[27] Therefore, the offences provided for under this Statute are three different crimes of conscripting or enlisting children, or using them in hostilities.

In 1999, the International Labour Organization adopted a convention that requires each State party to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.[28] It also thereby declares child soldiering an intolerable form of child labour and calls for an end to recruitment of children under 18 for use in armed conflicts under Convention No. 182 on the Worst Forms of Child Labour (1999).[29]

Finally, in 2000, the UN Optional Protocol on the Involvement of Children in Armed Conflict has been adopted. Given the above conventions and efforts what is the need for this Optional Protocol? Does

[26] Rome Statute of the International Criminal Court, Art.5.

[27] Id, Art.8, (vii). Cases before ICC on child soldiering include Thomas Lubanga Dyilo (Democratic Republic of the Congo), Germain Katanga & Mathieu Ngudjolo Chui (Democratic Republic of the Congo), Jean-Pierre Bemba Gombo (Central African Republic), Joseph Kony et al. (Uganda) cases.

[28] International Labour Organization (ILO) Convention 182, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Adopted by the General Conference at Its 87th Session, Geneva, 17 June 1999, Article 1. This Convention is ratified by Ethiopia (see, Proclamation No. 335/2003, A Proclamation to ratify the International Labour Organization Convention on Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *Federal Negarit Gazeta*, Federal Democratic Republic of Ethiopia, 9thYear No. 55, 8th May, 2003).

[29] Id., Article 3 (a).

it add any value? This issue would be discussed in the subsequent sections of this article.

3. The protection of children from recruitment into and participation in armed conflicts as provided under the CRC

The CRC is a comprehensive document on child rights adopted under the auspices of the United Nations. As a result, it deals with the issue of recruitment into and participation in armed conflict of children as well. It provides for different rules relating to child soldiers. First, it provides that 'States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.'[30] The protection from recruitment offered to this category of children is complete protection hence one may call it primary protection. The primary protection under the CRC is limited to children less than fifteen years of age.[31] Therefore, excluded are children who attained the full age of fifteen and below eighteen years. This makes CRC weak and also strong at the same time.

It is weak having regard to the fact that it offers protection to persons less than eighteen years, generally speaking, in other cases but limits it self to less than fifteen years in case of protection to child soldiers, which is low.[32] It is strong as it avoids states' discretion as far as children less than fifteen years are concerned. The strength in this regard is significant if seen in light of the discretion left to states to set minimum ages for criminal responsibility[33]and the practice thereto as some countries fixed very low age as the minimum age for criminal responsibility. Another

[30] CRC, Article 38 (3). This is the case under the Geneva Conventions and their Additional Protocols.
[31] This is a compromised age at the time of drafting the CRC. See Mezmur, cited at note 16 above, p.202; Hackenberg, M.L. 'Can the Optional Protocol for the Convention on the Rights of the Child protect the Ugandan child soldier,' *Indiana International and Comparative Law Review*, Vol.10, 2000, p.428.
[32] Becker, J. 'Child soldiers: Changing a culture of violence,' *WTR Human Rights*, Vol.32, 2005, p.16.
[33] CRC, Article 40 (3) (a).

point of weakness of the CRC is that it does not protect all children, even those less than fifteen years of age, in respect to conscription as it provides only for recruitment.[34] Finally, states are obliged to prioritize the recruitment of the old ones in case of recruitment of children between fifteen years of age to eighteen years of age.[35] This is what we call secondary protection.

Second, the CRC provides that 'States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.'[36] In this respect, it is possible to see three problems. The first problem is that the CRC is limited only to children who are less than fifteen years. This makes it less protective for the same argument forwarded above in respect to recruitment. The second problem relates to the language it uses. It obliges states to 'take all feasible measures.' But it does not define acts that constitute such measures. It also employs the phrase 'direct part.' Some writers argue that there is no protection from indirect participation.[37] They also argue that what constitutes direct and indirect part in hostilities is not clear.[38] The third problem relates to the lack of clarity as to whether this obligation under the CRC obliges states to ensure that children of this age group do not take a direct part in hostilities as members of their armed forces only or in armed groups in their territory as well.[39] This is to say that whether the emerging jurisprudence in human rights that informs states are liable for human rights violations within their territory regardless of their effective control applies to cases of child soldiers in armed groups or not

[34] Hodgkin, R. & Newell, P. *Implementation handbook for the Convention on the Rights of the Child*, United Nations Children's Fund, 2002, p.572.
[35] CRC, Article 38 (3).
[36] CRC, Article 38 (2).
[37] Detrick, S. *A commentary on the United Nations' Convention on the Rights of the Child*, Marthinus Nijhoff, 1999, p.652.
[38] Ibid.
[39] Escobar V. "Reclaiming the 'Little Bees' and the 'Little Bells': Colombia's failure to adhere to and enforce international and domestic laws in preventing recruitment of child soldiers,' *Fordham International Law Journal*, Vol.26, 2003, p.839.

is not well settled. The emerging jurisprudence in the international human rights arena is that states are responsible for acts of human rights violations by armed groups within their territory regardless of their effective control.

Third, the CRC provides that states are obliged to adhere to international humanitarian laws protecting children.[40] This should be taken as referring to the Geneva Conventions and their Additional Protocols, and customary international humanitarian law. Fourth, states are obliged to 'take all feasible measures to ensure protection and care of children who are affected by an armed conflict' in accordance with their obligations under international humanitarian law.[41] Here, too, it is clear to see that the CRC is infested with imprecise phrases-what is 'feasible measures?', which laws are 'international humanitarian laws protecting children?', and what are 'their obligations under international humanitarian law?'

Finally, the CRC deals with the duty of a state to 'take all appropriate measures to promote physical and psychological recovery and social reintegration of a child' who is victim of armed conflicts.[42] What constitutes 'all appropriate measures' is left unclear. Related to this duty is the duty of a state to carry out the promotion of the physical and psychological recovery and social reintegration of children affected by armed conflicts 'in an environment which fosters the health, self-respect and dignity of the child.'[43] This has to do with rehabilitation and reintegration of child victims but does not provide for disarmament and demobilization of child soldiers expressly.

To conclude, it is important to see that an attempt for regulation of child soldiering has been made under the CRC. However, the protection of

[40] CRC, Article 38 (1).
[41] Ibid.
[42] Id, Article 39.
[43] Ibid.

child soldiers provided is insufficient and problematic. Despite this fact, the attempt made by the CRC to provide for a framework of protection of child soldiers should be appreciated. In particular, the emphasis given to regulate the situation can be seen from devoting separate provision on the protection of child soldiers, making cross reference to international humanitarian law and imposing additional or specific state obligations in respect to child soldiers in addition to the general state obligations on the implementation of the CRC under Article 4. It also provides for the reintegration and rehabilitation of child victims. Finally, it is important to note that the CRC as human rights document applies only to states. Hence, the protection it provides to child soldiers is limited to protection of child soldiers in relation to the state (if only a party), not child soldiers in armed groups.

4. The protection of children from recruitment into and participation in armed conflicts as provided under the ACRWC

ACRWC is a regional counterpart of the CRC. In the same vein as the CRC, it deals with child soldiers under some provisions. It has been said that one of the reasons that necessitated the formulation and adoption of ACRWC 'was the use of children as soldiers and the required establishment of a compulsory minimum age for military service.'[44] Consequently, it is possible to expect that the ACRWC to provide for a better protection. Is this expectation realized or not will be answered after the discussion in this section.

The ACRWC deals with child soldiers under Article 22. Under this Article, various rules have been provided for. First, it prohibits states 'from recruiting any child'[45]into their armed forces. 'Any child' here refers to any person under the age of eighteen years as child is defined

[44] ACRWC, preamble, para.4.
[45] Id, Article 22 (2).

under ACRWC as 'every human being below the age of 18 years.'[46] This shows that the ACRWC has a wider room of protection of child soldiers unlike the CRC, which is limited to children of less than the full age of fifteen years. But it did not cure the defect under the CRC, namely, the failure to prohibit conscription of children into armed forces in clear terms. Second, the ACRWC obliges states to 'take all necessary measures to ensure that no child shall take a direct part in hostilities.'[47] This protection is similar to the CRC. The criticisms in relation to the CRC made above equally apply to the ACRWC as far as this protection is concerned. For instance, when can one say 'all necessary measures' are taken? What is taking direct part in hostilities as opposed to indirect part? Third, the ACRWC also requires states to adhere to their obligations under international humanitarian law relevant to protect child soldiers in armed conflict.[48] This should be taken as, like in the case of the CRC, referring to the Geneva Conventions and their Additional Protocols, and customary international humanitarian law. Fourth, states are obliged to 'take all feasible measures to ensure the protection and care of children who are affected by armed conflicts' in accordance with their obligations under international humanitarian law.[49] Here, too, it is clear to see that the ACRWC, like the CRC, is infested with imprecise phrases-what is 'feasible measures?', which laws are 'international humanitarian laws protecting children?', and what are 'their obligations under international humanitarian law?'

To conclude, the protection to child soldiers under the ACRWC is more or less similar to the CRC. But the former uses 'a straight' eighteen years position.[50] This makes it better than the CRC. The CRC is better for it deals with the physical and psychological recovery and social integration of child soldiers affected by armed conflicts unlike the ACRWC. Hence,

[46] Id, Article 2.
[47] Id, Article 22 (2).
[48] Id, Article 22 (1).
[49] Id, Article 22 (3).
[50] Id, Arts22 (2) & 2.

the only improvement to the CRC made by the ACRWC is the increment of the age of children protected from taking direct part in hostilities and recruitment to eighteen years. As Ethiopia is a member state to the ACRWC, what is the value added by ratification of the Optional Protocol by Ethiopia? This would take us to the next section.

5. The protection of children from recruitment into and participation in armed conflicts under the Optional Protocol on the Involvement of Children in Armed Conflict

Under this section, the writer deals with the protection of child soldiers as provided under the Optional Protocol on the Involvement of Children in Armed Conflict, 2000 (the Optional Protocol) and the value-added to the existing protection systems particularly the CRC and the ACRWC. In doing so, the discussion begins with the historical background of adoption of the Optional Protocol.

As mentioned in section two, the fifteen age limit for protection of child soldiers under Article 38 of the CRC is a compromised age. This compromise was made only to get the adoption of the CRC as soon as possible, not because the protection for child soldiers was deemed to be sufficient. Therefore, the United Nations appointed a working group with a mandate to draft an optional protocol to the CRC that would raise the minimum age for recruitment of child soldiers to eighteen years in 1989.[51] This attempt was slow to come up with optional protocol until it was energized by a report written by Graça Machel in 1996 in which 'she stressed the urgent need to stop the use of child soldiers and further recommended the imminent need for the optional protocol' and pressure from different reports and actors like the Coalition to Stop the Use of Child soldiers founded in 1998 by six Non-Governmental

[51] Vachachira, J.S. 'Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of children in Armed Conflict,' *New York Law School Journal of Human Rights*, Vol.18, 2002, p.544.

