

**THE AFRICAN HUMAN RIGHTS SYSTEM: CHALLENGES AND
PROSPECTS**

by

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**Thesis submitted in accordance with the requirements for the degree of
DOCTOR OF LAWS (LLD)**

**In the Department OF CONSTITUTIONAL, INTERNATIONAL AND
INDIGENOUS LAW
FACULTY OF LAW, UNIVERSITY OF SOUTH AFRICA**

Promoter: Prof. André MBATA BETUKUMESU MANGU

APRIL 2010

Dedication

To the memory of my father, INGANGE BABA Jean Désiré. I would have been happiest person if you lived longer to see this day as it was your desire. You will always be in my heart.

To my mother WAMBELA BOMPALA Sophie for everything you have done for me since I was born.

To my wife ILUMBE MBALAKA Clarisse Nono, for your love, encouragement, patience, understanding, prayers, moral support, sacrifices and constant attention. My love and appreciation go to you at all times. I could not have done this thesis without you, love of my life.

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Declaration

I declare that this thesis which I submit in accordance with the requirements for the degree of Doctor of Laws (LLD) at the University of South African is my own original work and has not previously been submitted by me for a degree at another university. All primary and secondary sources used have been duly acknowledged.

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SADC: Southern African Development Community
SACU: Southern African Customs Union
TNCs: Transnational Corporations
UMAC: Monetary Union of Central Africa
UEMOA: French acronym for West African Economic and Monetary Union
UN: United Nation
UNESCO: United Nation Educational, Science and Cultural Organisation
UNHCR: United Nations High Commission for Refugees
UNHCR: United Nations Human Rights Committee

Abstract

The world has seen gradual evolution of regional human rights arrangements. The adoption by the UN General Assembly of the Universal Declaration of Human Rights on December 10, 1948, was followed by the creation of numerous regional instruments that address concerns of particular importance in the regional context. Three world regions, Africa, the Americas and Europe, have established their respective regional instruments together with the supervisory mechanism, such as commissions and courts.

The African Charter on Human and Peoples' Rights, with its emphasis on group rights and individual duties challenges the Western liberal account of rights, as expressed in the Universal Declaration of Human Rights. The cultural differences brought to the fore not only the tension between individual and group rights but also the question as to whether of the universalism of human rights is possible. The study advocates for a moderate universalism of human rights, which can only be achieved through a dialogue among different cultural approaches to the notion of human rights.

This study examines the content and substance of human rights norms of the African system with a view to recommending the possible strategies for their reform. Its central thesis is, the system is rather weak and therefore needs to be reformed. Toward this end, the study analyses the provisions of the African Charter. Thereafter, it explores its weaknesses and proposes strategies for their reform. The African human rights mechanisms face a number of common and particular challenges. Prospectively, Africa is going through a tremendous and interesting phase. These challenges are not insurmountable.

Key words

Africa, human rights system – human rights – universalism – cultural relativism – African perspective on human rights – African Charter of Human and Peoples' Rights - African Commission – African Court – Challenges and Prospects

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Chapter one: General introduction

1. Introductory remarks

It is generally recognised that the concern for human rights is not confined to a particular society, continent or culture. Alongside the struggle over the years for the recognition of human rights, efforts have also been made to evolve mechanisms for the promotion and protection of those rights at the national, international and regional levels. At the international level there are, for instance, the Universal Declaration of Human Rights and the United Nations Covenants and several human rights instruments. Mechanisms have also been evolved to safeguard human rights at the regional level. The African Charter on Human and Peoples' Rights¹ is one such mechanism or arrangement for promotion and protection of human rights over the continent of African. Other examples of regional arrangements for safeguarding human rights include the European and American Conventions of human rights which serve similar purposes for the European and American continents respectively. At the national level, individual States make provisions in their constitutions and the ordinary legislations to safeguard human rights in their territories.

Regional systems are a product of the international concern for human rights that emerged at the end of the Second World War in 1945. Given the widespread movement for human rights that followed, it should not be surprising that regional organisations created or reformed after the war should have added human rights to their agendas. All of them drew inspiration from the human rights provisions of the United Nations Charter and the Universal Declaration of Human Rights.² Historical and political factors encouraged each region to focus on human rights issues. Buergenthal and Shelton noted that the Americas had a tradition of regional approaches to international issues including human rights that grew out of regional solidarity developed during the movements for independence.³

¹ The African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5 (1982) 21 International Law Material 58 (herein the African Charter).

² The Universal Declaration of Human Rights, adopted by the UN General Assembly, 10 December 1948 GA Res. A/RES/217 (III), UN GAOR, 3rd Sess., Supp. No; 13, UN Doc. A/810 (1948) 7 (hereinafter the Universal Declaration).

³ Buergenthal T. and Shelton D. (eds.) *Protecting Human Rights in Americas* 4th ed. (Kelh/Strasbourg: Engel Verlag, 1995) 37.

They further contended that Pan American Conferences had taken action on several human rights matters well before the UN, and this history led to the Organisation of American States to refer to human rights in its Charter and to adopt the Declaration on the Rights and Duties of Man some months before the UN adopted the Universal Declaration.⁴

Merrills noted that Europe had been the theatre of the greatest atrocities of the Second World War and felt compelled to press for international human rights guarantees as part of European reconstruction.⁵ For Merrills, faith in Western European traditions of democracy, the rule of law, and individual rights inspired the belief that regional system could be successful in avoiding future conflict and stemming post-war revolutionary impulses supported by the Soviet Union.⁶

Somewhat later, in Africa, claims to self-determination became a recognised part of human rights agenda as African States emerged from colonisation and continued struggle for national cohesion. Resistance to human rights abuses in the pre-1994 apartheid regime South Africa also contributed to regional efforts for all of Africa. Nguema traced a history of concern with human dignity in African culture, history, and values and noted that the youth of the African system does not mean it is less valuable or important than other regional systems.⁷ The European system of human rights, the first to be fully operational, began with the creation of the Council of Europe by ten Western European states in 1949.⁸ It has since expanded to include Central and Eastern European countries, bringing the total membership to 46.⁹

⁴ Buergenthal and Shelton (1995) 37.

⁵ Merrills J.G. 'Promotion and Protection of Human Rights within the European Arrangements' in Hanski R. and Suski M. (eds.) *An Introduction to the International Protection of Human Rights A Textbook* (Turku/Abo: Institute for Human Rights, Abo Akademi University: 2000) 275, 276-277.

⁶ Id., 277.

⁷ Nguema I. 'L'Afrique et les droits de l'homme' (1991) 1 *Revue de la Commission Africaine des Droits de l'Homme et des Peuples* 16, 26. The author quoted two African proverbs: (1) To be the first in a family to marry does not necessarily mean one is the richest and to be the last to marry does not necessarily mean one is the poorest ; (2) To be the eldest child does not make one the most intelligent and to be the last born does not make one the most stupid. In other words, he viewed the chronology of concern with human rights, even assuming it can be established, as distinct from the maturity and excellence of the present systems.

⁸ The Statute of the Council of Europe was signed in London on 5 May 1949 on behalf of Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. Statute of the Council of Europe, May 5, 1949. ETS No. 1, Great Britain T.S. No. 51.

⁹ Art 3 of the Council's Statute provides that: 'Every Member State must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. Membership in the Council is *de facto* conditioned upon adherence of the European Convention on Human Rights (The European Convention) and its Protocols'. See Committee of Ministers, Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe, adopted on 10 November 1994, reprinted in Council of Europe, Information Sheet No. 35 (July-December 1994) (1995), Appendix I, 146.

As the first human rights system, the European Convention began with a short list of civil and political rights, to which additional guarantees have been added over time. In addition, the jurisprudence of the European Court of Human Rights has been relatively conservative compared with that of other systems, reflecting an early concern for maintaining State support in the light of the innovations of the European system and the then-optional nature of the court's jurisdiction. The European system was the first to create an international court for the protection of human rights and to create a procedure for individual denunciations of human rights violations.¹⁰ The role of the victim was initially very limited and admissibility requirements were stringent. As the system matured, however, the institutional structures and normative guarantees have been considerably strengthened. Although most of the changes resulted from efforts to improve the effectiveness of the system and add to its guarantees, some of the evolution has been responsive to the activities of other regional organisations within and outside Europe. Others have resulted from the impact of expanding membership in the Council of Europe. The European system is in fact characterised by its evolution through the adoption of treaties and protocols. Through its Parliamentary Assembly, the Council has drafted a series of human rights instruments.¹¹

¹⁰ An earlier, more limited effort was made in 1907 with the creation of the Central American Court of Justice. The Court had jurisdiction over cases of 'denial of justice' between a government and a national of another state, if the cases were of an international character or concerned alleged violations of a treaty or convention. See Hudson M. *Permanent Court of International Justice* (Oxford: Oxford University Press, 1943) 49.

¹¹ It is also worth noting that the Assembly adopts recommendations on human rights, some of which are influential in shaping the laws and policies of member states. In some cases the Committee of Ministers requests governments to inform it of measures they have taken to implement specific recommendations.

The most significant instruments are the 1950 European Convention on Human Rights and Fundamental Freedoms and its fourteen protocols,¹² the 1961 European Social Charter with its protocols,¹³ the European Convention of Torture and its protocols,¹⁴ the European Charter for Regional Minority Languages,¹⁵ and the 1995 Framework Convention for the Protection of National Minorities reinforcing instruments for human rights protection in Europe.¹⁶

The Inter-American system as it exists today began with the transformation of the Pan American Union into the Organisation of American States (OAS). The OAS Charter proclaims, 'the fundamental rights of the individual as one of the organisation's basic principles'.¹⁷ The 1948 American Declaration on the Rights and Duties of Man gives definition to the Charter's general commitment to human rights.¹⁸ Over a decade later, in 1959, the OAS created a seven member Inter-American Commission of Human Rights with a mandate of furthering respect for human rights among member States.¹⁹

¹² Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, as completed by Protocol No. 2, ETS No. 44, and amended by Protocol No. 3, ETS No. 45, Protocol No.5, ETS No. 55, and Protocol No. 8, ETS No. 118. In addition, the following protocols have been adopted:

- Protocol No.4, ETS No.46, Securing certain Rights and Freedoms
- Protocol No. 6, ETS No. 114, Concerning the Abolition of the Death Penalty
- Protocol No. 7, ETS No. 117
- Protocol No. 9, ETS No. 140
- Protocol No. 10, ETS No.146
- Protocol No. 11, ETS No. 155, Restructuring the Control Machinery.

¹³ European Social Charter , ETS No. 35. The Charter entered into force on 26 February 1965. A Protocol to the Charter, adopted in 1988, imposes legal obligations in regard to additional economic and social rights. It entered into force on 4 September 1992. ETS No. 128. A 1991 Turin Protocol is not yet in force, ETS No. 142), as it requires the ratification of all parties to the Charter. A further Protocol, adopted on 9 November 1995, ETS No. 158, provides for a system of collective complaints.

¹⁴ European Convention for the Prevention of Torture, ETS NO. 126. Protocol I widens the geographical scope of the Convention by enabling no Member States of the Council of Europe to accede to it by invitation, ETS No. 151. Protocol II makes technical changes to the arrangements for elections of the members of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, ETS No. 152. The text of the Protocols is reprinted in (1994) 1 *International Human Rights Report* 339.

¹⁵ European Charter for Regional or Minority Languages, ETS No. 148, entry into force 1 March 1998.

¹⁶ Framework Convention on the Protection of National Minorities, ETS No. 15, reprinted in (1995) 2 *International Human Rights Report* 217, entry into force 1 February 1998. The Convention has been accepted of Central and Eastern Europe. All of the first four states to ratify have significant minority issues: Spain, Hungary, Romania and Slovakia. One non-Member State, Armenia, also ratified the Convention. The term 'framework', widely used in environmental agreements, indicates that the Convention sets forth general principles and objectives but does not specify the details of implementation by states parties. Supervision is by means of periodic state reports, to be reviewed by the Committee of Ministers with the assistance of an expert advisory committee.

¹⁷ Art 3, OAS Charter.

¹⁸ See Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Art 64 of the American Convention, 10 *Inter-Am.Ct.H.R.(Ser.A)* (1989).

¹⁹ The Statute of the Commission described it as an autonomous entity of the OAS having the function to promote respect for human rights. 1960 Statute, Article 1. In 1967, the Protocol of Buenos Aires amended the Charter to make the Commission a principal organ of the OAS.

In 1965, the Commission's competence was expanded to accept communications, request information from governments, and make recommendations to bring about more effective observance of human rights. The American Convention of Human Rights, signed in 1969, conferred additional competence on the Commission to oversee compliance with the Convention.²⁰ The Convention, which entered into force in 1978, also created the Inter-American Court of Human Rights. The court has jurisdiction over contentious cases submitted against states that accept its jurisdiction and the court may issue advisory opinions.

The American Commission's jurisdiction extends to all 35 OAS Member States.²¹ The twenty-five States which have ratified the Convention are bound by its provisions, while other member states are held to the standards of the American Declaration. Communications may be filed against any state; the optional clause applies only to inter-State cases. Standing for non-state actors to file communications is broad.²² The American Commission may also prepare country reports and conduct on-site visits to individual countries, examining the human rights situation in the particular country and making recommendations to the government. Country reports have been prepared on the American Commission's own initiative and at the request of the country concerned. It may also appoint special rapporteurs to prepare studies on hemisphere-wide problems.

²⁰ American Convention on Human Rights, November 22, 1969 (hereinafter American Convention).

²¹ Virtually the entire Western hemisphere is included: Antigua and Barbuda, Argentina, The Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.

²² Art 44 of the American Convention states that 'any person or group of persons, or any non-governmental entity legally recognised in one or more Member States of the Organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State party'. The Commission's Regulations provide the same extensive standing for complaints to be filed against OAS member states that are not party to the Convention.

Like the European system, the Inter-American system has expanded its protections over time through the adoption of additional human rights norms. The major instruments are: the Inter-American Convention for the Prevention and Punishment of Torture;²³ the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights;²⁴ the Second Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty;²⁵ the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women;²⁶ the Inter-American Convention on Forced Disappearance of Persons;²⁷ and the Declaration of the Rights of Indigenous Peoples.²⁸

The human rights debate in Africa is a reflection of the continent's political and legal history. Therefore, any discussion of human rights in Africa must be grounded in the political and history of the continent, covering three broad periods: pre-colonial, colonial and post-colonial. Such a perspective is essential, not only because of the changing nature of various forms of social organisation and expression as a result of both indigenous and external forces, but also because history continues to exert its influence, even up to the present. However, this is not the place to review the well-known discourse on the human rights in the pre-colonial and colonial periods in any great detail.

Conteh argued that human rights were present in the first phase of traditional societies, although in a context quite unlike that of the West.²⁹ Coifman has done a pioneering work on the flexible nature of pre-colonial patterns of political organisation in West Africa, including the coastal region stretching south from the Senegal River to Liberia (and also visible in the Sahara and Morocco).³⁰

²³ Inter-American Convention to Prevent and Punish Torture, OAS T.S. No. 67, reprinted in Basic Documents, 87, entry into force 28 February 1987.

²⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, OAS T.S. No. 69, OAS Doc. OEA/Ser. A/42 (SEPF), reprinted in Basic Documents, 69. The Protocol is not in force.

²⁵ Protocol to the American Convention on Human Rights to Abolish the Death Penalty. OAS T.S. No. 73, reprinted in Basic Documents, 83. The Protocol entered into force on August 28, 1991.

²⁶ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, OAS T.S., reprinted in Basic Documents, 109, entry into force 5 March 1995.

²⁷ Inter-American Convention on Forced Disappearance of Persons, OAS T.S., reprinted in Basic Documents, 99, entry into force 28 March 1996.

²⁸ IACHR, Press Communiqué of 3/97, reprinted in OAS, Annual Report of the Inter-American Commission on Human Rights 1997, OAS Doc. OEA/Ser. L/V/II. 98, Doc. 7 Rev. (1998) 1081.

²⁹ Conteh M.B. 'Human Rights Teaching in Africa: The Socio-Economic and Cultural Context' in Eide A. and Thee M. (eds.) *Frontiers of Human Rights Education* (New York: Columbia University Press, 1983) 58.

³⁰ Coifman V.B. 'West African Women: On the Edges of Jihad in the Early Days of MacWorld' (1998) 33 (2) *Listening: Journal of Religion and Culture* 111, 114.

The period of European colonialism (from the late 1800s to the mid 1900s) saw the most contradictions and transformations in Africa. Ayittey further mentioned that the colonial period witnessed a systematic subjugation and exploitation of the African people for the benefit of the colonisers, and believed there was a denial of human rights and an attempt at total annihilation of African customary law.³¹ Eze explained that, with colonialism, African law ceased to be endogenously developed, as its development was no longer achieved by Africans, neither did it continue to evolve according to African needs.³² All colonial policies in Africa had the same goals and produced more or less the same results.

The Belgian,³³ British,³⁴ French³⁵ and Portuguese³⁶ colonial policies differed in a number of points. Eze explained that differences in the manner of realising their goals were based on their philosophical and historical experiences. In his view, the French and Belgian practice of attempting to transform Africans into Frenchmen and Belgians was only partially successful, since very few Africans became assimilated into either the French or Belgian style of life.³⁷ Eze further argued that the British indirect rule regime, on the other hand, created a body of African elite with Anglo-Saxon values, who became restless, demanding self-rule.³⁸ He concluded that all colonialists were interested in exploiting colonies. The concern was more to siphon off their resources, and this was facilitated by various policies, irrespective of which colonial ruler adopted them.³⁹

³¹ Ayittey G. *Africa Betrayed* (New York: Transnational Publishers Inc., 1992) 82.

³² Eze O.C. *Human Rights in Africa: Some Selected Problems* (Lagos: The Nigerian Institute of International Affairs/Macmillan Nigeria Publishers Ltd, 1984) 14.

³³ See generally, Slade R. *King Leopold's Congo* (London/Oxford University Press, 1962) 175; Young C. 'Colonial Rule through Direct Rule: The Belgian Model' in Cartey W; and Kilson M. (eds.) *The African Reader: Colonial Africa* (New York: Vintage Books, 1962) 87-88; Rudashyankiko N. 'La codification du droit au Rwanda' (1966) 1 *Revue Juridique et Politique* 114, 116. and, Nzongola-Ntalaja G. *The Congo from Leopold to Kabila A People's History* (London/New York: Zed Books, 2005) 13-54.

³⁴ See generally, Boahen A.A. and Webster J.B. *History of West Africa* (New York : Praeger, 1970) 742 ; Read J. 'Bills of Rights in the 'Third World' – Some Commonwealth Experiences' (1973) 1 (1) *Verfassung und Recht in Übersee* 1, 29; and Crowther M. *West Africa under Colonial Rule* (London: Hutchinson, 1968) 198-199, 233-235.

³⁵ See Selacuse J.W. *An Introduction to Law in French-Speaking Africa* (Oxford : Oxford University Press, 1976) 467.

³⁶ De Souza E.F. *The Portuguese Colonialism in Africa : The End of an Era : The Effects of Portuguese Colonialism on Education, Science, Culture and Information* (Paris :UNESCO Press, 1974).

³⁷ Eze (1984) 21.

³⁸ Id.

³⁹ Ibid.

Haile's that⁴⁰ rendering of the effect of colonial rule provided an example of some of these themes:

Colonialism has contributed to the poor record of human rights in Africa. Human rights were not part of the Western law brought to Africa. The colonial government in Africa was authoritarian to the core, and its legacies in the areas of civil, political, and personal security rights, and in the administration of judicial systems were clearly undemocratic.

In the same vein, Ake contended that colonialism degraded and exploited African people, and this had a lasting negative effect on their psyche, economy and culture.⁴¹

Post-colonial African period from the mid 1900s to date may be described in the words of El-Obaid and Appiagyei-Atua as a period of great disappointment.⁴² In fact, the post-colonial is characterised by contradictions and confusion, at the centre of which lies the question of human rights and democracy.⁴³ Although initially a period of hopeful transition from European control and institutions to national independence, the said period was marked by repression and corruption, leading to a concentration of wealth in the ruling elite.⁴⁴ During this period, the ruling elite ran the gamut of ideologies: socialism, one-partyism, pro-Americanism, Pan-Arabism, Pan-Africanism.⁴⁵

The starting point for discussing human rights in post-colonial period is African nationalism and pan-Africanism. Roberts identified African nationalism with the political revolt against colonialism; pan-Africanism with the aspiration for continental solidarity and equality.⁴⁶ Rodney⁴⁷ and Kiwanuka⁴⁸ respectively demonstrated how earlier on African nationalist movements engaged in the fight against human rights abuses in Africa. Sithole highlighted a number of strategies adopted by African nationalists in their fight against colonial rule.⁴⁹

⁴⁰ Haile M. 'Human Rights, Stability, and Development in Africa: Some Observations on Concepts and Reality' (1982) 24 *Virginia Journal of International Law* 591, 592.

⁴¹ Ake Cl. 'The Congruence of Political Economies' in Gutkind P. C.W. and Wallersteing I. (eds.) *Political Economy of Contemporary Africa* (Beverly Hills, CA: Sage, 1985) 230.

⁴² El-Obaid E.O.A. and Appiagyei-Alua K. 'Human Rights in Africa – A New Perspective on Linking the Past to the Present' (1996) 41 *McGill Law Journal* 819, 822.

⁴³ Id.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Roberts M. 'A Socialist Looks at African Socialism' in Friedland W.H. and Rosberg C.G. (eds.) *African Socialism* (Stanford: Stanford University Press, 1964) 80, 82.

⁴⁷ Rodney W. *How Europe Underdeveloped Africa* (Washington: Howard University Press, 1974) 24-76.

⁴⁸ Kiwanuka S. *From Colonialism to Independence: A Reappraisal of Colonial Policies and African Reactions 1870-1960* (Nairobi: East African Literature Bureau, 1973) Chap. 1.

⁴⁹ Sithole N. *African Nationalism* 2nd ed. (London: Oxford University Press, 1968) 15-20.

Another example for further illustration of this point comes from the 1945 Pan-African Congress held in Manchester. Part of the Declaration read as follows:

We are determined to be free. We want the right to earn a decent living; the right to express our thoughts and emotions, to adopt and create forms of beauty. We will fight in everyday we can for freedom, democracy, and social betterment.⁵⁰

Human rights were, therefore, a main claim of the struggle for independence. Asante noted three international instruments that contributed to a favourable environment for human rights: the UN Charter which contains six provisions to encouraging or promoting respect for human rights (Articles 1, 13, 55, 62, 73 and 76), the Universal Declaration of Human Rights, which he described as providing ‘a powerful source of inspiration for the founding pattern of African nations’, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, which played an important role in shaping the human-rights provisions in the constitutions of various African States, such as Nigeria, and Sierra Leone.⁵¹ Yet, African nationalists relied on an important tool, the right to self-determination, which entitled all peoples to freely determine their political status and freely pursue their economic, social and cultural development.⁵² As a result, this right was brought to the forefront by the struggle of Africans to free themselves from European colonialism.

African leaders of newly-independent States translated their human-rights rhetoric into internal constitutional provisions, which were negotiated with the departing colonial powers.⁵³ El-Obaid and Appiagyei-Atua⁵⁴ noted:

The human- rights platform in nationalist and pan-Africanist campaigns, coupled with the promise of improvement in general welfare under indigenous rule, created in the African populace an expectation of firm human-rights guarantees with the arrival of nationhood. This hope was reinforced by continued promises of respect for rights at the dawn of independence.

⁵⁰ Quoted in Ayittey (1992) 99.

⁵¹ Asante S.K.B. ‘Nation Building and Human Rights in Emergent African Nations’ (1969) 2 *Cornell International Law Journal* 72.

⁵² Universal Declaration, Art 29 (3).

⁵³ Asante identified three types of post-independence constitutions in Africa: the Nigerian type, with an elaborate Bill of Rights spelled out in precise legal language; the Chad type, in which the Preamble proclaims in general terms a commitment to the principles set forth in the French Declaration of the Rights of Man and of the Citizen of 1789, and in the Universal Declaration; and the Ghana type, without a Bill of Rights or nay other institution to protect the rights of the ordinary citizen. Id., 74-75.

⁵⁴ El-Obaid and Appiagyei-Atua (1996) 824.

Despite this rhetoric, Ambrose observed that the state of human rights in most African States is without doubt, dismal, to say the least.⁵⁵ The contrast between the paper declarations in constitutions as well as laws and the practice was quite staggering. The human rights were at one extreme, whilst the practice of African States was at the other. The vast majority of the citizens in virtually all African States face difficult odds in the enjoyment of their rights and freedom from intolerable oppression, exploitation and destitution.

According to Ihonvbere⁵⁶:

The main human rights issue in contemporary Africa is what to do with the non-hegemonic, unstable, repressive and exploitative postcolonial State. The State has been more a weapon of intimidation and abuse than one with a sense of nation and mission designed to revolutionise the social formation, protect the citizenry and promote an enabling condition conducive to popular participation in development. Its total failure to improve on the conditions of the people, effectively mediate conflicts, protect the rights of the citizenry, and articulate a viable consistent agenda for growth and development has reduced the worth of the State in the eyes of the people. The State is simply an enemy of the people with structures that are biased...

The challenge for African States since independence has been how to refashion what Badie has called *l'Etat importé*⁵⁷ into an arrangement that is not only stable, but will also be accepted by its citizens as legitimate, as well as sufficiently able to perform the basic functions of statehood: control over national territory; oversight of the natural resources; effective and rational collection of revenue; maintenance of adequate national infrastructure; and capacity to govern and maintain law and order, including respect for basic human rights.⁵⁸

⁵⁵ Ambrose B.P. *Democratisation and the Protection of Human Rights in Africa: Problems and Prospects* (Westport, Conn.: Praeger, 1995) 45. Alhuwalia, Chabal and Alemika also expressed the same view. See respectively, Alhuwalia P. 'Human Rights in Africa: A Post-Colonial Perspective' (1998) 38(1) *Human Rights Quarterly* 21, 25; Chabal P. *Power in Africa: An Essay in Political Interpretation* (New York: St. Martin's Press, 1992) 120-121; and Alemika E.E.O. 'Protection and Realisation of Human Rights in Africa' (2001) 1 (3) *The Constitution – A Journal of Constitutional Development* 41, 51.

⁵⁶ Ihonvbere B. 'Foreword' in Udombana N.J. to *Human Rights and Contemporary Issues in Africa* (Lagos: Malthouse Press Limited, 2003) ii.

⁵⁷ Badie B. *The Imported State: the Westernisation of the Political Order* Trans. by Royal Cl. (Stanford: Stanford University Press, 2000) 118.

⁵⁸ *Id.*, 120.

At the regional level, the African human rights system is organised under the African Union (AU). Initially the system was anchored in the framework of the Organisation of African Unity. As it will be discussed, the Charter of the OAU made a few references to the UN Charter and the Universal Declaration. However, it did not contain any catalogue of rights in it. The struggle against colonialism at the time of making the Charter of OAU can explain the absence of any human rights provision within the main text of the Charter. Later the decline of colonialism at the time of making of the Charter of OAU can explain the absence of any human rights provision within the main text of the Charter. Later developments, including the decline of colonialism and the awareness of the imminence of end of apartheid, created the impetus to seriously consider developing an African human system. The out come was the adoption of the African Charter and Human and Peoples rights.⁵⁹

The African Charter follows a different approach that other human rights instruments in that it incorporates all civil, political, economic, cultural and social rights together in the same instrument. Besides this, the African Charter reflects its African identity and experiences by creating group and collective rights. The concept of individual duties also differentiates the African Charter. However, the African Charter attaches claw-back clauses to some of right provisions. It also allows for deriving inspiration from other international instruments in interpreting the provisions its provisions. The African human rights system also contains other treaties.⁶⁰

The regional human rights systems offer both practical and normative advantages. They are very often the most appropriate way of ensuring human rights protection and promotion on a national level. The reason for this is mainly their ability to define more closely and give legal meaning to the overall universal concepts of human rights by including an appropriate adaptation to cultural and other factors. In this respect, States may feel a higher degree of ownership and therefore exhibit a greater willingness to follow decisions, etc.

⁵⁹ See the following paragraph and chapter two for further details.

⁶⁰ Id.

Furthermore, they have the advantage of being closer to the national law and citizens of their Member States, which is also significant in relation to their implementation mechanisms, particularly in those cases where the instruments and their corresponding institutions of safeguard allow for individual and not just inter-State complaints.⁶¹ The advantage of regional systems lies in their capacity to address complaints more efficiently. They tend to be more sensitive to cultural and religious concerns if there are valid reasons for them. According to Anyangwe,⁶²

Regional systems are critical to contemporary human rights development. They play an important complementary role in reinforcing international standards and machinery. They provide the means by which human rights concerns can be addressed within the particular social, historical and political context of the region. Moreover, when it comes to human rights implementation, the universal human rights system relies heavily on regional human rights agreements.

Similarly Mugwanya⁶³ draws attention to the usefulness of regional systems by explaining that:

Regional systems have served as both institutional and normative building blocks and instruments for the realisation of human rights at the grassroots. Over the years, regional systems, particularly those established in Europe and the Americas, have provided the necessary intermediation between state domestic institutions which violate or fail to enforce human rights, and the global human rights system which alone cannot provide redress to all individual victims of human rights violations.Regional systems have served to fill gaps in the global system's mechanisms. They have successfully complemented the global system by impacting on and influencing domestic human rights practice in member states. Regional systems are flexible and have the ability to change as conditions around them change, and sometimes quickly.

⁶¹ Robertson and Merills Robertson argued that not only is the establishment of regional human rights systems fully compatible with Arts 33 and 52 of the UN Charter, they are simply more practical with respect to communication and mutual understanding, and are easier implemented because given the diversity of the modern State system, it is natural that regional systems of enforcement should be more readily accepted than universal arrangements. See Roberston A.H. and Merills J.G. (eds.) *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (Manchester: Manchester University Press, 1989) 222ff.

⁶² Anyangwe C. 'Obligations of States to the African Charter on Human and Peoples' Rights' (1998) 10 *Revue Africaine de Droit International et Comparé* 625.

⁶³ Mugwanya G.W. 'Realising Universal Human Rights Norms through Regional Human Mechanisms: Reinvigorating the African System' (1999) 10 (1) *Indiana International and Comparative Law Review* 40-41.

According to Heyns and Viljoen,⁶⁴

While international systems for the protection of human rights generally lack the benefit of direct enforcement, which domestic systems have, regional systems for the protection of human rights arguably have some advantages over the global or UN system. They can give more authentic expression to the values and historical peculiarities of the people of a particular region, resulting in more spontaneous compliance, and, due to the geographical proximity of the states involved, regional systems, under the right conditions, have the potential of stronger pressure being exerted against neighbours in cases of violations. Peer pressure is easier to exert in a smaller circle of friends. An effective regional system can consequently supplement the global system in important ways.

Hansungule⁶⁵ noted that:

Regional systems are particularly important for the opportunity to reflect local values that can not be reflected under the international system in being preoccupied with the values of the universe as such. The preoccupation with universal values, though important, can lead to a de-emphasis of certain peculiarities that are nonetheless basic to some societies. In a regional system, States have the opportunity of recalling their values for inclusion in the system in addition to what can be borrowed from other systems. This is why regional systems have been found necessary in Africa, Americas and Europe.

For Shelton,⁶⁶

Regional systems are indispensable to achieving effective compliance with international human rights, performing as they do a necessary intermediary function between State domestic institutions that violate or fail to enforce human rights and the global system which is so far incapable of providing redress to individual victims of human rights violations. They have the necessary ability and flexibility to change as conditions around them change, yet are applied in response to regionally-specific problems; they achieve equilibrium between uniform enforcement of global norms and regional diversity.

⁶⁴ Heyns C. and Viljoen F. 'Regional Protection of Human Rights in Africa: An Overview and Evaluation' in Zeleza P.T. and McConaughay P.J. (eds.) *Human Rights, The Rule of Law and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) 129, 131.

⁶⁵ Hansungule M. 'Protection of Human Rights Under the Inter-American System: An Outsider's Reflection' in Gudmudur A. et al. (eds.) *International Human Rights Monitoring Mechanisms Essays in Honour of Jakob Th. Möller* (The Hague: Martinus Nijhoff Publishers, 2001) 679, 684.

⁶⁶ Shelton D. 'The Promise of Regional Human Rights Systems' in Weston B. and Marks S. (eds.) *The Future of International Human Rights* (1999) 351, 353-398.

2. Some conceptual clarifications

The title of this thesis introduces two major concepts that need to be discussed and delineated for the purpose of this study. These concepts are: ‘system’, ‘African human rights system’, ‘human rights’, and ‘challenges and prospects’.

2.1. System or systems

Scholars of international law and relations frequently speak of systems or regimes.⁶⁷ Kratochwil and Ruggie defined a regime as ‘the principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area’.⁶⁸ Similarly, Keohane described international regimes as ‘formal international organisations and codified rules and norms’.⁶⁹ In describing the international protection of human rights, Coveney and Highfield saw in the term ‘system’ a best mean to encompass the interdependence, complexity,⁷⁰ and punctuated equilibrium that characterise the norms, institutions, and procedures that are particular to this field.

⁶⁷ This section is widely inspired on the study by Shelton referred to above. Shelton in Weston and Marks (1999) 351-353. See generally Weston B.H. et al. ‘Regional Human Rights Regimes: A Comparison and Appraisal’ (1987) 20 *Vand. Journal of Transnational Law* 586; Donnelly J. ‘International Human Rights: A Regime Analysis’ (1986) 40 *International Organisations* 599; Onuf N.G. and Peterson Spike V. ‘Human Rights from an International Perspective’ (1984) 38 *Journal of International Affairs* 329; Nmehielle O.V. *The African Human Rights System: Its Laws, Practice and Institutions* (The Hague: Martinus Nijhoff Publishers, 2001). For an overview of basic concepts of regime theory, see Abott K.W. ‘Modern International Relations Theory: A Prospectus for International Lawyers’ (1989) 14 *Yale Journal of International Law* 335.

⁶⁸ Kratochwil N. and Ruggie J.G. ‘International Organisation: A State of the Art on an Art of the State’ (1986) 40 *International Organisations* 753, 754.

⁶⁹ Keohane R.O. *International Institutions and State Power* (Westport, Conn.: Green Press, 1989) vii.

⁷⁰ Complexity theory has been described as the study of the behaviour of macroscopic collections of interacting units that are endowed with the potential to evolve over time. See Coveney P. and Highfield R. (eds.) *Frontiers of Complexity: The Search for Order in Chaotic World* (Westport, Conn. : Green Press, 1995) 7. Complexity theory looks at nonlinear dynamical systems, suggesting that law and society coexist interdependently and dynamically, inevitably leading to unpredictable, unanticipated behaviour that is necessary for the system to thrive and adapt in a dynamically fit manner. Ruhl J.B. ‘Complexity Theory as a Paradigm for the Dynamical Law and Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State’ (1996) 45 *Duke Law Journal* 849.

Ruhl argued that systems share certain main characteristics, yet each is unique.⁷¹ Ruhl explained that system characteristics include: (i) self-generation, self-regulation and self-reproduction; (ii) the tendency for systems to become more structured, more capable and more vulnerable with age; (iii) the tendency for systems to accumulate information overtime; and (iv) entropy, the tendency for systems to dissipate. Purposefulness is also inherent.⁷²

Licker considered system as a 'set of elements that are related and that, through this set of relationships, aim to accomplish goals'.⁷³ Waltz described a system as having a structure that consists of an ordering principle, differentiation and functional specification of the units and the distribution of capabilities across units. For Churchman, a system is a 'set of interrelated and interactive elements that work together to accomplish specific purposes'.⁷⁴ Lopucki contended a system is 'a regularly interacting or interdependent group of items forming a unified whole'.⁷⁵ According to Waltz, the behaviour of actors in the system is dictated by the structure.⁷⁶

In this regard, Ruhl noted that, based on an understanding of the attributes of systems, especially their inherent complexity, regional human rights systems can be evaluated in light of the goals, structures, and surrounding environments of each, and on their flexibility to move between rigidity on the one hand and chaos on the other.⁷⁷ According to Ruhl, the flexibility to evolve is particularly important. Systems analysis suggests that those systems that balance stasis and change are the most successful in maintaining themselves in the long run, however much they are challenged by unforeseen development in their surrounding environments.⁷⁸

⁷¹ Ruhl J.B. 'The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy' (1996) 49 *Vand. Law Review* 1407. Punctuated equilibrium is taken from biology and describes the evolutionary process whereby periods of minute variations in genetic makeup are interrupted by episodes of major change, many of which are random in nature rather than responsive to pressures for natural selection (the 'science of surprises'). In addition, ecosystem dynamisms indicate that evolution takes place in the context of complex, chaotic environments with which it is interdependent. Where gradualism does not explain the full dynamics of evolution, punctuated equilibrium does. The theory is seen to be applicable to all dynamical systems. Id, 1414-1416, 1440.

⁷² Id., 1417.

⁷³ Licker P. *Fundamentals of Systems Analysis* (Westport, Conn. : Green Press, 1987) 7.

⁷⁴ Churchman W. *The Systems Approach* 2nd ed. (Oxford: Oxford University Press, 1979) 11.

⁷⁵ Lopucki L.M. 'The Systems Approach to Law' (1997) 82 *Cornell Law Review* 479.

⁷⁶ Waltz K. N. *The Theory of International Politics* (Cambridge: Cambridge University Press, 1979) 99.

⁷⁷ Ruhl (1996) 1410.

⁷⁸ Id., 1410.

Lopucki argued that a human rights system can be said to consist of: (i) a list of internationally-guaranteed human rights; (ii) permanent institutions; and (iii) compliance or enforcement procedures.⁷⁹ Furthermore, he maintained that each system is composed of various sub-systems. At the global level, the United Nations system consists in large part of many interacting organs and specialised agencies concerned with human rights.⁸⁰ Regional human rights systems referred to above contribute to the international system, as well as forming their own interdependent systems. Sub-systems of actors also exist: States, intergovernmental organisations, Non-Governmental Organisations, business enterprises, labour unions, networks of individuals and so on.⁸¹

2.2. African human rights system

The expression ‘African human rights system’ refers to the regional system of norms and institutions for enforcing human and peoples’ rights in Africa. However, in the common language, when people speak about the African human rights system, attention is immediately focused on the African Charter and the African Commission. A closer look at the African political landscape reveals that the African human rights system comprises much more than just the African Charter and the African Commission.

According to Odinkalu, ‘the true origins of the pan-continental human rights system in Africa date back to 1969 when the OAU adopted its Convention Governing the Specific Aspects of Refugee Problems in Africa’.⁸² This is true as far as it relates to the adoption of human rights treaties within the OAU because the whole struggle for independence and the fight against apartheid and colonialism were aimed at shaping an African human rights system.⁸³ The protection of human rights in Africa therefore has a long and complex past that is rooted in the history, culture, consciousness of its peoples, and by the continent’s political economy.⁸⁴

⁷⁹ Lopucki (1997) 479.

⁸⁰ Id.

⁸¹ Ibid., 479.

⁸² Odinkalu C.A. ‘The Role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System’ (2001) 1 (1) *African Human Rights Law Journal* 226.

⁸³ Id.

⁸⁴ Ibid.

The African human rights system is based on a number of treaties⁸⁵ : the African Charter on Human and Peoples' Rights,⁸⁶ the Convention on Specific Aspects of the Refugee Problem in Africa,⁸⁷ the African Charter on the Rights and Welfare of the Child,⁸⁸ the Protocol on the Establishment of an African Court on Human and Peoples' Rights,⁸⁹ and the Protocol on the African Charter on the Rights of Women in Africa.⁹⁰ There are two other treaties dealing with the environment, although not from a human rights perspective, enlisted by some scholars among the norms informing the African human rights system.⁹¹ These are the African Convention on the Conservation of Nature and Natural Resources⁹² and the Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa.⁹³ There is also another instrument adopted by the AU Assembly, the African Charter on Democracy, Elections and Governance which forms part of the African human rights system as it will be discussed below.

The inclusion of the 1969 OAU Convention as part of the African human rights system is justified. Goodwin-Gill wrote that despite the fact that human rights law generally applies to all individuals, regardless of nationality or citizenship, refugees have traditionally been dealt with via humanitarian law.⁹⁴ Yet, Clark and Crépeau⁹⁵ argued the continued separation of the two disciplines seems untenable.

⁸⁵ One concurs with the followings commentators who argued that the African human rights system consists of five main African human rights treaties the African human rights system. See for example, Heyns C. 'The African Regional Human Rights System: The African Charter on Human and Peoples' Rights (2004) 108 *Pennsylvania State Law Review* 679; Viljoen F. 'Africa's Contribution to the Development of International Human Rights and Humanitarian Law' (2001) 1 (1) *African Human Rights Law Journal* 18; Okafor O.C. *The African Human Rights System, Activist Forces, and International Institutions* (Cambridge: Cambridge University Press, 2007) 1-2.

⁸⁶ Adopted on 27 June 1981 in Nairobi, Kenya, and came into force on 21 October 1986.

⁸⁷ The final draft of the OAU Convention was adopted by the AHSG at its Sixth Ordinary Session in Addis Ababa in September 1969. It came into force on 26 November 1974, upon the deposit of instruments of ratification by one-third of the member states of the OAU.

⁸⁸ OAU Doc. CAB/LEG/24.9 (1990) - adopted in 1990 and came into force on 29 November 1999.

⁸⁹ Adopted in 1998, and came into force on 25 January 2004.

⁹⁰ Adopted in Maputo on July 2003 and came into force on 25 November 2005.

⁹¹ Viljoen (2001) 28-30; Gutto S.B.O. 'The Reform and Renewal of the African Regional Human and Peoples' Rights System' (2001) 1 (2) *African Human Rights Law Journal* 175, 176.

⁹² Adopted in 1968 by the OAU Assembly and entered into force on 16 June 1969.

⁹³ Adopted on 30 January 1991 by a conference of ministers of the environment from 51 African States who are all Members of the OAU (entered into force on 22 April 1998).

⁹⁴ Goodwin-Gill G. *The Refugee in International Law*. 2nd ed. (Oxford: Oxford University Press, 1996) 268. It has been suggested that there may be benefits to avoiding a non-human rights approach, see Gorlick B. 'Human Rights and Refugees: Enhancing Protection through International Human Rights Law', Working paper N° 30, *New Issues in Refugee Research* (New York: UNHCR, October 2000), available at: www.unhcr.ch, 10 and 52 (accessed on 15 July 2008).

For them,

It is no longer possible to interpret or apply the Refugee Convention without drawing on the text and jurisprudence of other human rights treaties. Conversely, it is not possible to monitor the implementation of other human rights treaties, where refugees are concerned, without drawing on the text of the Refugee Convention and related interpretive conclusions of the UNHCR Executive Committee.⁹⁶

Similarly, Mertus contended that there is an increased awareness that a more permanent protection of refugees, returnees and internally displaced persons is perhaps needed, and this is accompanied by increasing reference to human rights standards.⁹⁷ According to Goodwin-Gill, even where human rights laws may provide protection, their applicability to refugees may not occur in practice since, it is argued, a disproportionate amount of energy and resources tends to be focused on determining who is a refugee.⁹⁸ Harvey believed that ensuring that human rights standards are actually enforced for the benefit of refugees is problematic, and in this regard, the mechanisms available within human rights treaties could be used.⁹⁹ In practice, the success of the various international and regional human rights bodies in dealing with refugee issues has been limited, and their approach has been cautious.¹⁰⁰

The most important provisions of the 1969 OAU Convention on Refugees are Articles I(1), II and V. While Article I (1) restates the traditional definition of a refugee, as laid out in Art 1 (A) (2) of the 1951 UN Convention on the Refugee, the Convention breaks new ground in international refugee law by providing for an additional category of refugees.¹⁰¹

⁹⁵ Clark T. and Crépeau F. 'Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law' (1999) 17(4) *Netherlands Quarterly of Human Rights*, 348-410, 389.

⁹⁶ Id.

⁹⁷ Mertus J. 'The State in the Post Cold War Refugee Regime : New Models, New Questions' (1998) 10(3) *International Journal of Refugee Law* 321, 335-336.

⁹⁸ Goodwin-Gill G. 'The International Law and Human Rights: Trends Concerning International Migrants and Refugees' (1989) 23(3) *International Migration Review* 526, 527.

⁹⁹ Harvey C.J. 'Dissident Voices: Refugees, Human Rights and Asylum in Europe' (2000) 9(3) *Social and Legal Studies* 367, 386.

¹⁰⁰ The right to seek and obtain asylum status has been recognised, for example, by the Inter-American Commission on Human Rights. See *Joseph v. Canada*, N° 27/93, Case 11/092, Annual Report 1993, OEA/Ser.L/V/II.85, Doc. 9; and *Haitian Interdiction v. U.S.*, Report N° 5/196, Case N° 10.675, 13 March 1997, Annual Report 1996, 598.

¹⁰¹ The 1969 OAU Convention, Art 1(2) read as follows : 'The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.

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It is important to note, however, that, according to this definition, not all displaced persons in Africa are recognised as refugees; some are excluded, for example externally uprooted persons, people who are forced to move to another country because of natural disasters, or internally displaced persons who are fleeing from their own country due to situations of civil wars, and so on. It should be emphasised, however, that efforts to have this expanded definition applied outside Africa have not been very successful. Considering the actual refugee situation in Africa, which is characterised by the fact that movements of refugees mostly occur as a result of internal armed conflicts, and therefore, the persons concerned do not fall under the traditional definition, Okoth-Obbo observed that the expanded definition is certainly the only reasonable and appropriate one in the African context.¹⁰²

Since the decolonisation era in Africa has come to an end with the independence of Namibia and so has the apartheid era in South Africa, Ramchan suggested that African States might re-examine the accuracy of the definition of refugees referred to above.¹⁰³ Ramchan raised some pertinent questions as: is it possible that this provision may lead to confusion in the contemporary African context? Who is the 'external aggressor' today? Who is the occupier? Which foreign entity is dominating African States? Will foreign diamond merchants be held accountable for causing refugee flows and human rights violations? Does this paragraph not amplify the 'refugee' problem unnecessarily? Should the convention not be updated to better reflect contemporary realities?¹⁰⁴

¹⁰² Okoth-Obbo G. 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention' (2000) 8 *African Yearbook of International Law* 3, 38.

¹⁰³ Ramchan R. 'The African Refugee Crisis: Contemporary Challenges to the Protection of Refugees and Displaced Persons in Africa' (2000) 8 *African Yearbook of International Law* 119, 159.

¹⁰⁴ *Id.*

Besides broadening the refugee definition, the 1969 OAU Convention also strengthens the institution of asylum. Member States of the OAU, proclaims Article II, 'shall use their best endeavours ... to receive refugees and to secure the settlement of those unable or unwilling to be repatriated'. On asylum at large, the convention affirms that it is granted in a peaceful and humanitarian act, and thus not to be regarded as unfriendly. It also emphasises the duty of refugees to abide by the laws of the country in which they find themselves and to refrain from subversive activities against any Member State. The principle of *non-refoulement* is declared without exception, although once again a call is made to lighten the burden on countries of first refuge. In addition, there is a suggestion that the principle of *non-refoulement* can be limited if the individual acts of a refugee are contrary to the principles of the convention.¹⁰⁵

The *refoulement* is a technical legal term in civil law systems of the French variety which designates an informal procedure of physically evicting an alien from the territory of the State by reconducting him/her to the frontier and seeing to it that he/she crosses it, as well as rejection of non-admission at the frontier.¹⁰⁶ In common law countries, there is no parallel concept to *refoulement* which is not distinguished from expulsion or deportation in its first variety.¹⁰⁷ In international refugee law, *refoulement* has acquired a specific meaning which distinguishes it from mere expulsion or rejection at the frontier not so much by the informal character of the procedure as by the destination to which the person subjected to it is directed, in that he is turned or pushed back or returned to the country or a country of persecution.¹⁰⁸ It becomes thus clear that *refoulement* represents the supreme danger and the greatest threat to a refugee by delivering him/her to the evil which was at the basis of his/her flight and of his/her becoming a refugee.¹⁰⁹ This is why Abi-Saab considers that a cardinal principle of international refugee law, the one which has to be maintained if all the international protection of refugees has to be reduced to only one principle, is that of '*non-refoulement*'.¹¹⁰

¹⁰⁵ The principle figures in a large number of international instruments both on the universal and on the regional level. See Art 33 of the 1951 Convention and the 1969 OAU Convention, Art 2(3).

¹⁰⁶ Abi-Saab G. 'The Admission and Expulsion of Refugees with Special Reference to Africa' (2001) *African Yearbook of International Law* 71, 86.

¹⁰⁷ Id.

¹⁰⁸ Goodwin-Gill (1996), chapters 4 and 5, on '*Non-refoulement*' and Asylum respectively.

¹⁰⁹ Abi-Saab (2001) 87.

¹¹⁰ Id.

The 1969 OAU Convention is silent on issues of mass influx, and the procedure for determining who is a refugee is largely left to States' discretion. A further provision, dealing with the refugee who has not received the right to reside in any country, merely acknowledges that he or she 'may' be granted temporary residence pending resettlement. Despite the encouraging tone of the OAU Convention, neither this instrument nor any other permits the conclusion that States have accepted an international obligation to grant asylum to refugees, in the sense of admission to residence and lasting on the ground, there are many examples of asylum given; the humanitarian practice exists, but the sense of obligation is missing, contrary to Weis, who believed that, Member States of the 1969 OAU Convention have accepted an obligation, under international law, to grant asylum to refugees.¹¹¹ There is no mention of refugees' rights. For Blavo, a major weakness is that the Convention did not adopt a strong human rights approach.¹¹² Similarly, Hovell and Oloka-Onyango observed that, the 1969 OAU Convention does not address women's rights, and restricts freedoms of movement; expression and association.¹¹³

The African Charter on Human and Peoples' Rights is on record as the first major attempt by African Heads of State and Government to establish regional mechanisms for the implementation of the human rights of Africans. It was adopted at the 18th Summit of the Heads of State and Government of the OAU in Nairobi in 1981. The African Charter finally came into force on October 21, 1986,¹¹⁴ making 2010 the 29th anniversary of its signing and the 24th anniversary of its coming into force.¹¹⁵ The African Charter established the African Commission as a mechanism to deal with human and peoples' rights issues.¹¹⁶

¹¹¹ Weis P. 'The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (1970) 3 *Human Rights Law Journal* 449. See also from the same author, 'Convention Refugees and De Facto Refugees' in Melander G. and Nobel P. (eds.) *African Refugees and the Law* (Uppsala: The Scandinavian Institute of African Studies, 1978) 1, 17. On this subject, a number of commentators expressed the same view. See for example Hofman R. 'Refugee Law in the African Context' in Kalu A.U. and Osinbajo Y. (eds.) *Perspectives on Human Rights* (New York : Picador, 1992) 36 and Sinha S.P. *Asylum in International Law* 4th ed (The Hague : Martinus Nijhoff Publishers, 1981) 100.

¹¹² Blavo E.Q. *Problems of Refugee in Africa* (Aldershot: Ashgate, 1999) 45, 50.

¹¹³ Hovell tot Westerflinter W. 'Africa and Refugees: The OAU Refugee Convention in Theory and Practice' (1989) 7(2) *Netherlands Quarterly of Human Right* 11; Oloka-Onyango J. 'The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of the Refugee and Internally Displaced Women in Africa' (1996) 24 *Denver Journal of International Law* 349. Oloka-Onyango also made the same assessment elsewhere, see, 'Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years after Geneva' (1991) 3 (3) *International Journal of Refugee Law* 453.

¹¹⁴ For discussion, see respectively chapter two and chapter three.

¹¹⁵ Id.

¹¹⁶ See chapter three of this study for an analysis.

Since its establishment, the African Commission witnessed the creation of several other mechanisms which have been tasked with monitoring the implementation of human rights in Africa. These include the Committee of Experts on the Rights of the Child, set up in terms of the African Charter on the Rights and Welfare of the Child.¹¹⁷ The African Charter on the Rights and Welfare of the Child is the first regional and comprehensively binding instrument proclaiming the rights of the child. The adoption of the Charter closely followed that of the UN Convention on the Rights of the Child. This instrument was justified on several grounds, including the multiple compromises that were necessary in order to achieve the adoption of the UN Convention, the limited participation of African countries in its drafting, and the consequent lack of consideration given to situations particular to Africa.

Viljoen¹¹⁸ explained the main reasons which have justified the elaboration of an African instrument related to the rights of children. The Child Charter, in its preamble, reaffirms adherence to the principles of the rights and welfare of the child, as contained in, *inter alia*, the UN Convention on the Rights of the Child (CRC). The appeal to African traditions and values is further emphasised in the Charter which, apart from reproducing Article 18 of the African Charter in its own Article 18(1), also affirms, in its preamble, that the African approach to children's rights takes cognisance of the virtues of African cultural heritage and the values of African civilisation, which should inspire and characterise the nature of the African child.¹¹⁹

The African Charter on the Rights and Welfare of the Child provides for rights encompassing civil and political rights, economic, social and cultural rights, and specific rights for the protection of children in the African context.¹²⁰ The provisions of the Charter have three principal objectives, namely to secure for the child basic needs for subsistence and rounded growth and development, to secure for the child a framework for his/her participation in the making and implementation of decisions which affect him/her, and to protect the child against all forms of harmful practices.¹²¹

¹¹⁷ African Charter on the Rights and Welfare of the Child, which was adopted in Addis Ababa, Ethiopia on 11 July 1990, and came into force on 29 November 1999 (Hereinafter referred to as the Child Charter).

¹¹⁸ Viljoen, F. 'The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 (1) *Comparative and International Law Journal of Southern Africa* 198, 206-207.

¹¹⁹ Child Charter, Preamble, para 7.

¹²⁰ Gose analysed the Child Charter in details. See Gose M. *The African Charter on the Rights and Welfare of the Child: An Assessment of the Legal Value of Its Substantive Provisions by Means of a Direct Comparison to the Convention on the Rights of the Child* (Cape Town: Community Law Centre, 2002).

¹²¹ Child Charter, Arts 3-29.

The African Committee of Experts on the Rights and Welfare of the Child is established under the Article 32 of Child Charter. The first experts of the Child Committee were elected by the OAU Assembly at its 37th Ordinary Session held in Lusaka, Zambia, 9-11 July 2001. As stated in Article 32 referred to above, the Committee is established to promote and protect the rights and welfare of the child. More specifically, its mandate is set out in Article 42, an article that has obviously been modelled on Article 45 of the African Charter. As a result, the mandate of the Child Committee can be divided into three parts: protection, promotion, and interpretation. The Child Committee is entitled to receive communications from any person, group or Non-Governmental Organisation recognised by the AU.¹²²

However, on the field of monitoring, the Child Committee seems to be a weak body. It is almost invisible, mainly due to its lack of resources and the fact that it does not have its own secretariat. For some people, the Child Committee gives the impression that it was largely irrelevant and it would be better to focus on the African Commission, which could probably also look at the rights of children and could arguably make decisions on alleged violations of the Child Charter.¹²³

It is because of the lack of effective enforcement mechanisms under the African Charter that steps were taken to reinforce the African human rights system.¹²⁴ These steps culminated in the establishment of the African Court on Human and Peoples' Rights which is already operational.¹²⁵ In this respect, Mutua¹²⁶ argued:

The African Human Rights Court is a potentially significant development in the protection of rights on a continent that has been plagued with serious human rights violations since colonial rule. The problems of the African human rights system, including the normative weaknesses in the African Charter and the general impotence of its implementing body, the African Commission, may now be addressed effectively and resolved by the establishment of this new adjudicatory body.

¹²² Child Charter, Art 44.

¹²³ Chirwa D.M. 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

¹²⁴ The Protocol on the African Court, Preamble para 7.

¹²⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court for Human and Peoples' Rights, which was adopted in Addis Ababa, Ethiopia, on 10 June 1998, and came into force on 25 January 2004. For discussion, see Chapter Three.

¹²⁶ Mutua M.W. 'The African Human Rights Court: A Two- Legged Stool?' (1999) 21 (2) *Human Rights Quarterly* 342, 352.

Waris contended that the establishment of the African Court comes at a time a time when the human rights, good governance and democracy landscape in Africa is underpinned by an appreciable framework of African instruments such as the AU Constitutive Act, New Partnership for Africa's Development (NEPAD) and especially the African Peer Review Mechanism (APRM).¹²⁷ For Mangu, it was only after having been established after the launch of the AU, NEPAD, and its APRM, did the African Court receive considerable attention. Feelings were mixed as the announcement of the 'baby' did not sound as good as the news of the 'pregnancy'.¹²⁸

The jurisdiction of the African Court includes issuing advisory opinions and adjudicating contentious cases.¹²⁹ As with some other permanent, the African Court has both compulsory and optional jurisdiction for contentious cases.¹³⁰ The principal function of the Court is to decide if there has been a violation of any rights enumerated in the African Charter, the Protocol of the African Court, or any other human rights treaties or conventions binding on the State concerned.¹³¹ The Protocol authorises the court to issue reparations or other remedies if it finds there has been a violation of human rights law.¹³² The decisions of the court in cases of compulsory jurisdiction are to be annually summarised and presented to the AU Assembly.¹³³

One of the most contentious issues relating to the African Court is the right of individual and NGOs access. Another concern is concerning the composition of the bench is the absence of gender equality. Nine out of the 11 judges are men, depicting a strong gender imbalance in the African Court's bench. It is imperative that the appointment of judges of the African Court ensures gender equality. This is of particular importance given the potentially role the African Court could play in establishing case-law relating to women's rights in Africa.

¹²⁷ Waris A. 'The Remedies, Application and Enforcement Provisions of the African Court on Human and Peoples' Rights' in in Viljoen F. (ed.) *The African human rights system: Towards the co-existence of the African Commission on Human Rights and African Court on Human Rights Judiciary Watch Report* (Nairobi: The Kenyan Section of the International Commission of Jurists, Konrad Adenauer Stiftung, 2006)97, 121.

¹²⁸ Mangu A.M.B. 'What Future for Human and Peoples' Rights under the African Union, New Partnership for Africa's Development, African Peer-Review Mechanism and the African Court?' (2004) 29 *South African Yearbook of International Law* 136, 154.

¹²⁹ Protocol on the African Court, Arts 3 and 4.

¹³⁰ Id., Arts 5 and 34(6).

¹³¹ Ibid., Art 30.

¹³² Ibid., Art 27.

¹³³ Ibid., Art 31.

The Protocol to the African Charter on the Rights of Women in Africa attempts to invigorate the African Charter's commitment to women's equality, by adding rights that were omitted and clarifying governments' obligations. The Protocol provides for four broad categories of rights: civil and political rights; economic, social and cultural rights; the rights to development and peace; and reproductive and sexual rights. It protects the civil and political rights of women, their economic, social and cultural rights, and also collective rights.¹³⁴

The content of the Protocol is particularly unique as an African women's rights instrument in that it makes specific mention of harmful cultural practices linked to marriage, sexuality, and property (for example, female genital mutilation, property rights during and after marriage, and burial and initiation ceremonies) that infringe on women's rights. The Protocol recognises that the fulfilment of African women's rights requires a fundamental shift in cultural practices of the communities in which African women live.¹³⁵ Nmehielle maintained that, apart from re-emphasising and extending the UN instruments for women, the Protocol enshrines the mainstreaming of human rights and gender equality in African affairs, an objective and principle of the AU.¹³⁶ The adoption of the African Charter on the Rights and Welfare of the Child and Women's Protocol should be hailed as a positive step towards the right direction as far as strengthening of the African Charter and the regional human rights system is concerned.

The AU in what has been described by some as unprecedented development¹³⁷ adopted the African Charter on Democracy, Elections and Governance.¹³⁸ The Charter has yet to acquire 15 ratifications necessary to come into force.¹³⁹ The Charter is remarkable in a lot of respect. This important and very broad document includes not only issues relating the holding of elections but also broader democratic and development principles.

¹³⁴ Chirwa D.M. 'Reclaiming (Wo)manity : The Merits and Demerits of the African Protocol on Women's Rights (2006) 53(1) *Netherlands International Law Review* 63. See also Kaniye S.A.E. 'A New Hope for African Women: Overview of Africa's Protocol on Women's Rights' (2004) 13 (3) *Nordic Journal of African Studies* 264.

¹³⁵ For instance, Article 17 of the Protocol calls on governments to provide a positive cultural context and ensure a women's rights to participation in the conception of cultural policies at all levels. By naming specific harmful practices prevalent in various African communities, the Protocol takes cognisance of African women's lived experiences of gender oppression.

¹³⁶ Nmehielle V.O. 'Development of the African Human Rights System in the Last Decade' (2004) 11 (3) *Human Rights Brief* 6.

¹³⁷ See for instance McMahan E.R. 'The African Charter on Democracy, Elections and Governance: A Positive Step on a Long Path' (May 2007) *Open Society Institute Africa Governance Monitoring and Advocacy Project* 1, 5.

¹³⁸ The African Charter on Democracy, Elections and Governance [Hereinafter the Charter], adopted by the Eighth Ordinary Session of the AU Assembly, held in Addis Ababa, Ethiopia on 30th January 2007.

¹³⁹ As of 15 April 2010, only three States have ratified to States have ratified the Charter: Ethiopia, Mauritania and Sierra Leone. For further information, see the web site of the African Union: www.africa-union.org

Among its objectives are the promotion of adherence to the universal values of democracy and human rights,¹⁴⁰ as well as a commitment by States to promote democracy, the rule of law and human rights and popular participation through universal suffrage.¹⁴¹ There is a general obligation to eliminate discrimination¹⁴² and to ensure the establishment of democratic institutions.¹⁴³ Article 17 includes the requirement for States to hold transparent, free and fair elections as well as setting up independent national electoral commissions and for the AU Commission to send observers.¹⁴⁴ The Charter also importantly sets out types of unconstitutional changes of government and the possibility of suspending the State from the AU in those contexts.¹⁴⁵

There are broader provisions on governance,¹⁴⁶ the importance of women in development and democracy,¹⁴⁷ and citizen as well as other participation in development and governance processes.¹⁴⁸ There are also provisions on the environment.¹⁴⁹ The Charter is to be implemented by activities at a number of levels including nationally through the adoption of legislative and other measures,¹⁵⁰ and by the AU Commission which will develop necessary benchmarks, ensure the Democracy and Electoral Assistance Unit has the appropriate resources and ensure effect is given to decision of the Assembly on unconstitutional changes of government.¹⁵¹ The AU Commission is also to act at the regional level by encouraging ratification of the Charter and establishing focal points to co-ordinate implementation.¹⁵²

The AU Commission itself is the central co-ordinating body for implementation of the Charter overall and should co-ordinate evaluation of implementation among key bodies named in Article 45 of the Charter.¹⁵³ Among these is the African Commission on Human and Peoples' Rights. States are also mandated to submit a report to the AU Commission every two years on the measures they have taken to implement the Charter.

¹⁴⁰ The Charter, Art 2(1).

¹⁴¹ *Id.*, Art 4.

¹⁴² *Ibid.*, Art 8.

¹⁴³ *Ibid.*, Arts 14 and 15.

¹⁴⁴ *Ibid.*, Art 20.

¹⁴⁵ *Ibid.*, Arts 23 and 25, respectively.

¹⁴⁶ *Ibid.*, Art 27.

¹⁴⁷ *Ibid.*, Art 29.

¹⁴⁸ *Ibid.*, Arts 30 and 31.

¹⁴⁹ *Ibid.*, Art 42.

¹⁵⁰ *Ibid.*, Art 44(1).

¹⁵¹ *Ibid.*, Art 44(1) (A).

¹⁵² *Ibid.*, Art 44(1) (B).

¹⁵³ *Ibid.*, Art 45.

These reports will then be sent to relevant AU organs and the Commission will co-ordinate a report to the Assembly on the implementation. The Assembly then can take the necessary decisions in this regard.¹⁵⁴The African Commission at its 42nd Ordinary Session adopted a resolution noting the lack of ratification of the Charter, and called upon States to ratify it.¹⁵⁵

The African Charter on Democracy, Elections and Governance has generated a number of critics in the literature. According to Saungweme,¹⁵⁶

The Charter essentially fails to make that vital connection between human rights violations and conflict as a main ingredient for instability in Africa and a root cause of unconstitutional changes of government. If this link was expressly acknowledged in the Charter it would affirm that this is a Charter designed to protect people rather than regimes. The Charter's failure to acknowledge this link is one of its major weaknesses.

Saungweme went on and mentioned that Article 23(5) is very broad and can become subject to abuse in that manipulative, corrupt governments can easily circumvent it.¹⁵⁷ To guard against this, the Charter should have in unequivocal and unambiguous terms specifically referred to the types of constitutional amendments that would be regarded as violations of democratic principles, such as amendments to extend constitutional terms, pose a serious threat to Africa's democratic transition.¹⁵⁸ In view of the chronic inability of African leaders to leave office when their time is due, the Charter should have made specific reference to this issue; its failure to do so is another point of weakness.¹⁵⁹

¹⁵⁴ The Charter, Art 49.

¹⁵⁵ Resolution on the Ratification of the African Charter on Democracy, Elections and Governance, 28 November 2007, ACHPR/Res. 115 (XXXII) 2007, available at www.achpr.org (last accessed 15 April 2010).

¹⁵⁶ Saungweme S. 'A Critical Look at the Charter on Democracy, Elections and Governance in Africa' (May 2007) *Open Society Institute Africa Governance Monitoring and Advocacy Project 2*, available at: www.sarpn.org/documents/d0002566/chater_saungweme_May2007.pdf (last visited 15 April 2010).

¹⁵⁷ Id. Article 23(5) of the Charter prohibits amendment or revision of constitutions and legal instruments, which is an infringement of the principles of democratic change of government.

¹⁵⁸ Id.

¹⁵⁹ Ibid.

Ebobrah argued that Article 25, the provision for perpetrators of unconstitutional changes to be tried before competent courts of the AU is innovative. However, it raises the question of a proper forum as the AU currently lacks any judicial forum with criminal jurisdiction.¹⁶⁰ Ebobrah also contented that a reading of the Protocols establishing the African Court on Human and Peoples' Rights as well as the African Court of Justice and Human Rights shows neither of these judicial institutions is competent to exercise jurisdiction in this regard.¹⁶¹ For Him, while it is not impossible for the AU to grant such a jurisdiction or establish an institution in the mould of the International Criminal Court, nothing in the Charter or AU Act remotely suggests such an eventuality.¹⁶²

In the absence of an appropriate forum and with no evidence of an intention to create one, it is not clear why such a provision was added to the Charter.¹⁶³ With regard to the observation of the election, Kane argued that the steps recommended by the Charter contain all the ingredients of its ineffectiveness for a number of reasons as followed:

1. The Union's participation in any election observation is entirely dependent on the goodwill of the State on whose territory the elections are taking place. If a party or candidate decides to rig the election, the latter may purely and simply send an invitation to the AU Commission one month before the start of the election and block any participation by the regional organisation.
2. The rules surrounding the functioning of the observer missions do not guarantee total impartiality because there are no clear criteria for the selection of its members. This is particular relevant for rules dealing with conflict of interests.
3. Both the duration of observer missions and time allocated for presentation of their report are very vague and could give rise to political scheming.¹⁶⁴

¹⁶⁰ Ebobrah S.T. 'The African Charter on Democracy, Elections and Governance: A New Dawn for the Enthronement of Legitimate Governance in Africa?' May 2007) *Open Society Institute Africa Governance Monitoring and Advocacy Project* (May 2007) 6 available at:

http://www.afrimap.org/english/images/paper/ACDEG&ECOWAS_Ebobrah.pdf . See also, McMahon E.R. 'The African Charter on Democracy, Elections and Governance: A Positive Step on a Long Path', (May 2007) available at:

http://www.afrimap.org/english/images/paper/ACDEG&IADC_McMahon.pdf (visited on 15 April 2010).

¹⁶¹ Id.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Kane I. 'The Implementation of the African Charter on Democracy, Elections and Governance' (2009) 17 (4) *African Security Review* 44, 56-57.

2.3. Human rights

The starting point in understanding human rights is the appreciation of the term 'rights' which is covered by the wider concept of claims - for example, the wants, desires and aspirations that people have and express. Those claims which are also supported by or in accordance with some objective standards or general theory, whether those of a code of morality or ethical theory, or those of a political system or political theory, or of a legal system, are usually and aptly called rights.¹⁶⁵

Salmond,¹⁶⁶ Hohfeld,¹⁶⁷ and Hart¹⁶⁸ have identified four types of legal rights as follows:

1. Rights, *stricto sensu*, with correlative duties. A makes a claim on B, on whom the law imposes a duty to conform. Such rights exist in contracts, torts, criminal law, etc.
2. Legal freedoms, privileges and licences cover conduct that is permissible law. Examples are the right to a reasonable use of one's property, and freedom of expression within the law.
3. Legal powers to alter the legal position of oneself or someone else, for example, the right to sue for a violation of duty, the right to marry, the power of a judge to try an offender, and of a legislator to make laws.
4. Legal immunities. A is exempted from the exercise of the power over another, and such exemption is recognised by the law. Examples are the immunity of diplomats and the constitutional protection of rights, which thus limit the executive and legislature.¹⁶⁹

Although human rights are a key concept in international law and relations, its precise meaning and content remain as controversial as ever. The UN Charter, to which the development of human rights law is often attributed, is prototype. Article 1(3) includes, as part of the purposes of the organisation, the promotion and encouragement of a respect for human rights and fundamental freedoms for all, but without defining them.¹⁷⁰ The Universal Declaration also shies away from a definition. Its preamble merely declares that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.¹⁷¹

¹⁶⁵ Dowrick F.E. *Human Rights, Problems, Perspectives and Texts* (Westmead, UK: Saxon House, 1979) 8.

¹⁶⁶ Salmond J. *Jurisprudence* 12th ed. (Oxford: Oxford University Press, 1986) 45.

¹⁶⁷ Hohfeld W.N. *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 15th ed. (Berkeley: University of California Press, 1997) 18.

¹⁶⁸ Hart H.L. *Definition and Theory of Jurisprudence*. 15th ed. (Cambridge, MA: Harvard University Press, 1999) 21.

¹⁶⁹ Dowrick (1979) 8-9.

¹⁷⁰ UN Charter, Art 1.

¹⁷¹ Universal Declaration, preamble, para 1.

The operative part of the Universal Declaration merely listed the rights and freedoms guaranteed without any definition. This pattern is repeated in the other major international human rights instruments. Henkin contended that the idea of human rights is related, but not equivalent to, justice, the good and democracy. It is a political idea with a moral foundation which defines the relationship that should exist between the individual and society.¹⁷² Henkin explained elsewhere that:

Human rights are claims asserted and recognised as a right, not claims upon love, or grace, or brotherhood, or charity... They are claims under some applicable law. They are rights upon society as represented by the government and its officials. The good society is one in which individual rights flourish and in which their protection and promotion are the fundamental objectives of government.¹⁷³

His subsequent definition is perhaps more succinct, in that human rights are those liberties, immunities and benefits which in terms of accepted contemporary values, means that all human beings should be able to claim 'as a right' from the society in which they live.¹⁷⁴ Eze's definition is close to Henkin's, since, according to the former, human rights represent demands or claims which individuals or groups make on society, some of which are protected by law and have become part of *lex lata*, while others remain aspirations to be attained in the future.¹⁷⁵ Eze clearly avoided the controversy as to whether the 'right' can be used even when the municipal system is patently unable to attain it due to economic or other circumstances. A right may thus be aspirational and therefore, at that moment, unenforceable in practice. For such situations, the minimum requirement is a programme of implementation.¹⁷⁶

¹⁷² Henkin L. *International Law* (St. Paul, MN: West Publishing, 1989) 15.

¹⁷³ Henkin L. *Human Rights Today* (Oxford: Clarendon Press, 1979)1-2.

¹⁷⁴ Henkin L. 'Human Rights' in Bernhardt R. (ed.) *Encyclopedia of International Law*. Vol.8 (Oxford: Clarendon Press, 1985) 268.

¹⁷⁵ Id.

¹⁷⁶ Eze (1984) 5.

The coexistence of the 'ought' with the 'is' in human rights is illustrated by Nsirimovu:¹⁷⁷

The term 'human rights' means the conditions of life which men have right to expect by virtue of being a human being. The concept involves not a statement of fact but rather a yard-stick against which conditions in practice may be measured. Nor does the supposed existence of rights necessarily imply the existence or even possibility of laws to enforce or protect rights, though in practice this may sometimes be the case. Rights are the ideals and distinguishing marks of a civilised society. The fundamental concepts embraced in the over-arching concept of rights may be identified as justice, equality, freedom and self-determination.

Cranston defined human rights as moral rights which all men everywhere at all times ought to have and something which no one may be deprived of without grave affront to justice; something which is owing to every human being simply because he is human.¹⁷⁸

Wasserstrom¹⁷⁹ outlined the four characteristics which a human right must have:

First, it must be possessed by all human beings, as well as only by human beings. Second, because it is the same rights that all human beings possess, it must be possessed equally by all human beings. Third, because human rights are possessed by all human beings, we can rule out as possible candidates any of those rights which one might have in virtue of occupying any particular status or relationship, such as that of parent, president, or promise. And fourth, if there are any human rights, they have the additional characteristic of being assertable, in manner of speaking, 'against the whole world'.

Stark saw human rights as internationally recognised norms or behaviour of States and other persons in international law,¹⁸⁰ while Buergenthal defined human rights by making reference to law which governs human rights. He referred to 'the law which deals with the protection of individuals and groups against violations by governments'.¹⁸¹ Dowrick defined human rights as those claims made by men for themselves or on behalf of other men, supported by some theory which concentrates on the humanity of man, on man as a human being and a member of humankind.¹⁸² Dowrick pointed out that human rights in essence combine ethical and political doctrines with rationalistic and theological roots.¹⁸³

¹⁷⁷ Nsirimovu R. *Human Rights Educations Techniques in Schools* (Lagos: Macmillan, 1994) 24.

¹⁷⁸ Cranston M. *What Are Human Rights?* (New York: Taplinger, 1973) 3-4.

¹⁷⁹ Wasserstrom R. 'Rights, Human Rights and Racial Discrimination' (1964) 2 *Journal of Philosophy* 41, 50 .

¹⁸⁰ Stark B. 'International Human Rights and Family Planning : A Modest Proposal' (1989) 33 *Denver Journal of International Law and Policy* 44-78, 66.

¹⁸¹ Buergenthal T. *International Human Rights in a Nutshell* (St. Paul, MN: Mest Publishing, 1995) 1.

¹⁸² Dowrick F.E. *Human Rights, Problems, Perspectives and Texts* (Westmead, UK: Saxon House, 1979) 12.

¹⁸³ Id.

Cassese¹⁸⁴ described rather than defined human rights as:

An ideological and normative 'galaxy' in rapid expansion, with a specific goal: to increase safeguards for the dignity of the person. Human rights represent an ambitious (and part, perhaps, illusory) attempt to bring rationality into the political institutions, and the societies of all States. They are tenets that dominate the natural instinct, making man a 'social' rather than a 'natural' animal, and crystallise rules of behaviour to be respected by all persons and all nations. They are based on an expansive desire to unify the world by drawing up a list of guidelines for all governments...an attempt by the contemporary world to introduce a measure of reason into its history.

Boutros-Boutros Ghali,¹⁸⁵ the former Secretary-General of the UN, emphasised on the historical context of human rights when, at the opening of the World Conference on Human Rights held in Vienna in 1993, he declared:

Human rights should be viewed not only as the absolute yardstick, which they are, but also as a synthesis from a long historical process. As an absolute yardstick, human rights constitute the common language of humanity. Adopting this language allows all peoples to understand others and to be the authors of their own history. Human rights, by definition, are the ultimate norms of all politics.

2.4. Challenges and prospects

Although the African Charter is ratified by all AU Member States, the African human rights system is not only the least developed but also the least effective as compared with its Inter-American and European counterparts. The prevailing state of affairs clearly shows that human rights have not still given due consideration by many African States. From the early 1960s, Africa has been going through tumultuous times characterised by series of egregious violations of human rights. This is why, the literature related to the African human rights system uses 'challenges' and 'problems' to mean the same things.¹⁸⁶ This study also adopts the approach of using interchangeably the two terms.

¹⁸⁴ Cassese A. *Human Rights in a Changing World* (Philadelphia: Temple University Press 1990) 3 and 158.

¹⁸⁵ Ghali B.B. *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping* (New York: United Nations, 1993) 15.

¹⁸⁶ See for instance Badawi. Badawi El-Sheik I. 'The African Commission on Human and Peoples' Rights: Problems and Prospects' (1989) 3 *Netherlands Quarterly of Human Rights* 272; Okafur O.C. 'The African System on Human and Peoples' Rights, Quasi-Constructivism, and the Possibility of Peacebuilding within African States' (2004) 8 (4) *International Journal of Human Rights* 413, 421.

Therefore, ‘challenges’ or ‘problems’ are understood as limitations and constraints, which impede the effectiveness of African human rights system. In spite of the challenges it encounters, it has produced encouraging results. More importantly, the African Commission took steps in the past to improve on its work. Currently, there is a project on ongoing at the African Commission: the African Commission Strategy and Review.¹⁸⁷

The AU has answered to the repeated called of the African Commission to support it. The AU is undertaking review of the entire African human rights system with the view to come with an Africa-wide strategy on human rights.¹⁸⁸ The term ‘prospects’ is used in this study as all the possible means of improving the efficiency or of strengthening the African human rights system. In other words, prospects are impetus for making the African system greater than it is today.

3. Statement of the problem

The African Charter on Human and Peoples’ Rights (the African Charter) was adopted on 27th June 1981 by the Organisation of African Unity (OAU), predecessor to the African Union (AU), at its Assembly of Heads of States and Government in Nairobi, Kenya. The African Charter as a progressive document that, amongst others, recognises the indivisibility of civil and political rights and economic, social and cultural rights, distinct from other international human rights treaties.

The African Charter was also the first human rights treaty to refer to the right to development, although it did not define this right. Others have criticised the African Charter for its many shortcomings, in particular its ‘claw- back’ clauses, which make certain rights subject to domestic law. For example, Article 9(2) of the African Charter states: ‘Every individual shall have the right to express and disseminate opinions within the law’. Other rights such as the right to privacy do not feature in the African Charter and some rights including the right to fair trial are inadequately defined.¹⁸⁹

¹⁸⁷ See the report of Members of the African Commission on Human and Peoples’ Rights (ACHPR) facilitated by the Office of the High Commissioner for Human Rights, held in Addis-Ababa, Ethiopia, 24th to 26th September 2003.

¹⁸⁸ Former African Commission Member Andrew Chigovera from Zimbabwe is consulted mapping out the African human rights system to lead to the strategy.

¹⁸⁹ See Chapter two for an analysis.

The African Commission, the body created under the African Charter to monitor compliance by states with the treaty, currently functions in an environment plagued by civil wars in several countries including Sudan, Côte d'Ivoire, Democratic Republic of Congo, Somalia and Chad. Serious human rights violations continue throughout the continent from Egypt to Equatorial Guinea and Ethiopia. The phenomenon of coup d'état and counter coups continue to haunt many countries. Measures adopted by governments throughout Africa to counter terrorism make serious inroads into long-standing human rights values. A growing commitment to human rights by a handful of progressive countries including Mali, Benin and South Africa on the other hand offer some optimism that the continent is intent on improving its human rights record.