Organizations.[52] The increasing concern for child soldiers culminated into the Optional Protocol in 2000.

The Optional Protocol has strengthened protection to children in relation to armed conflict. It obliges states to 'take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.'[53] This shows that the Optional Protocol increases the age for taking direct part in hostilities to a straight eighteen years of age.[54] This can be seen as a value-added on CRC as the protection in the CRC is limited to children less than fifteen years of age. But it does not have added-value in respect to the ACRWC in this respect. In addition, the Optional Protocol is still defective as it does not expressly deal with protection in the case of indirect participation in hostilities. But it has been suggested that direct participation should be interpreted to include not only active participation in combat but also military activities and direct support functions.[55]If such wider interpretation is accepted, the Optional Protocol clarifies the concept of taking direct part under both the CRC and ACRWC. This can also be taken as one added-value to the CRC and the ACRWC. What about recruitment, i.e. conscription and enlistment?

Second, the Optional Protocol obliges states to 'ensure that persons who have not attained the age of 18 years are not compulsorily recruited into

---

[52] Ibid.

[53] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000, entered into force on Feb.12, 2002, (Optional Protocol), Article 1. The ILO Convention 182 is the first international instrument to set participation in military at the age of eighteen. See Abraham S., cited at note 13 above, p.5.

[54] Cohn, I. 'Progress and hurdles on the road to preventing the use of children as soldiers and ensuring their rehabilitation and reintegration,' *Cornell International Law Journal*, Vol.37, 2004, p.532.

[55] The United Nations Children's Fund (UNICEF), *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict*, United Nations Children's Fund, New York, 2003, p.14.

their armed forces.'[56] By imposing such obligation, it excludes compulsory recruitment (conscription) of persons under the age of eighteen.[57] This shows that the Optional Protocol affords a wider protection to children than the CRC. This can be taken as one area of value-added to the CRC by the Protocol as it affords protection to children above fifteen but below eighteen years of age. But it adds no value to the ACRWC.

Third, the Optional Protocol provides for voluntary recruitment (enlistment) of children with safeguards.[58] This may also be taken as an added-value to protection of children under Article 38 of the CRC. But as far as the ACRWC is concerned, it adds no value as the ACRWC prohibits recruitment, even if it is through enlistment, of a child. In addition, ACRWC provides a better protection than the Optional Protocol as the safeguards provided for voluntary recruitment under the latter are not viable safeguards in the African context.[59] One example of the safeguards that are not feasible in the context of Africa is the requirement of 'reliable proof of age'[60] as birth registration is rare in many countries in the continent.[61] Relating to voluntary recruitment, it is important to see that the Optional protocol 'requires parties to raise the age of voluntary enlistment to at least one year above the fifteen-year age limit' provided under the CRC.[62] This can also be taken as an added-value of the Protocol.

[56] Optional Protocol, Article 2.
[57] UNICEF, cited at note 54 above, p.4; Cohn, cited at note 52 above, p.532.
[58] Optional Protocol, Article 3. In this respect, the ACRWC s better as it prohibits the recruitment of child soldiers be it voluntarily or compulsorily.
[59] Mezmure, cited at note 18 above, pp.205-206. Such minimum safeguards are 'Such recruitment is genuinely voluntary; such recruitment is done with the informed consent of the person's parents or legal guardians; such persons are fully informed of the duties involved in such military service; and, such persons provide reliable proof of age prior to acceptance into national military service.' Optional Protocol, Art.3 (3 a-d).
[60] Optional Protocol, Article 3 (3) (d).
[61] Mezmure, cited at note 18 above, p.205
[62] Cohn, cited at note 52 above, p.532.

Fourth, the Optional Protocol, unlike other human rights treaties, deals with armed groups.[63] It prohibits the recruitment or use of children below the age of eighteen years of age by armed groups.[64] This prohibition is indeterminate in the sense that it prohibits both voluntary and compulsory recruitment or use of children by armed groups. Such stringent standard with respect to armed groups while allowing states to voluntarily recruit children below eighteen years of age is said to reflect the world's reality. In reality, children are mostly recruited by armed groups. This fact necessitated such commendable standard with respect to armed groups.

As far as this feature of the Optional Protocol is concerned, the Protocol has two added-values with respect to both the CRC and the ACRWC. First, it applies to armed groups and states unlike the CRC and the ACRWC, which are limited only to states as they are the only signatories governed by the terms of the conventions. Second, it provides for a higher standard of protection for children with respect to recruitment and use of children below the age of eighteen years in hostilities by armed groups. In relation with armed groups, the Optional Protocol not only prohibits the recruitment or use of children less than eighteen years of age by armed groups but also obliges states to 'take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.'[65] This shows that the Optional Protocol requires the enforcement of the obligations of armed groups by feasible means possible. This can also be seen as an added-value to the CRC and the ACRWC. But, critically seen the application of this value of the Optional Protocol is very doubtful as Africa is a continent where many armed groups exist and at the same time economically poor. It can not economically afford to run programs necessary to implement the Optional Protocol.

[63] Optional Protocol, Article 4.
[64] Id, Article 4 (1).
[65] Optional Protocol, Article 4 (2).

Fifth, the Optional Protocol explicitly provides that states are obliged to carryout a task of promotion with a view to making the principles and provisions of the Optional Protocol known to both children and adults.[66] The CRC and the ACRWC do not explicitly impose such obligation on states specifically for protection of children from armed conflict. Hence, this can be seen as one added-value to the CRC and the ACRWC. This is significant for Africa where human rights awareness in general and child rights awareness in particular is very low for various reasons like illiteracy and poor media accessibility.

Sixth, the Optional Protocol provides for the principles of demobilization, disarmament and reintegration.[67] It provides that children recruited or used in hostilities in violation of the Optional Protocol be demobilized or released from service and given 'appropriate assistance for their physical and psychological recovery and their social reintegration' when necessary.[68] The value-added to the CRC under this principle of the Optional Protocol is that the latter includes a new concept of disarmament, which is not present under both Article 38 and Article 39 of the CRC. As far as the ACRWC is concerned, the Optional Protocol has two added-values. First, it includes a concept of demobilization which is not there under the ACRWC. Second, the Optional Protocol includes the idea of reintegration which is not also there under the ACRWC. Finally, it is important to see that the Optional Protocol, though not clear, seems to incorporate the concept of rehabilitation to children recruited or used in hostilities contrary to its principles. This can be seen from the clause 'appropriate assistance for their physical and psychological recovery' and the term 'rehabilitation'[69]under Article 7 (1) of the Optional Protocol. If this is acceptable, it is possible to see that the Optional Protocol adds a new concept of rehabilitation to children recruited or used in hostilities in

[66] Id, Article 6 (2).
[67] Id, Article 6 (3).
[68] Ibid.
[69] See also Optional Protocol, Preamble, para.17.

violation of the Optional Protocol into the CRC and the ACRWC. This is significant for Africa as many of its children are victims of armed conflicts and need social reintegration and rehabilitation programs.

Seventh, the Optional Protocol calls for international cooperation with respect to implementation of the principles enshrined therein.[70] This may also be taken as an added-value of the Optional Protocol to the CRC and the ACRWC as the latter two do not have such obligation with regard to the protection of children from participation in armed conflicts but general cooperation obligation with regard to the implementation of the CRC and ACRWC in general. This difference is significant in relation to rehabilitation and social integration. The Optional Protocol emphasis international cooperation with regard to the rehabilitation and social integration of children who are victims of acts contrary to the principles of the Optional Protocol.[71] This is significant as rehabilitation programs and social integration activities need cooperation as they are costly and require experience sharing on what programs and activities are required in a certain situation and how it should be carried out. This may be taken as one praiseworthy added-value of the Optional Protocol to the CRC and the ACRWC.

Moreover, the Optional Protocol shows that the implementation of the principles incorporated thereunder calls for the involvement of relevant organizations as well as states.[72] It also envisages the idea of participation of local actors, in particular participation of the community in the implementation of the Optional Protocol.[73] It has also made children not only recipients of protection but also agents that should participate in the implementation of the Optional Protocol actively.[74] This shows that the Optional Protocol provides for a comprehensive approach to end the act

[70] Id, Article 7 (1).
[71] Ibid.
[72] Ibid.
[73] Id, Preamble, para.18.
[74] Ibid.

of recruitment or use in hostilities of children in violation of the Optional Protocol. Such approach is described by a certain writer as '[t]he most effective means of ending this offensive practice.'[75] It is very true that it is only through a multidimensional approach that involves states, relevant international organizations, local actors and affected children that the dreams under the Optional Protocol can be realized.

The significance of such approach can be seen in light of the difficulty some State Parties to the Optional Protocol like the Democratic Republic of Congo, the Sudan, and Somalia may face in implementing the principles under the Optional Protocol unless international assistance, for instance, is not offered to them.[76] Such multifaceted approach that allows the involvement of various actors in the implementation of the principles under the Optional Protocol could be seen as an added-value of the Protocol to the CRC and the ACRWC. CRC and the ACRWC though require international cooperation in their general implementation only and do not incorporate comprehensive means for their implementation at all. This feature of the Optional Protocol is significant for Africa as most states are poor to cover all costs necessary to implement the Optional Protocol, particularly to run disarmament, demobilization, reintegration and rehabilitation programs. Moreover, cooperation of states for implementation of the principles of the Optional Protocol may be helpful to reduce incidents of cross-boarder recruitment prevalent in Africa as states may not allow armed groups of neighboring countries in particular to crossover their boundaries and recruit child soldiers. This can be achieved through cooperation relating to tightening boarder security through bilateral and multilateral cooperation and agreements.

Ninth, the Optional Protocol requires states to report to the Committee on the Rights of the Child providing comprehensive information on the

[75] Abraham, cited above at note 13, p.2.
[76] Bainham, A. & Rwezaura, B. *International Survey of Family Law 2006*, International Society on Family Law, 2006, p.4.

measures they have taken to implement the provisions of the Optional Protocol in general and those on participation and recruitment in particular.[77] This report is additional to the report required under Article 44 of the CRC and Article 43 of the ACRWC.[78] This would strengthen the overall enforcement mechanism of child protection from participation in armed conflicts and recruitment into armed forces and groups. This in effect may have an added-value on strengthening the enforcement mechanism of the CRC and the ACRWC.

Finally, the Optional Protocol takes one step ahead of the CRC though in weak form in that it reiterates the concern for cross-boarder recruitment, training and use of children in hostilities.[79] But it does not deal with cross-boundary recruitment in its substantive provisions. This makes it weak. But, it has at least lifted the concern at preambular level and this is important in the implementation of the principles it contains. The provisions of the Optional Protocol should be interpreted having regard to such cross-boarder problem enshrined in the preamble as the preamble tells the purpose of the Optional Protocol. In this respect, it is possible to see an added-value of the Optional Protocol to the CRC and the ACRWC. Having regard to the African problem of cross-boundary recruitment of child soldiers, the Optional Protocol is typically significant.