At the time of the drafting and adoption of the African Charter the OAU Charter entrenched the central principle of State sovereignty and non-interference in domestic affairs. This principle prevented the OAU and African States from intervening to prevent serious human rights violations including the massacre of civilians by dictators such as Idi Amin of Uganda, Emperor Bokassa of Central African Republic, Mengistu Haile Mariam of Ethiopia, Valentine Strasser of Liberia, Hissene Habre of Chad and Samuel Doe of Liberia. In fact, former dictators such as Mengistu and Habré continue to enjoy the hospitality of Zimbabwe and Senegal respectively, with both States refusing to extradite them to stand trial for international crimes.

After its creation, the African Commission also failed to deal adequately with some of the most serious human rights violations committed on the continent, the genocide in Rwanda, the massive violations of human rights in the Democratic Republic of Congo, the human disaster in Darfur, to name by a few. It is encouraging to see that the AU is willing to act in accordance with its right of intervention, even against the wishes of the member state concerned. Whether the AU Mission in Sudan has been effective in reducing human rights violations is out of the scope of this study.

Being a creation of the OAU, and now reporting to the AU, the African Commission has been hampered, amongst others, by the lack of political will and initiative of its political masters to deal with serious human rights violations. After all, the dictators and human rights violators have been part of the same club of Heads of States to which the African Commission is required to submit its annual report, which included information on serious violations of human rights.

The objectives of the AU as enshrined in its Constitutive Act include promoting and protecting human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. The AU is also based, amongst others on the principle of 'respect for democratic principles, human rights, the rule of law and good governance'. The key question is whether the values enshrined in the Constitutive Act are implemented by AU member states or the institutions of the AU? There is little evidence to suggest that the AU is willing to hold Member States accountable for human rights violations. Zimbabwe is a case in point. Despite the African Commission presenting a report to the AU Assembly in July 2004 on the human rights situation in Zimbabwe and recommending measures to be taken to redress the situation, the Assembly failed to hold the Zimbabwean authorities accountable. Instead, it took cognisance of Zimbabwe's objections that it had not had an opportunity to comment on the report and delayed the adoption of the African Commission's annual report for six months. How has the African Commission fared over the last two decades? An analysis of the work of the African Commission would show considerable progress over the last twenty-two years. However there also have been many challenges that have hampered its work and consequent effectiveness on the continent.

The African Commission rendered numerous decisions on complaints filed before it, primarily by NGOs. These decisions have been against a range of countries including Egypt, Algeria, Sudan, Malawi, Nigeria, Cameroon and Botswana. Its jurisprudence has improved considerably over the years with recent decisions being well- reasoned. However, the African Commission would have to improve its decisions considerably if it expects the established African Court on Human and Peoples' Rights to uphold its decisions. The current staff of the African Commission comprises dedicated but inexperienced lawyers. Without skilled litigators and experienced legal researchers on its permanent staff, the African Commission is not likely to improve its decisions to a level that would be to the satisfaction of the African Court.

Unfortunately most States have ignored the rulings of the African Commission and its parent body the AU Assembly has failed dismally to hold these states accountable. As long as African States that are the subject of such complaints ignore the decisions of the African Commission, its status as the main body on the African continent responsible for the protection and promotion of human rights would remain minimal.

The African Commission has been plagued by inconsistency in its performance, which has been dependent on its composition.¹⁹⁰ The effectiveness of the treaty body depends on the independence and impartiality of its members. Disappointingly, African States have sometimes undermined the independence of the African Commission by nominating and electing Commissioners whose independence was compromised or who are perceived as lacking independence by virtue of their position in their government. Over the last twenty years various Commissioners have held positions of ministers, attorney-generals, ambassadors and advisers to their presidents. This has not only coloured the perception of the African Commission but has resulted in it lacking initiative to tackle some of the most serious human rights violations facing African countries.

The lack of adequate resources has considerably hampered the work of the African Commission. This despite repeated resolutions adopted by the AU Assembly urging that the African Commission has to be provided with adequate resources. This should be a source of embarrassment to the African Union that it is unable to provide sufficient resources to its primary human rights body. It also calls into question the commitment of the AU and its member states to the protection and promotion of human rights on the continent.

As mentioned above, the protection of human rights in Africa was enhanced by the establishment of the African Court. With the African Court having the authority to hand down binding decisions and the Executive Council of the AU being required to monitor implementation of the decisions, the protection of human rights on the continent is likely to improve. However, errant States are only likely to fully implement its decisions if the Executive Council is willing to take measures against states that fail or delay in applying the decisions of the African Court.

¹⁹⁰ See chapter three for an analysis.

African States bear considerable responsibility for the protection of human rights. Domestic institutions including national human rights commissions and courts should bear the primary duty for the protection of human rights. The establishment and strengthening of an independent judiciary in each African State and respect of and adherence to the decisions of the national courts is of vital importance. The regional system of human rights protection only becomes relevant where the national courts either fail to protect human rights or in instances where the State ignores the decisions of its own courts.

The regional and global contexts in which the African Commission is trying to fulfil its mandate have, however, changed quite significantly. The political landscape has changed a lot since its establishment.¹⁹¹ Many of the Member States of the AU are now operating more pluralistic political systems, holding elections with observers who include the AU, and are challenged by the local media and civil society organisations, which are becoming more and more competent and confident as watchdogs of human and people's rights.

In almost all African countries, new constitutions, national human rights institutions and electoral commissions have been established. The issue of accountability for human rights abuses is greater on both national and regional agendas, as shown by the establishment of truth commissions and special criminal courts. The transformation of the OAU into the AU brought with it new hopes and ideas regarding the welfare of the continent in general. Some of the key innovations that were introduced in the wave of continental transformation are the NEPAD and APRM. The APRM has been introduced with a human rights monitoring component in a context where there already exist a number of other human rights mechanisms and institutions such as the African Commission and the African Court. On the other hand, this leads to a situation where a growing number of regional bodies are explicitly or implicitly entrusted with cross-cutting mandates of promotion and/or protection of human rights.

¹⁹¹ This expression is borrowed from the study by Mangu. See Mangu A.M.B. 'The Changing Human Rights Landscape in Africa: Organisation of the African Union, African Union, New Partnership of Africa's Development and the African Court' (2005) 23 (3) *Netherlands Quarterly of Human Rights* 379.

Murray contended that most developments of human rights standards and institutions on the continent have often been *ad hoc*.¹⁹² Furthermore, Murray maintained that several of the continent's human rights initiatives remain conditioned on a number of factors, the most salient being the economic dependence of the continent and the reliance by regional institutions on external funding for their functioning.¹⁹³

Murray also argued that recent human rights initiatives in Africa, far from being wholly generated by genuine commitment by continental leaderships to human rights ideals are, rather, much more a result of uncoordinated but programmatic responses to global imperatives and external pressures directly or indirectly exerted on decision-makers to act in predetermined ways.¹⁹⁴ For her, the genuineness of the renewed political commitment to human rights remains to some extent questionable in the light of solid and legitimate foundations.¹⁹⁵

According to Udombana,¹⁹⁶

With the proliferation of institutions under the AU, it is already becoming clear that little thought was given to how the AU will be funded. Yet, African rulers are creating new organs, with sometimes ill-defined or duplicate functions, thus making the confusion more confounded. What AU needs is to trim down its existing institutions, so as to finance them effectively and efficiently.

... The existing institutions, including human rights institutions, are in danger of total collapse.

More specifically, Udombana argued that, African institutions have been castigated for their tendency to emulate their European counterparts, despite differing historical, cultural, and socio-economic contextual experiences.¹⁹⁷ Additionally, he noted that African countries as well as regional bodies seem to be in a rush to comply with the dictates of international institutions, non-governmental organisations, or Western partners, on which they heavily rely for funding, in paying lip service to the promotion and protection of human rights (mirroring international or European standards), without much working out of practical issues relating to their concerted implementation.¹⁹⁸

¹⁹² Murray R. (ed.) *Human Rights in Africa from the OAU to the African Union* (Cambridge: Cambridge University Press, 2004) 47.

¹⁹³ *Id.* 237.

¹⁹⁴ *Ibid.*, 167.

¹⁹⁵ *Ibid.*

¹⁹⁶ Udombana N.J. 'An African Human Court and An African Union Court: A Needful Duality or A Needless Duplication?' (2002) 28 *Brooklyn Journal of International Law* 811.

¹⁹⁷ *Id.*

¹⁹⁸ *Ibid.*

Appiagyei-Atua contended that the real impact of ongoing dynamics needs to be examined beyond formalism and the tendency of African institutions blindly and inconsequentially to sail in the mainstream.¹⁹⁹ Rather than indefinitely continuing on the path of elaborating human rights mechanisms that are little known and little used, even by AU organs themselves, Africa must find its rhythm and cohesive forces to build its institutions and adopt contextual relevance and enforceable standards.

4. Research questions

This study seeks to address the following key questions:

1. How does international human rights law respond to the phenomenon of cultural diversity? Can we respect culture and protect rights at the same time? Can international human rights law claim to be truly universal?
2. How far does the African Charter, its formulation of rights and freedoms, depart from or conform to, existing or desired regional and international standards and practices in the field of human rights?
3. To what extent does the African Charter embody values that are inherently ‘African’ in the sense that they are not shared by other regions? Put differently, does the African Charter contain principles and norms which are African in origin, for instance, customary norms or does it embody certain values that are imperative to the socio-economic concern of African States?
4. The African Charter has been operational for twenty-two years, to what extent does the African human rights system meet the expectations raised on its adoption?
5. To what extent has the African Commission proved effective in executing its mandate? In other words, since its establishment, how has the African Commission been fulfilling its mandate? What has it achieved? This study critically evaluates the African Court and assesses its potential impact on the African human rights system. It probes the powers of the court and asks whether a clear and mutually reinforcing division of labour between it and the African Commission could be developed to more effectively promote and protect human rights in Africa.

¹⁹⁹ Appiagyei-Atua K. ‘Human Rights NGOs and Their Role in the Promotion and Protection of Rights in Africa’ (2002) 9 *International Journal on Minority and Group Rights* 265.

6. For example, should the mandate of the African Commission be limited primarily to promotional activities, and the African Court exclusively given the protective mandate? What relationship should the court have with the African Commission?
7. Would the African human rights mechanisms effectively address the identified challenges at a substantive as well as implementation levels?
8. What does the transformation of the OAU into the AU in 2002 mean for human rights?
9. What are the challenges and the prospects of the African human rights system?

These and many other questions show that the African human rights system is at a very critical juncture in its life. A number of formal and informal evaluations have been conducted, many of which have shown that the system has succeeded in establishing beyond doubt, mechanisms for the protection and protection of human rights on the continent.

5. Literature review

The African human rights system has been the subject of many academic writings and comments. In this regard, an attempt to review the available literature on the system is a formidable task which cannot be achieved in this study. However, reference will be made to the major studies related to the topic of this work.

Eze,²⁰⁰ McCarthy-Arnolds, Penna and Sobrepen²⁰¹, Shepherd and Anikpo,²⁰² as well as An-Na'im and Deng²⁰³ discuss the foundations of human rights in Africa, and provide an attractive historical background of the evolution of human rights in pre-colonial and colonial Africa. The compilation of studies contained in the work of the latter two revisits the theories of human rights in the African context, and deals with issues such as the universalism of human rights.

²⁰⁰ Eze (1984).

²⁰¹ McCarthy-Arnolds E. et al. (eds.) *Africa, Human Rights and the Global System* (Westport/Connecticut, London : Greenwood, 1994).

²⁰² Shepherd G. Jr. and Anikpo M. (eds.) *Emerging Human Rights: The African Political Economic Context*, (New York: Greenwood Press, 1990).

²⁰³ An-Na'im A.A. and Deng F. (eds.) *Human Rights in Africa: Cross-Cultural Perspectives* (Washington DC: The Brookings Institution, 1990).

The authors challenged the idea that international human rights are only the result of Western achievement. They reflected on how African interests must be taken into account in contemporary human rights law, and how to achieve global legitimacy for the idea of human rights. The adoption and entry into force of the African Charter has also attracted considerable attention. The previous studies generally analysed the provisions and peculiarities of African Charter. For instance, Balanda²⁰⁴ identified eight peculiarities in the African Charter as follows: emphasis on solidarity and cooperation against domination; the enunciation of individual alongside peoples' rights; the equality of peoples; duties to the community; the preservation of African moral values; the affirmation of economic, social and cultural rights; especially the right to development; the right to international peace and security; and the affirmation of the right of the disabled.

Having analysed all the provisions of the African Charter, Bello²⁰⁵ concluded that:

The imperfections of the African Charter on Human and Peoples' Rights notwithstanding, the Charter constitutes a significant cornerstone in the drive towards the promotion and protection of human rights in Africa. It represents a radical change in that direction. No doubt a remarkable and praiseworthy achievement for all those who contributed directly or indirectly. Most of the early efforts of the OAU as a regional institution were focused on the right of peoples to self-determination and the struggle against racial discrimination.

Okere maintained that, despite its imperfections, the adoption of the African Charter was a significant milestone in the march towards protection of human rights in Africa.²⁰⁶ Commenting on the provisions of the African Charter, Mbaya contended that it follows the pattern of the international instruments concerning human rights. In four domains, however, it gives a new significance to aspects which have been lacking in the traditional notion of human rights.

²⁰⁴ Balanda M.L. 'African Charter on Human and Peoples' Rights' in K.G. Ginther & Wolfgang Benedek (eds.), *New Perspectives and Conceptions of International Law – An Afro-European Dialogue* (Osterreichische Zeitschrift für Öffentliches Recht und Völkerrecht, Supplementum 6, 1983) 134, 135.

²⁰⁵ Bello E.G. 'The African Charter on Human and Peoples' Rights : A Legal Analysis' in *Collected Courses of the Hague Academy of International Law* (Dordrecht: Martinus Nijhoff Publishers, 1987(V) Tome 194, 23,180.

²⁰⁶ Okere B. O. 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis With the European and American systems' (1984) 6 *Human Rights Quarterly* 2. Ntumba Luaba also expressed the same view. see Ntumba Luaba L. 'La Charte africaine des droits de l'homme et des peuples' (1982) 164 *Zaire-Afrique* 197, 210.

There are increased importance of peoples' rights as collective rights in relation to individual rights; the right to self-determination and the right to development; as well as the duties of individuals.²⁰⁷ Umozurike pointed that the African Charter has combined an impressive array of individual rights and duties as well as States' rights and duties. Some of these, like the right to development and the right to international peace and security, appear to be new addition to the list of international human rights.²⁰⁸ Okere also analysed rights and duties under the African Charter and explained that it is modest in its objectives and flexible in its means.²⁰⁹ Gittleman has also made a legal analysis of this instrument; he concluded that the African Charter is as much a political document as it is a legal one. This is why, the African Commission was given sufficient flexibility to interpret the African Charter in a manner consistent with other international instruments, and that despite the unique concept of peoples' rights and the firm obligation imposed upon individuals by their States.²¹⁰

Comparing the African Charter with the Tanzanian Bill of Rights, Peter observed that:²¹¹

The adoption of the African Charter on Human and Peoples' Rights was an epoch-making event, not only to over millions Africans but to peace-loving and democratic-minded people the world over. It was the crescendo of sporadic and sometimes uncoordinated attempts by different interest groups in Africa to create a legal mechanism that would guarantee fundamental rights and freedoms to the common people. For many Africans, the Charter had created high expectations, especially regarding the restoration of human dignity, which had been totally violated by some African leaders.

In the words of Kannyo:²¹²

The most significant consequence of the adoption of the African Charter is the implied recognition that the principle of non-interference can no longer provide a convincing defence for violators of human rights. The event may be seen as a blow to certain regimes in Africa, namely those which had taken the said principle as a license to violate the human rights of its citizens.

²⁰⁷ Mbaya E.R. 'The Compatibility of Regional Human Systems with International Standards' in Eide E. and Hagvet B. (eds.) *Human Rights in Perspective A Global Assessment* (Bergen: Norwegian Institute of Human Rights, Oslo and Chr. Michelsen Institute, 1992) 65-89, 83.

²⁰⁸ Umozurike U.O. 'The African Charter on Human and Peoples' Rights' (1983) 77 *The American Journal of International Law* 902, 911. See from the same author, *The African Charter on Human and Peoples' Rights* (Lagos : Nigerian Institute of Advanced Legal Studies, 1992) 22.

²⁰⁹ Okere (1984) 158.

²¹⁰ Gittleman R. 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 (4) *Virginia Journal of International Law* 667, 713.

²¹¹ Peter M.C. *Human rights in Africa: A Comparative Study of the African Charter on Human and Peoples' Rights and the New Tanzanian Bill of Rights* (New York: Greenwood, 1990) 7.

²¹² Kannyo E. 'The Banjul Charter on Human and Peoples Rights: Genesis and political background' in Welch. C.E. Jr and Meltzer R. I. (eds.) *Human rights and Development in Africa* (Pennsylvania: Pennsylvania University Press, 1984) 128,148.

According to Kunig²¹³:

The African Charter on Human and Peoples' Rights is a significant piece of law made by young states. It preserves the heritage of the Universal Declaration of Human Rights, and also follows the UN Covenants on Human Rights, but does not assert rights which are either not yet realisable or have few or no roots in African traditions. ... It emphasises rights of groups, fundamental duties and the individual obligations to the community, and restricts the jurisdiction of the Commission to advisory and conciliatory functions, thus avoiding a court-like structure which would equally not have been in accordance with African traditions. All in all the Charter thus demonstrates an independent approach by comparison with the other regional conventions on human rights, which is also reflected its provisions on the sources of law: customary law practised by States and general principles of law contained in their national legal system are emphasised, without rejecting universal international law in principle.

Nguema contended that, the African Charter was one of the finest gems, designed by Africa with a view to endowing itself proper self-awareness, creating a new image in the chain of peoples of the world, giving itself a place of choice in the concert of nations, and playing, henceforward, a significant role in the management and conduct of the world's affairs.²¹⁴ Kotey maintained that the, the African Charter represents the achievable minimum.²¹⁵ For Kotey, a stronger text might not have been so generally ratified, and a weak but functioning system may be preferable to no system at all.²¹⁶ Rembe²¹⁷ explained that:

The adoption of the African Charter has been outwardly a demonstration by the African States that they uphold and will promote fundamental human and peoples' rights. Such a move has restored, albeit temporarily, the image of Africa tarnished by the excesses committed by Idi Amin and others, at a time when the human rights agenda had prominently featured in international relations... The African Charter contains ingenious innovations as well as serious shortcomings.

²¹³ Kunig P. 'The protection of Human Rights by International Law in Africa' (1982) 25 *German Yearbook of International Law* 138, 167.

²¹⁴ Nguema I. 'La Charte Africaine des Droits de l'Homme et des Peuples' (1984) 3-4 *Revue Juridique et Politique, Indépendance et Coopération* 23, 26.

²¹⁵ Kotey E. 'The African Charter on Human and Peoples' Rights: An Exposition, Analysis and Critique' (1985) 85 *University of Ghana Law Journal* 130, 132.

²¹⁶ Id.

²¹⁷ Rembe N.S. *Africa and Regional Protection of Human Rights - A Study of the African Charter on Human and Peoples' Rights : Its Effectiveness and Impact on the African States* (Roma : Leoni Editore, 1985) 43.

Among the most critical are commentators such as, Mutua,²¹⁸ Sinkondo,²¹⁹ Takirambudde,²²⁰ Ojo and Sesay and Lindholt.²²¹ Mutua presented a very pessimistic assessment of the African Charter, when he described the African Charter as, ‘a façade, a yoke African leaders have put around our necks, and calling on like-minded peoples and interests to cast it off and reconstruct a system that we [Africans] can proudly proclaim as ours’.²²² Sinkondo maintained that:

The Charter is an example of ‘solemn comedy’ come into existence as a result of international pressure; its real purpose would be to exonerate states from their responsibilities in the field of human rights. The focus on development, on peoples’ rights and on individual duties would all serve the same goal: decrease the role of individual rights and especially the responsibility of African states for the promotion of these rights. The specificity of African human rights law is without a scientific basis and without an ethical justification.²²³

Takirambudde regarded the African Charter as an instrument that is deliberately left without teeth, designed to be merely a simulation.²²⁴ The real intention of the governments who created it was not to join the universal human rights movement, but rather to carve out a geographical exemption from the universal standards. For Olu Sala and Sesay, there is so much emphasis placed in the African Charter on the role of the State that it seems to be a useless instrument for individuals.²²⁵

Lindholt explained the high level of ratification of the African Charter with the simple fact that the obligations in this instrument are of such a nature that they do not pose any serious threat to the autonomy of its Member States.²²⁶ Firstly, because the enforcement mechanism of the African Commission is not very effective, at least not if the State in question decides to follow its own course.²²⁷

²¹⁸ Mutua M.W. ‘The African Human Rights System in a Comparative Perspective’ (1993) 3 *Review of the African Commission on Human and Peoples’ Rights* 5.

²¹⁹ Sinkondo M.H. ‘La Charte Africaine des Droits de l’Homme et des Peuples ou les apories juridiques d’une convention encombrante’ (1994) *Recueil Penant* 285.

²²⁰ Takirambudde P. *The Individual Under African Law* (Swaziland: University of Swaziland, 1982) 38.

²²¹ Ojo O. and Sesay A. ‘The OAU and Human Rights: Prospects for the 1980s and Beyond’ (1986) *Human Rights Quarterly* 89.

²²² Mutua (1993) 11.

²²³ Sinkondo (1994) 288.

²²⁴ Takirambudde (1982) 38-40.

²²⁵ Ojo and Sesay (1986) 96.

²²⁶ Lindholt L. ‘The African Charter: Contextual Universality’ in Hastrup K. (ed.) *Human Rights on Common Grounds The Quest for Universality* (The Hague: Kluwer Law International, 2001) 117, 136.

²²⁷ Id.

Secondly, because of the large number of clawback clauses, which significantly reduce the obligations inherent in the provisions.²²⁸ And thirdly, because of the opportunity for using individual duties to neutralise the exercise of rights and freedoms.²²⁹ Similarly, Mzizi observed that the African Charter itself is an obstacle to the more effective realisation of human rights on the continent.²³⁰ In Mzizi's words:

The Charter provides for a broad spectrum of rights and responsibilities, but it is woefully deficient in the enforcement machinery. The Commission has the mandate to compile reports on violations for the attention of Heads of States and Government. The internationally respected norm of non-interference in the domestic affairs of a sovereign State makes timely intervention impossible even when urgent measures have to be taken in order to protect human life.²³¹

Put aside these critics, it should be recognised that, the adoption of the African Charter and its entry into force represents a turning point in Africa's efforts to fully ensure justice in terms of equality, rule of law and development. The African Charter has been reinforced by the recognition that human-centred and sustainable development cannot be realised without ensuring human rights, democracy and the rule of law.

It is one thing to describe this system as 'weak', but another to so easily and quickly dismiss it as 'ineffectual'. To dismiss the African human rights system as such today would, as Odinkalu put it, be 'ill informed, ignorant, or both'.²³² Elsewhere, Odinkalu maintained that some of these rapid and harsh dismissals of the African system can even be justifiably accused of being clouded by a taint of afro-pessimism.²³³ Thus, a mapping of its promise has more of a potential to provide a valuable guide for the more accurate assessment of those of the human rights mechanisms which are already viewed as much more effective. The converse will likely not be true. What is more, in comparison with both the UN system and its regional counterparts, the African system has been under-studied.

²²⁸ Lindholt in Hastrup K. (ed.) (2001) 136.

²²⁹ Id.

²³⁰ Mzizi J.B. 'Human Rights, Peace and the African Charter on Human and Peoples' Rights' (1998) *African Legal Aid Quarterly* 37.

²³¹ Id.

²³² Odinkalu C.A. 'The Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary Assessment' (1998) 8 *Transnational Law and Contemporary Problems* 359, 402.

²³³ Odinkalu C.A. 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights, (2001) 23 *Human Rights Quarterly* 327.

Viljoen believed that the lack of focus on the functioning of the then African human rights system with reference to its secrecy.²³⁴ For him, this factor impeded academic analysis, especially of the role played by the African Commission.²³⁵ Despite these drawbacks, an impressive literature on the effectiveness of the African system, particularly the functioning of the African Commission has been gradually developed.

A first attempt to deeply analyse the system was done by Ouguergouz.²³⁶ The study done by Ouguergouz is devoted, as the title suggests, to the legal analysis of the African Charter. He set the stage with an introductory section on the context of human rights in Africa and detailed about the genesis of the African Charter. The heart of the study, dealt with the rights of individuals and peoples; duties of individuals; the implications of the absence of a non-derogation clause; the responsibilities of the African Commission and the OAU Assembly of Heads of State and Government is without doubt the one of the most comprehensive legal analysis of the African Charter.

Viljoen²³⁷ supported the Charter's unique procedural flexibility, its acceptance of communications from non-victims. He criticised the African Commission, however, for applying too strict a standard in barring communications. He examined international human rights law in Africa.²³⁸ This comprehensive, analytical overview of human rights in Africa deals with institutions, norms and processes for human rights realisation, provided for under the United Nations, the African Union and sub-regional economic communities in Africa. It explored their relationship with the national legal systems of African states. Viljoen also analyses the development of the African human rights system since the entry into force of the African Charter on Human and Peoples' Rights on 21 October 1986.

²³⁴ Viljoen F. *The Realisation of Human Rights in Africa through Inter-Governmental Institutions*, Thesis, University of Pretoria, Faculty of Law (1998) 26.

²³⁵ Id.

²³⁶ Ouguergouz F. *La Charte Africaine des Droits de l'Homme et des Peuples : Historique, portée juridique et contribution à la protection internationale des droits de l'homme en Afrique* (Paris : Presses Universitaires de France, 1993). See also by the same author, *The African Charter on Human and Peoples' Rights A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague : Martinus Nijhoff Publishers, 2003) .

²³⁷ Viljoen F. 'Admissibility under the African Charter' in Evans M.D. and Murray R. (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge: Cambridge University Press, 2002) 61.

²³⁸ Viljoen F. *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007).

The value of this study mainly lies in the fact that it reveals and gives extensive coverage of human rights developments related to human rights on the continent, which are little known internationally. As a result, it puts the African human rights system on the agenda and induces international and other regional human rights systems to take into consideration its development. However, in all, this study is a prime example of an over-positive assessment and support of the African human rights system. It is striking that little attention has been directed to the challenges facing the system.

For Ouguergouz, the drafters of the African Charter were cautious. They recognised that African Heads of State and Government jealously guarded domestic sovereignty, a means of avoiding criticism of their actions, and were unwilling to establish a human rights system with wide-ranging powers independent from them. He argued that the African States prefer political resolution of differences, which recalls the institution of the palaver, dear in African tradition,²³⁹ rather than judicial or legal settlement. As a result, the African Commission was given neither judicial but quasi-judicial authority.²⁴⁰ He further mentioned that the drafters wanted to create an organ with limited powers and with an objective (vocation) of promotion rather than protection of human rights.²⁴¹

Ouguergouz noted that the procedure established for communications definitely bears witness to a desire to control and channel as strictly as possible the flow of communications.²⁴² Administrative problems have been rampant. The secretariat in his words 'was not always truly operational' in its first six years.²⁴³ Among other critical points raised, he maintained that safeguarding human rights through the OAU Assembly Heads of State and Government is the 'Achilles heel' of the African Charter. For him, technical problems exist with the African Charter; the rights guaranteed are formulated imprecisely and incompletely.²⁴⁴ He suggested that the African Commission should be inspired by the actions of the Inter-American Commission on Human Rights (which used creative interpretation to expand its powers and significance).

²³⁹ Ouguergouz. (1993) 388.

²⁴⁰ African Charter, Art 45 (2) and (3).

²⁴¹ Ouguergouz (1993) 329.

²⁴² Id.

²⁴³ Ibid., 299.

²⁴⁴ Ibid., 388-394.

Nonetheless, Ouguergouz was relatively optimistic, he emphasised the possibilities for interpretation, calling the African Charter ‘a viable juridical instrument, full of possibilities’.²⁴⁵ Although the study by Ouguergouz was among the works devoted to the African human rights system, he did not address key questions. How have NGOs impacted to the African Commission’s work? Did the African Commission enjoy benign or malign neglect from the OAU? Can the Commissioners be galvanised into the broader interpretation that he wished to see?

Matringe also devoted a study on the African Charter.²⁴⁶ He considered the African Charter as the best available instrument on human rights to deal with questions in the new international order, such as the link between traditional African values and international law; and between contemporary Africa and the traditions of international law. Matringe repeated discussion of well-known arguments, for example, the potential danger to human rights caused by individual duties, yet the necessity to view rights in context of the society; the place of a right to self-determination after decolonisation; and the beneficiaries and enforcement of peoples’ rights.²⁴⁷ Although largely a theoretical study, the conclusion of his study does refer to some practical aspects of the African Commission’s work as evidence of its failure to provide an effective enforcement mechanism. Unfortunately, some of the information cited, for example that the African Commission has taken no decisions on the merits of communications, was out date.²⁴⁸

Ankumah examined concrete ways in which communications have been considered by the secretariat without considering the potential and possibilities of the African Charter as an instrument for realising human rights in the continent. She also discussed the African Commission decisions on admissibility and with the merits of many of these communications.²⁴⁹ She raised the common complaints that the African Commission is overly deferential to States, takes too long to process communications and overemphasises the goal of promoting dialogue, instead of deterring human rights abuses.

²⁴⁵ Ouguergouz (1993) 388.

²⁴⁶ Matringe J. *Tradition et modernité dans la Charte Africaine des Droits de l’Homme et des Peuples Etude du contenu normative de la Charte et de son apport à la théorie du droit international des droits de l’homme*(Brussels : Bruyant, 1996) 16.

²⁴⁷ Id.,70.

²⁴⁸ Ibid.

²⁴⁹ Ankumah E.A. *The African Commission on Human and Peoples’ Rights Practices and Procedures* (The Hague: Martinus Nijhoff Publishers, 1996).

Ankumah's study conducted from of a human rights activist perspective is more speculative than discursive. Yemet also examined the African Charter.²⁵⁰ In his study, Yemet analysed the normative content of the rights enshrined in the African Charter in a comparative perspective, mostly with international human rights instruments, such as the Universal Declaration and the two international covenants.²⁵¹ However, he did not focus chiefly on how the Commission interpreted and operated those provisions of the African Charter and its own rules of procedure.

Murray gave theoretical, historical and practical information on the African Commission human and peoples' rights.²⁵² Beginning with a look at theoretical issues, the author reviewed the evolution of the African Charter and including detailed information on the functioning of the African human rights system as compared to the European and Inter-American human rights systems. Murray then examined the role of NGOs, the concept of peoples in the African system, the dichotomy of law applicable in times of war and peace and the amicable *versus* judicial procedure adopted by the African Commission in resolving human rights complaints.

Österdahl limited his analysis to the procedures of considering individuals communications by the African Commission.²⁵³ While offering some critique on the decisions discussed, Österdahl did not make recommendations as to how improve the African Commission's work in the consideration of individual complaints.²⁵⁴ In his academic and scholarly contributions Umozurike also provided important information on and insights into the realities of the African Commission's work. He tended to be rather academic or theoretical in his approach.²⁵⁵

²⁵⁰ Yemet V.E. *La Charte africaine des droits de l'homme et des peuples* (Paris, l'Harmattan, 1996) 123.

²⁵¹ Id., 100-260.

²⁵² Murray R. *The African Commission on Human and Peoples' Rights and International Law* (Oxford: Oxford University Press, 2000).

²⁵³ Österdahl I. *Implementing Human rights in Africa: The African Commission on Human and Peoples' Rights and Individual Communications* (Uppsala: Uppsala University, Swedish Institute of International Law, 2002).

²⁵⁴ Ondikalu C.A. and Camilla Christense 'The African Commission on Human and Peoples' Rights : The Development of its Non-State Communications Procedures' (1998) 20 *Human Rights Quarterly* 235.

²⁵⁵ Umozurike U.O. *The African Charter on Human and Peoples' Rights Practices and Procedures* (The Hague: Martinus Nijhoff, 1997).

The study by Evans and Murray provided a constructive, no-frills critique on the African Commission's implementation of the African Charter, and evaluated the African Charter's efficacy in practical terms. The study contains contributions of eleven African human rights specialists, who avoided taking an adversarial, *exposé* style approach, seeking instead to combat pessimism about the African regional human rights system with realistic, informed, critical optimism.²⁵⁶ It opens with a look forward into 'Future Trends in Human Rights in Africa' by Naldi.²⁵⁷ Writing on State reporting mechanisms, Evans, Ige and Murray²⁵⁸ documented the widespread lack of compliance with the Charter's bi-annual State reporting requirements. They recommended greater involvement on the part of the African Commission in obtaining and responding to State reports. Murray²⁵⁹ made a strong case for the Commission to step out of its role as promoter of OAU solidarity, and take this role as finder and trier of facts more seriously. Heyns²⁶⁰ and Odinkalu²⁶¹ examined the normative framework that the Charter creates for the treatment of distinct categories of rights: civil, political, economic, social and cultural.

Reflecting on the challenge of culture for human rights in Africa, and the African Charter in a comparative context, Pityana pointed out that universality and cultural relativism need not exist as two opposing poles of approaches to human rights. There is a need for reconciling the theories.²⁶² Other authors highlight the roles of different players in the African human rights system: Ahmed Motala on NGOs,²⁶³ Evans and Murray on special rapporteurs,²⁶⁴ Harrington on the African Court on Human and Peoples' Rights,²⁶⁵ and Dankwa²⁶⁶ on the African Commission.

²⁵⁶ Evans and Murray (eds.) (2002).

²⁵⁷ Naldi G.J., 'Future Trends in Human Rights in Africa: The Increased Role of the OAU' in Evans and Murray (eds.) (2002) 1.

²⁵⁸ Evans M.D, Ige T. and Murray R. 'The Reporting Mechanism of the African Charter on Human and Peoples' Rights', in Evans and Murray (eds.) (2002) 36.

²⁵⁹ Murray R. 'Evidence and Fact-finding by the African Commission' in Evans and Murray (eds.) (2002) 100.

²⁶⁰ Heyns C. 'Civil and political rights in the African Charter' in Evans and Murray (eds.) (2002) 137.

²⁶¹ Odinkalu C.A. 'Implementation economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in Evans and Murray (eds.) (2002) 178.

²⁶² Pityana N. B. 'The Challenge of Culture for Human rights in Africa: The African Charter in a Comparative Context' in Evans and Murray (eds.) (2002) 219.

²⁶³ Motala A. 'Non-governmental organisations in the African system' in Evans and Murray (eds.) (2002) 246.

²⁶⁴ Evans M. and Murray R. 'The Special Rapporteurs in the African System' in Evans and Murray (eds.) (2002) 280.

²⁶⁵ Harrington J. 'The African Court on Human and Peoples' Rights' in Evans and Murray (eds.) (2002) 335.

²⁶⁶ Dankwa E.V.O. 'The promotional role of the African Commission on Human and Peoples' Rights' in Evans and Murray (eds.) (2002) 335.

Nmehielle analysed the African human rights system, its laws, practices and institutions.²⁶⁷ He used the comparative approach and presents a summary of the UN, European and Inter-American human rights mechanisms in terms of their impact on the African system. The role of NGOs in the African system is also considered. He concluded by recommending how the system can be reformed. Nmehielle did not analyse deeply the normative framework of the African Charter. Mainstream analyses of the African regional human rights system are characterised by a focus on normative, institutional, and jurisprudential developments on the continent, resorting to positivistic and comparative techniques.

Mugwanya,²⁶⁸ Mubiala,²⁶⁹ and Murray's²⁷⁰ subscribed to this traditional analytical framework. Following a very concise overview of human rights conceptions in Africa, Mubiala focused more or less extensively on the African Charter and related protocols, with a very limited insight into pre-Charter or subsequent mechanisms and processes. There lies the main disappointment for a study whose title ambitiously suggests that it covers all aspects of the ever-dynamic African human rights system, a task which Mubiala undertook but can hardly satisfactorily fulfil the limited extent of his contribution.²⁷¹ The analysis loses focus in attempting to cover all aspects of African human rights system. Despite its aim of covering the system as a whole, Mubiala's study primarily dealt with relatively recent normative, institutional, and interpretative dynamics, making it more than a duplication of pre-existing studies. Mubiala further gave particular attention to ongoing dynamics within the jurisprudence of the African Commission or other activities streaming from the African Commission's consultative mandate, resulting in flexible interpretations of peoples' rights provisions in the African Charter to encompass particular groups that are part national populations. He elaborated on recent dynamics intended to give potential for accommodation of the growing number of minority and indigenous peoples' claims for special protection.²⁷² His analysis of the African human rights system adopted a duality between charter-based normative and institutional developments on the one hand, and other disconnected self-contained regimes, on the other.²⁷³

²⁶⁷ Nmehielle (2001).

²⁶⁸ Mugwanya G.W. *Enhancing Human Rights through the African Regional Human Rights System* (London: Transnational Publishers, 2003).

²⁶⁹ Mubiala M. *Le Système Régional Africain de Protection des Droits de 'Homme* (Bruxelles: Bruylant, 2005).

²⁷⁰ Murray (2004).

²⁷¹ Mubiala's book is 299 pages long, of which annexes take up nearly 100 pages.

²⁷² Mubiala (2005) 42.

²⁷³ *Id.*, 29 ff.

Murray adopted a more holistic approach in her assessment of the African human rights system. She concentrated on normative and institutional developments relating to human rights from early instances of independence, with the creation of the OAU, to current dynamics under the aegis of the AU. She took a different analytical line by attempting to evaluate the significance of human rights in Africa through regional political institutions. In reflecting on human and peoples' rights in Africa, Murray did not restrict her insights to the relevant, formally binding variety of bodies across the AU structure which relate to human rights.²⁷⁴

The thorough reading of the book suggests that Murray endorsed, even though using very prudent language, a Western type of liberal democratic State and European institutions, including human rights mechanisms, as models for African counterparts, which, as she clearly put it copied the former in a number of ways.²⁷⁵ Murray went even further in this parallelism by suggesting that it is 'unfortunate ... that the opportunity was not taken to ensure, for example as happens with the European Union, that a requirement of accession to the AU should be that a State must be democratic'.²⁷⁶

Mugwanya analysed the normative and institutional aspects of the African human rights system. While Africa is composed of Francophone, Anglophone, Lusophone and Arabophone countries, he only drew on the experiences of two Anglophone countries, namely South Africa and Uganda, as an example of how some countries dealt with the African human rights system in the past, and how domestic institutions handled human rights problems.

Heyns's series of works on human rights in Africa are much more descriptive of the system and thus less discursive. However, these series gave a picture of the normative and institutional status of human rights on the continent, by exposing national constitutions. These studies also provide a chart that indicates the status of signatures, ratifications or accessions by African states to the major international human rights instruments.²⁷⁷

²⁷⁴ Murray (2004) 267.

²⁷⁵ Id., 31-35, and 105 ff.

²⁷⁶ Ibid., 82.

²⁷⁷ Heyns C. *Human Rights Law in Africa 1996* (The Hague: Kluwer Law International 1996); *Human Rights Law in Africa 1997* (The Hague: Kluwer Law International 1999); *Human Rights Law in Africa 1998* (The Hague: Kluwer Law International 2000); *Human Rights Law in Africa 1999* (The Hague: Kluwer Law International 2002) and *Human Rights Law in Africa* (The Hague: Kluwer Law International 2004).

So far little is known about the Protocol on the Statute of the African Court of Justice and Human and Rights and the Statute of the African Court of Justice and Human and Rights. The merger of the African Court of Human Rights and the African Court of Justice has been mentioned occasionally by authors in different contexts. This happens mostly in the form of an addendum in the context of the Protocol to the Establishment of an African Court of Human Rights. This limited comments of the merger of courts shows that this instrument raises number legal problems.²⁷⁸ In fact most of the comments were done on the topic before the adoption of the said Protocol.²⁷⁹

The confusion around the African Court of Justice and Human Rights is further complicated when it is quoted under a wrong name.²⁸⁰ Only very scarce literature can be found on the subject.²⁸¹ To one's knowledge, at the time of writings, Sceaux is among the authors, who wrote on the Protocol of the African Court of Justice and Human Right after its adoption. Sceaux, however, mainly concentrated on selected points of the Protocol.²⁸²

It must therefore be noted that a thorough legal analysis of the Protocol of the African Court of Justice has not been undertaken by any author. This Protocol appears to be a dormant human instrument the potential of which still needs to be explored in order to fill it with a life of its own. While the legal problems have been outlined by most of the earlier contributions dealing with the merger of the two courts, an analysis the substantive provisions has been neglected.

²⁷⁸ See for instance, Kindiki identified some of the legal problems related to the merger of the two courts. Kindiki K. in Viljoen F. (ed.) *The African Human Rights System: Towards the Co-Existence of the African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights* (Nairobi: Kenyan Section of the International Commission of Jurists, 2006) 124, 133-144.

²⁷⁹ See generally, Viljoen F. and Baimu E. 'Courts for Africa: Considering the Co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 (2) *Netherlands Quarterly of Human Rights* 241; 'An African Human Court and An African Union Court: A Needful Duality or A Needless Duplication?' (2002) 28 *Brooklyn Journal of International Law* 811.

²⁸⁰ Sceaux S. 'Africa's New Human Rights Court: Whistling in the Wind?' (March 2009) 9(1) *International Law Briefing Paper* 1. The author uses the term 'Permanent Court' rather than African Court of Justice and Human Rights.

²⁸¹ Kindiki in Viljoen (ed.) (2006) 124.

²⁸² For example, he outlined the advantages and disadvantages of the merger; temporary co-existence of the African Court and the African Court of Justice and Human Rights. Sceaux (2009) 5-7.

Despite its recentness, a lot has been written about the NEPAD and its peer review mechanism. The various AU official documents form a large part of these documentations; the most relevant of these are the AU Constitutive Act. The NEPAD general and specific documents, the APRM Base Document, the Declaration on Democracy, Political, Economic and Corporate Governance. Also important are the different reports, declarations and communiqués issued by the NEPAD Heads of State Implementation Committee (HSIC) and other APRM organs such as the Panel of Eminent Persons. The study will also focus on these official documents.

General articles and papers questioning the APRM or assessing and measuring public policies have also been published. In this regard, Cilliers,²⁸³ Pagani, Baker,²⁸⁴ Mathoho,²⁸⁵ Kajee,²⁸⁶ Nwonwu,²⁸⁷ Akokpari,²⁸⁸ Abraham,²⁸⁹ Ojienda,²⁹⁰ Mangu,²⁹¹ have made great contributions in response to the question ‘can we measure democracy, good governance, and if yes, what are we really measuring? Nzungola-Ntalaja, while acknowledging that the various indicators included in human development rate do provide a way of gauging democratic development in Africa, said it is better to test such development from the perceptions of the people of African themselves.’²⁹²

²⁸³ Cilliers J. ‘Peace and Security through Good Governance: A Guide to the NEPAD African Peer Review Mechanism’ (April 2003) 70 *Institute for Security Studies Paper*, available at www.iss.co.za (accessed on 16 August 2008).

²⁸⁴ Baker B. ‘The Quality of African Democracy: Why and How It Should Be Measured’ (2002) 17(2) *Journal of African Studies* 273-285.

²⁸⁵ Mathoho M. ‘An African Peer Review Mechanism: A Panacea for Africa’s Governance Challenges?’ (2003) 29 *Policy Brief* 1-14.

²⁸⁶ Kajee A. ‘NEPAD’s APRM: A Progress Report, Practical Limitations and Challenges’ (2003/04) *South African Yearbook of International Affairs* 243-258.

²⁸⁷ Nwonwu F. ‘NEPAD: A New Agenda or Another Rhetoric in Africa’s Political Adventurism’ (Fall 2006) 2 *African Policy Journal* 1-31.

²⁸⁸ Akokpari J.K. ‘The AU, NEPAD and the Promotion of Good Governance in Africa’ (2004) 13 (3) *Nordic Journal of Africa Studies* 243-263.

²⁸⁹ Abraham G. ‘Africa, the Tragedy; Africa, the Challenge: NEPAD and the New Humanitarian Agenda’ (2003) 85 (852) *International Review of the Red Cross* 717-735.

²⁹⁰ Ojienda T.O. ‘Implementing the New Partnership for Africa’s Development (NEPAD): Whither the African Peer Review Mechanism?’ (2007) 1(81) *Kenya Law Review* 81-119.

²⁹¹ Mangu A.M.B. ‘Assessing the Effectiveness of the African Peer Review Mechanism and Its Impact on the Promotion of Democracy and Good Political Governance’ (2007) 7(2) *African Human Rights Law Journal* 354-388.

²⁹² Nzungola-Ntalaja G. ‘Democracy Indicators in Africa: Remarks for Presentation at the Regional Launch of the UNDP’ Paper presented in Dar-es-Salaam, Tanzania, 11-12 October 2002, reproduced in *Human Development Report 2002: Deepening Democracy in a Fragmented World* (UNDP: New York, 2003).

If the literature on the APRM seems to be abundant, very little has been said on how reviews and especially the APRM should be conducted in order to effectively promote and human rights. In this regard, Killander contended that human rights issues have been dealt with to some extent in the APRM review reports. However, he underlined the lack of a human rights focus in the self-assessment could influence a lack of such a focus in the country review report as exemplified by the Rwanda Report.²⁹³

6. Aims and significance of the study

6.1. Aims of the study

The seemingly endless debate over universalism and cultural relativism in international human rights law is inescapable when analysing any regional human rights system. This study aims at re-emphasising on this debate by advocating for a universal approach of human rights in the African context. The study seeks to evaluate to what extent the African human rights system has been realised. Although the focus is on the African Charter and its monitoring body the African Commission, the role and contribution of other regional human rights instruments and mechanisms such as the new African Court of Justice and Human Rights are also analysed.

This study aims at prospectively investigating ways of improving the African human rights system through the investigation of common and particular challenges facing its enforcement. This study also aims at analysing the forgotten aspects under the African human rights system, namely the challenges. In the study seeks to contribute to ensuring an effective regional human rights system which upholds the rule of law, human dignity and human rights.

²⁹³ Killander M. 'The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward' (2008) 30 *Human Rights Quarterly* 41, 71.

This study also seeks to provoke and stimulate more and more reflection on the African system of human rights; to re-think on the discourses we have so far heard on the Africa system from both inside and outside the continent. The study intends to fill in some gaps and redress some conceptual and methodological shortcomings of the conventional discourse on the African system and thereby to further the development and reproduction of knowledge. The study seeks to contribute to a comprehensive understanding of the long struggle of African for human and peoples' rights, where they come from, the current state of affairs, the challenges which need to be overcome to establish and consolidate human rights as well as their prospects. Finally, the study highlights the role of African actors in protection and promotion of human rights; to provide some insights into the building of African system more supportive of human rights; and to provide a further African voice on human rights in the continent.

6.2. Significance of the study

It is important to discuss the African human rights system and examine ways of further strengthening it and enabling its mechanisms to fulfil their mandates more effectively under the new and still rapidly changing circumstances. This study evaluates the successes and failures of the African Charter for the protection and promotion of human rights on the continent. The study of the African human rights system is a significant exercise in that it provides an opportunity to understand the efforts that are being made by all stakeholders to work towards protection and promotion of human rights in Africa. Further, this study is significant in that it analyses the existing mechanisms in the form of the African Commission, the recent innovations within the AU in an effort to facilitate human rights protection. There is need to strategically locate the role of new mechanisms such as the African Court of Justice and Human Rights can play in human rights monitoring and ensure that it compliments the work of existing mechanisms. It is important that there is no duplication of activities and ensure that the efficiency of the African human rights system.

As importantly, the study's focus on the African system as opposed to, say, the European system, is informed in part by the fact that mechanisms have faced, and continue to face, far more challenges to their success than most other similar bodies. Another good reason for its significance is that the African human rights system is, almost without exception, portrayed in the literature as the weakest and most ineffective of existing systems.²⁹⁴ There is a need to demonstrate that while there are still some matters of concerns, a lot of has been done and it is wrong to continue to see the African system as the weakest.

7. Methodology

Legal research is not, or ought not to be, a seamless web of confusion. Like any other discipline, it has a pattern of performance, commonly referred to as research method; that method could be defined as the manner of proceeding adopted by legal researchers in their bid to gain systematic, reliable and valid knowledge about legal phenomena.²⁹⁵ The science of method is the methodology, denoting that:

The systematic and logical study of the general principles...concerned in the broadest sense with the questions of how...knowledge is established, and how others can be convinced that the knowledge is correct.²⁹⁶

Primarily, this study intends to be analytical. The prescriptive aspect of the study intends to devising strategies for improving the African human rights system of human rights. It is premised on the assumption that institutional arrangements have a role to play in such a system. The techniques involve legal analysis and comparative approach and field survey. Although the study is legal, one has gone some way towards accepting a multi-disciplinary approach to the study of human rights. The author has adopted different strategies in order to reach the goal of this study. One strategy was to browse and surf relevant literature in the various specialised human rights libraries at the University of South Africa and University of Pretoria. These resource centres provided the author with enormous and relevant raw materials from which this research has been processed.

²⁹⁴ See for example Welch C.E. Jr. 'The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment' (1992) 14 *Human Rights Quarterly* 42, 43; Rehman J. *International Human Rights Law A Practical Approach* (Harlow: Pearson Education, 2003) 265.

²⁹⁵ Cranston R. 'The Rational Study of Law: Social Research and Access to Justice' in Zuckermann A.A.S. and Cranston R. (eds.) *Reform of Civil Procedure: Essays on Access to Justice*(Oxford: Oxford University Press, 1996)31-32.

²⁹⁶ Gasiokwu M.U. *Legal Research and Methodology* (Oxford: Oxford University Press, 1993) 37.

Courtesy of the Institute for Human Rights and Development in Africa, the African Centre for Democracy and Human Rights Studies, the author participated and observed the proceedings of the African Commission on Human and Peoples' Rights, as part of his fieldwork.²⁹⁷ He observed, at the first hand, the workings of the African Commission and its Secretariat. He noted, *inter alia*, the various problems that it regularly encounters in its enterprise of securing human and peoples' rights for Africans.

The author attended a conference on 'Strengthening the African System of Human Rights in Commemoration of African Human Rights Day: 26 Years of the African Charter on Human and Peoples' Rights, Challenges and Prospects', where he presented a paper on the 'Overview of the African Charter on Human and Peoples' Rights'. The conference afforded the author the opportunity, *inter alia*, to learn from some key prominent African scholars and activists on the African human rights.²⁹⁸

The author was able to elicit varied responses from these interviews, which have assisted him in giving the work the breath, depth and height that the African system of human rights should have. They particularly shed lights in certain dark areas concerning the future of the African system and freely expressed their hope and expectations for the system. As a result, this work is the result of extensive review of relevant literature, participation in the processes of the relevant human rights institutions and some interviews with some players in the field of human rights. It must be stressed from the outset that the legal method should not be viewed in isolation from non-legal method or extra-legal method. Although the main methodology here is legal, the contention is not that African human rights system is the exclusive domain of legal institutions or lawyers. Even if the interrelation of non legal method with the aspects covered in this study is not spelt out, the observations made and conclusions reached in this work reveal their interdependence and interaction with the political, social, economic, historical, and demographic contexts.

²⁹⁷ The author of this study was in intern at the Institute for Human Rights and Development in Africa, an NGO based in the Gambia, Banjul, from 1-31 May 2006.

²⁹⁸ The conference held at the South African Human Rights Commission, Johannesburg, South Africa, 25-26 October, 2007, was organised by Human Rights Institute of South Africa (HURISA).

8. Scope and delimitation of the study

The African human rights system, as we know it has been in existence for almost 26 years since the entry into force of the African Charter. The African Commission, the currently existing supervisory institution, on the other hand, has existed for twenty-one year, having inaugurated on 2 November, 1987 in Addis Ababa, following the election of its members by the 23rd Ordinary Session of the Assembly of Heads of State and Government earlier in July of that year. This study is limited to the institutional and normative developments within the African system from its inception to June 2009; however, some references are made to main events that happen within the African system before the submission of the final version of this thesis.

The analysis of the case-law of the African Commission is a huge task, which cannot be done in this study due to time and other constraints. Toward this end, relevant jurisprudence from comparable regional and international human rights fora is examined. The analysis identifies best practices and postulates possible options in the protection of human and peoples' rights that could be applicable in the African human rights system.

9. Overview of chapters

This study is divided into four chapters. Chapter one is an introduction and sets out the content and structure of the research. The chapter comes with introductory remarks, with a brief discussion of human rights in pre-colonial, colonial and post colonial Africa. The chapter sets out the focus of the thesis, literature review, and methodology adopted in the research. Chapter two is a survey of the debate on universalism and cultural relativism of human rights. It puts into context one of the core claims by African scholars, namely the uniqueness of human rights in Africa. The chapter also proceeds to assess the two theories and the extent to which can be used. The African Charter is illustrated as an instrument that supports the two theories. Chapter three is devoted to the enforcement mechanisms under the African system. It analyses the jurisprudence of the African Commission. This chapter deals with the main challenges that hamper the realisation of human rights in Africa. It identifies possible ways of improving the system. Chapter four ends with findings and conclusions. The findings are expected to provide a basis for new research works in order to improve the African human rights system by making it more effective.

Chapter two: Universalism and cultural relativism of human rights and the African perspective

1. Introduction

After the Second World War, the Universal Declaration adopted by the UN General Assembly in 1948 assumed the existence of a common human rights standard for judging nations and governments. At that time, the consensus on human rights was justified by formal concepts based on inherent dignity and freedom as stated in Article 1 of the Universal Declaration: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one other in a spirit of brotherhood’.

Hennelly and Langan argued that today, the Universal Declaration of Human Rights, precisely because of its scope and abstraction, poses a problem in achieving an integrated understanding of the conceptual and practical connections of human rights.²⁹⁹ The problem is caused by irreconcilable disagreements that arise from the conflict of interests, socio-cultural, and ideological differences. Universal standards of human rights, standards that are believed to be applicable and justifiable independent of particular cultures, religious traditions, and social contexts are constantly questioned. For example, Hauerwas is sceptical about the existence of a common natural morality that transcends cultural and religious diversity. For him, beliefs in universal human rights ignore the fact that there is no actual universal morality, but rather ‘fragmented world of moralities’.³⁰⁰ Another serious objection to the universalism of human rights is found in MacIntyre who dismissed the abstract tenor of modern rights theories.³⁰¹ He argued that human rights only come into existence at particular historical periods under particular social circumstances.³⁰² As such, they are not self-evident or naturally instituted in human nature as legal theories of the seventeenth and eighteenth centuries asserted.³⁰³

²⁹⁹ Hennelly A. and Langan J. (eds.) *Human Rights in Americas: The Struggle for Consensus* (Washington D.C.: Georgetown University Press, 1982) 1.

³⁰⁰ Hauerwas S. *The Peaceable Kingdom: Primer in Christian Ethics* (Indiana: University of Notre Dame, 1983) 63.

³⁰¹ MacIntyre A. *After Virtue* (Indiana: University of Notre Dame, 1981) 67.

³⁰² Id., 68.

³⁰³ Ibid., 69-70.

An obvious question is: if people differ in their perceived interests, ideologies and social, cultural and religious backgrounds, then how can we approach human rights from the perspective of common standards in the normative and universalist sense? This question calls us to review our understanding of human rights. According to Pollis and Schwab, such an effort will require to distil from the multiplicity of philosophies and ideologies and their divergent values any universals that may exist.³⁰⁴ They further argued that the answer to this question will determine the applicability of the Universal Declaration of Human Rights in non-Western countries.³⁰⁵

Because of the cultural differences among countries, regional organisations felt the need to draft instruments of human rights. Such instruments were expected to include those elements that they thought could promote the realisation of what is inscribed in the Universal Declaration in non-Western countries. In this respect, the OAU initiated a project of drafting the African Charter.

Nevertheless, in June 1993, the Second UN World Conference on Human Rights took place in Vienna, Austria. Riding contended that Western States were concerned that universalism of human rights might be eroded.³⁰⁶ Their first priority was damage control to ensure that the conference issued a strong endorsement of the universalism of human rights and rejected the idea that such rights can be measured differently in some countries.³⁰⁷ Riding explained that, the US administration dismissed the argument that any definition of human rights should consider regional, social and cultural differences.³⁰⁸ It held that such a position is a screen behind which authoritarian governments could perpetuate abuses.³⁰⁹ The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993 contained thirty-nine paragraphs and a programme of action. The universalism of human rights was affirmed repeatedly, for example, in paragraphs 1, 5, 32, and 37.

³⁰⁴ Pollis A. and Schwab P. 'Human Rights: A Western Construct with Limited Applicability' in Pollis A. and Schwab P. (eds.) *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger Publishers, 1979) 1.

³⁰⁵ Id.

³⁰⁶ Riding A. *A Rights Meeting; But don't Mention it the Wronged* (New York: Praeger Publishers, 1993) 3.

³⁰⁷ Id.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

The Vienna Declaration reiterated not only the universalism of human rights but also that all human rights civil and political, as well as economic, social, and cultural – should be implemented simultaneously, and that neither set of rights should take precedence over the other. Achieving a consensus on the reaffirmation of the universalism of human rights, forty-five years after the adoption of the Universal Declaration, was perhaps the most significant success of the World Conference. As it will be discussed, in fact, the Vienna Declaration reaffirmed the universalism of human rights, while recognising that regional particularities should be born in mind.³¹⁰

Can human rights be regional and universal at the same time? Are there regional human rights norms? Cerna answered this question by saying that there are probably not, but achieving universal acceptance of international human rights norms is a process.³¹¹ She maintained that change and acceptance of these norms must ultimately come from within the region, and cannot be imposed by outside forces.³¹² Therefore, the creation of a regional human rights arrangement provided for its participants an accelerated acceptance in the form of a catalogue of international human rights norms.³¹³ According to her, there are no regional human rights norms - there are only regional arrangements which supervise compliance with international standards.³¹⁴

This study does not agree with Cerna, and argues that there is much more than this. The understanding and promotion of human rights have to be culturally and historically contextualised. Universalism that excludes cultural relativism is void of any meaning. In fact, universalism has its starting point in the particular, concrete and historical experiences of a people. It is the mutual interaction and co-operation among people that lead to a real universalism, which includes many different particularities. This is exactly the central theme of this chapter.

³¹⁰ Vienna Declaration and Programme of Action, A/CONF.157/23, para 5.

³¹¹ Cerna C.M. 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts (1994) 16 *Human Rights Quarterly* 740, 752.

³¹² *Id.*

³¹³ *Ibid.*

³¹⁴ *Ibid.*

In this chapter, it is proposed to assess the universalism and cultural relativism of human rights. The chapter is divided into four sections. The first section dealt with introduction, section two with universalism of human rights. Section three examines cultural relativism of human rights. This study will point out the need to recognise the on-going evolution of the discourse on universal human rights in the new global situation. On the one hand, there are limits to the universal application of rights but universalism is a legitimate aim. On the other hand, cultures are to be respected but there are limits to cultural relativism. There is a need for developing cross-cultural understanding of human rights norms. Section four is devoted to the analysis of the African Charter on Human and Peoples' rights as a way of focusing the inquiry on human rights in Africa.

The aim is to make explicit the extent to which a distinctive African approach to human rights is formulated in the African Charter. Concerns will be raised about whether the African Charter genuinely reflects African culture and thought. There are also questions about whether or not the emphasis on group rights results in pulling back of individual rights. It will be argued, however, that the African Charter does offer a challenge to the Western liberal account of rights. It offers a reformulation of rights that not only makes sense for African culture but can also help the West see the importance of values such as communal solidarity. A conclusion will be given in section five.

2. Universalism of human rights

2.1. Emergence of the discourse on human rights

The universal expression of a number of fundamental human rights is made up, historically, of several elements transmitted with greater or less success from national or regional level to the world arena. The first theoretical contributions in the field which benefited humanity as a whole came from the West. Debates over the relationship between man and society, and laws of nature, existed as far back as antiquity.³¹⁵

Robertson,³¹⁶ Weston,³¹⁷ Declan,³¹⁸ and Huber³¹⁹ described the prevailing Western tradition as a combined creation through intertwining Greek philosophy, Roman law, the Judaeo-

³¹⁵ Gillespie offers an excellent and concise overview of human rights notions in Antiquity. See Gillespie A. 'Ideas of Human Rights in Antiquity' (1999) 17 *Netherlands Quarterly of Human Rights* 233.

³¹⁶ Robertson and Merills (1989) 46.

Christian tradition, and the humanism of the Reformation and the Age of Reason, which ultimately left its legacy for the parliamentary democracies of present day Western Europe. Sophocles, in his play entitled *The Tereus*, already introduced notions of equality among all human beings.³²⁰ Hippias wrote of a similar principle of non-discrimination. Although it is rather humorous today, he argued that all individuals were to be considered in the same way, even barbarians and Greeks.³²¹

Pericles, on his part, wrote of unwritten laws which were applicable to all, even ordinary, mortals.³²² These works introduced the notion that rights existed for all people, irrespective of whether or not they were officially acknowledged in texts. These and other philosophers in Antiquity, such as Socrates and Plato, belonged to the school of philosophy which espoused the existence of universal values which were unchanging and eternal, because they resided in the inherent dignity of every member of the human family.³²³

According to Jowett, Plato's *Republic* is considered to be the first attempt at setting out the rights and responsibilities which individuals and communities possess. His master plan was designed to maintain the greatest possible unity within and equality among all the citizens living in the republic.³²⁴ Similarly, Aristotle believed in rights. However, he did not believe in such things as self-evident truths arising from nature, existing outside and independently of social considerations. Rather, he deemed the state to be natural and essential for the creation of justice and the source of rights.³²⁵

³¹⁷ Weston B.H. 'Human Rights' (1984) 6 (3) *Human Rights Quarterly* 257.

³¹⁸ Declan O.S. 'The History of Human Rights Across the Regions: Universalism Versus Cultural Relativism' (1982) 2 (3) *The International Journal of Human Rights* 22.

³¹⁹ Huber W. 'Human Rights: A Concept and Its History' (1979) 124 (4) *Concilium* 3.

³²⁰ Fragment 532 reads: '...There is a single human race. A single day brought us all forth from our father and mother. No man is born superior to another...' as quoted in Cleve M. *The Giants of Pre-sophistic Greek Philosophy* (The Hague: Martinus Nijhoff Publishers, 1969) 527-530.

³²¹ A passage in *Protagoras* reads as follows: '... by nature ...are all constituted alike in all things which are essential by nature to all men (...) In these things no barbarian is set apart from us, nor Greek ...' Quoted in Jowett B. *The Dialogues of Plato*. 5th ed. (Oxford: Oxford University Press, 1961) 321-324.

³²² Id., 330.

³²³ Ibid. 150-160.

³²⁴ Ibid., 161.

³²⁵ As explained by Miller, see Miller F. 'Aristotle and the Origins of Natural Rights' (1996) 49 *Review of Metaphysics* 879, 880.

Finally, proponents of Stoicism, the last school of antiquity, believed that there was a family of humanity, and that all members in this family were essentially equal. The principles of humanism included the idea that there are rules and rights for all people at all times, an idea which later resurfaced in Christianity, and which features centrally in universalism today.³²⁶ The Greeks also developed the idea of democracy where free individuals gained certain rights due to simply being born into that society.

The Romans themselves established many important landmarks in terms of the development of the law.³²⁷ The third century jurist, Gaius, in the beginning of his work entitled *Institutions*, distinguished between civil law, which differed from and between nations, and the universal application of the *Commune omnium hominum ius* (common law of all men).³²⁸ Essentially, this established a basis for simply claiming a right on the grounds that an individual was a human being, because the foundation of everything is nature, which can be discovered by reason. Only humans, it was argued, have that capacity.³²⁹

While there is no doubt that particular rights arose from Western Enlightenment, it cannot be denied that the idea of human rights also existed in other non-Western traditional societies.³³⁰ It was during this period that the philosophical doctrine, known as natural law or natural rights, was born, which stated that there is a natural law or that there are natural rights, irrespective of time and place. Individuals knew this law through their own reason. Originally a product of early rational thought, the Christian form of the doctrine was first defined by Saint Thomas Aquinas.³³¹ In 1215, the *Magna Carta Libertatum* was signed and promulgated by King John after pressure from English barons and the people. It recognised subjective rights by such terms as ‘his right’ (*jus suum*).³³² It was not a summary of English law, but rather a text produced by specific political circumstances, and its purpose was to provide legal remedies for specific grievances. It was therefore not a charter of the rights of the Englishmen, still less one of human rights.

³²⁶ Gillespie (1999) 258.

³²⁷ Tuck R. *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979) 7-9.

³²⁸ Declan (1982) 25.

³²⁹ Vincent R. *Human Rights in International Relations* (Cambridge: Cambridge University Press, 1986) 50.

³³⁰ See Chapter Three of this study for an analysis.

³³¹ For a concise description of the influence of Christian thought on natural law (as conceived by Locke) and human rights, see Little D. ‘A Christian Perspective on Human Rights’ in An-Na’im and Deng (eds.) (1990) 59.

³³² Holt J.C. *Magna Carta* (Cambridge: Cambridge University Press, 1965) 96-104.

However, its reputation as a precursor of modern human rights texts is not wholly unmerited. Article 39, for example, provided that no free man should be arrested, imprisoned, expropriated, exiled or in any way ruined, except by the lawful judgement of his peers or the law of the land.³³³ Article 40 also provided for the right to a fair trial, with the words: *Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam* (to no one shall we refuse or delay the right to justice). The *Magna Carta* emphasised property rights, but only such rights, and it extended substantial rights beyond the baronial class. It was later transformed from a limited political and legal agreement into a national myth, and in the seventeenth century it was invoked as part of early modern debates regarding rights in England.³³⁴ The establishment of the *Magna Carta* led to the emergence of the *Habeas Corpus Acts* and the Bill of Rights in 1689. This assumed the supremacy of parliament, the right to free elections, freedom of speech, the right to bail, freedom from cruel and unusual punishments, and the right to a fair trial by jury. Following these developments came the independence of the judiciary and the freedom of the press.

Dating back to the 18th century, rights ideology became embedded in the European conviction that human beings were endowed with inalienable, fundamental rights and freedoms, and that they were entitled to defend these rights and have them defended.³³⁵ According to Robertson, Locke, Rousseau and Kant, were all aware that they were not just discussing the moral relationship between human ruler and ruled, but dealing with matters of great contemporary political importance. He also asserted that they were the first to recognise the political aspects of human rights.³³⁶ He noted that the writings of these authors were to become fundamental contributions of thought on the need for, and formulation of, civil and political rights.³³⁷ He concludes that their arguments inform our contemporary understanding of the quintessential formula that, since human dignity is grounded in human nature and one's nature is inalienable, it logically follows that human dignity is inalienable.³³⁸

³³³ Holt (1965)1-2, 327.

³³⁴ *Id.*, 1.

³³⁵ See Locke J. *The Second Treatise of Government* (1690), in particular Articles 22, 77, 87, 89 and 99 (reproduced with amendments in Cambridge: Cambridge University Press, 1963) and Rousseau J.J. *Du Contrat Social*, in particular Livres Premier, Deuxième and Quatrième (reproduced in Paris: Collection Pluriel, 1978).

³³⁶ Robertson (1996) 335.

³³⁷ *Id.*

³³⁸ *Ibid.*, 336.

Voyelle believed that their ideas inspired both the French Revolution and American independence. In France, after a bloody battle, the French parliament adopted a document entitled the Declaration of the Rights of Man and Citizen.³³⁹ For Lelièvre, the historic text of 1789 is French in its affirmation of the rights of citizens, and universal in its declaration of the rights of man, whoever and wherever he may be.³⁴⁰ Lelièvre concluded that it is undeniable that the 1789 Declaration, in view of its content and worldwide reverberations, represents a landmark in the historical quest for human rights.³⁴¹ In this regard, one may refer to Declaration which stated that ‘the aim of all political association is the preservation of all the natural and inalienable rights of man. These rights are liberty, property, security and resistance to oppression’.³⁴²

The French Declaration affirmed equality before the law, freedom from arbitrary arrest, presumption of innocence, freedom of expression and religion, general freedom to do anything that did not harm others, and the right to property. These rights were qualified by restrictions and conditions, and were subject to the rule of law. The ideology of the French Revolution was expressed in egalitarian terms. The theoretical concept of equal rights had, however, to be implemented in a society in which various forms of inequality existed.

According to Von Senger, the declaration affirmed that human beings are born free, although slavery was tolerated. The colonists of Saint Doming took fright at Article 1, which declares that all men are free and equal. The Paris Assembly replied with a resolution that explained that this did not apply to the colonies, but only to France and the French.³⁴³ In his view, admittedly, this did not stop the text from playing a historic role in winning general acceptance for human rights. Once the principles were stated, their effects were often more far-reaching than their authors had intended.³⁴⁴

³³⁹ Vovelle M. *Les droits de l'homme et la conquête des libertés. Des lumières aux révolutions de 1848 Actes du colloque de Grenoble-Vizille 1986 Paris* (Grenoble : Presses universitaires de Grenoble, 1988) 58-66.

³⁴⁰ See Lelièvre J. *L'héritage politique de la Révolution française* (Lille : Presses Universitaire de Lille, 1993) 23.

³⁴¹ Lelièvre (1993) 24.

³⁴² Declaration of the Rights of Man and the Citizen, French National Assembly, 27 August 1789, Art II.

³⁴³ Von Senger H. ‘From the Limited to the Universal Concept of Human Rights: Two Period of Human Rights’ in Schmale W. (ed.) *Human Rights and Cultural Diversity* (Oxford: Clarendon Press, 1993) 60, 63.

³⁴⁴ Id., 63.

Bailyn noted that the concept of natural rights was pervasive in eighteenth century America. Americans linked the defence of religious liberty with the struggle for political freedom.³⁴⁵ For Bailyn, the American perceptions of the tendency of the British government towards tyranny, and the fact that they were not represented in that government, made it easier to justify resistance.³⁴⁶ Dickinson³⁴⁷ found the influence of natural rights theory in the following paragraph of the American Declaration:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness – that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it.

It is to be noted that the secular and positivist theories replaced the belief in natural rights. Beginning with Hume, and extrapolated to greater depths by Bentham, the utilitarian approach saw rights as a manufactured concept.³⁴⁸ In simple terms, the principle of utility was advanced as a universal moral principle. Reflecting the new theories taking place in science at the time, in particular those of Newton, this principle advanced and calculated the notion of the greatest happiness of the greatest number of persons.³⁴⁹ A similar counter-movement came from the theological perspective. Protestant thinkers such as Berth and Niebuhr contested the notion of natural law. Niebuhr, in particular, pointed out that there was no law that could be regarded as ‘natural’ for all men at all times, nor did all men possess the sensibility and reason to discern natural law.³⁵⁰

The doctrine of natural rights, as formulated by the French Declaration, has been criticised by many theorists from various ends of the political spectrum. Burke did not reject the concept of natural rights completely - he recognised the natural rights to life, liberty and freedom of conscience, the fruits of one’s labour, property and equal justice before the law.³⁵¹

³⁴⁵ Bailyn B. *The Ideological Origins of the American Revolution*. Enlarged ed. (Cambridge, MA: Harvard University Press, 1992) 123.

³⁴⁶ *Id.*

³⁴⁷ Dickinson H.T. *Political Ideology in Eighteenth Century Britain* (London: Methuen, 1977) 225. See the *Declaration of Independence of the Thirteen Colonies*, July 4, 1776.

³⁴⁸ Welch C.B. *Liberty and Utility: The French Ideologues and the Transformation of Liberalism* (New York: Columbia University Press, 1984) 193,194.

³⁴⁹ *Id.*, 195.

³⁵⁰ *Pears Cyclopedia* (Cambridge: Cambridge University Press (1998-1999) 136.

³⁵¹ Burke E. *Reflections on the Revolution in France*. Trans. Beitz C. (Hammondsport: Penguin Books, 1968) 45.

However, Burke saw the concept to be, at best, a useless metaphysical abstraction and at worst, subversive of social order.³⁵² Thus, the real rights of men were social rather than natural rights. These rights should be deduced from an abstract human nature, stemming from institutions and conventions of a given political community - they belong to the members of this community in accordance with an historical legacy.³⁵³ Burke distrusted all abstract theoretical ideas, as he believes politics to be essentially a practical activity that involves the making of judgments in complex circumstances. According to him, the French revolutionary doctrine of the Rights of Man was dangerous because it was simplistic and dogmatic.³⁵⁴ Freeman maintained that, while subscribing to natural rights theory, Burke opposed the 'universalism' of this theory because it fails to take account of national and cultural diversity.³⁵⁵ Significantly, Waldron noted that Burke appealed to the concept of natural rights when analysing what he regards as intolerable tyrannies, such as protestant rule in Ireland.³⁵⁶

Burke's criticism found echo in Arendt's political thoughts.³⁵⁷ According to Arendt, human rights conceived of as belonging to an abstract individual were found to be not that effective in safeguarding individual fundamental interests - otherwise, Jewish people would have been protected during the 1940-1945 genocide.³⁵⁸ Real human rights must be conceived of as those belonging to members of a given political community.³⁵⁹ Burke and Arendt considered in which way the idea of abstract human nature has strengthened human rights' transcendence. They believed that this transcendence led to harmful results. On the one hand, Burke contended that there is the risk of anarchy,³⁶⁰ and on the other hand, Arendt feared the risk of inefficiency.³⁶¹

³⁵² Burke. Trans. Beitz C. (1968) 45.

³⁵³ Id.

³⁵⁴ Ibid., 46.

³⁵⁵ Freeman M.A. *Edmund Burke and the Critique of Political Radicalism* 4th ed. (Oxford: Basil Blackwell, 2000) 129.

³⁵⁶ Waldron J. *Nonsense Upon Stilts': Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987) 83.

³⁵⁷ Arendt H. *The Human Condition* (Chicago: University of Chicago Press, 1958) 78.

³⁵⁸ Id., 78.

³⁵⁹ Ibid., 110.

³⁶⁰ Burke Trans. by Beitz (1968) 89.

³⁶¹ Arendt (1958)144.

Burke and Arendt did not consider certain significant aspects of the scope which is peculiar to the reference to an abstract human being:

- (i) The equalised scope, which contributed to setting up basic principles of democratic societies, for example, equality between all individuals, regardless of race, sex, language, religion, background and so on.
- (ii) Its relative indeterminateness, which corresponds to an uncertainty or indeterminateness concerning the legitimate organisation of society, an uncertainty that is assumed by the democratic society. This indeterminateness makes possible not only the debate on human rights issues, but also progressive recognition of new human rights.

The studies by Burke and Arendt contain interesting elements. On the one hand, they measured the weakness of the ideal of an abstract human nature, conceived of as a pre-existing fact in all socialisation, and ensuring the innate rights of individuals.³⁶² On the other hand, Burke³⁶³ and Arendt³⁶⁴ suggested that individuals should be related to the community, and that their fundamental rights should be linked to the political community to which they belong.

Bentham rejected the concept of natural rights more thoroughly than Burke.³⁶⁵ He believed that this requires the elimination of all concepts that are vague or fictitious, and the concept of natural rights was both.³⁶⁶ According to Bentham, the facts of pleasure and pain are the basis upon which rational laws can be built, and the object of ethics and politics is the greatest happiness of the greatest number, or the common good.³⁶⁷ He contended that legal rights are valid insofar as they contribute to the common good. Natural rights are, however, dangerous nonsense, because they might make a stable society impossible.³⁶⁸ Bentham maintained that claims of natural rights are vague, and they cannot be objectively evaluated. For him, disputes over natural rights are therefore likely to be settled by violence.³⁶⁹

³⁶² Burke E. Trans. by Beitz (1968) 93; Arendt (1958)156.

³⁶³ Id., (1968) 93.

³⁶⁴ Arendt (1958) 110.

³⁶⁵ Bentham J. 'Anarchical Fallacies' in Waldron (1987) 1.

³⁶⁶ Id., 39.

³⁶⁷ Ibid.,36.

³⁶⁸ Ibid., 83.

³⁶⁹ Ibid., 61.

Bentham further argued that, this explains the co-existence of the Rights of Man and violence during the French Revolution.³⁷⁰ He wrote that no rights can be absolute, because one right-claim might conflict with another, but if the scope of rights is limited, there must be clear criteria for limiting rights and resolving conflicts among rights-claimants.³⁷¹ The theory of natural rights cannot give a clear account of the limits of rights, whereas the principle of utility, Bentham believed, can.³⁷² For Bentham, the concept of natural rights consists of hasty generalisations from partially valid principles. Both the appeal and the danger of the discourse of natural rights lies in its simple dogmatism and its refusal to engage in the hard intellectual work of thinking through implementing general principles in the complex circumstances of society.³⁷³ Particularly absurd, Bentham thought, was the assertion that everyone is equal in terms of rights. Bentham was convinced that children were not equal in rights to adults and in practice; there were no equal rights for women, blacks, the poor and others. The principle of utility evaluates inequality in terms of its contribution to the general good, thereby avoiding the absurdities of the natural rights approach.³⁷⁴

Marx joined Burke in rejecting such rights, even though describing him as ‘a sycophant and vulgar bourgeois’.³⁷⁵ Marx’s criticism of ‘the so-called rights of man’ was grounded on their bourgeois contents: ‘None of the supposed rights of man goes beyond the egoistic man ... an individual withdrawn behind his private interests and whims and separated from the community’.³⁷⁶ Marx’s critique was of the idea of the political emancipation, which, as distinct from human emancipation is ‘the reduction of man, on the one hand to a member of civil society, an egoistic and independent individual, on the other hand to a citizen, a moral person’.³⁷⁷ According to Marx, this led in the bourgeois State, to a double life: one life in the political community and one in civil society. We are valued as ‘a communal being’ in the former whereas in the latter we are active as ‘a private individual’, treating others as means, and degrading ourselves to a means.³⁷⁸

³⁷⁰ Bentham J. ‘Anarchical Fallacies’ in Waldron (1987) 61.

³⁷¹ Id.

³⁷² Ibid.

³⁷³ Ibid., 34.

³⁷⁴ Ibid.

³⁷⁵ Marx K. *Capital* Vol. II Trans. Eden A. and Paul C. (London : Everyone Library, 1960) 46.

³⁷⁶ Id.

³⁷⁷ Marx K. *On the Jewish Question* Trans. McLellan E. (ed.) *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1971) 69.

³⁷⁸ For a comment on Marx’s critique of bourgeois ‘double life’, see Charvet J. ‘A Critique of Human Rights’ in Pennock J.R. and Chapman J.W. (eds.) *Human Rights: Nomos XXIII* (New York: New York University Press, 1981) 124.