Coming to the Case of FDRE, the Optional Protocol is significant in that it is part and parcel of the laws of the land as per Art.9 (4) of the FDRE Constitution. Thus, some values added to the CRC and to the ACRWC are also imported to the domestic human rights system as the result of ratification of this Protocol. However, it does not have any added value with respect to two significant points: a) the 18 years limit as this has already been done by adopting the ACRWC, and b) the criminalization of acts of recruiting child soldiers in times of war, armed conflict or

[77] Optional Protocol, Article 8 (1).
[78] Id, Article 8(2).
[79] Id, Preamble, para.11.

occupation as this has already be done under the FDRE Criminal Law. The Criminal Law has put that the act of organizing, ordering or engaging in child recruitment in times of war, armed conflict or occupation is a criminal act.[80] However, it is significant in that it adds the value that dictates criminalization of the act of child recruitment during other times.

6. Conclusion

The involvement of children in armed conflicts has been increasing since the beginning of the twentieth century. The protection of children from participation in armed conflicts, therefore, has been getting attention as of 1940s. The matter, though insufficiently, has been regulated since the Geneva Conventions, 1949 at the international level. The Additional Protocols on these Geneva Conventions also addressed the problem of child participation and recruitment in armed conflicts to some extent. Similar trend was adopted under the CRC and the ACRWC. However, these instruments address the problem in an incomplete manner.

The tremendous growth in participation of children in armed conflicts after the adoption CRC and the ACRWC made the issue a serious concern. Consequently, the Optional Protocol was adopted in 2000 and entered into force in 2002. This Optional Protocol has some added-values to the already existing system of child protection form participation in armed conflicts as established by the CRC and the ACRWC. These added-values include the increment of the age of children at which they participate in armed conflicts to eighteen years; attempt to regulate the recruitment of children under the age of eighteen by armed groups; effort

[80] Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, Art.270 (m). It reads: 'Whoever, in time of war, armed conflict or occupation organizes, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions: (m) recruiting children who have not attained the age of eighteen years as members of defence forces to take part in armed conflict is punishable with rigorous imprisonment from five years to twenty-five years, or, in more serious cases, with life imprisonment or death.'

to establish a comprehensive mechanism of implementation of the Protocol; and, emphasis is made on post-conflict issues as well by providing for the application of principles of demobilization, disarmament, reintegration and rehabilitation of child victims.

Given these facts, states should ratify the Optional Protocol so that children in their territory benefit from these added-values. Thus Ethiopia, by ratifying the Optional Protocol, has offered a wider space of protection for children in its territory. This Optional Protocol has now become part and parcel of its domestic laws. Thus, children in the territory of Ethiopia benefit from these added-values. The new Defence Force Proclamation shall be read in light of this Optional Protocol and the rules enshrined therein. The new Defence Force Proclamation says that the Ministry of National Defence 'may, in accordance with its criteria issued from time to time, recruit persons fit and willing for military services.' This Defence Force Proclamation does not fix the age limit for recruitment. This seems Ethiopia's failure to meet its international or regional obligation assumed as per the ratification of the ACRWC, which fixes 18 years. Thus, the ratification of the Optional Protocol shall be regarded as a reminder to Ethiopia of its obligation under the Optional Protocol and at the same time amendment of the Defence Force Proclamation. As the Optional Protocol and the Defence Forces Proclamation are, arguably, laws of equal status the new law, i.e. the Optional Protocol ratified by Proclamation No.826/2014, shall be taken as the prevailing law. Therefore, members of the Defence Forces recruitment age shall be above 18 years of age.

7. Recommendations

It can be said that, in Ethiopia, children are not at risk of recruitment. 18 years of age is established in call up notices as a minimum recruitment age. However, the following factors, among others things, constitute ongoing risks.

A. How much is the law and sanctions attached to breaking it known to the public and recruiting organs? In particular, since one of the requirements is completion of 10^{th} grade in school and this can be completed at 16, how is the government ensuring under 18 requirements even if call up notice is fixed at 18? There is no convincing answer to these questions. Therefore, the government should work towards ensuring 18 as minimum requirement age as put under the Optional Protocol, and raising the public awareness as to such law and sanctions attached to breaking such law. Beside this, breaches of the minimum age law requirement must be aggressively investigated and seriously punished.
B. Is the recruitment procedure, i.e. recruitment through agency of the 'kebeles', reliable? The recruitment is highly dependent on the enlistment and registration by 'kebeles'. It is obvious that in the long existing Ethiopian administration, though improvements are witnessed recently, these organs are not praised for their integrity and are not reliable. Therefore, there should always be independent monitoring on the recruitment made by the 'kebeles'.
C. Is the birth registration system in Ethiopia well developed? In Ethiopia, there exists a low rate of birth registration and absent or defective procedures for age verification. Given this fact, it is recommended that this matter should be given serious attention if Ethiopia has to discharge its obligation under the Optional Protocol.

As researches in many countries show, it is not difficult to prohibit child recruitment but to enforce such prohibition. In other words, it has been boldly witnessed that the real challenge is not establishing 18 as a minimum recruitment age in law; rather, it is the matter of enforcing that law. Ethiopian authorities should bear in mind that enforcement of the Optional Protocol by addressing the risk factors could be effectively addressed through a range of measures as the Optional Protocol declares it itself. Thus Ethiopia should come up with clear and comprehensive minimum legal, policy and practical

measures to prevent the admission of children into armed forces and armed groups. It shall in particular:

- Criminalize the act of organizing, ordering or engaging in child recruitment in other times in just like the case of in times of war, armed conflict or occupation.
- Ensure recruitment only through formal, standardized or reliable recruitment procedures. In case of recruitment by proxy in particular and recruitment in general independent monitoring of military recruitment processes must be realized.
- Establish birth registration system and ensure any candidate presents verifiable proof of age for recruitment. Related to this, the criminal justice system must be able to effectively investigate and prosecute allegations of unlawful recruitment and use of a child.

Finally, given the values added by the Optional Protocol, first, states should be encouraged to ratify the Optional Protocol so that children in their territory benefit from these added-values. Second, State Parties should work towards the implementation of the principles of the Optional Protocol and realization of the protection offered by same. This is true for Ethiopia as well. Third, the United Nations and the Committee on the Rights of the Child should work towards incorporating substantive provisions relating to cross-border recruitment, training and use of child soldiers, and provisions relating to specific problems to girl child soldiers or indirect participants into the Optional Protocol.

The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights

Legesse Tigabu[♣]

Abstract

As urban centers in Ethiopia are expanding fast, adopting and executing a flexible urban land use system which can respond to the ever mounting demand for urban land and ensure tenure security would be mandatory. In the absence of tenure security, no one is happy to bring about a costly permanent improvement to land. Under this article, the author argues that the Ethiopian urban land holders encountered land tenure insecurity due to poor real property registration system, restrictive rules on land holding, and their inability to pay lease and related debts to the government and all these have their own uncalled for consequences on property rights. This article also unveils how urban land has become unaffordable to the public at large.

1. Introduction

Countries around the world do have their own unique land policies and laws. Pragmatic differences in terms of political, social, economic and cultural setups have made adoption of different land policy and law schemes in such dissimilar societies inevitable. Accordingly, a country which has a society divided across economic classes with huge difference will not opt for land policies and laws which enable individuals to own land privately as this would allow those who have controlled the means of production and capital to buy all the land across the country and exploit the lower class. It is in light of such facts that the FDRE constitution declared that both urban and rural land and other natural resources are

[♣] LL.B, LL.M, Senior Lecturer, College of Law and Governance, Jimma University. The author can be reached at legessetigabu@yahoo.com/legese.tigabu@ju.edu.et.

owned by the state and peoples of Ethiopia and thus cannot be owned privately.[1]

While farmers may get rural land for free as proclaimed under the constitution,[2] urban residents have to go through tender and allotment procedures of the urban land lease system to secure urban land use rights on a plot of land. The Ethiopian urban land lease system has tried to ensure the right balance between the interest of the public at large as owner of land on one hand and individual interests related to urban land on the other. Among the most important urban land related interests of the individual citizen is tenure security. As urbanization is growing fast[3] in Ethiopia, introducing and implementing a land administration system which ensures tenure security is mandatory. In the absence of tenure security, no one is content to bring about any form of permanent improvement to land. This has serious ramifications as it discourages real estate development and ultimately results in shortage of housing and other immovable properties needed for different uses.

This piece of writing will explain how individuals may face urban land tenure insecurity due to poor real estate registration system, expiry of lease periods, their incapacity to pay lease debts to the government and

[1] Art.40 (3) of the FDRE constitution declared that "*The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange*."

[2] See Art 40(4) of the FDRE Constitution.

[3] Sisay Habtamu Tekle 2012, *Urban Land Policy vis-à-vis Tenure Security and the Environment:* A Case Study of Addis Ababa, Ethiopia. Also see Shlomo Angel, David de Groot, Richard Martin, Yohannes Fisseha, Tsigereda Taffese and Patrick Lamson-Hall 2013, *Urban Expansion (Ethiopia)*: Interim Report August 18 2013. Though Ethiopia is the least urbanized country in the region and below 20% of its population lives in urban centers, the urbanization process is one of the fast growing due to high rate jobless youth emigration from rural to urban areas. Thus, advancing the urban land administration system of the country is so indispensable to respond to growing demand for urban land.

failure to start and complete construction within the specified period. It will also explore on the implications of the relevant provisions under the Ethiopian urban land lease laws on property rights of individuals. So, both the urban land lease system which creates and terminates urban land use rights and the urban land registration system which aims at ensuring tenure security are the subjects to be dealt with hereunder. For easy understanding, this work is designed to have six sections. Section one will explore the expiry of lease period and its impact on tenure security and property rights of individual rights. Section two will focus on commencement and completion of construction and tenure security. Registration and urban land related property rights of individuals will be addressed under section three. Section four reflects on constitutionality of proclamation No. 818/2014. Section five explores land lease related debts and property rights and section six concludes the work.

2. Expiry of lease period, tenure security and property rights of individuals

There is no problem with setting time limits while transferring land to individuals through a lease arrangement as lease, by its nature, is temporary and for a defined period of time. Urban land transferred, particularly, to investors (persons who are considered domestic or foreign investors as per the investment proclamation No. 769/2012, Reg. No. 270/2012 and other relevant laws) should be for a defined time and even should not be for unjustifiably long time, say 99 years, as this would deny a given generation's right to use such tract of land. The reason is obvious. Investors need large tracts of land and such investors at times may be foreigners. Thus, giving urban land for undefined period of time or unduly long time may tailor the principle of public ownership of urban/rural land. This may change the nature of urban land market to land grabbing by investors who can afford it and that may put land use rights of Ethiopian citizens at stake. Given the fact that urban land related

corruption is common[4] in Ethiopia and the government is striving to curtail it, sympathetic approach in this regard may not be opted for.