‘The recognition of the rights of man by the modern State’, asserted Marx, ‘has only the same significance as the recognition of slavery in antiquity’.³⁷⁹ True emancipation, Marx argued, could be achieved only by people taking control of the material conditions of their lives.³⁸⁰ This proposal involves the unity of individual and society. In the words of Marx, ‘man must recognise his own forces as social forces from himself in the form of political forces’.³⁸¹ To sum up, Marx attacked human rights because he believed they represented a false view of human nature as selfish and egoistical, and of the social structure as consisting of isolated monads separable from the atomically constitutive of the community.³⁸²

According to Waldron, Marx was unclear as to whether the communist society would not need a concept of rights or would eliminate the bourgeois concept of rights. This was to prove to be a serious defect in Marx’s theory when the twentieth century witnessed the development of strong communist states with official Marxist ideologies and no commitment to individual rights.³⁸³

Mill presented a more egalitarian theory of natural rights, but his inclusive approach fallen short of universalism and took some extent that could be characterised as nothing but racist.³⁸⁴ Rawls reclaimed Locke, Rousseau and Kant’s theories on natural law, and introduces his theory of justice as fairness.³⁸⁵ He rejected the utilitarian viewpoint because it does not allow for rational choice.³⁸⁶ According to Rawls, treating the good as the attainment of the greatest measure of satisfaction, expressed in the form of pleasure and happiness, is unsatisfactory. In contrast, justice as fairness gives priority to inviolable rights or freedoms which could be overborne by a principle of ‘greater good shared by others’.³⁸⁷

³⁷⁹ Mark K. *The Holy Family* Trans. Bottomore T.B. and Rubel M. (eds.) *Karl Marx: Selected Writings in Sociology and Social Philosophy* (Harmondsworth: Penguin, 1963) 224.

³⁸⁰ For Wood, ‘It appears that, one point Marx turned Hegelian philosophy upside-down. Hegel himself was sceptical about human rights, regarding them as an ‘empty abstraction’. He argued that a social order founded on such abstractions will be unable to secure human freedom. There must be ‘a well-constituted ethical life’, which will remedy the principle of atomicity’. Though Marx concurred with Hegel on the question of atomicity, he nevertheless rejected Hegel’s solution to the problem. Marx believed that the real obstacle to human emancipation was poverty and exploitation rather than the lack of ethics.’ Wood A. *Introduction to Hegel’s Elements of Philosophy of Right* Trans. Nisbet H.B. (Cambridge: Cambridge University Press, 1991) xvi-xvi

³⁸¹ Marx in McLellan (ed.) (1971) 57.

³⁸² Marx K. *Critique of the Gotha Programme* in Lawrence N. and Wishart D. *Karl Marx and Frederic Engels* (eds.) *Selected Works in One Volume* (Cambridge: Cambridge University Press), 1968) 324.

³⁸³ Waldron (1987)132.

³⁸⁴ Mill J.S. *On Liberty* (London: Penguin Books, 1975) 69.

³⁸⁵ Rawls J. *Theory of Justice* (Oxford: Clarendon Press, 1972) 95.

³⁸⁶ Id., 96-97.

³⁸⁷ Ibid., 98.

Rawls' theory is deeply rooted in the libertarian attitudes of his time, but this emphasis on individual liberty and freedom has been a distinctive feature of Western political and legal philosophy since the seventeenth century, associated in particular with the doctrine of natural rights.³⁸⁸ His First Principle alone reflects one of the fundamental premises of existing human rights instruments: 'Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'.³⁸⁹ In any case, these various ways of opposing the idea of human rights in general make the renewal of justifications for human rights indispensable, insofar as human rights involve a reference to a pre-established and pre-determined human nature.³⁹⁰

2.2. The United Nations and universalism of human rights

The universalism of human rights has been clearly established and recognised in international law, mainly through the work of the UN. Cassese and Dugard, respectively maintained that the post-1945 era saw a dynamic promotion of human rights and, as a consequence of this, human rights instruments were codified on a scale never before encountered.³⁹¹ The newly established UN, which was still trying to cope with the horrors of two World Wars in particular, declared the promotion of human rights as one of its main objectives.³⁹²

³⁸⁸ Rawls (1972) 100.

³⁸⁹ *Id.*

³⁹⁰ *Ibid.*

³⁹¹ Cassese A. *International Law* (Oxford: Oxford University Press, 2004) 350; Dugard J. *International Law A South African Perspective* (Cape Town: Juta Co., 2005) 308-309.

³⁹² As reflected in the preamble, the UN was guided by, among other things, the objective: 'To reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small' (UN Charter, preamble, paragraph 2). Having proclaimed their lofty motives, the UN granted respect for human rights the status of one of the fundamental purposes of the organisation. The Charter states that the purposes of the UN are, *inter alia*, 'to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (Art 1(3)). More specifically, the accomplishment of this objective is contained in Arts 55 and 56 of the UN Charter.

The adoption, on 10 December 1948, of the Universal Declaration of Human Rights adopted by the UN General Assembly is a reflection of this determination to protect human rights, and it assumed the existence of a common moral standard for judging nations and governments.³⁹³

Building on the principles of the UN Charter, it firmly proclaims the universality of all human rights. Its fundamental message lies in the following statement: ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’.³⁹⁴

Eide and Gudmundur argued that the preamble refers to the inherent human dignity and inalienable nature of human rights as the philosophical sources of the Declaration and inspiration for further development.³⁹⁵ They also contended that such a formulation is often characterised as a reflection of Western liberalism, these concepts are nevertheless discernible in all human cultures.³⁹⁶ It is thus particularly significant that the preamble calls for intercultural consensus by indicating that ‘a common understanding of these rights and freedoms is of the greatest importance for the full realisation of the pledge of Members of the United Nations to achieve the promotion of universal respect for and observance of human rights and fundamental freedoms’.³⁹⁷

The preamble also reflects its pre-Second World War roots by pointing out that ‘Disregard and contempt for human rights have resulted in barbarous and acts which have outraged the conscience of mankind’.³⁹⁸ Against this background, the Universal Declaration announces that the advent of a world in which human beings shall enjoy freedom of speech and belief for fear and want had been proclaimed as the highest aspiration of the common people.³⁹⁹

³⁹³ Gewirth A. ‘Common Morality and Community Rights’ in Outka G. and Reeder J. P. Jr.(eds.) *Prospects for a Common Morality* (Princeton, New Jersey : Princeton University Press , 1993)1, 29.

³⁹⁴ Universal Declaration, preamble, paragraph 1.

³⁹⁵ Eide A. and Gudmundur A. ‘Introduction’ in Eide A. et al (eds.) *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992) 5.

³⁹⁶ Id.

³⁹⁷ Universal Declaration, preamble, paras 6 and 7.

³⁹⁸ Id., para 2.

³⁹⁹ Ibid.

Hence, ‘it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’.⁴⁰⁰ Another important element of the preamble is the recognition of the rights and freedoms contained in the declaration ‘as a common standard of achievement for all peoples and nations’.⁴⁰¹ This common standard seems to presuppose both a common ideal and a normative reference system for the new international order.

The operative part of the declaration can be divided into a number of provisions. The first provision contains an affirmation of the philosophical foundations of human rights, by stating that ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’.⁴⁰² The second provision proclaims a number of general principles. One is the principle of equality and non-discrimination,⁴⁰³ the principle that plays a fundamental role in the whole of human rights law. The second principle relates to the concept of duties of states in the form of the right of everyone to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised.⁴⁰⁴ The third principle spells out a concept of the duties of everyone to the community and permissible limitations in the exercise of human rights freedoms⁴⁰⁵. The fourth principle provides for the prohibition of activities by any State, group or person aimed at the destruction of the rights and freedoms set forth in the Declaration.⁴⁰⁶

On 16 December 1966, eighteen years after the Commission on Human Rights was first asked to prepare a Covenant on Human Rights, the General Assembly unanimously adopted the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Almost ten years later, on 3 January 1976, the two International Covenants came into force.⁴⁰⁷

⁴⁰⁰ Universal Declaration, para 3.

⁴⁰¹ *Id.*

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*, Art 2.

⁴⁰⁴ *Ibid.*, Art 28.

⁴⁰⁵ *Ibid.*, Arts 29 (1) and (2).

⁴⁰⁶ *Ibid.*, Art 30.

⁴⁰⁷ International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976) GA Res. 2200 (XXI), 21 UN GAOR Supp. (No. 16) 49, UN Doc. A/613 (1966); International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, 993 UNTS 3 (entered into force on 3 January 1976) GA Res. 2200 (XXI), 21 UN GAOR Supp. (No. 16) 49, UN Doc. A/6316 (1966).

Taken together, the two Covenants constitute a comprehensive codification of human rights and fundamental freedoms. It is therefore no exaggeration to consider, with Nowak, that they represent the most authoritative universal minimum standard of present international human rights law.⁴⁰⁸ The two international covenants were indeed the first UN human rights treaties of a general nature, although they were not the first human rights' treaties. At an earlier stage, on 9 December 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly. This instrument constituted the first attempt by member states of the UN to learn from history and to make punishable by law what is considered to be the gravest violation of human rights: the international crime of genocide. The importance of this treaty lies in it providing the basis for an effective international legal regime for the prevention and punishment of genocide.

Another important international human rights treaty pre-dating the two Covenants is the Convention on the Elimination of All Forms of Racial Discrimination (CERD) which was adopted on 21 December 1965. Contrary to the Convention on the Prevention and Punishment of the Crime of Genocide, which addresses only genocide in more detail, the Convention against Racial Discrimination deals with a particular form of discrimination in all its aspects: racial discrimination, for example, discrimination based on race, colour, descent and national or ethnic origin? The drafting of this Convention cannot be separated from two other events taking place at the time. These were the process of decolonisation set in motion following the famous General Assembly Resolution of 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁴⁰⁹ Later, the UN adopted the Convention on the Elimination of All Forms of Racial Discrimination.⁴¹⁰

Although the equal rights of men and women were proclaimed and laid down in various UN instruments such as the Charter of the UN, the Universal Declaration and the two covenants that form the International Bill of Rights, the need arose to take specific action to eliminate discrimination against women. Indeed, in 1967, after four years of debate, the General Assembly unanimously adopted the Declaration on the Elimination of Discrimination Against Women.

⁴⁰⁸ Nowak M. *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel, 1993) xviii.

⁴⁰⁹ GA Res. 1514 (XV) of 14 December 1960.

⁴¹⁰ CERD, adopted and opened for signature and ratification by the General Assembly, Res. 2106 (XXI) of 21 December 1965, which came into force on 4 January 1969.

The Declaration brought together a set of important principles and rights specifically relevant for women. Such principles and rights relate to such issues as participation in public life, education, labour and family rights. The adoption of the Declaration paved the way for the drafting and adoption of the Convention on the Elimination of All Forms of Discrimination Against Women in 1979 (CEDAW).⁴¹¹ During the 1980s, the family of the UN human rights treaties was enlarged by two other treaties: the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT),⁴¹² dealing in depth with a particular right, for example, the right not be subjected to torture, and the 1989 Convention on the Rights of the Child (CRC),⁴¹³ providing for special protection for a particularly vulnerable group. It is significant that so many states participated in the drafting of the Convention and that it was adopted without a vote by the General Assembly.

The First World Conference on Human Rights held in Teheran in 1968, reaffirmed the universality of human rights.⁴¹⁴ In 1993, the Second UN Conference on Human Rights took place in Vienna, Austria. The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights declared that:

The World Conference on Human Rights reaffirms the solemn commitment of all states to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the UN, other instruments relating to human rights, and international law.⁴¹⁵

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.⁴¹⁶

[T]he promotion and protection of human rights is a legitimate concern of the international community.⁴¹⁷ The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.⁴¹⁸

⁴¹¹ CEDAW was adopted and opened for signature and ratification by the GA Res. 34/180 (XXI) of 18 December 1979, and came into force on 3 September 1981.

⁴¹² CAT, was adopted and opened for signature and ratification by the GA Res. 39/46 of 10 December 1984, and came into force on 26 June 1987.

⁴¹³ CRC, adopted and opened for signature and ratification by the General Assembly Res. 44/25 of 20 November 1989, came into force on 2 September 1990.

⁴¹⁴ See Proclamation of Teheran, proclaimed by the International Community Conference on Human Rights held in Teheran from April 22 to 13 May 1968.

⁴¹⁵ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 24 June 1993, UN Doc. A/Conf. 157/24, para 1.

⁴¹⁶ Id., para. 5.

2.3. Theoretical content of the universalism of human rights

Universalism of human rights is indeed largely based on Western philosophy and the value it places on the individual. A product of Greek philosophy, Christianity and Enlightenment thinkers, and this approach contends that one can use nature, God or reason to identify basic rights inherent to every human being which pre-date society. Donnelly summarised the contemporary doctrine of universalism by putting forward the following conclusions: human beings have rights by virtue of their humanity; a person's rights cannot be conditioned by gender or national or ethnic origin; human rights exist universally as the highest moral rights, so no rights can be subordinated to another person (for example, a husband) or an institution (for example, the State).⁴¹⁹ He emphasised the universalistic validity of this theory by demonstrating that it is increasingly the practice of states to accept it through ratification of international instruments.⁴²⁰

Lindholt classified legal opinion into schools according to geographical and cultural boundaries.⁴²¹ For Lindholt, the tendency towards the more radical universalism can be found among the Americans (Rhoda, Howard, and Nickel).⁴²² Lindholt further noted that Scandinavian and other European scholars such as Tévoédjré, Rehof and Trier, Zahle, Eide and Alfredsson, Cassesse applied a slightly moderate approach to the ideological question of universalism. Lindholt further explained that these commentators tended to base their conclusions more on the degree to which the universalism is reflected empirically in various instruments.⁴²³

The basic assumption is that either human rights are universal or they are nothing; it makes no sense to speak of human rights if they do not pertain to all humans. The goal of international human rights norms is to establish a standard that disregards national sovereignty in order to protect individuals from abuse. To have human rights at all is to say that there are certain standards below which no State or society can go regardless of its own cultural values.

⁴¹⁷ Vienna Declaration and Programme of Action., para 4.

⁴¹⁸ Id., para. 32.

⁴¹⁹ Donnelly J. *Universal Human rights in Theory and Practice* (Ithaca, New York: Cornell University Press, 1989) 49ff.

⁴²⁰ Id.

⁴²¹ Lindholt L. *Questioning the Universality of Human Rights: The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique* (Aldershot: Dartmouth, 1997) 26.

⁴²² Id.

⁴²³ Ibid., 27.

It is this feeling that guides the proponents of this school. Proponents of this school mainly premise their arguments on the following two presuppositions: (i) The notion of culture as normative system supported by a set of values and beliefs commonly accepted by a group of people is irrelevant to the debate on the meaning and desirability of human rights, and (ii) that human rights are compatible with a set of moral values commonly shared by all cultures. In other words, this school denies the relationship between human rights and a cultural context, while affirming that human rights come exclusively from international legal instruments and can be preserved without cultural variation, according to existing international law. Gewirth is among the proponents of the school. He sought to underline the foundation of universal human rights through his analysis of the presuppositions of action of the instrumental type (rational action in finality).⁴²⁴

On the other side, moderate school claims that the universalism of human rights must be recognised in the context of the different cultures that actually exist. Human rights today are essentially universal, requiring only relatively modest adjustments. This universalism does not disregard the reality of different cultures in different societies. The concept of human rights is not static - it relates to all people and situations.⁴²⁵ Contemporary Western philosophers of the Aristotelian and Kantian tradition, such as Rawls and Nussbaum, have made cross-cultural arguments in favour of universalism. Rawls suggested that society can achieve an 'overlapping consensus' among the world's comprehensive moral doctrines, and that this overlapping consensus conforms to political liberalism.⁴²⁶ Nussbaum built on Rawls's theory by calling attention to human capabilities as a basis for consensus. Nussbaum used her 'capabilities approach' to champion universal human rights, particularly in the area of women's rights.⁴²⁷

A number of other scholars belong to the moderate universalism school. Donnelly recognised that the assumption that the claim of human rights' universality is not false.⁴²⁸ However, he explained that, the cultural variability of human nature not only permits but requires significant allowance for cross-cultural variations in human rights.⁴²⁹

⁴²⁴ Gewirth A. *Reason and Morality* (Chicago: University of Chicago Press, 1978) 10.

⁴²⁵ Dias C.J. 'The Universality of Human Rights: A Critique' (1993) 103 *Lokayan Bulletin* 44, 45.

⁴²⁶ Rawls J. *Political Liberalism* (Columbia: Columbia Press University, 1996) 133.

⁴²⁷ Nussbaum M.C. *Sex and Social Justice* (Oxford: Oxford Press University, 1999) 25.

⁴²⁸ Donnelly (1989) 110.

⁴²⁹ *Ibid.*, 122.

With specific reference to the African context, Howard contended that human rights ought to be universal, although she admits that, seen from an empirical perspective, cultural variations do indeed affect people's perception of human rights.⁴³⁰ Similarly, Nickel believed that claims of universalism and inalienability are plausible at least for some specific rights, if not for all of them.⁴³¹ Tévoédjré maintained that there exist certain universally accepted norms for the protection of a people's rights that form the fundamental core of human rights.⁴³² Rehof and Trier speak empirically about the definition of a core of universally applicable basic principles governing the relationship between the State and its citizens. At the same time, however, they recognise that different human rights are considered important and fundamental at different points in time and under different circumstances.⁴³³

From an empirical perspective, Zahle defined human rights as being neither 'eternal' nor 'self-evident', but debatable and affected by time as well as location.⁴³⁴ Analysing the Universal Declaration of Human Rights, Eide and Alfredson argued that the unanimous adherence to this instrument does not mean that there is universal consensus regarding human rights.⁴³⁵ Cassese argued that the Universal Declaration of Human Rights and the two International Covenants do establish human rights norms of a universal scope. However, he noted at the same time that, since human rights are both conceived of and observed in different ways, universality is, at least for the present, strong.⁴³⁶ Brownlie maintained that all States are willing to accept the universality of a certain core group of rights. These are the rights that are listed in human rights treaties as non-derogable rights or are considered to be *jus cogens*. For the non-derogable rights, cultural specificities should be taken into account.

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⁴³⁰ Howard R. *Human Rights in Commonwealth Africa* (Totowa, NJ: Rowman and Littlefield, 1990) 12.

⁴³¹ Nickel J. *Making Sense of Human Rights* (Berkeley: University of California Press, 1987) 44.

⁴³² Tévoédjré A. 'Human Rights and Democracy in Africa' (1986) 2 *Annual Lecture Series 2 The United Nations University*.

⁴³³ Rehof L. A. and Trier T. *Menneskeret. Jurist – OG Økonomforbundets* (Forlag, København, 1990) 57.

⁴³⁴ Zahle A. 'International Human Rights' in Nielsen N. et al (eds.) *Menneskeret Tigheder – Viden OG Handling* (G.E.C.Gad: København, 1987) 79.

⁴³⁵ Eide A. et al (eds.) *The Universal Declaration of Human Rights. A Commentary* (Norway: Scandinavian University Press, 1992) 214.

⁴³⁶ Cassese A. *Human Rights in a Changing World* (Philadelphia: Temple University Press, 1990) 108.

⁴³⁷ Brownlie I. *Principles of Public International Law* (Oxford: Oxford University Press, 1990) 513.

Koch suggested that it is possible to see the human rights system as a pluralistic system, since the sources of law applied by different bodies are not necessarily the same.⁴³⁸ Still from a moderate universalism perspective, Habermas attempted to distinguish justification (legitimation of abstract rights) from application (in different cultural contexts) as distinct orders of moral discourse.⁴³⁹

2.4. Assessment of the universalism of human rights

Farley maintained that radical universalism is ‘exclusive, oppressive, and repressive of women and of men who do not belong to a dominant group’.⁴⁴⁰ For her, whether consciously or unconsciously, the formulators of such theory have inaccurately universalised a particular perspective; as a result, the needs and moral claims of some groups and individuals have been left out, their roles and duties distorted, and the full voices silenced.⁴⁴¹ Bretzke argued that efforts toward the building a theory of radical universalism of human rights and the universalisation of moral discourse are in themselves fundamentally misguided efforts.⁴⁴²

The excessive concern with the universalism of human rights may presume and/or create a certain perspective, which in turn may blind us to seeing the richness of cultural diversity, and how this richness could be used to promote the understanding and realisation of the proposed ideals about human rights.⁴⁴³ According to Gustafson, while the strong universalism of human rights has certain advantages, the project may be ultimately unrealistic, as it rests too heavily on the congenial premise of an overly facile universalisation of moral discourse.⁴⁴⁴

⁴³⁸ Koch I.E. ‘Legal Pluralism in the Human Rights Universe’ in Hastrup K. (ed.) *Human Rights on Common Grounds The Quest for Universality* (The Hague: Kluwer Law International, 2001) 139.

⁴³⁹ Habermas J. *Moral Consciousness and Communicative Action*. Trans. by Lenhardt C. and Nicholsen S.W. (Cambridge, Massachusetts: The MIT Cambridge Press, 1991) 123. See also, from the same author, *Justification and Application: Remarks on Discourse Ethics*. Trans. by Cronin C.P. (Cambridge, Massachusetts: The MIT Cambridge Press, 1993) 234.

⁴⁴⁰ Id.

⁴⁴¹ Farley M. ‘Feminism and Universal Morality’ in Outka G. and Reeder J. P. Jr.(eds.) *Prospects for a Common Morality* (Princeton, New Jersey : Princeton University Press , 1993) 171.

⁴⁴² Bretzke J.T. ‘Cultural Particularity and the Globalization of Ethics in the Light of Inculturation’ (1996) 9 *Pacifica* 71,73.

⁴⁴³ Id., 73.

⁴⁴⁴ Gustafson J.M. *Theology and Ethics: Ethics from a Theocentric Perspective* Vol. 1(Chicago: University of Chicago Press, 1981) 126.

Safi argued that radical universalism usually favours a unilinear view of history that equates moral with technical superiority.⁴⁴⁵ In Safi's view, this school considers human cultures on a continuum in which primitive cultures represent one extreme, while modern culture represents the other. Primitive cultures are seen to be lacking not only in technology, but in morality as well.⁴⁴⁶ Primitive cultures are described as barbaric and savage, while modern culture is seen as refined and civilised.⁴⁴⁷

Referring to Kant, Safi contended that radical universalism invoke, more often than not, the subjective rather than the objective dimension of universalism.⁴⁴⁸ For Safi, subjectively speaking, radical universalism is monological because it takes the form of a hypothetical process of argumentation occurring in the individual mind' and it follows the pattern set by Kant in the form of a categorical imperative: 'Act only on the maxim through which you can at the same time will that it should become a universal law'.⁴⁴⁹ Safi argued that, the principle of universalism, as formulated by Kant, is a subjective principle that can have universal validity only in so far as others share the same moral subjectivity with the moral actor. In other words, the Kantian principle of universalism, which takes the form of a subjective process of generalisation, can only work in a homogenous culture in which people share common intersubjectivity.⁴⁵⁰ Safi's conclusion is that, as soon as one moves into a world characterised by cultural pluralism, for example a world which resembles international society, a different principle of universalism would be needed.⁴⁵¹

Radical universalism could be turned into an instrument in the hands of hegemonic cultures, and could be used for imposing one culture on another as Donnelly explained.⁴⁵² Radical universalism opens the door for leaders who seek to retain dominance over the world. Some Westerner leaders often confuse their interests with universal values.

⁴⁴⁵ Safi L.M. 'Human Rights and Cultural Reform in Contemporary Muslim Society: From Hegemonic Discourse to Cross-Cultural Dialogue' in Donohue J.J. and Esposito J.L. (eds.) *Islam in Transition* (New York: Oxford University Press, 2002) 24.

⁴⁴⁶ Id.

⁴⁴⁷ Ibid., 25.

⁴⁴⁸ Ibid., 27.

⁴⁴⁹ Ibid. as quoted from Kant I. *Groundwork of the Metaphysic of Morals* (London: Routledge, 1993) 84. From a Kantian point of view, a rule can be universal if it passes the test of the reciprocity principle, viz. if the person who adopts the rule as a maxim for his/her action is willing to be treated by others according to the same rule.

⁴⁵⁰ Id., 37.

⁴⁵¹ Ibid., 40. See also, McCarthy T. *The Critical Theory of Jürgen Habermas* (Cambridge: Cambridge University Press, 1998) 326.

⁴⁵² Donnelly (1989) 110.

They believed do seem to believe that what is good for them is good for the world, and if not, then that is their problem. The dangers of such arrogant and abusive ‘universalism’ are especially striking in international relations, where normative disputes that cannot be resolved by rational persuasion or appeal to agreed upon international norms tend to be settled by political, economic, and cultural power of which, the Western countries today have more than anyone else. For example Tony Blair, the former UK Prime Minister, captured the centrality of values in contemporary struggles, including even the ‘war against terrorism’ that developed in the immediate aftermath of the 9 September 2001 disaster.⁴⁵³ He defined this war on terror as a battle for values, and one that can only be won by the triumph of tolerance and liberty.⁴⁵⁴

Legesse criticised the radical universalism as it ignores the moral implications of human rights, which cannot be limited to universal principles.⁴⁵⁵ Keke’s analysis of the validity of ethical principles is useful in elaborating this point.⁴⁵⁶ Keke mentioned principles are derived from social conventions which in turn confirm that practice is primary and principles secondary.⁴⁵⁷ In this regard, Nussbaum noted that, principles are perspicuous, descriptive summaries of good judgments, valid only to the extent to which they correctly describe such judgements.⁴⁵⁸ Ellacuria made a similar observation when he pointed out that theories of human rights are historical products, and their realisation depends on practice.⁴⁵⁹ Ellacuria argued that without historicising the common good and human rights, it is impossible to either overcome their abstract, mystifying formality or to define their truth or falsity.⁴⁶⁰

⁴⁵³ Blair T. ‘A Battle for Global Values’ (January/February 2007) *Foreign Affairs [online]*. Available at: www.foreignaffairs.org/20070101fessay8606/tony-blair/a-battle-for-global-v (accessed on 15 November 2007).

⁴⁵⁴ Id.

⁴⁵⁵ Legesse A. ‘Human Rights in African Political Culture’ in Thompson K.W. (ed.) *The Moral Imperatives of Human Rights: A Moral Survey* (Washington, D.C.: University of America Press, 1980) 123.

⁴⁵⁶ Keke J. *The Examined Life* (Lewisburg: Buckwell University Press, 1988) 123.

⁴⁵⁷ Id.

⁴⁵⁸ Nussbaum M. *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (New York: Cambridge University Press, 1986) 299.

⁴⁵⁹ Ellacuria I. ‘Human Rights in a Divided Society’ in Hennelly A. and Langan J. (eds.) *Human Rights in the Americas : The Struggle for Consensus* (Washington, D.C.: Georgetown University, 1982) 52.

⁴⁶⁰ Id., 53.

Ellacuria observed that the presupposition that there is a common good for all people and epochs reduces its reality to a minimal content, and also ignores the conditions for its realisation.⁴⁶¹ Putnam argued that liberal approaches to justice tend to present themselves as being universal.⁴⁶² Putnam believed that unconsciously, in the pursuit of universality, they speak with a single voice which arises from the dominant groups.⁴⁶³

3. Cultural relativism of human rights

3.1. Development of the concept

The counter-school of relativism also existed as far back as 2,500 years ago. This school of thought countered existing social philosophy and the notion of universal values. Of particular interest to the subject at hand, early relativists, beginning with the Sophists and later the Skeptics, considered social customs to be a discriminating factor among individuals.⁴⁶⁴ Herodotus and others such as Pindar demonstrated that for every socially justifiable practice, there was an opposing one elsewhere. Herodotus went so far as to create a small catalogue of social customs that varied between different people.⁴⁶⁵

According to the Sophists and Skeptics, this would necessarily preclude any possibility of universality in values. In this manner, they proclaimed, no one man or race was or should be made competent to judge which custom was better than another.⁴⁶⁶ From the Skeptics point of view, Herodotus' claimed that social custom was 'king over all' rang true.⁴⁶⁷ Hume conveyed the relativist logic in simple words: 'In each city, the rites of that city'.⁴⁶⁸

⁴⁶¹ Ellacuria in Hennelly and Langan (eds.) (1982) 53.

⁴⁶² Putnam R.A. 'Why Not a Feminist Theory of Justice?' in Nussbaum M. and Glover J. (eds.) *Women, Culture, and Development* (New York: Oxford University Press, 1995) 300-302. See also the summary by Sandel M. and Walzer M. Critique of Rawlsian liberalism in Muhall S. and Swift A. *Liberals and Communitarians* (Cambridge, Massachusetts: Blackwell Publishers, 1996) 40-69, 127-156, 191-222.

⁴⁶³ Id., 222.

⁴⁶⁴ Book III, part 38 of Herodotus' *The Histories* (reproduced by Harmondsworth: Penguin Classics, 1954). Herkovits echoed this very same sentiment, stating that '...non relativists say that some moral judgements are valid for everyone, but when asked to state them they always list the rules of their culture. They label as 'right' the habits of their own people, and condemn as 'wrong' the habits of others'. See also, Herkovits M.J. *Cultural Relativism: Perspectives in Cultural Pluralism* (New York: Vintage Books, 1973) 50.

⁴⁶⁵ Id.

⁴⁶⁶ Sextus in *The Tenth Mode* as noted in Saunders J.L. (ed.) *Greek and Roman Philosophy after Aristotle* (New York: The Free Press, 1966) 177-181.

⁴⁶⁷ Herodotus by Harmondsworth (1954).

⁴⁶⁸ As cited in Gellner E. (ed.) *Legitimation of Belief* (Cambridge: Cambridge University Press, 1974) 47-48.

While the arguments may have become more refined and complex, cultural relativists today would still find much consolidation and reinforcement in the Sophist and Skeptic schools of thought, while universalists would find place in the philosophies of the Stoics, as mentioned above. In a submission to the Commission on Human Rights in 1947, during the drafting of the Universal Declaration, the American Anthropological Association (AAA)⁴⁶⁹ stated that:

... It will not be convincing to the Indonesian, the African, the Indian, the Chinese, if it lies on the same plane as like documents of an earlier period. The rights of Man in the twentieth century cannot be circumscribed by the standards of any single culture or be dictated by the aspirations of any single people. Such a document will lead to frustration, not realisation of the personalities of vast numbers of human beings...

Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of beliefs or moral conducts of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole....The individual differences entail a respect for cultural differences and respect for differences between cultures is validated by the scientific fact that on technique of qualitatively evaluating cultures has been discovered.⁴⁷⁰

During the Cold War, the main political controversy between East and West in human rights debates was about which, between economic and social rights or civil and political rights, are more important, and cultural rights were paid virtually no attention. The North/South tension in human rights since then has been mainly characterised by a debate around culture.⁴⁷¹This debate repeated itself in the years that followed, and as the UN was preparing for the World Conference on Human Rights in 1993.

⁴⁶⁹ American Anthropological Association 'Statement on Human Rights' (1947) 49 (4) *American Anthropologist* 539-543, reprinted in Winston M.E. *The Philosophy of Human Rights* (Belmont: Wadsworth, 1989) 116-120. The concern raised by this statement, and also expressed by other scholars, see An-Na'im A.A. 'Human Rights and the Challenge of Relevance: The Case of Collective Rights' in Holleman C. et al (eds.) *The Role of Nation-State in the 21st Century: Human Rights, International Organisations, and Foreign Policy* (The Hague: Kluwer Law International, 1998) 3.

⁴⁷⁰ Id.

⁴⁷¹ It was a memorable moment during the post Cold War era at the General Assembly session in the autumn of 1989 when China and Iraq, in well-crafted speeches, launched a major ideological offensive, in a sense introducing an era of North/South 'cultural wars' at the UN, during the human rights debate at the Third Committee of the General Assembly. These countries' main argument was that human rights were a Western concept imposed on developing countries, which had their own cultures and particularities, and that this imposition was unacceptable. See in particular A/C.3/44/SR/56, 4, 12-13, A/C.3/44/SR. 54, 7-8, A/C.3/44/SR. 56, 4.

Regional preparatory meetings had been held prior to the World Conference in Africa, in the Latin American and Caribbean region and in Asia. At the end of each of these meetings, a final declaration was adopted which referred to the particular concerns of each region. The Final Declaration of the Regional Meeting held in Bangkok for Asia (The Bangkok Declaration) stated that:

The Asian states recognise that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.⁴⁷²

The Tunis Declaration adopted in November 1992 by African countries stated that:

The universal nature of human rights is beyond question, however, no ready-made model can be presented at the universal level since the historical and cultural realities of each nation and the traditions, standards and values of each people cannot be disregarded.⁴⁷³

At the Humanity Round Table on Strengthening Commitment to the Universality of Human Rights, held in Amman in April 1993, participants recommended that the universality of human rights requires respect for the diversity of faiths and cultures.⁴⁷⁴

⁴⁷² Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, Report of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok, 29 March – 2 April, 1993), preamble. Similarly, in the San José Declaration, the Latin American states stated that: ‘Reaffirmed that our countries represent a broad grouping of nations sharing common roots within a rich cultural heritage based on a combination of various peoples, religious and races, and that our roots unite us in the search for collective solutions to present through friendly dialogue, peaceful co-existence and respect for pluralism and the principles of national sovereignty, non-interference in the internal affairs of States and self-determination of peoples’. See Final Declaration of the Regional Meeting for Latin America and the Caribbean States on the World Conference on Human Rights (San José, 18-22 January 1993) 3 A/Conf. 157/LACRM/15-A/Conf. 157/PC/58 (11 February 1993).

⁴⁷³ Doc A/CONF.157/AFRM/14.

⁴⁷⁴ *Rights and Humanity Round Table on Strengthening Commitment to the Universality of Human Rights*, Art 1(iv) World Conference on Human Rights Preparatory Committee: Report of the Secretary-General, UN GAOR, 4th Session, Agenda Item 6, 4, UN Doc. A/CONF. 157/PC/42/Add. 7 (28 April 1993).

The Vienna Declaration and Programme of Action, adopted by consensus, stated that:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁴⁷⁵ ... Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the UN human rights activities.⁴⁷⁶

In 1993, over 100 Asia-Pacific NGOs met to prepare the World Conference, and adopted the Asia-Pacific Declaration of Human Rights.⁴⁷⁷ The AAA's 1947 position is still feeding the arguments of cultural relativists, although it has since nuanced its position regarding human rights. In a 1999 declaration, the Association stated its ethical responsibility to protest and oppose the denial by any culture or society of the right of people everywhere to the full realisation of their humanity, which is to say their capacity for culture.⁴⁷⁸

In other words, cultural or other differences between human societies should not be used as a pretext for justifying human rights violations. However, the problem with this view is that it assumes or presupposes the existence of a clearly identified and accepted set of human rights in the first place. In an effort to anticipate objections to the circular logic of this view, the 1999 AAA Declaration also cautions against equating or limiting human rights to the abstract uniformity of Western traditions, and emphasises the need to keep the concept open to additional and new perspectives. This reflects a commitment to human rights consistent with international standards, but not limited by them.

⁴⁷⁵ The Vienna Declaration and Programme of Action, para. 5.

⁴⁷⁶ *Id.*, para. 37.

⁴⁷⁷ Asian Cultural Forum on Development, *Our Voice: Bangkok NGO Declaration on Human Rights* (1993) 198-199.

⁴⁷⁸ In June 1999, the American Anthropological Association adopted the Declaration on Anthropology and Human Rights (www.aaanet.org/stmts/humanrights.htm, visited on 23 December 2007). For comments on the declaration, see Engle K. 'From Skepticism to Embrace: Human Rights and the American Anthropological Association From 1947 to 1999' in Richard A. et al. (eds.) *Engaging Cultural Differences The Multicultural Challenge in Liberal Democracies* (New York: Russell Sage Foundation, 2002) 344.

Cultural relativism is not a term of art, nor even a legal term. It has been borrowed from anthropology and moral philosophy, a fact that has several consequences. In the context of the debate about the viability of international human rights, cultural relativism may be defined as the position according to which local cultural traditions (including religious, political and legal practices) properly determine the existence and scope of human rights enjoyed by individuals in a given society.⁴⁷⁹ As it will be discussed below, one of these situations is the practice of female circumcision, for example. This practice is seen as unlawful in terms of international human rights norms, while at the same time it is defended by some as being required by cultural traditions.

International law only begun to deal with the issue of cultural relativism, which first emerged in a 1971 book written by Bozeman.⁴⁸⁰ The central themes of this book are as follows: There exist profound differences between Western legal theories and cultures and those of Africa, Asia, India and Islam. In order to fully understand a culture, one must be a product of that culture. Even if a culture was to borrow a concept from another culture, that concept's meaning would be filtered through the first culture's unique linguistic-conceptual culture. There can be no universal meaning to a moral value. A universal text on values is a futile exercise.

According to Holeman, each culture has its own distinctive ways of viewing and doing things. Each culture is uniquely worthy of respect. The distinctiveness among cultures should not be blurred or mitigated. They should not be compared favourably with one another, and should be respected. To consider the Universal Declaration to be universal could imply that all contradictory concepts be eliminated, and that the culture which has given birth to the concept of human rights should also be called upon to become a universal culture.⁴⁸¹ Donnelly categorised cultural relativism into two schools namely strong cultural relativism and weak cultural relativism.⁴⁸²

⁴⁷⁹ Gutmann A. *Multiculturalism: Examining the Politics of Recognition* (Princeton NJ: Princeton University Press, 1994) 13.

⁴⁸⁰ Bozeman A. *The Future of Law in a Multicultural World* (Princeton: Princeton University Press, 1971) 12.

⁴⁸¹ Holeman W.L. *The Human Rights Movement Western Values and Theological Perspectives* (New York: Praeger, 1987) 209-211.

⁴⁸² Donnelly (1989) 49-57.

3.2. African approach on cultural relativism of human rights

To understand the African discourse on the cultural relativism of human rights, it is necessary to draw attention to the argument by some scholars that the contemporary concept of human rights is a modern development which has its roots in the Universal Declaration of human rights and was alien to traditional societies in Africa or elsewhere.⁴⁸³ Some of these scholars have suggested that the concept of human rights as legal entitlement, which individuals hold in relation to the State, simply did not exist in traditional African societies. They argued that what is usually put forward as human rights concepts in traditional Africa is nothing more than the notion of human dignity and worth which exist in all preindustrial societies.⁴⁸⁴

In contrast to these positions, several African and Third World scholars have contended that the philosophy and conceptions of human rights are neither exclusive to Western liberal traditions nor relevant only with reference to post-1948 developments. They rejected the notion that the concept of human rights, having been originated, developed and refined in the West was thereafter transplanted to Africa and the rest of the world. For instance, Asante rejected the notion that human rights concepts are peculiarly or even essentially bourgeois or Western, and without relevance to African and other non-Western traditions.⁴⁸⁵ According to Hannum, this philosophy is eternal and universal phenomenon that is applicable to Western traditions as it is to African and other non-Western traditions.⁴⁸⁶ Hountondji shared this view, and argued that:

Generally both the originality and coherence of Western civilisation is overestimated. Europe certainly did not invent human rights, any more than it invented the idea of human dignity. It was simply able to conduct on the theme – and this was its merit – systematic research with took the form of an open progressive discussion. It thus produced, not the thing, but discourse about the thing, not idea of natural law or of human dignity but the work of expression concerning this idea, the project of its formulation, explanation, analysis of its presuppositions and its consequences, in short, the draft of a philosophy of human rights.⁴⁸⁷

⁴⁸³ Donnelly (1989) 57.

⁴⁸⁴ Howard R.E. 'Is there an African Concept of Human Rights?' in Vincent R.J. (ed.) *Foreign Policy and Human Rights* (Cambridge: Cambridge University Press, 1986) 45.

⁴⁸⁵ Asante (1969) 74;

⁴⁸⁶ Hannum H. 'The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A summary and Analysis' (April-June 1979) 1 *Universal Human Rights* 63.

⁴⁸⁷ Hountondji P. 'The Master Voice – Remarks on the Problem of Human Rights in Africa' in UNESCO and International Institute of Philosophy (eds.) *Philosophical Foundations of Human Rights* (Paris: Unesco and Institute of Philosophy, 1986) 323.