On the other hand, transferring urban land only through a lease arrangement and thus setting lease periods for all types of urban land holdings might be undesirable. Art 18 of the lease proclamation has set the ceiling lease periods[5] as this proclamation declared lease to be the only means of acquisition of urban land. Such ceiling ranges from 5 years for short-term land uses for economic and social activities to 99 years. There is no problem with limiting land use rights through lease periods. The problem with the proclamation is that it doesn't provide any exception to the principle of acquisition of land through a lease system. To be precise, lease shouldn't have been the only urban land acquisition modality and the constitution doesn't dictate so. The nature of the real state to be built, the function it has to give and some other factors should be considered before putting time limits for all types of holding rights. Above all, individuals have a constitutional right to private property and thus may own improvements over land permanently unless the government exercises its inherent right to take land back for public purposes (expropriation) by virtue of art 40 (8) of the FDRE constitution or their land use right was temporary from the beginning because they acquired it through a lease arrangement. Yet, it doesn't mean that the constitution has declared lease arrangement as the only means of acquisition of urban land use right. The legislator, as stated under the preamble of the lease proclamation, intends to ensure the prevalence of good governance by introducing lease as the only means of urban land

[4] Samira Lindner 2014, *Ethiopia: Overview of corruption in land administration*, Anticorruption resource center, June 2014

[5] See the sub articles under art 18 of the lease proclamation. Under the urban land lease law of Ethiopia, there is no any exception to the principle that land use right in urban areas expires after some defined time. Though the constitution has kept silent over this particular issue and thus the government may regulate it, such very inflexible stand could have uncalled for ramifications on property rights of real estate owners.

acquisition.[6] Yet, the government could have included other modalities and made the procedures transparent to ensure equitable access to land.

As long as the government can avail itself of expropriation proceedings when it needs land for public purposes, setting time limits for all cases (using lease as the only means of acquisition of urban land) and removing any type of real estate after expiry of and refusal to renew a lease period would have detrimental effects on the country's economy and is even inconsistent with the constitutional right of real estate ownership which in principle has to be limited by the government through expropriation proceedings.[7] Though the government may come up with different restrictions on land use rights, it cannot deny the real estate ownership right of individuals unless the land use right of individuals ends. Individuals may lose their urban land use right either because of expropriation or after expiry of lease periods. Individuals cannot avoid expropriation; but as the constitution has not set lease as the only means to acquire urban land, the urban land use right of individuals should not have been limited by time in all cases and there could have been possibilities where urban residents exercise permanent land use and real estate ownership right subject to expropriation like the farmers in rural areas.

Only urban land holdings whose nature requires lease periods should be transferred through lease arrangement and subjected to such time bound. Otherwise argument leaves urban land under the control of the government while the constitution says land belongs to the state (not government) and peoples of Ethiopia.[8] Government is not land owner. It is there to regulate land use right on behalf of the state and peoples of Ethiopia. While doing so, it has to make land accessible to all and ensure tenure security. But, the modality of urban land acquisition adopted by the government couldn't achieve these constitutional objectives as

[6] See section 3 of the preamble of the lease proclamation.
[7] See art 40 (8) of the constitution
[8] See Art 40(3) of the constitution.

unaffordable land tender proceedings could push out the lower class. At times, such undesired lease arrangements may also discourage real estate development and result in lower quality buildings as the owners of buildings have no guarantee that they/their children will continue to be owners of the building they erect after expiry of the lease period. Though renewal might be requested, it could be refused and the grounds of refusal are not mentioned under the proclamation. One may, for example, transfer his land use right along with poorly constructed house 5 or 10 years ahead of expiry of his lease hold right. Then, who is imprudent to construct a better building on such plot of land while he/she is not certain that the lease period will be renewed? He/She knows that no compensation will be paid in case the renewal request is rejected as proclaimed under art 19 of the urban land lease proclamation. We can think of many more scenarios.

It could be said that a lease period can be renewed after its expiry and we can ensure tenure security using the procedures set by art 19. But, under art 19 of the lease proclamation, getting the lease hold right renewed cannot be claimed as of right if one closely reads the last phrases. Rather, it is the discretionary power of the authority concerned to reject or approve a renewal request. To ensure that such discretionary power is used properly, the proclamation should have mentioned the grounds of refusal as such grounds have serious implications on one of the fundamental rights of individuals-the right to property. While art 25 (1) (a) and (b) set sufficient grounds which could terminate urban land use right any time before expiry of the lease period, sub 1 (c) declared that the fact that the lease period has not been renewed in accordance with art 19(1) results in termination of the lease hold right without explaining when the lease period could not be renewed. Art 19 has made it clear that at times renewal couldn't be possible though the request is made. This could have been clarified. It is obvious that the lease holder could also lose his right because of his failure to request renewal up on expiry of the lease period as such period cannot be renewed unless the lessee lodges an application to this effect as proclaimed under art 19 (2).

The lease regulations of the regions under the study have tried to close rooms for abuse by setting some grounds to reject renewal requests. Yet, such grounds of rejection are not clear enough and could be abused. The directives of the respective regions have copied and pasted the grounds stated under the regulations instead of elaborating them. Art 45(2) of Addis Ababa City Administration urban land lease regulation, art 50(2) of Amhara Regional State urban land lease regulation, art 48(2) of SNNP Regional State urban land lease regulation and relevant provisions of the urban land lease directives of the respective regions have set identical grounds of rejection of a renewal request.[9] These grounds are:

1. *When the structural plan of the urban center is changed*
2. *When the land is required for public interest*
3. *When it is impossible to change the previous development to the development level the place demands.*

The lease proclamation should have incorporated these grounds as they determine fundamental rights of individuals. The first ground is quite clear. If a fundamental urban land plan changes the purpose of some tract of land from industrial zone to residential area after impact assessment, then the one who have leased urban land for specified time may not be able to get his holding right renewed. This may simply fall under the broad notion of "public purpose" which allows the government to expropriate land even before expiry of a lease period.

The last two requirements are vague. The government may say the land is needed for public interest or it may claim that it is impossible to change the previous development to the development level the place demands.

[9] See Art 45(2) of Addis Ababa City Administration urban land lease regulation, Art 50(2) of Amhara Regional State urban land lease regulation, Art 48(2) of SNNP Regional State urban land lease regulation and relevant provisions of the urban land lease directives of the respective regions. As grounds for the rejection of urban land lease renewal request will have serious impacts on the constitutionally recognized property rights of individuals in general and tenure security in particular, they should have been set by the legislator itself in unequivocal terms. Also see Zelalem Yirga 2914, *Critical Analysis of Ethiopian Urban Land Lease Policy Reform since Early 1990s*: USA, 2014

The latter couldn't be a big challenge if experts in the field set clear guidelines and decide accordingly. The former is worth considering. Broadly speaking, any land can be required for public interest. It is, therefore, really difficult for the individual to establish absence of public interest. The narrow phrase "public purpose" which is employed by the constitution and the civil code is substituted by public interest. Public purpose limits the power of government by allowing expropriation when the land is needed for goods and services which are going to be open for the public at large like schools and hospitals. In such cases, the public at large acquires direct benefit from the use of land. If one takes a look at the broad definition given to the phrase 'public interest' under art 2(7) of the lease proclamation, he can easily understand that there exists a room for abuse. This provision reads:

> *""Public interest" means the use of land defined as such by the decision of the appropriate body in conformity with urban plan in order to ensure the interest of the people to acquire* ***direct or indirect benefits*** *from the use of the land and to consolidate sustainable socio-economic development."*

Such disputes may not be brought before ordinary courts (art 29(1) of the lease proclamation). When land is expropriated for public use, for example, the 'public use', claimed by the government cannot be questioned by ordinary courts and it should not be as it is an administrative matter.[10] If so, the rules the concerned authorities base their decisions on should be clear enough to avoid possible arbitrariness. Only disputes over the amount of compensation may be brought before courts.[11] In case, the land is needed for public use after expiry of the lease period, there is no compensation to be paid[12] which would mean that there is no issue at all to be brought before ordinary courts. Thus, there is a room for tenure insecurity.

[10] Art 29(3) of the lease proclamation
[11] Ibid
[12] Art 19(1) of the lease proclamation

What is more, urban land lease contract is a distinct form of administrative contract in which the government represents the land owners, the state and peoples of Ethiopia. This would mean that the government will have control over the lease contract as administrative contracts always involve public interest and such public interest is represented by the government. Such control and discretionary power over the lease arrangement, if abused, will result in tenure insecurity and leaves ownership and other urban land related rights at stake.

Regarding the renewal procedure, art 19(2) declared that the period of lease will be renewed only if the lessee applies in writing to the appropriate body within 10 to 2 years before the expiry of the period of lease. The appropriate body is required to respond within a year from the date of submission of the application and failure to do this would mean that the lease period is renewed pursuant to art 19(3) of the proclamation. Art 19(4) warns officials who fail to respond within a specified time by making them liable for all adverse consequences of the renewal. Thus, it is less probable that lease right holders will make use of this opportunity to get their right renewed.

All these would mean that the ownership right of the lessee over his/her improvements made over the land could be at stake.[13] Lease by its nature is temporary and hence subject to renewal. But, the grounds of refusal, as they are serious limitations on a fundamental right of an individual, should be imposed and clearly mentioned by the law maker. If his/her leasehold right is not renewed, then he/she has to remove his/her property or the government will take the land along with the property without any payment. This might have damaging ramifications unless the decision makers consider the prevailing facts. Removal/non-removal of very expensive buildings should be worth considering and needs wise decisions to avoid undesirable destruction.

[13] See Mekasha Abera 2013, *Ethiopian Basic Lease Law Concepts and the problems associated with the lease system*, Far East Press, 2013 p.120-121.

3. Commencement and completion of construction and tenure security

The Ethiopian urban land lease arrangement has set construction commencement and completion time ceilings as it transfers land use rights for a defined time. The lease proclamation has regulated these issues under art 22 and 23. Given the fact that the demand for urban land is increasing at an alarming rate in Ethiopia and because urban land could be used for different purposes, our land lease system should avoid circumstances which may make urban land idle. If there is no time ceiling for commencement and completion of construction, the natural consequence is that there won't be guarantee that the land will be improved within a reasonable time.

Art 22 of the lease proclamation declared that the time of commencement of construction should be specified under the lease contract. Such time might be extended based on the complexity of the construction and cannot be extended beyond the ceilings provided by regional regulations.[14] The time of commencement is from the date of conclusion of construction permit as proclaimed under the regional regulations. The regional regulations have copied and pasted the time limits set under art 34 of the model regulation adopted by the Ministry of Urban Development and Construction which are 6, 9 an 18 months for small, medium and large constructions respectively with possible extension for 6, 9 an 12 months correspondingly. Accordingly, art 34, 36 and 33 of the urban land lease regulations of SNNPs regional state, Amhara regional state and the Addis Ababa City Administration respectively have set identical ceilings as they have copied art 34 of the model regulation as it is. Other regions have also followed the suit with no or insignificant differences. The constructions are classified as small, medium and large constructions based on their complexity and all these categories are eligible for commencement time extension as may be allowed by the regulations of regional states. The

[14] See Art 22(2) of the lease proclamation

proclamation has not set the time of commencement of construction nor the ceiling periods. It has left these matters to the regional states.