In the same vein, Marashinge acknowledged that African traditional conceptions of human rights, unlike modern conceptions, were not universalist but depended on membership in a particular group.⁴⁸⁸ He also mentioned that ‘the right to membership, the freedom of thought, speech, belief, and association, and the right to enjoy property have all been recognised by most traditional societies as fundamental human rights’.⁴⁸⁹ Cobbah contended that human rights were present in the first phase of African traditional societies, although in a context quite unlike that of the West.⁴⁹⁰ He asserted, that African traditional societies do possess a coherent system of human rights, but the philosophy underlying that system differs that which inspired in France the Declaration of the Rights of Man and of the Citizen.⁴⁹¹

Welch agreed that the recognition as well as protection of human rights certainly existed in the traditional societies. He identified six major sets of rights in traditional society: the right to life, the right to education, the rights of freedom of movement, the right to receive justice, the rights to work, and the right to participate in the benefits and decision making of the community.⁴⁹² He noted that in contrast to European conceptions stressing individual protection, African conceptions have emphasised collective expression.⁴⁹³

Wai listed specifically the freedoms of expression and association in African traditional life.⁴⁹⁴ He argued that, concern for civil liberties and political rights was an integral part of this life.⁴⁹⁵ Wai’s real point about traditional African societies is that their government power was limited with check on abuses of power and institutionalised participation in decisions. As an example, he quoted the work of Ottobah Cugoano of Ajumaku (now Ghana) published two years before the French Revolution.⁴⁹⁶

⁴⁸⁸ Marashinge L. ‘Traditional Conceptions of Human Rights in Africa’ in Welch and Melzer, (eds.) *Human Rights and Development in Africa* (Albany : State University of New York Press, 1984) 33.

⁴⁸⁹ Id..

⁴⁹⁰ Cobbah J.A.M. ‘African Values and the Human Rights Debate: An African Perspective’ (1987) 9 *Human Rights Quarterly* 309.

⁴⁹¹ Id.

⁴⁹² Welch Jr. C.E. ‘Human Rights as a Problem in Contemporary Africa’ in Welch Jr. C.E. and Meltzer R. (eds.) *Human Rights and Development in Africa* (Albany: State University of New York Press, 1984) 11.

⁴⁹³ Id.

⁴⁹⁴ Wai D. ‘Human Rights in Sub-Saharan Africa’ in Pollis A. and Peter S. (eds.) *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger Publishers, 1979) 117.

⁴⁹⁵ Id.

⁴⁹⁶ Referring to the slaves taken from Africa, Ottobah said: ‘those people annually brought away from Guinea are born free, and are brought up with as great a predilection for their own country, freedom and liberty, as the sons and daughters of fair Britain. Their freedom and rights are as dear to them as those privileges are to other people. And it may be said that freedom, and the liberty of enjoying their own privileges, burns with as much as zeal and fervour in the breast of an Ethiopian, as in the breast of any inhabitant of the globe’. Ottobah C. *Thoughts and Sentiments on the Evils of Slavery* (1787). Quoted in Wai, id.

Legesse noted that the effort itself to impose universal human rights norms on Africa is a serious violation of human rights.⁴⁹⁷ For him ,

One critical difference between African and Western traditions concerns the importance of the human individual. In the liberal democracies of the Western world the ultimate repository of rights is the human person. The individual is held in a virtually sacralised position. There is a perpetual, in our view obsessive concern with the dignity of the individual, his worth, personal autonomy, and property.⁴⁹⁸

Similarly, Mojekwu argued that:

The concept of human rights in Africa was fundamentally based on ascribed status. It was a person's place of birth, his membership or belonging to a particular locality and within a particular social unit that gave content and meaning to his human rights – social, economic, and political. A person had to be born into a social unit or somehow belong to it in order to have any rights which the law of the land could protect. One who had lost his membership in a social unit or one who did not belong – an outcast or a stranger – lived outside the range of human rights protection by the social unit. Such strangers to the community had no rights except those which they could negotiate their hosts or protectors.⁴⁹⁹

Eze made an important contribution to the discussion by pointing out that the picture of human rights in traditional African societies is not bright as most of the accounts suggest.⁵⁰⁰ He started by criticizing as 'rather romantic' the usual communitarian emphasis on social harmony and redistributive justice.⁵⁰¹ Eze acknowledged the existence of individual-based human rights in Africa as the right to life and the right to freedom of expression but the extent of their protection depended on the concrete material living conditions of a given political, social and economic formation.⁵⁰² He pointed out that Africans knew and practiced institutional derogations from human rights that were more than occasional aberrations. These included slavery, a caste system, mutilations, human sacrifice, and killing of twins.⁵⁰³

⁴⁹⁷ Legesse A. 'Human Rights in African Political Culture' in Thompson K.W. (ed.) *The Moral Imperatives of Human Rights: A Moral Survey* (Washington, D.C.: University of America Press, 1980) 123,130.

⁴⁹⁸ Id.

⁴⁹⁹ Mojekwu C.C. 'International Human Rights: The African Perspective' in Nelson J.L. and Green M. (eds.) *International Human Rights: Contemporary Issues* (New York: Human Rights Publishing Group,1980) 85.

⁵⁰⁰ Eze (1984) 13.

⁵⁰¹ Id.

⁵⁰² Ibid.

⁵⁰³ Ibid.

Human rights are the heritage of all mankind and the concept of human rights has been developed, struggled for, and won by different people in different historical, political, social, and cultural contexts. These struggles and victories should combine to give our contemporary understanding of human rights its essence and universal validity. There is hardly any basis for the rather sweeping assertion that traditional Africa or indeed any pre-modern society for that matter has made no normative contribution to contemporary human rights corpus. Indeed, as Haile argued, the fact that human rights have been part of Western philosophic tradition from early times does not imply that non-Western societies have no equivalent conception of human rights. Written treatises on natural law or natural rights were no prerequisites to conception about or commitment to human rights elsewhere in the world.⁵⁰⁴

One found Pannikar's metaphor of the window particularly appropriate to illustrate the views expressed by African scholars mentioned above:

Human rights are one window through which one particular culture envisages a just human order for its individuals. But those who live in that culture do not see the window. For this, they need the help of another culture, which sees through another window. Now I assume that the landscape seen through the one window is both similar to and different from the vision of the other. If this is the case, should we smash the windows and make of the many portals a single gaping aperture – with the consequent danger of structural collapse – or should we enlarge the view points as much as possible and, most of all, make people aware that there are – and have to be a plurality of windows?⁵⁰⁵

Pityana identified many of variations within cultural relativism of human rights. Firstly, they argue that civilisations and cultures vary both in time and geographical location, and so too will their life worlds. As a result, international human rights norms are merely European or Western standards, imposed on non-Western cultures everywhere for all time.⁵⁰⁶ Secondly, even if it was to be agreed that there exist some human rights norms which have universal acceptance, it is impossible to attach similar value or weight to any of them, depending upon location and circumstance.⁵⁰⁷ Thirdly, some think that not all human rights norms have universal acceptance - others are negotiable according to culture, history or values applicable at any one time or place. Fourthly, in any case, the nature of society and the world is that there is a multiplicity of cultures and values.

⁵⁰⁴ Haile (1982) 575.

⁵⁰⁵ Panikkar R. 'Is the Notion of Human Rights a Western Concept?' (1982) *Diogenes* 78-79.

⁵⁰⁶ Pityana N.B. 'Toward a Theory of Applied Cultural Relativism' in Zeleza and McConnaughay (eds.) (2004) 40, 42.

⁵⁰⁷ Id., 42.

These have to be respected, and they provide a starting point for any understanding of societal norms.⁵⁰⁸ For Pityana, this last is a moderate version of cultural relativism, and it is predicated upon the notion that all human rights must be mediated through local understandings and interpretations.⁵⁰⁹

The African discourse on the cultural relativism of human rights can therefore be broadly divided in two schools. The first of these is the less radical school which is theoretically closer to the dominant universalism. While arguing the validity of a uniquely African concept of human rights proponents of this school, also recognised the universalism of a basic core of human rights.

Quashigah noted that human rights concepts, which are rooted in certain social facts that are peculiar to particular societies, cannot be expected to be universal.⁵¹⁰ He acknowledged that certain basic needs are indisputably universally ascribable to persons of every historical, geographical and cultural background.⁵¹¹ Berger distinguished between rights that emerge from an exclusively Western view and those that derive from a wider consensus.⁵¹² According to him, notions of respect for human rights are common to all these cultures and provide the basis for fundamental human rights.⁵¹³ Berger further argued that different cultures may choose to establish different, additional norms that reflect their particular values.⁵¹⁴

Gutto also supported the co-existence of universalism and relativism in human rights norms, principles, standards and implementation formulae.⁵¹⁵ In his view, the universalism of human rights means legitimacy in the eyes of various societies.⁵¹⁶ Gutto believed that African specificity can contribute to strengthening this universality, by increasing the contribution of the masses at grassroots level.⁵¹⁷

⁵⁰⁸ Pityana in Zeleza and McConnaughay (eds.) (2004) 40, 42.

⁵⁰⁹ Id., 42.

⁵¹⁰ Quashigah E.K. 'The Philosophical Basis of Human Rights and its Relation to Africa' (1992) 1(3) *Journal of Human Rights Law and Practice* 1, 1-3.

⁵¹¹ Id.

⁵¹² Berger P. L. 'Are Human Rights Universal?' (1977) 64 *Commentary* 60, 62.

⁵¹³ Id.

⁵¹⁴ Ibid.

⁵¹⁵ Gutto S. B.O. *Human and Peoples Rights for the Oppressed* (Lund: Lund University Press, 1993) 44.

⁵¹⁶ Id.

⁵¹⁷ Ibid., 45.

According to Schwartz, formal declarations, although important, will not suffice to establish universal human rights.⁵¹⁸ He believed that legal norms and constitutions cannot regulate societies unless they are supported by different spheres of social life such as culture, religion, associations and so forth.⁵¹⁹ Hendrickson believed that only conglomerations of views from different segments of humanity add inputs to a truly universal perspective on human rights.⁵²⁰ Mbaya suggested that a genuinely universal concept of human rights requires a multicultural perspective.⁵²¹ For Mbaya, this universalism should incorporate conceptions from different regions of the world.⁵²²

Nguema rejected a principle of universality that is reached by imposing one conception of human rights on all.⁵²³ He also refuted a universality that pretends to be a synthesis of all different human rights conceptions, as this can never be more than superficial.⁵²⁴ What he suggested is a reconsideration of all human rights conceptions in a spirit of humanity and fraternity, in order to learn from the experiences of others.⁵²⁵ In this sense, he kept in mind some African traditional values from which the world could benefit: respect for the elderly, solidarity with the poor and hospitality towards foreigners.⁵²⁶

The second school is in more radical opposition to the universalism of human rights. It seeks to fundamentally challenge the Western-oriented State-individual perspective that otherwise dominates human rights discourse. The main argument here is rooted in a belief that the philosophical basis and worldviews of Western and African societies are fundamentally different, that collectivist rather than individualistic conceptions of rights and duties predominate in Africa.⁵²⁷ Khushalani and Mutua are some of the scholars in this school.

⁵¹⁸ Schwartz R. D. 'Human Rights in an Evolving World Culture' in An-Na'im and Deng (eds.) (1990) 369.

⁵¹⁹ Id., 369.

⁵²⁰ Hendrickson J. M. 'The Human Rights of Africans' (1989) *Africa Development* 44.

⁵²¹ Mbaya E.-R. in Bernhardt and Springer (eds.) (1987) 77.

⁵²² Id.

⁵²³ Nguema I. 'Universalité et spécificité des droits de l'homme en Afrique' (1989) *Revue Juridique et Politique : Indépendance et Coopération en Afrique* 341, 343.

⁵²⁴ Id.

⁵²⁵ Ibid.

⁵²⁶ Ibid.

⁵²⁷ Ibhawoh B. 'Restraining Universalism: Africanist Perspective on Cultural Relativism on Cultural Relativism in the Human Rights Discourse' in Zeleza and McConaughay (eds.) (2004) 20, 31.

Khushalani wrote that the modern conception of human rights contains three elements that are Western-oriented and makes it inappropriate to the African and other non-Western contexts.⁵²⁸ One, the fundamental unity of the society is the individual, not the family or community. Two, the primary basis of securing human existence in society is through rights, not duties. Three, the primary method of securing these rights is through a process of legalism where rights are claimed as inalienable entitlements and adjudicated upon, not reconciliation, repentance and education.⁵²⁹

Mutua noted that much affirmation of African human rights is not at odds with the principle of universality.⁵³⁰ Rather, it came from a basket approach to universality as a dynamic process, in which the creation of a valid concept of human rights must be universal, that is, the cultures and traditions of the world must, in effect, compare notes, negotiate positions and come to an agreement over what constitutes the corpus of rights characterised as human rights.⁵³¹ Mutua⁵³² believed that, since human rights norms are based almost exclusively on Western conceptions of human dignity, the human rights corpus should be treated as an experimental paradigm, a work in progress, and not a final, inflexible truth.⁵³³

Mutua called for the re-negotiation of the discourse of human rights, with the participation of all societies and cultural environment, so that it can properly claim genuine universality.⁵³⁴ Finally he concluded that the professed universal aspirations of human rights since the adoption of the Universal Declaration hardly accommodate relativistic propositions not conforming to the mainstream movement.⁵³⁵

⁵²⁸ Khushalani Y. 'Human Rights in Asia and Africa' (1983) 14 (4) *Human Rights Law Journal* 403, 404 ; Mutua M.W. 'The Banjul Charter and the African Fingerprint: An Evaluation of the Language of Rights and Duties' (1995) 35(2) *Virginia Journal of International Law* 339, 340.

⁵²⁹ Id.

⁵³⁰ Mutua M.W. 'Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State' (1995) *American Society of International Law Proceedings* 940.

⁵³¹ Id.

⁵³² Mutua M.W. *Human Rights A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002) preface, xi.

⁵³³ Id.

⁵³⁴ Ibid..

⁵³⁵ Mutua M.W. 'The Ideology of Human Rights' (1995-1996) 36 *Virginia Journal of International Law* 589, 640-646.

Against this background, M'Baye pointed out that traditional or pre-colonial Africa knew of human rights adapted to the political and social situations existing in that epoch.⁵³⁶ For him, these rights as recognised and protected, must be looked at within the context of societies were atomised and hierarchical by a caste system and at the same time unified by mythological beliefs.⁵³⁷ M'Baye further argued that within these societies, the object of law was to maintain society in the State in which social context was thus necessarily communal and humanist, fostering mutual respect and a recognition of the rights and liberties of each individual within the wider context of the community.⁵³⁸

3.3. Assessment of cultural relativism of human rights

A number of strong cultural relativists human rights scholars assume that the common tendency among universalists is to see the Universal Declaration as a standard that is established independently from social conventions in which human rights are made concrete. For instance, Otto argued that very few of the States that make up the international community today were at the table when the Universal Declaration was debated.⁵³⁹ Furthermore, many of the promulgators of this instrument, including Britain and France, were colonial powers; this partly explains why the Declaration fails to guarantee the right to self-determination as a fundamental right of all people.⁵⁴⁰ The United States was yet to recognise the equality of people of colour, while the Soviet Union had violently suppressed the rights of numerous people forcibly incorporated within its ambit.⁵⁴¹ The same country housed several thousand people in virtual concentration camps.⁵⁴² Otto contended that it was quite ironic that these four countries were the most prominent in the promulgation of an instrument, the basic principles of which they domestically recognised much more through their breach of them.⁵⁴³ In Otto's view, current universalist rhetoric notwithstanding, it is quite evident that the Universal Declaration assumed the shape and character most familiar to Judeo-Christian conceptions of democratic governance and individual autonomy.⁵⁴⁴

⁵³⁶ M'Baye K. 'Human Rights in Africa' in Vasak K. and Alston P. (eds.) *The International Dimensions of Human Rights* (Westport, CT and Paris: Greenwood Press and UNESCO, 1982) 583.

⁵³⁷ *Id.*

⁵³⁸ *Ibid.*

⁵³⁹ Otto D. 'Rethinking the Universality of Human Rights Law' (1997) 29 *Columbia Human Rights Law Review* 18, 30.

⁵⁴⁰ *Id.*, 30.

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*, 31.

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*, 33.

Pollis and Schwab also argued that the UN Charter and the Universal Declaration of Human Rights do not reflect the experiences of some parts of the world. As such, they hinder African people from enjoying their right of self-determination.⁵⁴⁵ According to them, the kind of ‘universality’ claimed by the Universal Declaration of Human Rights and the UN appears to be ‘ethnocentric’. The reason is that the whole process of their formulation was based on Western values and cultural understandings. In this formulation, Western civilisation is taken as a point of reference by other cultures.⁵⁴⁶

It is incorrect to assume that the Universal Declaration is neutral or universal.⁵⁴⁷ It should not be forgotten that the San Francisco Conference which established the UN in 1945 was dominated by the West, and that the Universal Declaration of Human Rights was adopted at a time when most Third World countries were still under colonial rule.⁵⁴⁸ Thus to argue that human rights have standing which is universal in character is to contradict historical reality.⁵⁴⁹ What ought to be admitted by those who argue universality is that human rights as Western concept based on natural rights should become the standard upon which all nations ought to agree, recognising however, that this is only one particular value system.⁵⁵⁰

Milne stressed that the ideals set forth in the Universal Declaration for all people reflect the values and institutions of liberal-democratic society.⁵⁵¹ Milne further explained the Western definition of human rights constitutes a cultural structure in which Western society finds itself easily at home.⁵⁵² Non-Western societies, however, find alternative conceptions of human rights and human dignity more relevant.⁵⁵³

⁵⁴⁵ Pollis A. and Schwab P. ‘Human Rights: A Western Construct with Limited Applicability’ in Pollis and Schwab (eds.) (1979)1, 8.

⁵⁴⁶ Id.

⁵⁴⁷ Pollis and Schwab in Pollis and Schwab (eds.) (1979) 8. See also arguments by Hountondji (1986) 333. It is not the intention of Pollis, Schwab and Hountondji completely rejected the importance of the Universal Declaration of Human Rights. The central thesis of their arguments is that through experience, we know that each culture is endowed with a unique history and identity. As such, African approaches to the issue of human rights must reject those ideas or approaches which give some cultures a kind of universal or supracultural value. This means that, although one should not underrate the historical value and importance of the Universal Declaration and other international legislation geared to protect and promote human rights, there is a need to promote contextualised approaches that are inspired by and based on local socio-cultural and historical backgrounds.

⁵⁴⁸ Pollis and Schwab in Pollis and Schwab (eds.) (1979) 8.

⁵⁴⁹ Id.

⁵⁵⁰ Ibid.

⁵⁵¹ Milne A.J. *Human Rights and Human Diversity* (London: Macmillan, 1986) 2-3.

⁵⁵² Id.

⁵⁵³ Id., 4.

Senger argued that the human rights of the first period (pre-1948 Universal Declaration), as they developed in Europe, were by no means designed to be universal, and there was to be no gradual expansion to include women and human beings of all races.⁵⁵⁴ According to him, it was only logical that the first initiative in international law towards international recognition of an equality of human beings that transcended the bounds of the white race did not come from the West.⁵⁵⁵ Senger's conclusion is that the universal human rights of the second period (after the Universal Declaration) are as new for the West as they are for non-Western countries. Since then, both cultural spheres have been confronted with such a universal conception for the first time.⁵⁵⁶

Flinterman noted that even if it were to be acknowledged that not many African states were represented at the drafting of the Declaration, they have all subsequently shown allegiance to it and its principles through their participation in the standard-setting which has characterised the period since the adoption of the international covenants on Civil and Political Rights and Economic, Social and Cultural Rights of 1966.⁵⁵⁷ Koroma maintained that regardless of who actually drafted the Universal Declaration of Human Rights and by whom it was adopted, it cannot be denied that the Declaration reflects human values which are universal to humankind.⁵⁵⁸ He further acknowledged the charge that it does not reflect African values and culture, and that it propounds an individualistic view of rights.⁵⁵⁹ However, he believed that human rights have always been part of the African value system. In his view 'the values and ethos which were proclaimed by the Declaration have neither proved adverse nor injurious to the interests of the African people as a whole.'⁵⁶⁰ Accordingly, the significance and the impact of the Declaration should not be underestimated, because it was inspired and defined by a certain political philosophy, elements of which are universally shared.⁵⁶¹

⁵⁵⁴ Senger H.V. 'Chinese Culture and Human Rights' in Schmale W. (ed.) *Human Rights and Cultural Diversity – Europe, Arabic – Islamic World, Africa and China* (London: Keip Publishing, 1993)277-290, 286.

⁵⁵⁵ Id., 287.

⁵⁵⁶ Ibid., 290.

⁵⁵⁷ Flinterman C. 'The Universal Declaration of Human Rights and the Protection of Human Rights in Africa' (September-December 1998) *Africa Legal Aid Quarterly* 19. See also, Waltz S. 'Universalising Human Rights: The Role of Small States in the Construction of Universal Declaration of Human Rights (2001) 23 *Human Rights Quarterly* 44; Arat Z.F.K. 'Forging A Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights' (2006) 28 (2) *Human Rights Quarterly* 416, 422; and Bobbio N. *The Age of Rights*. Trans. Cameron A. (Oxford: Clarendon Press, 1996) xi.

⁵⁵⁸ Koroma A. 'The Influence of the Universal Declaration of Human Rights in Africa – Fifty Years After Its Adoption' (September-December 1998) *Africa Legal Aid Quarterly* 6.

⁵⁵⁹ Id.,6.

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid.

Similarly, Ajibola argued that most of the freedoms guaranteed in the Universal Declaration reflect values which in traditional African society were well respected and cherished.⁵⁶² Traditional African society particularly cherished human values such as equality and liberty. Respect and privilege stemmed not from the individual's power and wealth, but from his or her humanity.⁵⁶³

Even though this seems a fairly limited representation of what is today considered the world of developing countries, one has to keep in mind the fact that, particularly in Africa, almost none of today's independent States were at that time free from colonial rule. Now, the Universal Declaration must be evaluated in the light of the subsequent unanimous support and recognition accredited to it both at the time of its conception and in later years. An important point is that most of the UN Member States have also repeatedly endorsed the Universal Declaration.⁵⁶⁴

Taken to its extreme, strong cultural relativism would pose a dangerous threat to the effectiveness of international human rights law, which has been painstakingly constructed over the decades. If cultural tradition alone governs State compliance with international standards, then widespread disregard, abuse and violation of human rights would be given legitimacy. In this regard, the promotion and protection of human rights perceived as culturally relative would only be subject to state discretion, rather than international legal imperative. By rejecting or disregarding their legal obligation to promote and protect universal human rights, states advocating strong cultural relativism could raise their own cultural norms and particularities above international law and standards.

As for radical universalism, radical cultural relativism failed to capture the full scope of the intercourse between culture and universal values, and both have been used to advance self-interests. Strong cultural relativism cannot be theoretically maintained, given the fact that one can hardly find a society today which still maintains a homogenous culture. Besides considering the dynamic nature of culture, no community can claim that the cultural tradition it espouses is either externally static or is not involved in a process of cultural exchange with outside cultures.

⁵⁶² Ajibola B. 'Problems of Human Rights and the Rule of Law' (July-September 1997) *Africa Legal Aid Quarterly* 25.

⁵⁶³ Id.

⁵⁶⁴ Havel V. 'Voices' in Danieli Y. et al. (eds.) *The Universal Declaration of Human Rights: Fifty Years and Beyond* (New York: United Nations/Baywood Publishing Company, 1999) 319,331.

Donnelly also rejected strong relativism, because it would deny human rights, and because of the *de facto* existence of a cross-cultural consensus on at least some of the values that human rights seek to protect, as well as the near-universal proclamation of a formal adherence to human rights.⁵⁶⁵ Donnelly's conclusion is that, rather than a wholly universal approach, human rights discourse should apply what he terms moderate universalism, in which culture is an important consideration, without completely leaving out the aspect of universality.⁵⁶⁶ According to Bin Tabal, strong cultural relativism can be rather seen as an attempt to create or invent a new arch-enemy, after the Cold War, which could justify huge defence budgets.⁵⁶⁷

Strong cultural relativism gives room for political manipulation. Indeed, some African political leaders pick and choose those cultural elements that are most useful to their political needs. They use culture to justify their lack of respect for human rights and to advance their own political interests. South Africa is an example of a country where culture has been used by the government to achieve its own ends. Because culture presupposes differences, it opened the way for segregation, which in turn may led to discrimination. In the case of South Africa, cultural differences served as the justification for apartheid. The experience of apartheid should make any radical cultural relativist think again.

It has been suggested that in asserting the African cultural values, rulers from Africa find that they have a convenient tool to silence internal criticism and to fan anti-Western nationalist sentiments.⁵⁶⁸ Howard suggested that the picture of an idyllic traditional communitarian society that has been presented by African rulers and elite from Kaunda to Nyerere only to hide and rationalise their own unbridled violations of human rights.⁵⁶⁹

⁵⁶⁵ Donnelly (1989) 112-113.

⁵⁶⁶ Id., 114.

⁵⁶⁷ Bin Talal Al-H. 'The Universality of Ethical Standards and the Governance of Civil Society' (1997) 4 (17) *Arab Thought Forum* 1, 5.

⁵⁶⁸ This point has also been made repeatedly with reference to the argument for 'Asian values' in the discourse on the cultural relativism of human rights. See Xiaorong L. 'Asian Values and the Universality of Human Rights', available at: www.puaf.umd.edu/ipp/ll.htm (accessed on 27 March 2008).

⁵⁶⁹ Howard R. 'Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons' (1984) 6 *Human Rights Quarterly* 160, 170.

Ibhawoh contended that, there is a misappropriation of tradition by some of Africa's political leaders to justify coercive measures against individuals under the guise of culture.⁵⁷⁰ He further argues that modernised elites often invent traditional customs to defend their repressive and corrupt regime from criticism.⁵⁷¹ Mutua feared about some States and governments will hide behind the veil of culture in order to perpetuate practices that are harmful to their populations.⁵⁷²

Donnelly also expressed and gave two examples cases to support his arguments.⁵⁷³ In Malawi, Hastings Kamuzu Banda, the former president, utilised 'traditional courts' to silence his opponents; Mobutu Sese Seko, the then long-term Zaïrian president, at one point instituted *salongo*, a form of communal labour with a supposedly traditional basis. It had little or nothing in common with indigenous traditional practices – rather, it was more or less a revival of the colonial practice of forced labour. Both practices, which had nothing to do with pre-colonial values, were cynically designed to increase the state's power over the people.⁵⁷⁴

One refers to a similar practice called *Harambee* which has been used in contemporary Kenya as a philosophy to drive domestic development groups. Gillies and Mutua observed that *Harambee* self-help projects in rural communities accounted for the construction of 70 per cent of Kenya's secondary schools.⁵⁷⁵ *Harambee* projects have been undertaken with little or no State assistance. Originally conceived of as the social glue binding the State to society, it forced the State to be accountable in the realm of social services under Kenyatta, and it worked as an extra-parliamentary bargaining system for elected politicians to negotiate alliances and attract additional private resources for their constituencies. It acted, in effect, as a redistributive mechanism, whereby the influential politician would assemble prosperous friends to make personal monetary contributions or materials for self-help projects.

⁵⁷⁰ Ibhawoh in Zeleza and McConnaughay (eds.) (2004) 33.

⁵⁷¹ Id.

⁵⁷² Mutua in Sajó (ed.) (2004) 62.

⁵⁷³ Donnelly (1989) 136-137.

⁵⁷⁴ Id., 140.

⁵⁷⁵ Gillies D. and Mutua M.W. 'A Long Road to *Uhuru*: Human Rights and Political Participation in Kenya' in the International Centre for Human Rights and Democratic Development. *Report of the International Centre for Human Rights and Democratic Development* (Montreal, Canada: the International Centre for Human Rights and Democratic Development, 1993) 2-3.

Widner mentioned that as the State became more repressive and the political elites more cynical, *harambee* was turned into a forced tax and an instrument of patronage, whereby senior politicians would extort funds from businesses or frighten away contributions to particular causes or institutions.⁵⁷⁶ Chanock acknowledged the manipulative use of culture made by African elites acting on behalf of States, noting that they resisted moves towards the adoption and enforcement of human rights within their States by appealing to notions of culture and cultural identity.⁵⁷⁷ Specifically, Chanock demonstrated how the leaders of some States have tried to push human rights issues out of the realm of both State and society and into that of culture.⁵⁷⁸

Another case of the misuse of culture to deny human rights, specifically the rights of women is female genital mutilation (FGM).⁵⁷⁹ Kenyatta described and explained this practice in his anthropological study of Kikuyu. He pointed out that a strong community of educated Kikuyu defended the custom because they regarded it as the very essence of initiation rites, which in turn were regarded as the condition *sine qua non* of the whole teaching of tribal law, religion and morality.⁵⁸⁰ He fulminated against Christian missionaries who denounced the practice without thorough knowledge of it, and who, in the eyes of the overwhelming majority of Kikuyu, only attacked this custom in order to disintegrate the Kikuyu social order and thereby hasten their Europeanisation.⁵⁸¹ Kenyatta defended the practice, called *irua* among the Kikuyu, as one of the pillars of their culture.⁵⁸² According to him, the abolition of *irua* could destroy the tribal symbol which identified the age-groups, and prevent the Kikuyu from perpetuating the spirit of collectivism and national solidarity which they had been able to maintain from time immemorial.⁵⁸³

⁵⁷⁶ Widner J.A. *The Rise of a Party State in Kenya: From Harambee to Nyayo!* (Berkeley, CA: University of California Press, 1992) 45.

⁵⁷⁷ Chanock M. 'Human Rights and Cultural Branding: Who Speaks and How' in An-Naim A.A. (ed.) *Cultural Transformation and Human Rights in Africa* (London: Zed Press, 2002) 38, 63. Higgins also expressed the same view. See Higgins R. *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 96-97.

⁵⁷⁸ Chanock in An-Na'im (ed.) (2002) 38. See also Favali L. and Pateman R. (eds.) *Blood, Land and Sex: Legal and Political Pluralism in Eritrea* (Indianapolis: Indiana University Press, 2003) 224.

⁵⁷⁹ Kenyatta J. *Facing Mount Kenya The Traditional Life of the Kikuyu* (London: Heinemann, 1979) first published by Secker M. and Warburg 1938) 133.

⁵⁸⁰ Id.

⁵⁸¹ Ibid., 134.

⁵⁸² Kenyatta (1979)135-140.

⁵⁸³ Id.,133.

When assessing the whole debate on universalism and cultural relativism of human rights, it must be put in mind that the achievements in human rights standard-setting span nearly six decades of work by the United Nations General Assembly and other parts of the United Nations system. As an assembly of nearly every State in the international community, the General Assembly serves as an excellent indicator of international consensus on human rights. This consensus is embodied in the language of the Universal Declaration itself. Its preamble proclaims the Declaration as a ‘common standard of achievement for all peoples and all nations’. This statement is echoed in the Vienna Declaration and Programme of Action, which repeats the same language in order to reaffirm the status of the Universal Declaration as a ‘common standard’ for everyone. As if to settle the matter once and for all, the Vienna Declaration states in its first paragraph that ‘the universal nature of all human rights and fundamental freedoms is beyond question’.⁵⁸⁴ The indisputable universalism of human rights is presented in the context of the reaffirmation of the obligation of States to promote and protect all human rights.

Not selective, not relative, but universal respect, observance and protection. Moreover, the obligation is established for all states, in accordance with the UN Charter and other international human rights instruments. No State is exempt from this obligation. All UN Member States have a legal obligation to promote and protect human rights, regardless of particular cultural perspectives. Universal human rights protection and promotion are asserted in the Vienna Declaration to be the ‘first responsibility’ of all governments.⁵⁸⁵ The non-discrimination principle protects individuals and groups against the denial and violation of their human rights. To deny human rights on the grounds of cultural distinction is discriminatory.

⁵⁸⁴ Vienna Declaration, para 1.

⁵⁸⁵ *Id.*, Part I, Art 1. It provides that ‘The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question. In this framework, enhancement of international cooperation in the field of human rights is essential for the full achievement of the purpose of the United Nations. Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of governments.’

Universal human rights do not impose one cultural standard, but rather one legal standard of minimum protection necessary for human dignity. In this regard, Henkin noted that the concept of human rights is not based on imperialism, as it does not demand total uniformity and conformity, but rather is considered to be the mere ‘minimum’ which is required to maintain human dignity.⁵⁸⁶ Bielefeld wrote that universalism of human rights does not mean the global imposition of a particular set of Western values, but instead aims at the universal recognition of pluralism and difference, difference religions, cultures, political convictions, ways of life, insofar as such difference expresses unfathomable potential of human existence and the dignity of the persons.⁵⁸⁷

To be sure, pluralism and difference apply also to the concept of human rights which itself remains open, and must be open to different and conflicting interpretations in our pluralistic and multicultural political world.⁵⁸⁸ Without the recognition of such difference within the human rights debate, the discourse would amount to cultural imperialism. Nevertheless, it seems clear that the very idea of human rights precludes some political practices, such as oppression of dissidents, discrimination against minorities, slavery and apartheid.⁵⁸⁹

As a legal standard adopted through the United Nations, universal human rights represent the hard-won consensus of the international community, not the cultural imperialism of any particular country, region or set of traditions. Like most areas of international human rights in particular, and international law in general, the universalism of human rights is a modern achievement, new to all cultures. Human rights are neither representative of, nor oriented towards, one culture to the exclusion of others. The universalism of human rights reflects the dynamic, coordinated efforts of the international community to achieve and advance a common standard and international system of law to protect human dignity.

⁵⁸⁶ Henkin L. ‘Confucianism, Human Rights, and Cultural Relativism’ in De Bary T. and Tu W. (eds.) *Confucianism and Human Rights* (New York: Columbia University Press, 1997) 308, 314.

⁵⁸⁷ Bielefeldt H. ‘Muslim Voices in the Human Rights Debate’ (1995) 12 *Human Rights Quarterly* 587,594.

⁵⁸⁸ Id.

⁵⁸⁹ Ibid.

In this regard, Annan⁵⁹⁰ explained that:

All people share a desire to live free from the horrors of violence, famine, disease, torture, and discrimination. Human rights are foreign to no culture and intrinsic to all nations. They belong not to a chosen few, but to all people. It is this universality that endows human rights with the power to cross any border and defy any force. Human rights are also indivisible; one cannot pick and choose among them, ignoring some, while insisting on others. Only as rights equally applied can they be rights universally accepted.

Similarly, Hastrup contended that, the acknowledgment of the equal desire to live free from horrors is an acknowledgment of a shared humanity that is both the foundation and the aspiration of human rights.⁵⁹¹ While no legal language can make a claim to representing the world, it can still suggest a particular way of imagining it, and thereby gradually make it real.⁵⁹² Hastrup further argued that, if human rights law reduces or condenses global complexity to a particular and rather narrow genre of statements, it also, and by the same stroke, becomes part of that complexity, and a significant actor in its transformation.⁵⁹³

It should be kept in mind that universal human rights emerge with sufficient flexibility to respect and protect cultural relativism. The flexibility of human rights to be significant to diverse cultures is facilitated by the establishment of minimum standards and the incorporation of cultural rights in a number of international and regional instruments. These instruments establish minimum standards for civil and political rights, economic, social and cultural rights. Within this framework, States have lots of room for cultural variation, without diluting or compromising the minimum standards of human rights established under international human rights law. These minimum standards require from states a high level of performance in the field of human rights. As previously indicated, the Vienna Declaration provides a clear consideration of culture in human rights promotion and protection. It expressly acknowledges, in the context of the duty of States, the need to promote and protect human rights, regardless of their cultural systems. While its importance is recognised, cultural consideration in no way diminishes States' obligations under human rights treaties.

⁵⁹⁰ Annan K. 'Forward' in Danieli Y. et al. (eds.) *The Universal Declaration of Human Rights: Fifty Years and Beyond* (New York: United Nations/Baywood Publishing Company, 1999) i.

⁵⁹¹ Hastrup K. 'The Quest for Universality: An Introduction' in Hastrup K. (ed.) (2001) 1, 21.

⁵⁹² Id.

⁵⁹³ Ibid.

Universalism facilitates respect for and protection of cultural relativism by the fact that some international human rights instruments provide for cultural rights. These rights are provided into the major international human rights instruments adopted by the UN, UNESCO, the International Labour Organisation and regional instruments. These include the Universal Declaration of Human Rights;⁵⁹⁴ the ICESCR;⁵⁹⁵ the ICCPR;⁵⁹⁶; the CERD;⁵⁹⁷ the CEDAW;⁵⁹⁸ the CRC;⁵⁹⁹ the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;⁶⁰⁰ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁶⁰¹

In terms of UNESCO's rich standard-setting activity, various instruments have contributed to the understanding of the debate about the universalism versus cultural relativism of human rights. These include: the 1966 Declaration of the Principles of International Cultural Co-operation⁶⁰² and the Universal Declaration on Cultural Diversity adopted in 2001. Convention No. 169 of the ILO Concerning Indigenous and Tribal Peoples in Independent Countries was adopted in 1989, and contains various provisions on cultural rights.⁶⁰³

Regional human rights instruments also provide for cultural rights. The African Charter is perhaps one of the best examples of an attempt to grapple with the tensions and dilemmas introduced by the debate on the universalism and cultural relativism of human rights.⁶⁰⁴ Under the auspices of the OAU, the Cultural Charter for Africa was adopted in Port Louis, Mauritius, on 5 July 1976, and came into force on 19 September 1990. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988 Protocol of San Juan) recognises cultural rights in similar terms to the Universal Declaration and the ICESCR.

⁵⁹⁴ Universal Declaration, Art 27.

⁵⁹⁵ ICESCR, Art 15.

⁵⁹⁶ ICCPR, Art 27.

⁵⁹⁷ CERD, Arts 1, 5 and 7.

⁵⁹⁸ CEDAW, Arts 5 and 13.

⁵⁹⁹ CRC, Arts 8, 17, 20, 24, 29, 30 and 31.

⁶⁰⁰ UN, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Arts 1 and 4.

⁶⁰¹ UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Arts 31 and 43.

⁶⁰² UNESCO 1966 Declaration of the Principles of International Cultural Co-operation, Art II.

⁶⁰³ Convention No. 169 of the ILO Concerning Indigenous and Tribal Peoples in Independent Countries was adopted in 1989, Arts 2, 4, 5, 7, 8, and 23.

⁶⁰⁴ African Charter Art 17(2): the right of every individual to take part in the cultural life of the community in which they live. Art 17(3): The duty of all states to promote and protect traditional cultural values recognised by the community. Art 22 (1): the right to cultural development. For details, see Chapter Two.

To sum up, international and regional human rights which relate to cultural diversity encompass a wide range of protections, including: the right to cultural participation; the right to enjoy the arts; conservation, development and diffusion of culture; protection of cultural heritage; freedom for creative activity; protection of persons belonging to ethnic, religious or linguistic minorities; freedom of assembly and association; the right to education; freedom of thought, conscience or religion; freedom of opinion and expression; and the principle of non-discrimination. Everyone has the right to culture, including the right to enjoy and develop a cultural life and identity. Cultural rights, however, are not unlimited. The right is limited at the point at which it infringes on other rights. No right can be used at the expense or destruction of another, in accordance with international law. This means that cultural rights cannot be invoked or interpreted in such a way as to justify any act leading to the denial or violation of other human rights and fundamental freedoms. As such, claiming cultural relativism as an excuse to violate or deny human rights is an abuse of the right to culture.