Art 23(2) on the other hand has provided time limits for completion of construction. The time limits under art 23(2) may be extended when circumstances so require. The applicable ceilings are those set by the regulations of the regional states; yet these ceilings cannot go beyond the ceilings set by the proclamation which are 28, 48 and 60 months for the three levels of construction, respectively.[15] So, the regions can set ceilings within the ceilings stated under the proclamation. However, the regional regulations have again copied and pasted the time limits on completion of construction under art 35 of the model regulation and this model regulation is identical to the lease proclamation in this regard.

As discussed earlier, the author advocates the time stipulations for commencement and completion of constructions. However, the severe penalties for failure to commence or complete construction in time stated under the lease proclamation will have undesired consequences and may discourage real estate development. Given the down payment the lessees should pay in advance,[16] project study and design costs and regular lease payments before they commence or complete their construction, they will obviously be in financial difficulties to commence or complete construction. What is more, those who have failed to comply with the time bounds might be at different stages of construction. If they fail to discharge such obligations within the time ceilings, they all will automatically lose their lease hold in addition to the penalty.[17] The author

[15] See 23(4) of the lease proclamation

[16] In urban land tender proceedings, the amount of the down payment (the amount to be paid in advance) and the lease price offered by a bidder determine his/her chance of winning. It is, therefore, natural that the bidders will present higher down payments to win the bid. Then, they fall into financial crisis when they start construction. The urban lease hold proclamation and most of the regional urban land lease laws have proclaimed that the winner bidders are identified based on the lease price they offered (80%points) and the down payment they undertook to pay (20%).

[17] See art 22 and 23 of the lease proclamation

would say penalty is indispensable to ensure timely improvement over land; but it should not be this much sever and discouraging. The construction progress the lessees are making and the stage they are in should also be considered in determining penalties. Ordering the lessee to remove a building of any type and at whatever stage following his failure to comply with the time of completion of construction[18] could not also be economically sound. When the lessee fails to remove, the appropriate body may, through auction, transfer the incomplete building to other individuals or remove it, as the case may be, and recover costs from the lessee.[19] As the appropriate body may remove it and recover costs from the lessee instead of selling it through auction[20], the lessee may remove an incomplete construction as he has this right under art 23(6) and that is simply an economic loss for the country. Though the government authorities will have to opt for the right solution at the end in each case, the uncertainty right after the order may result in demolition of the incomplete construction by the lessee.

If the lessees face such tenure insecurity, then they will choose to transfer their lease hold rights before the time of commencement or completion is over, as the case may be, to escape penalties. Hence, a lessee who is not capable of commencing construction ahead of the deadline or a lessee who already has commenced construction but is not able to complete it within the time ceiling may transfer their lease hold right without paying any penalty as they do have this legal right under art 24(2 and 3). Such transfer is attractive and rewarding compared to the penalty discussed above. The lessee will get the effected lease payments back including interests calculated based on bank deposit rate, value of the already executed construction if he is transferring his lease hold right after commencement and before the time of completion and lastly 5% of the

[18] See sub art 6 of art 23 of the lease proclamation
[19] See Art 23(7) of the lease proclamation
[20] See Art 23(7(b) of the lease proclamation

transfer lease value.[21] This encourages individuals to transfer their lease hold rights before commencement or completion of construction and that is detrimental to real estate development. Individuals who have transferred their holdings before completion of construction repeatedly could be barred from participation in future land lease bids if they have done so "in anticipation of speculative market benefits."[22] This could discourage rent seekers from manipulating the land market.

4. Lease debts, tenure security and property rights of individuals

In addition to the obligations like down payment,[23] commencement and completion of construction which at times may result in termination of the lease hold right unless discharged, there is also annual lease payment[24] which may lead to punishment and seizure and sale of the property of the lessee by the concerned authority when such lease payment is not effected timely.[25] All these would mean that the early stages of urban lease arrangements are quite onerous and can easily drive the majority of Ethiopians away from urban land markets. The researcher would say such a lease arrangement serves only the rich who are capable of discharging such onerous obligations and government as it derives a significant amount of revenue from the transaction. The process should have enabled the lower class construct and own real estate as one of the most important rationales behind adoption of public ownership over land is to avoid accumulation of land and real estate in the hands of the rich and overcome exploitation of the lower class by the rich.

On top of the penalty fee equivalent to the rate of penalty fee imposed by the Commercial Bank of Ethiopia on defaulting debtors, their property may be seized and sold by the appropriate body to collect the arrears. This gives the government free hand to seize and sale the properties of

[21] See sub art 2 and 3 of art 24 of the FDRE urban land lease holding proclamation No.721/2011.
[22] See art 24(7) of the lease proclamation
[23] See supra note 15.
[24] See Art 20(6) of proclamation No. 721/2011.
[25] Ibid

defaulting debtors without going to and waiting for court orders. Thus, accumulation of arrears for three years may result in seizure and sale of properties of the debtor by the concerned body and this leaves the lease hold rights of the lessee uncertain as the property right the concerned authority knows closely and may most likely sale is the real property he has built on his lease holding.

In principle, one cannot oppose the penalties and the powers given to the appropriate body as such penalties and powers are meant to help effective enforcement of the proclamation. But, given the onerous obligations that I mentioned earlier and the power granted to the government under art 20(6) of the lease proclamation, the lease hold rights of the lessees are uncertain and that would make an urban land lease arrangement scaring for many Ethiopians.

5. Registration and urban land related property rights of individuals

Registration of land and land related properties would be crucial in improving land management and development. Scientific recording of information regarding real estate is indispensable to administer urban land and urban land related properties. In the absence of systematic recording of physical and legal information on a plot of urban land, we won't have advanced urban land management and this in turn could have serious implications on tenure security. Tenure insecurity has many undesired consequences. The UN Centre for Human Settlement (Habitat) has identified the following as unwanted ramifications of tenure insecurity.[26]

1. *Inhibits investment in housing*
2. *Hinders good governance*
3. *Undermines long term planning*
4. *Distorts prices of land and services*
5. *Reinforces poverty and social exclusion*
6. *Impacts most negatively on women and children.*

[26]Peter Dale, *The importance of land administration in the development of land markets - a global perspective,* University College London, England, 2000, p.4.

Cadastre which records physical information about a plot of land[27] and land register which records legal information related to a unit of land[28] are so important in improving land market and use as such systems provide reliable information about a plot of land. Cadastre registers boundaries, fertility, purpose of a unit of land and size of such land.[29] Such physical information has, basically, to be recorded, managed and studied by engineers and geographers.

Countries may adopt cadastre and land registration separately or a multipurpose integrated land information system which includes both cadastre and land register and is advisable to respond to market demands.[30] Ethiopia has chosen the latter when it approved the Urban Landholding Registration Proclamation No. 818/2014. Though the country incorporated land registration provisions under Title 10 of the Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960 decades ago, these provisions are denied a legally binding force as article 3363 of the Civil Code suspended their application until an executive order is issued by the government.[31] No government in Ethiopia so far issued such an order.

As the application of the provisions under Title 10 of the Civil Code is suspended, the courts have been using these provisions as customary rules as this part of the Civil Code incorporated important principles on registration of immovable properties and because the country didn't provide alternative comprehensive legislation governing the subject matter. The Civil Code regulated the country's land information system in a unified approach integrating cadastral and land register rules.[32] The

[27] Ibid, p.3, also see Daniel W/Gebriel and Melkamu Belachew, *Land Law Teacing Materia*l, Justice and Legal Research Institute, 2008, p.1001-104
[28] Ibid
[29] Ibid
[30] Supra note 25, p.5
[31] See art 3363 of the civil code
[32] See art 1567 and 1606 of the Civil Code.

Civil Code didn't also make a distinction between urban and rural real properties.[33] Real property registration laws of the country adopted by the existing government are scattered over legislations as the rural and urban land laws at regional and federal levels provide their own landholding registration rules. Thus, one has to take a look at the federal and regional rural and urban land proclamations, regulations and directives to fully understand the Ethiopian law governing registration of immovable properties. The country's urban land registration law has, therefore, not been comprehensive and the country has experienced poor urban land registration system due to lack of capacity and well established system to record urban land use rights, transactions over these right and possible restrictions.[34]

In 2014, the government has adopted Urban Landholding Proclamation No. 818/2014 to realize real property rights of individuals, provide reliable land information to the public at large, minimize land related disputes and modernize the country's real property registration system.[35] Though limited in scope (as it doesn't regulate registration of rural real property), this proclamation is applicable throughout the country and can bring about tenure security and certainty in real property transaction as registration provides reliable and public information both for the land holder and interested third parties. The Proclamation has adopted integrated urban land information system by dictating registering organs to record both physical (cadastral) and legal information about land; it unified cadastre and land register.[36] The Proclamation has employed the phrase 'legal cadastre' to refer to both legal and cadastral information about a unit of land.[37] This urban landholding registration proclamation is comprehensive as long as urban real property registration is concerned

[33] See art 1575 of the Civil Code.
[34] Ethiopia: *Overview of corruption in land administration*, file:///C:/Users/ju/Downloads/2014-11%20(1).pdf. Accessed on Nov 7, 2014 (845PM).
[35] See the preamble of proclamation No. 818/2014.
[36] See Art 6 of proclamation No. 818/2014.
[37] Ibid

and has repealed all pre-existing laws and customary practices governing urban real property registration as long as they are inconsistent with it.[38]

What we can infer from this is that already existing rules on real property registration in urban areas are yet valid as long as they don't contradict the urban landholding registration proclamation. The courts may, therefore, make use of urban real property registration laws preceding this proclamation to fill possible gaps.

One point worth considering when we talk about the urban landholding registration proclamation is that this proclamation doesn't create, modify, transfer or terminate real property rights of individuals. The registering organ, according to this proclamation, simply registers/records physical and legal information about land. In other words, registering organs record/register cadastral information about a unit of land and rights and restrictions which already have been created on such unit of land through other laws or decisions. Among others, the Urban Land Lease Holding Proclamation No. 721/2011, law of succession, judicial decisions, administrative decisions, contract law and property law may create such rights and restrictions over immovable properties in urban areas.

6. Proclamation No. 818/2014 and constitutional land related powers assigned to the federal government and regional states

Though the urban land registration proclamation No. 818/2014 has set basic rules which can ensure tenure security and full realization of the land use rights enshrined under the urban land lease legislations, there is a contention over its constitutionality. The contention is as to whether the federal legislator can enact such land administration related laws having nationwide application.[39] This section reflects on such contention.

[38] See Art 56 of proclamation No. 818/2014.

[39] http://www.ethiopianreporter.com/index.php/news/item/4384. Accessed on Oct 13, 2014 (6:38PM)

In Ethiopia, land is a subject-matter over which both levels of government can exercise power. The federal government is empowered to enact laws on utilization of land and natural resources[40] while the power to administer the same in accordance with federal laws is assigned to the regions.[41] Power of administration involves enactment of subsidiary legislation. Some federal land laws recognized this and allow regional states to enact laws on utilization of land. The federal government cannot address all details and it is a regional state which can adopt feasible subsidiary land legislation to implement federal laws considering the prevailing facts in the region.

When we come to the power of land administration, however, it is an exclusive power of the regions[42] and we cannot come across legal nor practical reasons to assert otherwise. While the laws on utilization of land enacted by the federal government have to define land use rights, manners of use of land and restrictions on land use rights, land administration laws set rules on enforcement and realization of the laws on land utilization. Nonetheless, the Ethiopian urban landholding registration proclamation which has been enacted by the federal government dictates the regional states to administer urban landholding in a certain way as the regions are expected to adhere to the rules on registration under Proclamation No. 818/2014. The proclamation is applicable in all urban centers in Ethiopia.[43] The question here is whether the federal government can go beyond regulating land use rights in the regions and involve itself in the administration of the same by ordering regions to administer land in a particular way. The federal government has enacted substantive land laws including urban land leasehold proclamation No. 721/2011 to regulate creation, transfer, modification, restriction and termination of rights over immovable properties. Is it not then up to the states to administer such rights once they are regulated through substantive laws? If the federal

[40] Art 51(5), FDRE Constitution.
[41] Art 52(2) (d), FDRE Constitution.
[42] Art 52(1) and 52(2) (d), FDRE Constitution.
[43] Art 3, urban landholding registration proclamation No. 818/2014.

government can order the regions to administer land in a particular way, where is the significance of the constitutional power of the regions to administer land? One may raise these and related questions over the urban landholding proclamation No. 818/2014.

The HPRs (the Ethiopian legislator) was not sure if the draft urban landholding proclamation was consistent with the constitution while deliberating on it. It has, therefore, sent it to the HOF (Ethiopian second chamber which has a final say on constitutional disputes).[44] Some MPs have objected such decision claiming that the HOF is not given any legislative role under the constitution and, therefore, we should not request a comment from the second chamber as a precondition to pass draft laws.[45] The HOF decided that the draft legislation is consistent with the constitution and the country is in need of such legislation to build one economic community.[46] It should be noted that the HPRs has the power to enact laws on civil matters (though they are left to the regions under the constitution) whenever the HOF deems indispensable to bring about one economic community.[47] Art 55(6) of the FDRE constitution declared the following.

> *It (the federal legislator) shall enact civil laws which the House of the Federation deems necessary to establish and sustain one economic community.*

Thus, one could uphold constitutionality of the Ethiopian urban landholding registration proclamation No. 818/2014 considering this particular provision under the constitution. Among the major objectives of the proclamation, one is building one economic community and this goes in line with art 55(6) of the constitution. The second and most important objective of the proclamation is ensuring tenure security for urban land

[44] Supra note 39.
[45] Ibid
[46] http://www.ethiopianreporter.com/index.php/news/item/4640. Accessed on Oct 13, 2014 (7:29PM)
[47] Art 55(6), FDRE Constitution.

holders.[48] Given the fact that the country didn't have uniform and well functioning real property registration law previously, the adoption of the urban landholding registration proclamation should be appreciated and even the same trend could be suggested when it comes to the rural real property registration system.

7. Conclusion and recommendations

This work has uncovered that urban land tenure insecurity, due to poor real estate registration system, inflexible rules on lease periods, the land users' incapacity to pay lease debts to the government and failure to start and complete construction within the specified period, would discourage real estate development in Ethiopia. The recently adopted urban land registration proclamation no. 818/2014, if implemented very well, can improve the urban land registration system and ensure tenure security.

Yet, making lease the only means of acquisition of urban land and hence setting time bounds for all types of improvement on urban land cannot hold water and could at times result in tenure insecurity. As individuals know that they may lose their building or have to remove it after expiry of the lease period whenever the government rejects their request for renewal, they don't want to spend a lot on the land leased to them. Though no lease period related to permanent improvement over urban land has naturally expired so far or is going to expire soon and we couldn't witness refusal of a renewal request and its consequences at this point of time, one can figure out how such procedures are discouraging when the relevant provisions get executed. This work revealed that there is no problem with limiting land use rights through lease periods. The setback with the Ethiopian urban landholding system is that it doesn't provide any exception to the lease system. Lease shouldn't have been the only urban land acquisition modality and the constitution doesn't say so. The government could have come up with flexible and accommodative legislation using the constitutional silence.

[48] See Art 4 of proclamation No. 818/2014.

The obligations related to rent payment, commencement of construction and completion of construction are also onerous and all these would mean that land users are discouraged from or incapable of bringing quality permanent improvements over land and hence they may prefer to transfer their land use right without any improvement on the land.

Based on the findings discussed under this work, the author recommends the following:

- Given the country's poor record in registration of urban real estate, the government should strive to fully implement the recently enacted urban land registration proclamation no. 818/2014 to modernize the urban real state registration system. This could ensure tenure security and minimize land related disputes in urban centers.
- Tenure security could also be further improved by revising some objectionable lease periods set under the country's urban land lease holding laws by drawing exceptions to the lease system to address compelling scenarios as the constitution has not prohibited the government from doing so.
- What is more, the rules which have made obligations related to rent payment, commencement of construction and completion of construction onerous should be revised as such rules discouraged the land users from bringing quality permanent improvements over land. Among others things, the required amount of down payment in the tender procedures should be reduced and we should have rules which can accommodate the progress the lessees are making while constructing even though they may have failed to start or complete construction within the time limits set by the law due to imperative reasons. We can impose fees than employing severe penalties stated under the lease proclamation which could result in taking away the land from the lessee. Reconsidering the Ethiopian urban land lease system taking into account the compelling reasons discussed above would mean making urban land accessible to the public at large and ensuring equitable distribution of wealth.

Can Ethiopian Courts Make/Shape Environmental Policies? An Essay

Dejene Girma Janka (PhD)[♣]

1. Introduction

We are now in time when there are mounting environmental problems. These problems may be solved by measures that can be taken by individuals and the private sector. However, although individuals and the private sector may contribute to the protection of the environment or to overcoming environmental problems, the measures they take often remain inadequate unless they are assisted by public policies such as law supported by government authority. Thus, government involvement in the protection of the environment is necessary. On the other hand, government involvement in environmental regulation is justified partly on the inherent limitations of the market system and the nature of human behaviour. As there is no or little incentive to protect the environment, environmental protection cannot be left to market regulation alone. Moreover, the scope and urgency of environmental problems exceed the capacity of private market and individuals' efforts to deal with. That is, the scope of the environmental problems is beyond what the market can handle. Likewise, some environmental problems need urgent actions whereas market response to such problems may not be swift enough. Further, the fact that there is high level of conflicts on environmental protection should be noted. That is, there are arguments on whether or not and to what extent the environment needs protection. All these factors

[♣] Assistant Professor of Law, College of Law and Governance, Jimma University; E-mail: dejulaw@yahoo.com.

coming together make a strong case for the involvement of a government in environmental protection. The question then is to know how a government can protect the environment, whereas one way is formulating and enforcing public policy. Public policy here refers to an action that is taken in response to social problems. Since environmental problems are part of social problems, a government can respond to environmental problems by making environmental policy. In a federal arrangement, such policy can be formulated by both tiers of governments, the central and state governments. Similarly, within a government itself, environmental policy can be formulated by all the three branches of the government, the legislative, the executive and the judiciary.[1]

Therefore, as one branch of a government, environmental policy formulation (policy making/shaping) can also be undertaken by the judiciary. This has been true in various countries such as the USA.[2] In this essay, I will explore how the courts in Ethiopia can make/shape environmental policy assuming that there is judicial activism in favour of environmental protection. The discussion will use as parameters the roles courts in the US play in relation to environmental policy making/shaping.

2. Judicial policymaking/shaping

It is said that courts perform three interrelated but distinguishable functions, that is, they determine facts, they interpret authoritative legal texts, and they make new public policy. While the first two functions are

[1] For more on what is raised and discussed in this paragraph, see Michael E. Kraft and Norman J. Vig, *Environmental Policy in Four Decades: Achievements and New Directions* included in Norman J. Vig and Michael E. Kraft (editors), *Environmental Policy: New Directions for the Twenty-First century*, 7th ed., CQ press, Washington D.C., 2010, p. 1-4

[2] See Lawrence S. Rothenberg, *Environmental Choices: Policy Responses to Green Demands*, CQ Press, Washington DC, 2002, p 60-62, Rosemary O'Leary, *Environmental Policy in Courts*, included in Norman J. Vig and Michael E. Kraft (editors), *Environmental Policy: New Directions for the Twenty-First century*, 7th ed., CQ press, Washington D.C., 2010, p. 129-143, and Malcolm M. Feeley and Edward L. Rubin, *Judicial Decision Making and the Modern State: How the American Courts Reformed America's Prisons*, Cambridge University Press, 2000, p 5.

familiar, the third one is freighted with blasphemy as, traditionally, courts are not supposed to act as policymakers. In fact, the assertion that courts generally make policy is treated as either harsh realism or a predicate to condemnation. The reality, however, is that courts make policy when they are of the opinion that their actions will produce socially desirable results. However, they disguise their action of judicial policymaking as judicial interpretation of an unseen document. [3]

It should be noted that when a court makes/shapes a policy, judges invoke legal text to establish that they have control over the subject-matter and then rely on non-authoritative sources, and their own judgment, to generate a decision that is guided by a perceived desirability of its results.[4] For instance, in common law system, judicial power is not limited to applying the existing laws; instead, it extends to judicial policy making in which case the judiciary goes beyond its role of dispute

[3] For more on the functions of courts, see Malcolm M. Feeley and Edward L. Rubin, supra note 2, p. 1-10, and Stephen R. Chapman, *Environmental Law and Policy*, Prentice Hall, New Jersey, 1998, p. 28. It is argued that, with regard to judicial policy making, questions of legitimacy are largely irrelevant when it comes to specialized courts; specialist judges are better suited than generalist judges to address substantive questions of policy because they have expertise. See Isaac Unah, *The courts of international trade: judicial specialization, expertise, and bureaucratic policy-making*, University of Michigan Press, 1998, p 84. Another point worth noting at this juncture is the fact that judicial decision-making does not necessarily make the judiciary stronger than the other organs. Moreover, such decision-making may also have its own drawbacks. For instance, Christopher E. Smith catches the essence of these problems as follows. *Much of the literature on the judiciary's impact on the government system treat judges as powerful judicial decision makers although they are less powerful than they appear to be. For example, although judges can issue orders about what ought to be, they cannot implement their orders unless they are endorsed by lower courts and other executive officials. There is also detrimental consequence that judicial policymaking entails such as the unanticipated consequence of using an individual case concerning to specific litigants as the vehicle for making far-reaching policy decision that affects many people whose circumstances may be different than those of the litigants*. Christopher E. Smith, *Judicial self-interest: federal judges and court administration*, Greenwood Publishing Group, 1995, p 2.