There are legitimate, substantive limitations on cultural practices, even in well-entrenched traditions. For example, no culture today can legitimately claim a right to practise slavery. Despite its practice in many cultures throughout history, slavery today cannot be considered legitimate, legal or part of a cultural legacy entitled to any kind of protection. To the contrary, all forms of slavery, including contemporary slavery-like practices, are a gross violation of human rights under international law. Similarly, cultural rights do not justify torture, murder, genocide, discrimination on grounds of sex, race, language or religion, or a violation of any of the other universal human rights and fundamental freedoms established in international law. Any attempts to justify such violations on the basis of culture have no validity under international law.

3.3. Advocating the need for a moderate universalism of human rights

From the above discussion, this study concurs with scholars who rejected strong universalism and strong cultural relativism. It adheres on the moderate universalism, especially in its moderate school. It did not completely reject the weak cultural relativism. One does not adhere to this school because the starting point for all culturalists is culture but not human rights. Culture is not a substitute of human rights.

In case such as female genital mutilation, which many communities in Africa practice, culture does not offer protection, however, human rights do offer. While adhering on the moderate universalism, the difference lies on the proposed way for achieving this universalism. There are various arguments for the universalism, there seems to be a number of routes towards the shared goal, reflecting not only diverse academic disciplines but also distinct personal visions. Consequently, one suggests a moderate universalism⁶⁰⁵ which derives from diversities, and which aims at developing moral attitudes and encouraging social transformations that can yield a point of view acceptable to all. This demand involves a concrete process of moral struggle in order to achieve an inclusive sphere of universalism. In other words, if one seeks to construct this moderate universalism of human rights, which relies on the processes of the historicisation of moral norms.⁶⁰⁶

How one can construct a concept of universalism which is historical and inclusive? In other words, can one think of a concrete universalism based on a historicised justification that truly serves an overlapping consensus of comprehensive and divergent conceptions of human rights? Particular conditions of life and cultural identities, as related to the process of historicisation, stand as necessary factors that justify the validity of the rhetoric of human rights and the concept of universalism. Such a claim clearly shows that the processes of historical consciousness in every group of people count as factors that guarantee concretisation of the ideals of human rights. If this is the case, when dealing with the issue of common morality and human rights, the study then maintains the balance between universalism and cultural relativism. The proposed approach is located in the historical experiences of each culture.

⁶⁰⁵ An-Na'im described the commitment to the universalism of human rights as being premised on a 'shared consciousness of vulnerability'. According to him, 'All human beings should endeavour to achieve the universal acceptance and practical implementation of international standards of human rights simply because we all need their protection as potential, if not actual, victims of the violation of our rights. In my view (An-Na'im), this understanding of universalism of human rights affirms the belief that they are matters of immediate relevance to our own personal situations, wherever we happen to live, instead of assuming that human rights are secure in our societies and threatened in other places'. An-Na'im A.A. 'The Position of Islamic States Regarding the Universal Declaration of Human Rights' in Baerh P. et al. (eds.) *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 1999) 177.

⁶⁰⁶ This expression is borrowed from Ellacuria. See, Ellacuria I. 'The Historicisation of the Concept of Property' in Hasset J. and Hugh L. (eds.) *Towards a Society that Serves Its People: The Intellectual Contribution of El Salvador's Murdered Jesuits* (Washington D.C.: Georgetown University Press, 1991) 106.

Moderate universalism of human rights refers to cultural values, customs or practices created in or by a specific culture and which, by reason of historical significance, mutual interaction and cooperation, are embraced by other peoples and cultures, and finally attain a status of universalism which is inclusive and acceptable. This universalism is thus to be attained as a combination of diversities. In fact, human communication and interaction between cultures reveal the existence of this concrete universalism.

The moderate universalism of human rights is closely related to the process of the historicisation of moral norms. According to Ellacuria, the discourse about the historicisation of human rights attempts to contextualise the understanding and realisation of human rights by considering different historical contexts.⁶⁰⁷ Ellacuria believed that this approach becomes even more illuminating as that concept is historical and dynamic.⁶⁰⁸ Ellacuria started his argument by considering human knowledge and held that knowledge is interested knowledge, and the fundamental interest of knowledge is life and the direction that one wants to give this life.⁶⁰⁹ For Ellacuria, the factor of interest always remains present and impedes the path towards abstract objectivity.⁶¹⁰ This assumption enabled Ellacuria to develop his argument, concluding that concepts are historical, especially when they refer to historical reality.⁶¹¹ Finally, he concluded that:

The historic concept, since it refers immediately to historic and changing realities which depend on the structural situation where they are present, means something different in accordance with the particular moment of the process and context in which that process is taking place... Similarly, historic concepts refer to different realities in process: the reality referred to is the same, but the modes of the process vary.⁶¹²

In the same vein, Kanyandago believed that human rights for different people cannot be completely defined in advance. Each group of people needs to do this for itself.⁶¹³ This is because, as long as people's way of life keeps changing, people's understanding of morality and norms are also subject to change.

⁶⁰⁷ Ellacuria in Hasset J. and Hugh L. (eds.) (1991) 106.

⁶⁰⁸ Id.

⁶⁰⁹ Ibid., 107.

⁶¹⁰ Ibid.

⁶¹¹ Ibid., 108.

⁶¹² Ibid., 106.

⁶¹³ Kanyandago P. 'The Church's Role Regarding Education for Human Rights in AMECEA Countries' in Kyeyune D. et al (eds.) *New Trends for the Empowerment of the People* (Nairobi: St. Paul Publications, 1997) 147.

More importantly, Ellacuria maintained that operative concepts whose content and significance are relative must continue to change, even if their essential meaning is maintained.⁶¹⁴ Ellacuria further argued that the effort of demonstrating the dynamism and impact of certain concepts within a particular context is what is understood as historicisation.⁶¹⁵ Another strategy is to take seriously Shivji called for a human rights discussion that is historically situated and socially specific.⁶¹⁶ He believed that human rights are essentially about protecting human dignity as it is realised in a given cultural and historical context, and not in abstract human nature.⁶¹⁷ From this perspective, individual rights, as well as collective rights, are also related to the way in which people create their history. In other words, concretisation and realisation of the ideals of human rights must confront the question of social organisation in a given society, as well as search for the possibility of transforming social structures.

In all this, an important point to bear in mind is that attempts to contextualise and particularise the concept of human rights should not be seen as ill-founded efforts trying to destroy what has been achieved. Instead, people should see these efforts as the manifestation of a vision of moral maturity that intends to analyse human rights from the point of view of a network of social relationships. Donoho noted that,⁶¹⁸ people should not forget that the validity of moral principles depends essentially on the experiences of a particular community, that is, the way in which its social reality is organised and symbolically constituted.

For Donoho, this is why there is a need to clarify moral principles, both at the meta-ethical level with respect to their logic of justification, and at the substantive and normative levels with reference to their concrete content.⁶¹⁹ Donoho further argued that, the tendency is to assume that the other person, like ourselves, is a being who has concrete needs, desires and affects, but that what constitutes his or her moral dignity is not what differentiates us from each other, but rather what we, as speaking and acting rational agents, have in common.

Donoho opined that our relation to the other is governed by the norms of formal equity and reciprocity.⁶²⁰

⁶¹⁴ Ellacuria in Hasset and Hugh (eds.) (1991) 110.

⁶¹⁵ Id.

⁶¹⁶ Shivji I.G. *The Concept of Human Rights in Africa* (London: CODESRIA Books Series, 1989) 70.

⁶¹⁷ Id.

⁶¹⁸ Donoho D.L. 'Relativism versus Universalism in Human Rights: The Search for Meaningful Standards' (1991) 27 *Stanford Journal of International Law* 345.

⁶¹⁹ Id., 347.

⁶²⁰ *Ibid.*, 348.

In terms of this assumption, particularities and differences are seen as weaknesses. Donoho's standpoint does not focus on an abstract, but rather on a concrete human being with his or her own needs and lifestyle. As such, differences require us to view each and every human being as a person with a concrete history and identity.⁶²¹ In this regard, Donoho maintained that people have to perceive human relationships in society as:

Governed by norms of complementary reciprocity. Each is entitled to expect and to assume from the other forms of behaviour through which the other feels recognised and confirmed as a concrete human being with specific needs, talents and capacities. Human differences in this case complement rather than exclude one another.⁶²²

Therefore, the task is to ensure that the understanding and promotion of human rights are contextualised. The advantage of moderate universalism is that a related discourse on human rights will take into consideration the contextual understanding of human rights from the start. This approach sees both universalism and cultural relativism as being relevant. It is possible that once one identifies the context in which one is dealing with human rights, then one can easily produce a direct response and something that speaks to ordinary people, especially from the viewpoint of the poor. In the words of Ellacuria⁶²³:

It is likely that such a down-to-earth understanding will address practical issues of a particular culture and context. This orientation calls people to make sure that each local community is analysed in view of identifying those practices that are positive for shaping an alternative consciousness. This openness will also demand people to challenge cultural patterns in order to move in the direction of debate, analysis, and shared reflection for the achievement of a new consciousness.

Although theoretically suggested, this approach is practically feasible if the following guidelines are used: (i) closely examine the history of the cultural practice. What is the background or history leading to the cultural norms that conflict with particular human rights as established in a declaration or other human rights instrument? What apparent rationale or reasons have created the cultural norm? (ii) Examine the powerbrokers who determine the cultural norm.

⁶²¹ Donoho (1991) 348.

⁶²² *Id.*, 356.

⁶²³ Ellacuria in Hennelly and Langan (1982) 123, 137.

After analysing the history and background of a cultural practice, the next step in placing the practice into a human rights context requires an analysis of who has actually determined the cultural norm? Have many voices been included in the establishment of the cultural norm, or does it appear to have been established by only a few segments of society? (iii) Analyse the cultural practice within a contemporary human rights standard. What are the contemporary human rights standards against which the cultural practice should be compared? Over time, some cultural norms that have existed for many years may appear incompatible with contemporary human rights standards, and there is a need to eradicate them.⁶²⁴

The moderate form of universalism suggested in this study is the one in which cultures should be approached and recognised as partners in promoting greater respect for and observance of human rights. Drawing on compatible practices and common values from traditional cultures would enhance and advance human rights promotion and protection. This approach not only encourages greater tolerance, mutual respect and understanding, but also fosters more effective international cooperation in terms of human rights. An understanding of the ways in which cultures protect the well-being of their people would illuminate the common foundation of human dignity on which human rights promotion and protection stand.

This insight would enable human rights advocacy to assert the cultural relevance, as well as the legal obligation, of the universalism of human rights in diverse cultural contexts. Recognition and appreciation of particular cultural contexts would serve to facilitate, rather than to reduce, human rights respect and observance. Working in this way with particular cultures inherently recognises cultural relativism, without compromising or diluting unquestionably universal human rights standards. Such an approach is essential in order to ensure that the future will be guided above all by the universalism of human rights.

⁶²⁴ These guidelines are borrowed from Reichert. See Reichert E. 'Human Rights: An Examination of Universalism and Cultural Relativism' (2006) 22 (1) *Journal of Comparative Social Welfare* 23, 31-32.

4. African Charter on Human and Peoples' Rights as an Expression of Balancing the Universalism and Cultural Relativism of Human Rights

4.1. Historical background

The events preceding the adoption of the African Charter occurred over a 20-year period.⁶²⁵ In 1961 the International Commission of Jurists (ICJ) organised an African Conference on the Rule of Law in Lagos, Nigeria, which produced the 'Law of Lagos' containing the origins of the ideal of a legal instrument on human rights protection in Africa: The Law of Lagos proclaimed at that conference *inter alia* stated:

In order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.⁶²⁶

It is interesting to note that the Conference proposed the establishment of an African Court of Human Rights, which was temporarily abandoned at that stage in favour of a commission. However, Robertson rightly argued that, the call from the African Conference fell on deaf ears of African leaders.⁶²⁷ The debate on universalism and cultural relativism of human rights was indirectly addressed, in the sense that it could be questioned whether the form and mode of a Western-style court was a legitimate institution in an African context.

⁶²⁵ The subsection is drawn from the following commentators : Kunig (1982) 141-150; Welch C.E. Jr. 'The OAU and Human Rights: Towards a New Definition' (1981) 19 (3) *The Journal of Modern African Studies* 401; Bello E.G. *The African Charter on Human and Peoples' Rights* (Dordrecht: Martinus Nijhoff Publishers, 1987) 23-31; Hansungule (2000) 269-275; Ouguergouz (1993) 41-64; (2003) 19-48; Viljoen (2007) 157-169.

⁶²⁶ International Commission of Jurists *Report on the Proceedings of the Conference* (Geneva: International Commission of Jurists, 1961) 9, para 4.

⁶²⁷ Robertson A.H. 'A Commission on Human Rights in Africa' (1969) 2(4) *Revue des Droits de l'Homme* 696,700.

An overview of the OAU Charter indicates that it did not give human rights prominence among its concerns. For instance, while Article 20 provided for the creation of five specialised commissions, none of them was devoted to the issue of human rights.⁶²⁸ The OAU was pre-occupied with more pressing issues, such as unity, non-interference in internal affairs and liberation.⁶²⁹ For instance, the first, second and third paragraphs of the Preamble recognise, respectively: ‘the inalienable right of all people to control their own destiny’; that ‘freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples’, and the ‘responsibility of Member States to harness the natural resources’ of the continent ‘for the total advancement of our peoples in spheres of human endeavour’.⁶³⁰

In sum, the OAU’s commitment to human rights was vague and weak. Commenting on the general attitude of the OAU on matters relating to human rights, Ndiaye noted that most of the efforts of that Organisation, which represented the African continent, focused upon the rights of peoples to self-determination and the struggle against racial discrimination.⁶³¹ M’Baye,⁶³² argued:

Thus, the African governments appear clearly to have sacrificed rights and freedoms for the sake of development and political stability. This situation can be explained and even justified. In mobilising the masses in order to secure economic and social development, everyone’s attention is directed exclusively towards the prospect of improved standards of living. Inaction or idleness thus came to be regarded as an infraction and the exercise of certain freedoms, even in the absence of any abuse, an attack of public order.

⁶²⁸ The Commissions were: Economic and Social; Educational and Cultural; Health, Sanitation and Nutrition; Defence; Scientific, Technical and Research. Two more Commissions, Transport and Communications, and the Commission of Jurists, were added at the first Ordinary Session of the OAU in 1964. There is an agreement in the literature about the OAU’s failure to take human rights into consideration. See generally, Ait-Ahmed H. *L’Afro-fascisme Les droits de l’homme dans la Charte et la pratique de l’Organisation de l’Unité Africaine* (Paris: L’Harmattan, 1980) 183-222; Akinyemi A.B. ‘The Organisation of African Unity and the Concept of Non-Interference in Internal Affairs of Member States’ (1972-1973) 46 *British Yearbook of International Law* 393; Eze O.C. ‘The Organisation of African Unity and Human Rights: Twenty Five Years After’ (1988) 14 *Nigerian Journal of International Affairs* 163; Aluko O. ‘The Organisation of African Unity and Human Rights’ (1981) *The Commonwealth Journal of International Affairs* 234; Naldi G.J. *The Organisation of African Unity An Analysis of Its Role* 2nd ed. (London: Mansell Publishing Limited, 1999) 108-112; Ndiaye B. ‘The Place of Human Rights in the Charter of the Organisation of African Unity’ in Vasak and Alston (eds) (1982) 601; Welch C.E. Jr. ‘The OAU and Human Rights: Towards a New Definition’ (1991) 29(4) *The Journal of Modern Studies* 401; Chanda A. ‘The Organisation of African Unity: An Appraisal’ (1989-92) 21-24 *Zambian Law Journal* 1.

⁶²⁹ OAU Charter, Preamble, and specifically Articles 2(1) (c) and 3, which talked about guaranteeing the national sovereignty and territorial integrity of the Member States, and Art 3(6), which stipulated an ‘absolute dedication to the total emancipation ‘ of African territories not yet independent.

⁶³⁰ *Id.*, para 4.

⁶³¹ Ndiaye in in Vasak and Alston (eds.) (1982) 583.

⁶³² M’Baye in Vasak and Alston (eds.) (1982) 599.

In 1966, The UN Commission on Human Rights decided to study the possibility of establishing regional commissions on human rights where they did not already exist.⁶³³ From 2-15 September 1969 a seminar was cosponsored by the government of Egypt and the United Nations and attended by representatives of 20 African States, the League of Arab States and the Council of Europe. They agreed to create a Commission on Human Rights in Africa, which would promote greater respect for human rights, and also serve as weapon with which to attack political opponents of governments and disseminate propaganda for African governments.⁶³⁴

In 1978 the OAU Assembly of Heads of States and Government adopted a decision on the preparation of a draft of an African Charter on Human and Peoples' Rights. In July 1979 a highly qualified group of experts was commissioned to draft the African Charter. From 10-21 September 1979, a UN Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa was held in Monrovia, Liberia. The seminar, attended by representatives of 30 African States, the OAU, NGOs and International Organisations, posed a direct challenge to, and modification of the sacrosanct principle of territorial integrity and sovereignty of African States.⁶³⁵

While endorsing conferences, seminars, and resolutions, the OAU and its Member States justified their silence on human rights breaches in African States by relying on the domestic jurisdiction principle. Ojo and Sessay argued that the African leaders at that time adopted a restrictive interpretation of the Universal Declaration and the international covenants. In their view, human rights instruments were for the purpose of promoting peaceful and positive international cooperation.⁶³⁶

⁶³³ For details, see *Seminar on Human Rights in Developing Countries*, Dakar (Senegal) 8 to 22 February 1966, United Nations, New York, 1966, UN Doc. ST/TAO/HR 25.

⁶³⁴ *Seminar on the Establishment of Regional Commissions on Human Rights With Special Reference to Africa*, UN Doc., New York, 1969, ST/TAO/HR/38, 1.

⁶³⁵ It adopted three important conclusions : (i) In cases of human rights violations in a particular African State, the principle of non-interference in the internal affairs of a sovereign State could not, and should not, exclude or prevent international action. (ii) It was essential that a Commission be created to protect human rights in Africa. The Commission, once created, must perform four basic functions: study the causes and manifestations of human rights violations in Africa; offer good office to Member States, individually or collectively, in cases of human rights violations, for example, through acts of reconciliation, arbitration for settlement of disputes, payments of compensation for loss or damage, deprivation of rights and so on; make recommendations to the OAU on courses of action to be taken; and serve as the agent of governments for propaganda and other promotional activities for African States. UN Doc. ST/HR/Ser.A/4 NY (1979).

⁶³⁶ Ojo and Sessay (1986) 91-92.

The OAU and African Heads of State and Government were constantly accused of adopting double standards in the struggle for respect for human rights. They were condemning apartheid in South Africa while remaining silent in the face of massive human rights violations within Member States.⁶³⁷ The OAU was caught in a moral dilemma and found it difficult to garner support for its fight against apartheid while continuing its conspiracy of silence for the gross maltreatment of other African peoples by their governments. The organisation had to take steps to improve the human rights situation on the continent. The OAU had, as Ndiaye emphasised,

Acknowledged the need for comprehensive, institutionalised machinery to give effect to the firm attachment of Member States of the Organisation of the African Unity to the promotion of respect for and protection of human rights.⁶³⁸

The most significant step of the process was perhaps the OAU's constructive change of policy towards more direct interference against the massive violations in the countries mentioned above. Significant in this regard was the establishment of the Bokassa inquiry in May 1979, where an independent OAU Commission of five judges from the Côte d'Ivoire, Liberia, Rwanda, Senegal and Togo publicised their findings of substantive violations of human rights. In November 1979 a ministerial conference held in Dakar, Senegal, adopted the Dakar Draft Articles comprising the first draft of the proposed African Charter, following discussion there of the report of the Monrovia Seminar.

⁶³⁷ See Viljoen F. and Ondikalu C.A. *Prohibition of Torture and Ill-Treatment in the African Human Rights System A Handbook for Victims and Their Advocates* (Geneva: Organisation Mondiale Contre La Torture, Series Editor: Boris Wiljkström, 2006) 21. It is to be mentioned that the OAU suffered from the reputation of dictators all over the continent such as Mengistu, Moi, Doe, Traore, Mobutu, Bongo, Eyadema and so on. However, Amin, Nguema and Bokassa are signalled out because of the exceptional brutality and repressive nature of their regimes. Reports of wide-scale killings and severe and gross human rights violations in their respective countries saturated the mass media and human rights forums. For a catalogue and analysis of human rights violations in these countries, see Amnesty International *Political Killings by Governments* (1983); *Recent Human Rights Violations in The Central African Empire* (London: Amnesty International, 1979); *Human Rights in Uganda* (London: Amnesty International, 1978). Randall also deplored the massive violations of human rights in Equatorial Guinea. See Randall F. 'The UN Human Rights Commission: The Equatorial Guinea Case' (1981) 3 *Human Rights Quarterly* 34. Okoth observed that at the height of Amin's bloody rule, forty three African Heads of State and Government turned up for the Twentieth OAU Summit, held in Kampala, Uganda, in July 1975, under Amin's chairmanship. Only three countries, namely Tanzania, Zambia and Botswana, stayed away from the Summit. Okoth-Obbo G. 'OAU and the Uganda-Tanzania War 1978-1979' (1982) 14 *Journal of African Studies* 157, 163.

⁶³⁸ Ndiaye in Vaak and Alston (eds.) (1982) 612.

In June 1980 and January 1981 OAU Council of Ministers met in Banjul to discuss the Dakar Draft Articles.⁶³⁹ The culmination of all these events was when President Senghor of Senegal moved a resolution, during the OAU Assembly in July 1979, that a group of highly qualified experts should be called upon to prepare a preliminary draft of an African Charter and Peoples' Rights.⁶⁴⁰ In November 1979 a ministerial conference held in Dakar, Senegal, adopted the Dakar Draft Articles comprising the first draft of the proposed African Charter, following discussion there of the report of the Monrovia Seminar. In the same year, Bokassa, Idi Amin Dada and Macias Nguema, among the notorious despots, were ousted from power. In June 1980 and January 1981 OAU Council of Ministers met in Banjul to discuss the Dakar Draft Articles.

The favourable moment in history of the African Charter came when it was finally laid before the Eighteenth Summit of the OAU, on 27 June 1981, in Nairobi, Kenya. Note was taken of the submissions and recommendations⁶⁴¹ of the Council of Ministers, and thereafter the last rubicon was crossed as the Assembly gave the African Charter its formal approval and adopted it unanimously.⁶⁴² The African Charter came into force in 1986 in accordance with its Article 63(3). It is worth analysing this instrument which remains the founding instrument of the African human rights system.

⁶³⁹ Bello E.G. 'The African Charter on Human and Peoples' Rights: A Legal Analysis' in *Collected Courses of the Hague Academy of International Law* (Dordrecht: Martinus Nijhoff Publishers, 1987) 9, 290.

⁶⁴⁰ The resolution has often been referred to as follows: Resolution 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a preliminary draft on an African Charter on Human and Peoples' Rights providing, inter alia, for the establishment of bodies to promote and protect human and peoples' rights. A group of 20 legal experts under the Chairmanship of Keba M'baye, met in Dakar from 28 November to 8 December 1979, in implementation of paragraph b of Article 2 of the operative part of Decision 115 (XVI) of the Assembly of Heads of State and Government of the OAU held in Monrovia from 17 to 20 July 1979. The resolution of the OAU Assembly called on the Secretary-General of the OAU to: '(a) Draw the attention of Member States to certain international conventions whose ratification would help to strengthen Africa's struggle against certain scourge, especially apartheid and racial discrimination, trade imbalance and mercenarism; (b) organise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of a 'African Charter on Human and Peoples' Rights' providing, inter alia, for the establishment of bodies to promote and protect human and peoples' rights'.

⁶⁴¹ See the African Charter on Human and Peoples' Rights adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev. 5. For the full text, see *International Materials* (1982) 21, 58.

⁶⁴² Thus, the resolution of the OAU at the Sixteenth Ordinary Session of the AHSG held in Monrovia, Liberia in 1979 became a reality.

4.2. Structure and content of the African Charter

The African Charter departs from other regional human rights instruments by taking into account problems unique to Africa while retaining Western conceptions of human rights as embodied in the Universal Declaration of Human Rights. The Preamble is in itself a programme for human rights. It recalls that the Charter of the OAU provides for ‘freedom, equality, justice and the legitimate aspirations of the African peoples’.⁶⁴³ It reaffirms the solemn pledge made by Member States of the OAU to coordinate their actions in order to eradicate all forms of colonialism from Africa, so as to achieve a better life for their peoples and so as to promote international cooperation with due regard to the Charter of the UN and the Universal Declaration.⁶⁴⁴

The historical traditions and values of African civilisation are drawn upon in order to affirm ‘the importance traditionally attached to these rights and freedoms in Africa’.⁶⁴⁵ This is how the African Charter rejects the argument of those, on the outside, who believe that the democratic experience is incompatible with the history of African peoples. In this perspective, the Preamble recognises the universal dimension of human rights both civil and political, and economic, social and cultural.⁶⁴⁶ Moreover, the three last types of rights are considered as guarantees for the full enjoyment of civil and political rights.⁶⁴⁷

It is stipulated that ‘the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone’, although the accent was put on peoples’ rights to freedom. The essential objective of the African is equally clearly indicated in the next to the last paragraph, namely the promotion and protection of human rights. The State parties reaffirm, in effect, ‘their adherence to the principles of human and peoples’ rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organisation of African Unity, the Movement of Non-Aligned States and the United Nations’.⁶⁴⁸

⁶⁴³ African Charter, Preamble para 2.

⁶⁴⁴ *Id.*, para 3.

⁶⁴⁵ *Ibid.*, para 4.

⁶⁴⁶ *Ibid.*, para 5.

⁶⁴⁷ *Ibid.*, para 6.

⁶⁴⁸ *Ibid.*, para 9.

As for the specific rights themselves, Articles 1-17 list individual rights of the type found in most human rights instruments. Article 18 provides for group rights. Articles 19-24 detail the rights of peoples', while the whole of chapter II (Articles 27-29) deals with individual duties. Part II deals with measures for safeguarding, establishing the African Commission on Human and Peoples' Rights, and laying down its organisation and procedure.

4.2.1. Individuals rights

4.2.1.1. Civil and political rights

The first category of rights is fairly straightforward, including non-discrimination (Article 2) and equality before the law (Article 3); the right to life (Article 4), and the inherence of human dignity (Article 5), right to liberty and security (Article 6); freedoms of conscience and religion, expression, association, assembly and movement (Articles 8 to 12); and the right to participate freely in the government of one's country (Article 13).

Article 2 of the African Charter reiterates the right to non-discrimination. This right represents the core of modern human rights law. It is very correctly established as the leading right within the context of a region which has suffered from substantial acts of discrimination and from inequalities.⁶⁴⁹ The terminology of the Article and the prohibited categories of discrimination are very similar to those employed in other human rights treaties. Like in other human rights instruments, distinctions based on race, ethnicity, colour, sex, religion, language, political opinions, national and social origins, or birth are not permitted. The analysis of the provisions of this Article allows one to make a number of specific comments. First, the terms used in the Article are not exhaustive. Other possible grounds of discrimination, for example age, disability and sexual orientation are covered though not stated. Secondly, the usage of the term 'fortune' represents an innovative basis of non-discrimination.

⁶⁴⁹ Art 2 of the African Charter provides that : 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic groups, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Davidson suggested that its addition ‘implied African recognition that the enforcement of rights may depend upon a person’s general circumstances or status in society’.⁶⁵⁰ Thirdly, among this broad right to non-discrimination, certain sections of the community nevertheless deserve special attention. In the light of the frequent discrimination faced by women and children, protection of their rights on the basis of equality is an important concern.⁶⁵¹ The right to non-discrimination is further reinforced by the provisions of Article 3 which emphasise equality of all individuals before the law and equal protection of everyone before the law. Equality includes *de jure* and *de facto* equality confirming Umozurike pointed that the African Charter refers to substantive or relative and not material, formal or absolute equality.⁶⁵² The notion of equality, therefore, allows for reverse discrimination or affirmative action policies.

Article 4 recognises the inviolability of human life and confirms the entitlement of everyone to the right and integrity of person. At the same time, the article is structured in an awkward manner and does not address some fundamental issues. There is no explanation of the meaning of term ‘life’ and it is not clear as to the extent to which the rights of the unborn child are protected. Additionally, following the ICCPR, the African Charter does not prohibit all forms of deprivation of life. Only arbitrary deprivation of life is prohibited, although the meaning of arbitrary is not defined. Unlike the ICCPR, no limitations are placed on the usage of capital punishment. The imposition of the death penalty remains a controversial subject in international human rights law, and a majority of African States retain this sentence within their territories.

Article 5 provides for the right to the respect of the dignity in human beings. It also prohibits slavery, the slave trade, and cruel, inhuman or degrading treatment or punishment. It also needs to be appreciated that cruel, inhuman and degrading treatment is a subject impinging heavily upon cultural or religious relativism. For those States practising *Sharia*, punishments such as flogging, physical amputations and executions raise issues of compatibility with international human rights standards.

⁶⁵⁰ Davidson S. *Human Rights* (Buckingham: Open University, 1993) 154.

⁶⁵¹ Van Bueren G. *The International Law on the Rights of the Child* (Dordrecht : Martinus Nijhoff Publishers, 1995) 402.

⁶⁵² Umozurike (1997) 30.

Some African countries have been criticised for allowing such practices as female genital mutilations or for criminalising adult homosexuality.⁶⁵³ The African Charter clearly prohibits slavery and slave trade. However, various practices of servitude, in particular child labour, continue to take place. In addition to the prohibition of slavery and subjugation, the African Charter provides for the right to liberty and security of person in Article 6.

The right to liberty and security of person is an important human right, and forms an essential ingredient of the corpus of human rights. While providing protection, Article 6 is unsatisfactory because of its vague and uncertain terminology. The ‘reasons and conditions’ are not provided anywhere in the African Charter thus making it impossible to assess their conformity with other international human rights instruments.

The right to freedom of religion provided for in Article 8 constitutes an invaluable in the context of a continent which continues to suffer from serious persecutions based on religious differences. Notwithstanding the value of this right, the provisions of this article themselves have left a great deal to be desired. The meaning of ‘free practice’ is unclear, as it does not establish where it incorporates the freedom to change religion or if it allows proselytism. As it will be discussed below, the use of the claw-back clause can lead to unreasonable and unacceptable restrictions upon this freedom.

Article 9 provides for an interesting rather than unusual right, the right to receive information. The article also provides for a right of expression and the freedom to disseminate one’s opinion. At the same time, the provisions of the article 9 can be highly restrictive as the ultimate discretion to determine the boundaries of right to receive information and give expression is retained.

According to Article 11, all individuals have the right to assemble. This right is also subject to a claw-back clause. Article 12 provides for freedom of movement and residence within the borders of a State. It also confirms that the individual has the right to leave any country including its own, and to return to his country. Within this article, there is also the right to seek and obtain asylum and for non-nationals not to be expelled, unless due to a decision made in accordance with the law.

⁶⁵³ See Communication 136/94 *William Courson v. Zimbabwe*, para 21.

Mass expulsion aimed at expelling national, racial, ethnic or religious groups is prohibited. This prohibition represents a highly valuable ordinance and is aimed at preventing recurrent mass expulsion in the continent. Nationality has been a problematic area of international human rights law and denial of citizenship as a tool for discrimination has been applied by a number of States, including those from Africa. International Conventions, including the International Convention on the Elimination of All Forms of Racial Discrimination and the African Charter, do not specifically prohibit discrimination on the basis of nationality. However, mass expulsion as the most acute form of discrimination has been conducted against many ethnic, religious and racial group on Africa. The inclusion of such a provision was a positive development of regional human rights law.

Although the drafters of the African Charter were not put under an obligation to elaborate an instrument in accordance with existing international human rights, they omitted some rights, as such the right to not be subjected without free consent to medical or scientific experimentation that is provided in Article 7 of the ICCPR. The African Charter also lacks more elaborated guarantees against arbitrary detention. Similarly, although the right to a fair trial is covered by Article 7 of the African Charter, it does not provide about trial in abstention, the issue of legal aid, or the right to an interpreter. Also omitted are compensation for the miscarriage of justice and protection against double jeopardy - all of which are covered by Article 14 of the ICCPR. The African Charter makes no reference to the protection of private life (Article 17 ICCPR), or to the right of free choice of a marriage partner (Article 16 of the Universal Declaration and Article 23(3) ICCPR, including other marriage-related rights such as the right to marry and the equality of the spouses (Article 16(1) Universal Declaration and Article 23(2), (4) of the ICCPR).

Bekhechi and Milenkovic respectively explained that the drafters of the African Charter wanted to avoid enouncing principles that would conflict too strongly with social and cultural realities.⁶⁵⁴ There is also non mention on the prohibition of forced or compulsory labour (Article 8(3) ICCPR).⁶⁵⁵ Rembe compared the African Charter with a draft declaration awaiting further elaboration rather than a binding document.⁶⁵⁶

⁶⁵⁴ Bekhechi M.A. 'La Charte Africaine des Droits de l'Homme et des Peuples' (1987) *Revue Algérienne des Relations Internationales* 79, 85 ; and Milenkovic S. 'La Charte Africaine des Droits de l'Homme et des Peuples' (1984) 20 *Revue Politique Internationale* 23, 25.

⁶⁵⁵ Yemet (1996) 342.

⁶⁵⁶ Rembe (1983) 68.

This open-endedness of the African Charter was necessary, it has been argued, in order to maintain a balance between providing rights and taking into consideration what was politically palatable.⁶⁵⁷ It has been emphasised that the African Charter is open for further enrichment and it depends on the ability of the African Commission in doing so.⁶⁵⁸

One area for which the African Charter has drawn a lot of criticism, however, is in relation to what is referred to as claw-back clauses. One concurs with Mutua,⁶⁵⁹ when he held, 'perhaps the most serious flaw in the African Charter concerns its claw-back clauses, which permeate the African Charter and permit African States to restrict basic human rights to the maximum extent allowed by domestic law'. Komeja argued that the main problem with 'claw-back clauses' is that they restrict the exercise of a right without defining the circumstances for such restriction or providing for procedural safeguards against violation.⁶⁶⁰ In the absence of such safeguard the enjoyment of the right may be left to the mercy of domestic law.⁶⁶¹

Thus, no one may be deprived of his liberty 'except for reasons and conditions previously laid down by the law.'⁶⁶² Freedom of religion is protected, subject to law and order.⁶⁶³ Freedom of opinion must be within the law.⁶⁶⁴ Freedom of association is provided but abides by the law and subject to the obligation of solidarity provided for in Article 29.⁶⁶⁵ Freedom of assembly is subject to necessary restrictions provided for by law in particular those enacted in the interests of national security, the safety, health, ethnics and rights and freedoms of others.⁶⁶⁶ The right to participate in government is to be enjoyed in accordance with the provisions of law.⁶⁶⁷ In addition, the rights to freedom of movement and residence are provided but according by law.⁶⁶⁸

⁶⁵⁷ M'Baye K. 'Keynote Address on the African Charter on Human and Peoples' Rights' in *Human and Peoples' Rights in Africa and the African Charter*, Report on a Conference held in Nairobi, Kenya, 2-4 December 1985 convened by the International Commission of Jurists (Geneva: International Commission of Jurists, 1986) 19,20.

⁶⁵⁸ Id.

⁶⁵⁹ Mutua (1995) 359.

⁶⁶⁰ Komeja M. 'The African System of Human and Peoples' Rights: An Annotated Bibliography' (1997) 3 (2) *East African Journal of Peace and Human Rights* 262, 267.

⁶⁶¹ Id.

⁶⁶² African Charter, Art 6.

⁶⁶³ Id., Art 8.

⁶⁶⁴ Ibid., Art 9.

⁶⁶⁵ Ibid., Art 10(1) and (2).

⁶⁶⁶ Ibid., Art 11.

⁶⁶⁷ Ibid., Art 13.

⁶⁶⁸ Ibid., Art 12(1).

The Right to asylum is recognised but granted in accordance with the laws of those countries and international conventions.⁶⁶⁹ The right to property may all be encroached upon in the interests of national security, public morality or public need.⁶⁷⁰ This led to the criticism that the African Charter allows too much scope for states to avoid their obligations by enacting domestic laws which drastically limit the rights guaranteed.⁶⁷¹ The African Commission has made clear that the term ‘law’ is not equivalent to domestic law, finding that any limitation of the African Charter rights must be compatible with standards of international law.⁶⁷²

The weaknesses emanating from the claw-back clauses are exacerbated by the lack of derogation clauses in the African Charter. Higgins wrote that the derogation clauses define the circumstances under which some rights may be temporarily suspended, for example in times of emergencies and rights which are non-derogable in such circumstances.⁶⁷³ The absence of a provision on derogation is not necessarily a prohibition of derogation.

Ouguergouz observed that the entitlement of States to derogate from treaties exists in customary international law even though a number of human rights instruments do not provide for it.⁶⁷⁴ According to Abdullahi, by omitting derogation clauses, the African Charter has given Member States *carte blanche* to decide which rights are derogation rights and which are not, removing the external sanction that bridles the powers of the State.⁶⁷⁵ For him, the African Charter application during emergencies remains not only undefined, but further gives Member States the unhindered power and mobility to chart their own course. In reality, nothing in the African Charter prevents State parties from denying certain rights during national emergencies.

⁶⁶⁹ African Charter, Art 12(3).

⁶⁷⁰ *Id.*, Art 14.

⁶⁷¹ Gittleman (1982) 692.

⁶⁷² See Commission 105/93, 128/94, 130/94, *Media Rights Agenda and Others v. Nigeria*, Twelfth Activity Report of the African Commission (2000) *African Human Rights Law Review* 200 (African Commission on Human and Peoples’ Rights 1998).

⁶⁷³ Higgins R. ‘Derogations under Human Rights Treaties’ (1976-1977) 48 *British Yearbook of International Law* 281, 300.

⁶⁷⁴ Ouguergouz F. ‘L’absence de clause de dérogation dans certains traits relatifs aux droits de l’homme – Les réponses du droit international général’ (1994) 105 (2) *Revue Générale de Droit International Public* 289, 300.

⁶⁷⁵ Abdullahi A.A. ‘Human Rights Protection in Africa: Toward Effective Mechanisms’ (1997) 3 (1) *East African Journal of Peace and Human Rights* 1, 9.

The African Commission has realised the shortcomings of the African Charter as the omission of derogation clause. As a result, it has interpreted this silence to mean that derogation from the Charter is impermissible. In the case of *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*,⁶⁷⁶ the African Commission declared that :

The African Charter, unlike other human rights instruments (for example the European Convention on Human Rights, Article 15; the Inter-American Convention on Human Rights, and the International Covenant on Civil and Political Rights), does not allow for State parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.⁶⁷⁷

In the *Constitutional Right Project and Civil Liberties Organisation v. Nigeria*, the African Commission held that: 'The Government should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights. No situation justifies the wholesale violation of human rights'.⁶⁷⁸ In the *Constitutional Right Project and Civil Liberties Organisation and Media Rights v. Nigeria*, the African Commission Declared that: 'In contrast to other international human rights instruments, the African Charter does not contain a derogation clause.

Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances'.⁶⁷⁹ Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. 'The only legitimate reasons for limitations to rights and freedoms of the African Charter are found in Article 27(2). It is that the rights of the Charter's shall be exercised with due regard to the rights of others, collective security, morality and common interest.

⁶⁷⁶ Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Ninth Activity Report (2000) *African Human Rights Law Review* 66 (African Commission on Human and Peoples' Rights 1995).

⁶⁷⁷ *Id.*, para 40.

⁶⁷⁸ Communication 102/93, *Constitutional Right Project and Civil Liberties Organisation v. Nigeria* (African Commission, 24th Ordinary Session, 1998) para 58.