[4] Malcolm M. Feeley and Edward L. Rubin, supra note 2, p. 5

resolution and assumes the responsibility of problem solver.[5] In other words, in addition to giving resolution to the problems at hand by applying the existing policies such as environmental policies courts may come up with new rules, if need be, to solve the problem at hand. This shows that public policy making/shaping is not an exclusive domain of the other branches of the government. If that is the case, then, environmental policy making/shaping like any other public policy can be the responsibility of all the three branches of a government. Hence, courts can engage in environmental policy making/shaping when they deem such action will produce socially desirable consequences. For instance, a court may extend the scope of an existing environmental law to include a new phenomenon if such extension is believed to produce beneficial results.

Judicial policymaking/shaping in the US and Ethiopia

At the beginning, it is important to make few points about the evolution and development of environmental policy in the US and Ethiopia. In the US, it is said that environmental policy emerged and developed in the form of responses to the demands of its citizens for better environmental quality.[6] In other words, environmental policy in the US emerged and developed in the form of governmental responses to the demands of its citizens for environmental protection. Here, the term *government* refers to all branches of the government, the legislature, the executive and the judiciary.[7] Thus, in the US, the judiciary like the other branches of government can be credited for contributing at least to the development of US environmental policy. For instance, the contribution of the US courts to the effective application and development of National Environmental Policy Act (NEPA) in relation to issues such as NEPA procedural strengths, alternative course of actions that NEPA requires to be

[5] Jos C. N. Raadschelders, *Government: A Public Administration Perspective*, M.E. Sharpe, 2003, p 127

[6] For more on this point, see Lawrence S. Rothenberg, supra note 2, p. 60-61.

[7] Crafting environmental policy is not the power and responsibility of the legislature and the executive branch of the government alone. Some argue that the judiciary can also craft environmental policy. Id. P. 62

considered, the kind of mitigation measures that are necessary and the state at which they need to be considered, and when and how to consider cumulative impacts of an action on the environment can be cited as examples of courts' environmental policy making/shaping in the US.[8]

In Ethiopia, the emergence and development of environmental policy is characterized by an opposite factor. That is, while there were no demands from the public for environmental protection (hence, no public environmentalism), the government started formulating environmental policy (hence, government environmentalism) to respond to some environmental problems such as deforestation and land degradation.[9] Thus, unlike in the US, environmental policy in Ethiopia can hardly be taken as a supply to public demands. Moreover, although our judiciary could contribute to the development of environmental policy, the major source of environmental policy in Ethiopia thus far has been the legislature.[10] This is so because judicial contribution to the development of environmental policy is dependent on public demand which is virtually non-existent in Ethiopia due to low economic situation of most of its citizens.[11] Moreover, environmental awareness plays a great role in making the public approach courts demanding environmental protection thereby creating opportunities for the judiciary to create/shape

[8] For more on the contribution of courts to NEPA's application and development, see W.M. Cohen and M.D. Miller, *Highlights of NEPA in the Courts* included in Ray Clark and Larry Canter (editors), *Environmental Policy and NEPA: Past, Present, and Future*, St. Luice Press, Florida, USA, 1997, p 181-192

[9] For more on the emergence of environmental policy in Ethiopia, see Dessalegn Rahmato, *Environmental Change and State Policy in Ethiopia*, FSS Monograph Series 2, Forum for Social Studies, Addis Ababa, Ethiopia, 2001, p 38-61

[10] This is so because while we have a number of laws dealing with the environmental in one way or another, judicial decisions involving the environment are virtually absent.

[11] It is said that, in economic context, environmental quality, by and large, appears to be a normal good, a good for which demand increases with economic resources, like many other government supplied goods such as education. Thus, environmental "consumption", or at least demand for a high quality environment, appears to increase with prosperity. For more on this point, see Lawrence S. Rothenberg, *Environmental Choices: Policy Responses to Green Demands*, CQ Press, Washington DC, 2002, p. 5-6

environmental policy while such awareness in Ethiopian context is very low.

Anyway, how can the judiciary craft environmental policy? In the US, Rosemary O'Leary states that courts can make/shape environmental policy by deciding on issue of standing, deciding on question of ripeness, choice of review standard, interpreting environmental laws, choice of remedies, and setting precedents.[12] In this section, we will see how environmental policy making/shaping result from these actions. We will also consider whether or not Ethiopian courts can do the same in relation to environmental policy.[13]

First, courts can make/shape environmental policy by determining who does and does not have standing or the right to sue.[14] Although

[12] Rosemary O'Leary, supra note 2, p. 129-143

[13] At this juncture, it is important to note that there is an argument claiming that environmental policy is different from other public policies in that the former deals with how to sustain life whereas the latter deals with how to improve the quality of life. Of course, there are arguments against this argument, too. For instance, it is said that not only environmental policy but also other public policies can deal with how to sustain life such as policies dealing with drug prescription and automobile safety. For more on this controversy, see Lawrence S. Rothenberg, supra note 2, p. 2-3

[14] The question of *standing* is the question of who can seek remedy when there are certain environmental wrongs. Thus, depending on legal systems, those who can seek remedies for EWDs can be either anyone or those who are immediately concerned like the direct victims of a given action or inaction. However, as a rule, in order to select suitable plaintiff and allocate scarce resources to it,[14] only a person whose right or interest is affected by a given behaviour can seek relief from whosoever is responsible therefor.[14] See Han Somsen, Protecting the European Environment: Enforcing EC Environmental Law, Blackstone Printing Ltd, UK, 1996, p 151 and C.M. Abraham, Environmental Jurisprudence in India, Kluwer Law International, The Hague, London, and Boston, 1999, p 29. Nonetheless, the limitation of standing in environmental cases only to a person whose right or interest is (to be) affected by a given action or inaction may be an impediment to effective protection of the environment. Indeed, some have argued that recognizing the standing of all to sue for EWDs amounts to removing one of the major obstacles to enforcement of environmental law.[14] Moreover, it is argued that in environmental cases, standing should be extended to many because all citizens or at least all citizens in a region are individually affected by the administrative action or inaction relating to the environment.[14] There are also scholars who argue that standing in environmental litigation should be extended to all citizens as it allows the use of private

environmental statutes give citizens, broadly defined, the right to sue polluters or regulators, procedural hurdles must still be cleared in order to gain access to the court.[15] This means, the stipulations in environmental regulations granting *locus standi* to citizens may still need interpretation. By interpreting these stipulations, courts decide how they should be understood and applied. On the other hand, such activity of courts has the tendency to shape the environmental policy under consideration. For instance, if a given environmental legislation contains a provision that allows citizens to bring court action for any environmental wrongdoing, question as to what the term *citizen* refers to may arise, that is, whether it means only nationals or it includes residents as well. The judiciary entertaining a case in which such issue arises may decide that the citizen suit provision covers not only nationals but also residents or the vice versa thereby making/shaping the existing environmental policy.

The above method of shaping environmental policy can be used in Ethiopia, too. For instance, while article 11(1) of our Environmental Pollution Control Proclamation grants every person, without the need to show any vested interest, the right to lodge complaint, against any persons allegedly causing actual or potential harm. Moreover, Council of Ministers Regulation on Prevention of Industrial Pollution, Regulation No. 159/2009, allows everyone to lodge complaint, without proving vested interest, to environmental protection organs if there is industrial pollution. From these two laws, it is not clear if regulators can be sued for failing to discharge their duties. However, in one case,[16] the Federal First

---

resources to enforce environmental laws. See Duard Barnard, *ENVIRONMENTAL LAW FOR ALL: A PRACTICAL GUIDE FOR THE BUSINESS COMMUNITY, THE PLANNING PROFESSIONS, ENVIRONMENTALISTS AND LAWYERS*, Impact Books Inc, Pretoria, 1999, p 51, Han Somsen, Id., p 152 and Steven Ferrey, *Environmental Law: Examples and Explanations*, 3rd Edition, ASPEN Publishers, New York, 2004, p 228. Interestingly, the experiences of some countries such as the US, RSA, and Kenya also show that environmental standing is recognized in its broader sense.

[15] Rosemary O'Leary, supra note 2, p. 129

[16] *Action Professionals' Association for the People vs. Environmental Protection Authority*, reported by Wondwossen Sintayehu, (Federal EPA) as part of Public Interest

Instance Court explained this issue in relation to the article 11(1) of our Environmental Pollution Control Proclamation. First, it stated that the expression *without the need to show any vested interest* shows that the plaintiff should not demonstrate injury, actual or potential, to himself. Second, and impliedly, the court accepted that legal persons can bring court actions for alleged environmental wrongs because the plaintiff in the case was a legal person. Third, the Court decided that the article does not grant any person the right to sue regulators thereby limiting the scope of the right to standing individuals can have to bring environmental cases to courts. Therefore, by explaining the content of article 11(1) of the Proclamation, the Court shaped how the message of the article on standing should be understood and applied. However, there is one issue that has not been settled by this case. That is, although the article grants every person the right to sue those who do wrong to the environment, it is not clear whether this right extends to foreigners. For instance, whether or not persons on the other side of the border can bring court action before Ethiopian courts because they are feeling the negative impacts of an activity taking place on Ethiopian soil is not clear. Our court can however clarify this point when there is a chance thereby further shaping the environmental policy we have on *locus standi*. Further, if constitutional interpretation were given to courts, they might explain the provision of our Constitution which imposes on every citizen the duty to ensure observance of constitutional stipulations which includes environmental protection as granting right to standing to every citizen.[17]

Second, the US courts can shape environmental policy by deciding which cases are ripe or ready for review, whereas a case is said to be ripe if there is controversy that is more than merely anticipated.[18] Thus, by deciding on readiness of a case, courts can determine when the application of a

Litigation Report(available online): Report on the Public Interest Litigation Case instituted at the Federal First Instance Court of Ethiopia (available online).

[17] Article 9, 44, 92 of the FDRE Constitution. The power to interpret the Constitution is given to the House of the Federation. See article 62 and 83 of the Constitution. However, there are still arguments that courts are not excluded from interpreting the Constitution.

[18] Rosemary O'Leary, supra note 2, p. 129

given environmental policy can be set in motion/invoked in court of law. For instance, in the *Sierra Club v. Ohio Forestry Association Inc.* where certain forestry plan was challenged, the US Supreme Court decided that the case was not ripe for review because it concerned abstract disagreements on administrative policies.[19]

Ethiopian courts can also shape environmental policy in similar fashion. For instance, assume that the executive organ has issued regulations which authorize starting implementing one's project which is subject to preliminary EIA and for which such EIA is being done but not completed. If these regulations are challenged, our courts may decide that the regulations are unlawful, seen in light of higher laws such as the laws of the parliament, and hence, there is a case to litigate. Or, alternatively, the courts may decide that there is no case so long as no one has started implementing a project that is subject to preliminary EIA. This will, however, not be because if ripeness means presence of some harm, it may be late to prevent certain environmental problems.

Third, US courts can shape environmental policy by choice of standards of review, that is, when they have to review and reverse the decision of administrative bodies and when not to do so.[20] For instance, according to the US Supreme Court, reasonable interpretation of a given environmental policy made by an administrative organ must be deferred to if the policy is silent or ambiguous with respect to a given issue.[21] This means, so long as a given environmental policy is either silent or ambiguous in respect of an issue, then the solution given by an administrative body based on such policy must be accepted as correct provided that the solution (the interpretation of the policy) is reasonable.[22]

[19] Id., p. 133
[20] Id., p. 129
[21] Id., p. 134
[22] Of course, what is reasonable could be challenged which a court has to decide.

In Ethiopia, it is not common to review administrative decisions by courts. This is so for two reasons. First, there is no clear legal framework authorizing courts to do so. In other words, courts lack clear mandate to review administrative decisions. In fact, although there were opportunities to do so, some laws unfortunately failed to recognized courts' role to review administrative actions (including inaction). This is clearly observable in relation to the Environmental Pollution Control Proclamation which fails to recognize right to standing to sue environmental protection organs thereby missing the opportunity to subject such organs' decisions to courts' review authority. Of course, the attitude of the general public that the government or its organs cannot be sued (as saying goes *the sky cannot be tilled, nor can the government be sued*) may be worth mentioning here. Even the only environmental case brought against the Federal EPA for not taking the measures it was supposed to take was dismissed on the ground that the Federal EPA could not be sued at least in light of the law that was mentioned (the Environmental Pollution Control Proclamation).[23] In the end, the absence of administrative procedure law in the country plays great role in the absence of judicial review of administrative actions.

The fourth way in which the US courts can shape environmental policy is by interpreting[24] environmental laws which are often ambiguous and vague, whereas on the other hand situations which were not anticipated by the drafters of these laws may arise. Thus, courts can interpret and make these ambiguous and vague laws apply to the new (and an unanticipated)

[23] *Action Professionals' Association for the People vs. Environmental Protection Authority*, supra note 16

[24] Some argue that judicial policy making/shaping is different from interpretation. In the case of the latter, judges invoke applicable legal text to determine the content of their decision. In the case of policy making, judges invoke legal text to establish that they have control over the subject-matter and then rely on non-authoritative sources, and their own judgment, to generate a decision that is guided by a perceived desirability of its results. Malcolm M. Feeley and Edward L. Rubin, supra note 2, p. 5

situations. By so doing, courts can make/shape both current and future environmental policies.[25]

This role of the judiciary is obvious. In our case, judicial power is given to the courts by the Constitution.[26] Thus, by virtue of this constitutional authorization alone, our courts can interpret environmental laws and regulate any new situation that is not expressly covered by the existing environmental laws. For instance, in relation to projects that are to be implemented around boarders, our EIA Proclamation does not expressly impose duty on proponents to consult the communities living on the other side of the boarder. However, if any member of such community institutes an action in Ethiopian courts challenging the failure of the proponent to consult them, the court may decide that the proponent should have consulted them, too, because the EIA Proclamation was intended to cover this situation as well. By so doing, the court will be extending the scope of the existing law to a situation perhaps not intended by the drafters of the EIA Proclamation.

Finally, the major way in which US courts can shape their environmental policy is by choosing remedies for not observing environmental regulations.[27] For instance, the courts may choose to apply imprisonment, fine, corrective measures or other remedies in case a particular form of environmental policy non-observance occurs. Thus, the remedies the courts apply may be taken as policy shaping provided of course that courts can choose remedies.

In Ethiopia, too, courts can choose the remedies they apply for non-observance of environmental regulations. For instance, our environmental laws provide, *inter alia,* for imprisonment, fine, cleaning up environmental pollution, suspension or closure or relocation of an

[25] Rosemary O'Leary, supra note 2, p. 130, 138-141 and Stephen R. Chapman, supra note 3, p. 28
[26] See article 79 of the FDRE Constitution
[27] Rosemary O'Leary, supra note 2, p. 130, 140-143

enterprise causing environmental problems, etc. Thus, anyone of these remedies can be chosen and applied to a given environmental case. Under such circumstance, the courts make or at least choose environmental policy for the concerned party. However, there are times when our courts cannot shape our environmental policy through choice of remedies. This happens when the law that is violated provides for only one remedy to apply. For instance, our EIA Proclamation subjects any person who, without obtaining authorization from the relevant environmental protection organ, implements a project that is subject to EIA or makes false presentations in an EIA study report, to fine of not less than fifty thousand birr and not more than one hundred thousand Birr.[28] Thus, a court that entertains a case involving such misbehavior can only apply fine as a remedy since the law does not provide for other alternatives.[29] Moreover, there are times when the law provides for cumulative remedies to apply. In this case, too, courts cannot choose remedy and hence shape environmental policy because they can only apply both remedies.

In the end, it should be noted that the US Supreme Court sets precedents for the other courts to follow. Thus, the decisions it make will be used as a law by lower courts. If the ways of environmental policy shaping discussed thus far are used by the US Supreme Court, the environmental policy so shaped will have wider application. For instance, lower courts will use the standard used by the US Supreme Court to decide issues of ripeness. When it comes to Ethiopia, the Federal Supreme Court does not ordinarily set precedent for lower courts. Consequently, lower courts can follow their own path of shaping environmental policy. After all, unlike in common law countries, in Ethiopia, Article 79(3) of Our Constitution requires judges to exercise their functions in *full independence* and to be directed *solely by the law*. Thus, judges can legitimately refuse to accept

[28] See article 18(2) of the EIA Proclamation

[29] If there is any discretion left to the courts it is only on the amount of fine to be imposed. Otherwise, the courts cannot impose, for instance, imprisonment instead of fine for that would amount to violation of the principle of legality as recognized in our criminal law.

the opinions of other judges, when invoked, even if they may be Supreme Court Judges and claim independence in relation to what they do. Moreover, the term *law* in the Constitution refers to statutes as opposed to judge-made law. Of course, the consequence of this constitutional stipulation is that judges can shape the same environmental policy in different ways thereby resulting in its non-uniform application.

Nevertheless, as of 2005, the Cassation Bench of the Federal Supreme Court has been mandated to make decisions on interpretation of laws binding on all levels of courts at all levels (Federal and Regional) provided that applications are made to it when fundamental error of law occurs.[30] As a result, the Bench has been using this mandate to make various decisions on interpretation of laws when fundamental errors in their uses are claimed. On the other hand, other courts are also using the decision of the Bench to decide similar cases presented before them. For example, in one family case,[31] lower courts decided based on the Federal Revised Family Code that marriage dissolves only if there is death or absence of one of the spouse, invalidation of marriage by judicial order, or divorce declared by a court. Indeed, these are the only grounds the Federal Revised Family Code recognizes to dissolve marriage.[32] However, the Federal Supreme Court Cassation Bench decided that long disuse of marriage should be added to (read into) the grounds expressly recognized by the Code. As a result, other courts are now using disuse of marriage for long period, because they are required by Proclamation 454/2005, as additional ground to declare that marriage is dissolved.[33]

---

[30] See article 2(1), Federal Courts Proclamation Re-amendment Proclamation, Proclamation No. 454/2005. Actually, upon its enactment, the Proclamation was criticized for its unconstitutionality because some people thought that it would erode the independence of judges as recognized and required by the Constitution.

[31] *Shewaye Tessema V Sara Lengana and Others*, Federal Cassation Bench, File No. 20938, April 19, 2007

[32] See article 75 of the Federal Revised Family Code, 2000

[33] Of course, there are arguments in favour of and against this decision of the Bench. See Filipos Aynalem, *ሳይፋቱ (ዲ ፋክቶ) ፍቺ* (*De facto* Divorce), p 131-132, Mizan Law review, V 2, No. 1, 2008 (in favour) and comments by Mehari Radae, Journal of Ethiopian Law, Volume XXII, No.2, December 2008, p 37-45, and Dejene Girma Janka,

With regard to environmental policy making/shaping, two points may deserve emphasis in relation to what is raised and discussed in the preceding paragraph. First, the decision of the Bench in relation to environmental policy will be used by all other courts. This is particularly good if judicial activism in favour of environmental protection is reflected in the decision of the Bench. Second, the bench may, while interpreting a given environmental law, go beyond the text of a law and decide to include a given aspect into its scope. For instance, in one case mentioned before,[34] the Federal First Instance Court decided that the Environmental Pollution Control Proclamation does not allow suing environmental protection organs. If the case had been brought before the Bench claiming that fundamental error of law was committed by the court in relation to understanding the spirit of the Proclamation, the Bench might have decided that the Proclamation permits, as it did in relation to grounds of dissolving marriage, suing regulators if there are faults on their sides.[35] Nonetheless, applications involving fundamental error of environmental law(s) are yet to reach the Bench.

3. Conclusion and recommendations

To conclude, as this brief essay has tried to explain, the judiciary can play a role in the formulation of environmental policy. In the US, the avenues for judicial policy formulation (making/shaping) are many. In fact, the US courts have been using these avenues to shape their environmental policies whenever opportunities present themselves. In Ethiopia, too, the judiciary can shape environmental policy although some of the avenues available to the US courts are not available to them. However, there is no meaningful effort, except one, that has been made by our courts to shape our environmental policy. Of course, absence of judicial efforts to shape

---

Tell Me Why I Need to Go to Court: A Devastating Move by the Federal Cassation Division, Jimma University Journal of Law, V2, N1, 2009 (against)

[34] *Action Professionals' Association for the People vs. Environmental Protection Authority*, supra note 16

[35] After all, in the absence of suits against regulators to fore them take measures they are expected to, the purposes of the Proclamation can hardly be served.

environmental policy in Ethiopia may be attributed to either lack of demand (case) presented before the courts by the public (or other entities) for environmental protection, whatever the reasons may be, or absence of judicial activism in favour of environmental protection. It is, therefore, recommended that our courts should use any opportunity that may present itself to them to shape the existing environmental policies in favour of environmental protection.

Information to Authors

The Editorial Board of JULJ will be pleased to consider contributions provided they are not published or have not been submitted for publication elsewhere.

1. Contributions must be presented in their final form in English. The Board may consider contributions presented in other languages.
2. Special attention should be given to quotations, footnotes, and references which should accurate, complete and in accordance with the Journal's style sheet. The style sheet may be obtained from the editor-in-chief upon request.
3. The submission of contributions indicates that the authors consent, in the event of publication, to the automatic transfer of his/her copyright to the publisher Jimma University Journal of Law.
4. Contributions can be submitted to the editor-in-chief at dejulaw@gmail.com or to the managing editor at legessetigabu@yahoo.com or to other Editorial Board members at birejana@yahoo.com and alemuyosef@gmail.com. They could also be sent to the Dean of College of Law and Governance at saintata2@gmail.com or to the Head of Law School at kassahun.molla@yahoo.com. They will immediately forward contributions to the editor-in-chief and the managing editor.