⁶⁷⁹ Communication 140/94, 141/94, 145/95 *Constitutional Right Project and Civil Liberties Organisation and Media Rights v. Nigeria*, Thirteenth Activity Report (2000) *African Human Rights Law Review*, 297 (African Commission on Human and Peoples' Rights, 1999), para 41. See also Communication 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Conference of East Africa v. Sudan*, Thirteenth Activity Report (2000) *African Human Rights Law Review*, 297 (African Commission on Human and Peoples' Rights, 1999)

The reasons for possible limitation must be founded in a legitimate State interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained'.⁶⁸⁰ Justifying the omission of the derogation in the African Charter, the African Commission explained that 'this can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic State governed by the rule of law'.⁶⁸¹ A revision of the African Charter should excise the offending claw-back clauses and insert a provision on non-derogable rights, and another specifying which rights States can derogate from, when, and under what conditions. Unfortunately, there have been no serious efforts to revisit the African Charter.

A great impediment to the achievement of civil and political rights is also constituted by illiteracy, ignorance and poverty. For many poor dwellers in an African State, and indeed to the urban poor, the lack of awareness or means makes it impossible for them to assert their rights.⁶⁸² They are much at the mercy of their leaders. The stage of development of most African countries makes economic growth their most important preoccupation, so that in order to satisfy this need, it is necessary to detract from civil and political rights and that a lesser standard should be expected of them.⁶⁸³

Civil and political rights are meaningful in the context of certain minimum standards of living and welfare. While civil and political rights generally require governments to abstain from undue interference in the liberty of the subject, economic, social and cultural rights call for definitive action, forward planning and expenditure of resources in order to make their enjoyment possible. They give substance to the first generation, to which they are clearly related. Social justice is indeed impossible if second generation rights are not available.

⁶⁸⁰ *Constitutional Right Project and Civil Liberties Organisation and Media Rights v. Nigeria*, paras 67-68.

⁶⁸¹ *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Africa v. Sudan* case, para 79.

⁶⁸² African Charter, Art 25

⁶⁸³ Howard R. 'The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence From Sub-Saharan Africa' (1983) 5 *Human Rights Quarterly* 467, 490.

4.2.1.2. Economic, social and cultural rights

The Preamble of the African Charter states that: 'Civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and the satisfaction of economic, social and cultural rights is guarantee for the enjoyment of civil and political rights'.⁶⁸⁴ What the African Charter expresses is not a preference for any category of rights, but an attachment to the principle of the indivisibility of all human rights, one decade before the Vienna Declaration and Programme of Action.⁶⁸⁵

The economic rights in the African Charter are the right to property,⁶⁸⁶ the right of equal access to public property and services,⁶⁸⁷ and the right to work under equitable and satisfactory conditions, including equal pay for equal work.⁶⁸⁸ Article 14 of the African Charter stipulates that the right to property shall be guaranteed, and may only be restricted in the interest of public need or in the general interest of the community. In addition, expropriation of property would have to be in accordance with the provisions of the law.

The grounds for expropriation are not elaborated upon. The right to property has been a controversial one. The Universal Declaration contains the right to property, as does Protocol 1 to the European Convention and the American Convention. The right to property, however, proved too divisive and it was not possible to incorporate it within the International Covenants.

Socialist and developing countries argued against providing absolute guarantees for property rights. They campaigned for a State to be able to expropriate and nationalise foreign assets and to restrict the rights of foreign nationals more generally. A confirmation of this view is provided by Article 2(3) of the ICESCR which provides that 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals'.

⁶⁸⁴ African Charter, Preamble, para 8.

⁶⁸⁵ Uchegbu A. 'Economic Rights: The African Charter on Human and Peoples Rights' in Omotala J.A. and Adeagun A.A. (eds.) *Law and Development* (Lagos: Lagos University Press, 1987) 169, 170.

⁶⁸⁶ African Charter, Art 14.

⁶⁸⁷ *Id.*, Art 13(3).

⁶⁸⁸ *Ibid.*

Issues regarding the disposal of property and natural wealth are further addressed within the African Charter in the context of peoples' rights.⁶⁸⁹ Article 15 provides for the right to work. This right is contained in the Universal Declaration and in the ICESCR. Among regional instruments it can be found in the European Social Charter and the Treaty of the European Union. Unlike any of the international and regional human rights instruments, Article 15 fails to deal with this right in any great detail. Moreover, the right to work is not guaranteed *per se*, but once employed a worker would have a right to work in equitable and satisfactory conditions and shall receive equal pay for equal work. Equal pay for equal work is also aimed at ensuring equality for women.

The only social right in the African Charter is the right to health.⁶⁹⁰ The African Charter provides for the right to enjoy the best attainable state of physical and mental health. These provisions place State parties under an obligation to provide health and medical services for their populations. The right to health is an important right although compliance with this obligation remains problematic. Heyns⁶⁹¹ argued that 'the unconditional way, in which the right is stated it is not made subject to progressive implementation, the availability of resources, etc. could easily create unrealistic expectations and as such would undermine the legitimacy of the Charter'. In the same vein, Amadi observed that the obligations are immediate and a State party is required to guarantee to its citizens the right to health immediately and irrespective of the availability of resources.⁶⁹²

Article 17 covers a wide range of interrelated rights. According to this Article, individuals are accorded the right to education, though there is no specification of the content of this right. The Article provides individuals with the right to participate freely in the cultural life of the community and imposes an obligation on the State to promote and protect the morals and traditional values recognised by the community. The provision of free participation in community life is presumably intended for minority groups within States; while there is no reference to minorities in the entire African Charter, this provision is useful.

⁶⁸⁹ African Charter, Art 21.

⁶⁹⁰ *Id.*, Art 16.

⁶⁹¹ Heyns (2001) 161.

⁶⁹² Amadi S. 'Promoting Economic, Social and Cultural Rights in Africa' (2004) 11 (unpublished paper).

Some of the peoples' rights (in particular Articles 21 and 22) are also economic rights. Cultural rights are the rights to education, the right to take part in the cultural life of the community, and the promotion and protection of morals and traditional values by the State.⁶⁹³ It is clear, however, that the collective rights listed in Articles 20-24 also have important economic, social and cultural dimensions. Odinkalu pointed out that these rights are relevant for communities as such, but also for those individual subsistence farmers and fishermen who seek guarantees of physical and economic security for themselves and their families.⁶⁹⁴

Another important characteristic of the economic, social and cultural rights provisions in the African Charter is that this instrument does not use the formulation of progressive realisation of these rights, as is usually the case with respect to them. This would mean that the obligations of State Parties in this regard are of immediate application and would underscore the fact that all rights are on an equal footing.⁶⁹⁵ The main reason why the African Charter attaches particular importance to economic, social and cultural rights is that the realisation of several of these rights coincides with some of the goals of development policy.

El-Obaid and Appiagye-Atua linked the socialism nature of some African countries that time to the concept of economic, social and cultural rights.⁶⁹⁶ Degni-Segui believed that the indivisibility of human rights in the African Charter also has a cultural origin in the unitary African worldview.⁶⁹⁷ The peculiarity of the African Charter with regard to economic, social and cultural rights lies in the conceptual and conventional unity it establishes with civil and political rights.⁶⁹⁸ However, the African Charter does not guarantee some of these rights found in other treaties.

⁶⁹³ African Charter, Art 17.

⁶⁹⁴ Odinkalu (2001) 346-347.

⁶⁹⁵ Comparison with Article 2(1) of the ICESCR which provides for progressive realisation of rights as the general State obligation.

⁶⁹⁶ El-Obaid and Appiagye-Atua (1996) 846-847.

⁶⁹⁷ Degni-Segui R. 'L'apport de la Charte africaine des droits de l'homme et des peuples au droit international de l'homme' (1991) *Revue Africaine de Droit International et Comparé* 724, 716-719.

⁶⁹⁸ Degni-Segui (1991) 716-717. The American Declaration of the Rights and Duties of Man includes provisions on economic, social and cultural rights. Yet, the American Convention on Human Rights contains in this respect only an indirect reference (Chapter III 'Economic, social and cultural rights' includes only Article 26 'Progressive Development. Extensive provisions on economic, social and cultural rights are found in the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights) (Protocol of San Salvador, 8 June 1990).

The non-provided rights include the rights to rest, leisure, reasonable limitation of working hours, periodic holidays with pay, and remuneration (Article 7(d), ICESCR); trade union rights (Article 8, ICESCR), the right to social security (Article 9, ICESCR); the right to an adequate standard of living, including adequate food, clothing, housing and continuous improvement of living conditions (Article 11, ICESCR); and the prohibition of forced labour and so forth.⁶⁹⁹ According to Baricako,⁷⁰⁰

The omission of the right to social security was not an oversight but rather takes into account the current economic environment in the majority of African States, whose resources could not adequately support a social security system. It is therefore left to the discretion of each State to provide its own social security system.

Baderin argued that the question of underdevelopment and lack of resources creates a paradox for economic, social and cultural rights in Africa. Although, the realisation of these rights will lead to both human and economic development in Africa, the said rights cannot be fully realised without economic resources in the first place.⁷⁰¹ Furthermore, Baderin contended that:

This paradox must be broken through careful resource balancing by African States, which is currently hampered by mismanagement of resources and a high level of corruption in governance in most African States. The traditional practice of trying to justify the non-guarantee of certain important economic, social and cultural rights by African States on grounds of general lack of resources and poor economic conditions in African has there been criticised.

⁶⁹⁹ Klerk expressed the same view with respect to the forced labour. See Klerk Y. 'Forced Labour and the African Charter on Human and Peoples' Rights in African Law Association (ed.) *The African Charter on Human and Peoples' Rights: Development, Context, Significance* (African Law Association, 1990) 1.

⁷⁰⁰ Baricako G. 'The African Charter and the African Commission on Human and Peoples' Rights: A Mandate to Promote and Protect Economic, Social and Cultural Rights in Africa' in International Commission of Jurists *Report of A Regional Seminar on Economic, Social and Cultural Rights (Banjul, The Gambia, 9-12 March 1998)* (Geneva: International Commission of Jurists, 1999) 45, 51.

⁷⁰¹ Baderin M.A. 'The African Commission on Human and Peoples' Rights and the Implementation of Economic, Social, and Cultural Rights in Africa' in Baderin M.A. and McCorquodale R. (eds.) *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2007) 139, 142.

Agbakwa⁷⁰² wrote:

Conditions in many African States today arise not out of a lack of wherewithal to satisfy the socio-economic rights of the people to a minimum of human dignity. Rather, they are partly the direct consequence of an active process of impoverishment and de-development. In some cases, international loans and grants purportedly secured to provide essential facilities have ended up lining private pockets, securing safe nests for the advantaged class or being spent to protect that class from the ire of the dispossessed, all in the name of development and security. It is unconscionable for those who participate in the squandering of development opportunities to point to the conditions they create as grounds for marginalising enforcement of economic, social and cultural rights.

In fact, the problem in most cases is that there is bad governance and economic mismanagement by African leaders, rather than a lack of resources *per se*. It is also often argued that the traditional African communitarian and familial system can replace the need for a state social security system, whereby family members and children are considered as a form of social security for other needy members and for the elderly. While partly agreeing with Yemet, the omission of right to social security as well as other rights mentioned above from the African Charter can be seen either as an act of short-sightedness or a lack of political will, or both. The drafters of the African Charter could have provided for these rights and subject state parties to the well-known international obligation of progressive realisation.

Odinkalu optimistically argued that some of the omitted rights 'are not outside the scope of interpretive possibilities' open to the African Charter.⁷⁰³ Similarly, Ankumah explained that the right to rest, leisure and limited working, paid holidays are covered by the right to work under equitable and satisfactory conditions, provided for under Article 15 of the African Charter, and the right to assemble could be interpreted as the right to join a trade union.⁷⁰⁴ However, Ankumah expressed concerns about the Resolution on the Right to Freedom of Association adopted in 1992, which explained the scope of the right to freedom of association under the African Charter, as the African Commission failed to go as far as interpreting that right to include trade union rights, as would have been expected.⁷⁰⁵

⁷⁰² Agbakwa S.C. 'Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177, 189-190.

⁷⁰³ Odinkalu (2001) 341.

⁷⁰⁴ Ankumah (1996), 145.

⁷⁰⁵ *Id.*, see also African Commission on Human and Peoples' Rights /Res. 5 (XI)92 (1992).

Cheru noted that, if the normative framework is lacking, the contemporary realisation of economic, social and cultural rights on the African continent has been compounded by the policies of structural adjustment that have been in place since the early 1980s, and by the phenomenon of globalisation.⁷⁰⁶ Cheru opined that the basic tenets of these policies are essentially antithetical to the effective realisation of economic, social and cultural rights.⁷⁰⁷ Oloka-Onyango⁷⁰⁸ noted that,

This is primarily because the basic foundation of structural adjustment policies is a reduction of the role of the State in either guaranteeing, or in simply protecting the individual against the violation (or the progressive non-realisation) of his or her economic and social rights. Policies such as privatisation, trade liberalisation and deregulation inordinately expose Africans to a variety of practices-particularly by the multinational corporations that have the effect of minimising their options and parameters of choice. The 'race-to-bottom' effect which has been set in place to attract more investment and on the bidding of international finance capital has entailed a much worsened situation of the protection of these rights. A distinct group that is considerably affected by both the realisation of economic, social and cultural rights and by the impact of global policies of economic restricting is African women.

In the debate on economic, social and cultural rights, Oloka-Onyango maintained that it is not erroneous to describe economic, social and cultural rights as an 'ugly sister' to the more widely recognised civil and political rights.⁷⁰⁹ Not only is there a lacklustre approach to their effective realisation, there are even lingering questions about their conception.⁷¹⁰ Some have even gone so far as to argue that economic and social rights are not rights, they are merely unenforceable individual or group entitlements. Frequent objections focus on the issue of justiciability. The argument most often heard is taken from Kotey according to whom economic, social and cultural rights are not simply justiciable.⁷¹¹ In other words, they cannot be the subject of adjudication and enforcement through the mechanism of court litigation and judicial enforcement, in the same way as civil and political rights.

⁷⁰⁶ Cheru F. Independent Expert of the Commission on Human Rights(now Human Rights Council) on the Effects of Economic Reform Policies and Foreign Debt on the Full Enjoyment of Human Rights, particularly Economic, Social and Cultural Rights, *Structural Adjustment on the Full Enjoyment of Human Rights* (E/CN.4/1999/50) 10-11.

⁷⁰⁷ Id., 11.

⁷⁰⁸ Oloka-Onyango J. 'Human Rights and Sustainable Development in Contemporary Africa : A New Dawn, or Retreating Horizons ?' in *Human Development Report 2000*, Background Paper.

⁷⁰⁹ Oloka-Onyango J. 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa (1995) 26 *California Western International Law Journal* 40,41.

⁷¹⁰ Sieghart P. *An Introduction to the International Covenants on Human Rights* (London: Commonwealth Secretariat, 1998) 45.

⁷¹¹ Kotey E.N.A. 'Some Fallacies About Rights: Of Indivisibility, Priority and Justiciability' in International Commission of Jurists & African Development Bank (eds.) *Report of A Regional Seminar on Economic, Social and Cultural Rights* (Geneva: International Commission of Jurists, 1999) 101.

Kotey asserted that economic, social and cultural rights are ‘aspirational’ or ‘abstract’, they cannot be the subject of either affirmative state obligation or of immediate realisation and enforcement.⁷¹² Both Indian⁷¹³ and South African Courts⁷¹⁴ have effectively disproved this thesis, aside from the fact that the 1993 Vienna Declaration explicitly reaffirmed the indivisibility, interdependence and interrelatedness of the two categories of human rights.⁷¹⁵ Consequently, the question for debate is not so much conceptual but practical: how can one make economic and social rights resonate for Africans for whom these rights are critical?

The African Commission emphasised that socio-economic rights form an integral part of the African Charter and that they can be ‘made real’ in the same way as any other right.⁷¹⁶ This is because, in some instances, what is at stake in the dispute over such rights may be issues such as discrimination (in terms of gender or social status); prioritisation (concerning budgetary allocations) or access. A State does not require expending resources to address any of the above.

⁷¹² Kotey in International Commission of Jurists & African Development Bank (eds.) (1999) 101.

⁷¹³ See for example the remarks of former Indian Chief Justice Bhagwati on Public Interest Litigation (PIL) as a necessary tool to foster the enforcement of economic and social rights in the case of *People’s Union v. Union of India* (1983) 1 SCR 456, 459.

⁷¹⁴ See for example *South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC). The Constitutional Court held that ‘It recognised that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in Section 26. A right of access to adequate housing also suggests that it is not only the state that is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society’. *Grootboom*, para 39.

⁷¹⁵ Gutto S.B.O. ‘Beyond Justiciability: Challenges of Implementing, Enforcing Socio-Economic Rights in South Africa (1999) 4 *Buffalo Human Rights Law Review* 89, 91.

⁷¹⁶ Communication 155/96, *Social and Economic Rights Action Centre and Another v. Nigeria*, Fifteenth Activity Report (2001) 60 *African Human Rights Law Review* (African Commission 2001) para 68.

Responding to the claim that enforcement of social and economic rights must be dependent on the capacity of a State to afford the cost entailed, the South African Constitutional Court, for example, declared that:

It is true that the inclusion of socio-economic rights may result in courts making orders that have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of State beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon them by a bill of rights that it can result in a breach of the separation of powers.⁷¹⁷

Bhagwati rightly observed that the judgments of the South African Constitutional Court go a considerable way towards clarifying what has traditionally been extremely murky terrain.⁷¹⁸

4.2.2. Group rights

In tackling family matters, Article 18 of the African Charter makes specific provision for the protection of women, children and the disabled. Worthy of note is Article 18 (3):

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

Article 18 is wide ranging and covers at least four rights. It recognises family as the natural unit and basis of society, and establishes a duty upon the State to take care of the physical health and morals of the family.

In its acknowledgment of family as the natural unit, the provisions draw upon Article 16 of the Universal Declaration, Article 23 of the ICCPR and Article 10 of the ICESCR. The provisions emphasise on what it is already known to be matters of importance in African societies. According to Bradley and Weisner, the family in its nuclear and extended forms is a significant social unit, embodying important values.⁷¹⁹ Meillasoux argued that the elderly generally hold a privileged position and must be respected.⁷²⁰

⁷¹⁷ Gutto (1999) 92. See Certification Judgment of the South African Constitutional Court (10) BCLR 77.

⁷¹⁸ Bhagwati P.N. 'Liberty and Security of the Person in India, with a Particular Emphasis on Access to Courts' in Commonwealth Secretariat and Interights (eds.) *Developing Human Rights Jurisprudence* Vol. 7 (London: Commonwealth Secretariat and Interights 1998) 203, 210.

⁷¹⁹ Bradley C. and Weisner T.S. 'Introduction: Crisis in the African Family' in Weisner T.S. et al. (eds.) *African Families and The Crisis of Social Change* (London: Bergin and Garvey, 1997) xxvi.

⁷²⁰ Meillasoux C. 'La conquête de l'âge' in Attias-Donfut C. and Rosenmayr L. (eds.) *Viellir en Afrique* (Paris: Presses Universitaires de France, 1994)49.

Bradely and Weisner contended that, in the event of problems and disputes, solutions should be sought to protect the unity of the family where possible.⁷²¹ For some critics, such as Ankumah, it is the specific framing of the promotion and preservation of the family as a duty of the individual which raises concern.⁷²² One does not adhere to this view, because the concept of a duty to one's fellow human being is also contained in international human rights instruments.⁷²³ There is no connection between an individual's duty to preserve and respect his family and other members of the community, and enjoyment of his own human rights.⁷²⁴ In the same way, there is no conflict between points (ii) and (iii) mentioned above in human rights law. Every day, individuals in every society balance, without conflict, their duties to their family and society with their rights and freedoms.

The striking feature of the African Charter is its failure to specifically mention marriage. It is not immediately apparent why the African Charter avoids all reference to marriage. One can surmise that in the interests of obtaining the widest possible acceptance for the instrument, the drafters decided to leave the issue of marriage to the domestic legislation of each state. It seems reasonable to suppose that, with the diversity of customs, legal systems and religions existing on the continent, it was felt that the imposition of even the most general guidelines on a subject as delicate as marriage was undesirable, as it would compromise the widest possible acceptance ideal.

Nevertheless, the omission does compound the problem of family rights under the African Charter. Article 18(2) reinforces the obligations with the duty on the State to assist the family unit in establishing it as the custodian of morals and traditional values. Article 18(3) is a comprehensive clause concerning prohibition of discrimination against women.

⁷²¹ Bradley and Weisner in Weisner et al. (eds.) (1997) xxvii.

⁷²² Ankumah (1996) 171.

⁷²³ See for example ICESCR: 'Realising that the individual, having duties to other individuals and to the community to which he belongs, is under the responsibility to strive for the promotion and observance of the rights recognised in the present Covenant'. Preamble, para 5. See also Universal Declaration, Art 29.

⁷²⁴ Lewis demonstrates the commonality of duties to parents, elders and ancestors by listing the religious sources of these, including Hindu, Ancient Jewish, Ancient Egyptian, Ancient Chinese and traditional African societies. Lewis C.S. *The Abolition of Man* (London: Fount Paperbacks, 1978) 53-60.

However, Nhlapo⁷²⁵ raised some concerns with regard to the Article 18(2):

The primary problem with the Charter's mechanisms for the protection of women's human rights is that those protections are located in the context of the family...The high level of standard of equality required by Article 16 of CEDAW, to the extent that this article is incorporated by Article 18(3) and the duty to be conscious of 'the values of African civilisation', is not easily reconcilable with the African traditional values that exist in African marriage law...It is not really necessary to rehash the standard debate over the problems posed for women by traditional values in general and customary marriage law in particular. It should suffice simply to post a reminder about the notion of patriarchy that permeates the whole traditional law, and the stifling aspects of this notion when it is translated into practices which treat women as inferior to men...These factors render the protection of women under the Charter weak and ambiguous.

Against this background, one agrees with Beyani,⁷²⁶ who did four observations in connection with this provision:

First, it lays a gender-specific obligation upon States in Africa to eliminate discrimination against women, and merely on grounds of sex as such. Second, the language employed admits of no exception in requiring States to eliminate every discrimination against women. Third, it distinctly acknowledges the existence of the rights of women and children, and recognises the necessity for the protection of those rights by the State. Fourth, it incorporates the application, within the African Charter, of international standards protecting the rights of women and children as stipulated in international conventions and declarations.

At first glance, providing for the elimination of discrimination against women, Article 18(3) represents an open canvas for the promotion and protection of women's rights. The provision's call to protect women's rights, as stipulated in all human rights instruments, is significant. Through this provision, the African Charter makes a clear commitment to provide protection equal in scope to that is required by international declarations and conventions. By including declarations among the list of international instruments to be consulted, the African Charter grants an even greater legal scope of protection than is to be found under the systems from which these instruments originate.

⁷²⁵ Nhlapo R.T. 'The African Charter and Women's Rights: What Next?' (July-Sept.1996) *African Legal Aid Quarterly* 11, 12.

⁷²⁶ Beyani C. 'A More Effective Guarantee of Women's Rights in the African Human Rights System' in Cook R.J. (ed.) *Human Rights of Women: National Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 285, 290.

Furthermore, international declarations (owing to the fact that they commonly issue out political process and are not binding upon states) often suggest a broader selection of rights and scope of protection. An illustration of this is the recognition of reproductive rights in the Beijing Declaration and Platform for Action. Another declaration significant to any effort to end harmful traditions is the 1993 UN Declaration on the Elimination of Violence against Women. In short, Article 18 ensures that states will act to protect the rights of women as stipulated in a broad spectrum of instruments, and the preamble, paragraph 9 of the African Charter, affirms that states shall adhere to the principles they set forth, and Articles 60 and 61 declare that the African Commission shall draw inspiration from these in all their deliberations.

The overlap of protection offered between the various declarations and conventions strengthens the claims African women may make in order to challenge, modify or eliminate traditional cultural practices, which are inconsistent with international human rights standards. In this regard, Article 18 of the African Charter is significant in its scope, allowing a claimant to pick and choose from those instruments and provisions which most strongly make the case that those traditional practices contrary to international human rights norms represent violations of human rights of women.⁷²⁷

Some commentators, however, such as Dankwa and Welch contended that, because the African Charter has only one provision on women's rights, it gives insufficient direct attention to women as a group and thereby skilfully avoids dealing with the rights of women and the forms of violations they may disproportionately suffer because of their gender.⁷²⁸ It is true that a simple reading of the African Charter gives little information as to the specific rights women may claim and states must ensure. Filling this gap requires thorough knowledge and consultation of many instruments by all parties concerned: individuals, human rights activists, and the African Commission alike. This is one of the reasons for the adoption of the Protocol on the Rights of Women mentioned above.

⁷²⁷ Egypt is the only State to have entered reservation to Article 18(3) of the African Charter, making it subject to the provisions of the Shari'a.

⁷²⁸ Dankwa suggested that 'women should not only serve as Commissioners, but their rights should receive more serious elaboration and guarantee that what obtains under the present Charter'. Dankwa E.V.O. 'Conference on Regional Systems of Human Rights Protection in Africa, the Americas and Europe' (1992) 13 (7-8) *Human Rights Law Journal* 314, 315; Welch C.E. Jr. 'Human Rights and African Women: A Comparison of Protection Under Two Major Treaties (1993) 15 (3) *Human Rights Quarterly* 549,554.

Other analysts believed, the African Charter also fails to adequately engage States to alter the traditional roles of men and women in the family and society, in order to achieve sexual equality. Ankumah, for example, argued that such an omission may be indicative of the drafters' intention not to deviate from customary practices relating to women in general, and with respect to marriage in particular.⁷²⁹ Nhlapo believed that this omission may have arisen out of the need to exclude sensitive issues which risked compromising the adoption of the African Charter by some OAU Member States.⁷³⁰ Anhumah and Nhlapo may be right in both their views. However, these omissions are more likely to be a result of two mutually enforcing considerations, the simple lack of awareness by the drafters that women's rights required special focus, and their belief that further specificity was unnecessary in light of Article 18 (3).

4.2.3. Peoples' rights

The African Charter is not the first document to recognise peoples' rights, together with individual human rights. The most well-known examples are the ICCPR and ICESCR, which guarantee peoples' rights to self-determination and free disposal of their wealth in their first article. The most far-reaching enumeration of peoples' rights is found in the Algiers Declaration of 1976, a non-binding document of private origin as mentioned by Cassese and Jouve, as well as Shivji.⁷³¹

The African Charter has a much stronger focus on peoples' rights. As the rubric of the treaty reflects, there is a special position accorded to peoples' rights. Indeed, the African Charter has the distinction of being the only international instrument to provide a detailed exposition of the rights of peoples. Peoples' rights are spelt out in Articles 19-24 of the African Charter. These are the right of all peoples to equality,⁷³² to existence and self-determination,⁷³³ to dispose freely of wealth and natural resources,⁷³⁴ to economic, social and cultural development,⁷³⁵ to national and international security,⁷³⁶ and to a general satisfactory environment.⁷³⁷

⁷²⁹ Ankumah (1996) 156.

⁷³⁰ Nhlapo T. 'International Protection of Human Rights and the Family: African Variations on a Common Theme' (1989) 3 *International Journal of Law and the Family* 1, 14.

⁷³¹ Universal Declaration of the Rights of Peoples, Algiers, 4 July 1976. See Cassese A. and Jouve E. (eds.) *Pour un droit des peuples Essais sur la Déclaration d'Alger* (Paris: Berger-Levrault, 1978) ; Shivji (1989) 99-103.

⁷³² African Charter, Art 19.

⁷³³ Id, Art 20.

⁷³⁴ Ibid., Art 21.

⁷³⁵ Ibid., Art 22.

⁷³⁶ Ibid., Art 23.

⁷³⁷ Ibid., Art 24.

Several reasons are advanced to justify the inclusion of peoples' rights in the African Charter. According to Glélé-Ahanhanzo, it was the expression long kept in the memory of the African struggle for independence, which was a struggle of peoples.⁷³⁸ According to Gonidec, the Charter's affirmation of peoples' rights was thus a logical continuation of the support that the OAU had never stopped giving to national liberation movements, because at the time of the drafting of the African Charter, not all African peoples were yet free from colonisation or other forms of oppression, for example, apartheid in South Africa.⁷³⁹ Mbaya argued that peoples' rights may be understood as a modern answer to African political problems, neo-colonialism, foreign domination and the bloc policy.⁷⁴⁰ Fierens believed that peoples' rights can be read as claims of the African people on the rest of the world, in particular the former colonisers.⁷⁴¹

Wonyu⁷⁴² and Degni-Segui⁷⁴³ respectively believed that the inclusion of peoples' rights was a means of recreating the harmony between the individual and society in Africa, which had been broken by the imposition of Western concepts. Mahalu justified the inclusion of peoples' rights in the African Charter in terms of the socialist ideology prevailing in many African countries at that time.⁷⁴⁴ Mahalu viewed the African Charter as a compromise between the socialist and capitalist States of the continent, with capitalist interests represented in individual human rights and socialist interests in peoples' rights.⁷⁴⁵

The underdevelopment also reflected by several demands expressed as peoples' rights in the African Charter, in particular the right to development, is also a consequence of African countries' position with regard to the establishment of a new international economic order. Notwithstanding a detailed exposition of the peoples' rights, the drafters of the African Charter deliberately avoided the complex issue of the definition of the term 'peoples'.

⁷³⁸ Glélé-Ahanhanzo M. 'La Charte Africaine des Droits de l'Homme et des Peuples' in *Etudes Offertes à C.A. Colliard* (Paris : Pedone, 1984) 511, 522.

⁷³⁹ Gonidec P.-F. 'La Charte Africaine des Droits de l'Homme et des Peuples' (1983) 209-210 *Le Mois en Afrique* 22, 24.

⁷⁴⁰ Mbaya in Eide and Hagtvet (eds.) (1992), 74.

⁷⁴¹ Fierens J. 'La Charte Africaine des Droits de l'Homme et des Peuples' (1990) 3 *Revue Trimestrielle des Droits de l'Homme* 235, 241.

⁷⁴² Wonyu E. 'Un support juridique pour la protection la démocratie en Afrique: La Charte Africaine des Droits de l'Homme et des Peuples' (1992) *Afrique 2000* 29, 33.

⁷⁴³ Degni-Segui (1991) 724. See also, Kiwanuka R. 'The Meaning of 'People' in the African Charter on Human and Peoples' Rights' (1988) 35 (1) *African Journal of International Law* 80, 82; Okoth-Ogendo H.W. 'Human and Peoples' Rights: What Point is Africa Trying to Make?' in Ronald Cohen (ed.) *Human Rights and Governance in Africa* (Gainesville: University Press of Florida, 1993) 81, 81-82.

⁷⁴⁴ Mahalu C.R. 'Africa and Human Rights' in Kunig P. et al (eds.) *Regional Protection of Human Rights by International Law: Emerging African System* (Baden-Baden: Nomos Verlagsgesellschaft, 1985) 26.

⁷⁴⁵ Id.

The only affirmative aspect that emerges from a close scrutiny of the provisions of the African Charter is that there is no single uniform meaning that could be attributed to the word 'peoples'. The African Charter presents a variable approach, depending on the issue in questions. In Kunig's opinion, the term 'peoples' in Article 19 includes minorities in a State, as well as the populations of States.⁷⁴⁶

Ouguergouz noted that the principle of non-discrimination of peoples can be read as a condemnation of any *de jure* or *de facto* hegemony of any ethnic group over another, and as a prohibition of any form of discrimination against an ethnic group. In this sense, Ouguergouz believed that Article 19 is a principle that applies to the implementation of all collective rights in the African Charter.⁷⁴⁷ Kiwanuka opined that, it prescribes both external and internal forms of colonialism, which means that it applies to minorities within a State, and minorities are entitled not to lose their identity and interests in the aggregation of the whole.⁷⁴⁸ Umozurike⁷⁴⁹ shared this view, while Kunig suggested that it only applies at the international level.⁷⁵⁰

Article 20 emphasises the right to existence as a condition *sine qua none* for the right to self-determination and all other peoples' rights.⁷⁵¹ The affirmation of peoples' right to existence is an original means of dealing with the problem of genocide. In the context of recent African history, it should be applied to ethnic groups in a state.⁷⁵² Peoples' right to existence concerns not only physical existence, but also the specificity of a people, for instance, their cultural identity.⁷⁵³ In its external aspect, this right is also an affirmation of the State's right to respect for its sovereignty and independence, and in its internal aspect, it is exercised against the State.⁷⁵⁴ This is the right of people to choose their political institutions and rulers, the principle of democratic legitimacy.⁷⁵⁵

⁷⁴⁶ Kunig P. 'The Role of 'Peoples' Rights' in the African Charter of Human and Peoples' Rights' in Ginther K. and Benedek W. (eds.) *New Perspectives and Conceptions of International Law An Afro-European Dialogue* (Wien/New York: Springer, 1983) 169.

⁷⁴⁷ Ouguergouz (1993) 140.

⁷⁴⁸ Kiwanuka (1988) 93.

⁷⁴⁹ Umozurike (1997) 54.

⁷⁵⁰ Kunig (1982) 158-159.

⁷⁵¹ Ouguergouz (1993) 141.

⁷⁵² M'Baye (2002) 183.

⁷⁵³ Ouguergouz (1993) 145.

⁷⁵⁴ *Id.* 162.

⁷⁵⁵ *Ibid.*

For Gonidec ‘Peoples’ here refers to citizens of a State, those endowed with the right to vote in accordance with Article 13(1) of the African Charter.⁷⁵⁶ Kiwanuka suggested that ‘peoples’ comprise all persons within the boundaries of a country or geographical entity that has yet to achieve independence or majority rule.⁷⁵⁷ Umozurike maintained that, the right of minorities to self-determination, with respect to State sovereignty and territorial integrity, is included in this Article.⁷⁵⁸

As for other peoples’ rights, Article 21 adopts an assertive African position vis-à-vis the rest of the world. It contains strong language in response to some of the real African problems, such the looting of natural wealth, other dispossessions, and the pernicious role of international corporations. Ouguergouz saw this provision as a call for a united African front in the assertion of the right to free disposal of natural resources.⁷⁵⁹ By replacing ‘peoples’ by ‘states’ for the exercise of the right to free disposal of their wealth and natural resources, Degni-Segui noted that ‘people’ in this context seems to mean ‘State’, at the exclusion of groups within the State,⁷⁶⁰ while Gonidec argues that the meaning of ‘people’ here is that of ‘population’, which is the word used in the French text of the African Charter.⁷⁶¹

Finally, what is the meaning of ‘people’ or ‘peoples’? Avoiding either a minimalist or maximalist definition, there appears to be a consensus about the common features of groups of human beings who might well be regarded as ‘peoples’. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) Meeting of Experts on the study of the rights of peoples, held in Paris in 1989, defined peoples for purposes of peoples’ rights in international law, as a group of individual human beings who enjoy some or all of the following common features: (a) A common historical tradition; (b) Racial or ethnic identity; (c) Cultural homogeneity; (d) Linguistic unity; (e) Religious or ideological affinity; (f) Territorial connection; and (g) a common economic life.⁷⁶²

⁷⁵⁶ Gonidec (1983) 28.

⁷⁵⁷ Kiwanuka (1988) 90.

⁷⁵⁸ Umozurike (1988) 71-72.

⁷⁵⁹ Ouguergouz (1993) 180.

⁷⁶⁰ Degni-Segui (1992) 708.

⁷⁶¹ Gonidec (1983) 28.

⁷⁶² UNESCO ‘New Reflections on the Concepts of Peoples’ Rights’ (1990) 11 (3-4) *Human Rights Law Journal* 441, 446.

This definition also identifies other considerations. For example, the group must be of a certain size, not a mere association of individuals in the state, and it must have the will and means to identify itself as a people. Brownlie summarised the requirements as a 'distinct character'.⁷⁶³ He further identifies a core of 'reasonable certainty' concerning the definition of people.⁷⁶⁴ This core, in his opinion, consists of the right of a community to have its distinct character reflected in its political life.⁷⁶⁵ Brownlie further argued that:

The concept of distinct character depends on a number of criteria which may appear in combination. Race or nationality is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate.⁷⁶⁶

The right to development provided for in Article 22 is of particular concern for Africa. Not only is Africa the continent where developmental efforts are probably most needed, but also the idea of presenting development as a right was launched by an African, Keba Mbaye, in 1972.⁷⁶⁷ The right to development gained the status of an internationally recognised right through the adoption of the Declaration on the Right to Development by the UN General Assembly in 1986.⁷⁶⁸ The role of the state in the right to development may present a threat to individual rights, especially in the case of a conflict of interests, whereby the rights of the state would override those of the individual.⁷⁶⁹ According to M'baye, one thing is clear - while States may be the executors of the right to development or the ones responsible for its implementation, they are definitely not the beneficiaries. Development is a human right, not a State right. He interpreted the right to development in the African context as not merely a collective right, but also an individual right.⁷⁷⁰ Ouguergouz found the individual dimension of the right to development in the African Charter only in the goal of that right, the flourishing of the human person, but not in its mode of exercise, which is conceived of as a collective one.⁷⁷¹

⁷⁶³ Brownlie I. 'The Rights of Peoples in Modern International Law' (1985) 9 *Bulletin of Association of Legal Philosophy* 108, 110.

⁷⁶⁴ *Id.*

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Ibid.*

⁷⁶⁷ In his inaugural lecture at the Study Session of the International Institute of Human Rights in Strasbourg; Mbaye K. 'Le droit au développement comme droit de l'homme' (1972) *Revue Des Droits de l'Homme* 503.

⁷⁶⁸ UN GA Res. 41/128, 41 UN GAOR, Supp. No. 53 UN Doc. A /41/925 (1986).

⁷⁶⁹ Busia (1989)72.

⁷⁷⁰ M'Baye (1972) 503.

⁷⁷¹ Ouguergouz (1993)180.

There is no continent in the world that requires peace as urgently as Africa. Inter-State and internal conflicts on the continent are quite prevalent. The right to peace has been recognised in resolutions of the General Assembly of the UN in 1978⁷⁷² and 1984.⁷⁷³ The first paragraph of Article 23⁷⁷⁴ remains vague, and must probably be taken to mean ‘that the parties are obliged to do their utmost to ensure national and international peace and security’.⁷⁷⁵ The word ‘peoples’ in this paragraph can refer to entire populations as well as to smaller groups within a State. The State is the entity that exercises this right on the international forum. The second paragraph contains some concrete measures in the context of maintaining friendly relations among African States. The beneficiaries of these measures are in the first place the States themselves,⁷⁷⁶ next to the people, which in paragraph 2(b) most likely refers to the population that makes up a State.⁷⁷⁷

Environmental rights are gradually emerging in international law. The African Charter was very progressive, by including the right to a satisfactory environment. However, this is not the highest standard.⁷⁷⁸ However, its impact remains uncertain, as no duty-holder is mentioned, and the wording is rather vague. A ‘satisfactory environment’ is certainly not a very high standard. According to Kunig the priority of the goal of development, with its likely negative effects on the environment explains the modesty of the aim of this article.⁷⁷⁹ Article 24 does nothing towards finding a solution for the contribution between the pressure for industrialisation and the need for environmental protection.⁷⁸⁰

⁷⁷² GA Res. 33/75, 15 December 1978

⁷⁷³ GA Res. 39/11, 12 December 1984

⁷⁷⁴ African Charter: ‘1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity shall govern relations between States. 2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:
a) Any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter. b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.’

⁷⁷⁵ Umozurike U.O. ‘The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples’ Rights’ (1988) *African Journal of International Law* 65, 72.

⁷⁷⁶ Ouguergouz (1993) 219.

⁷⁷⁷ Id., 133.

⁷⁷⁸ Peter C.M. ‘Taking Environment Seriously: The African Charter on Human and Peoples’ Rights and the Environment’ (1993) *Review of the African Commission on Human and Peoples’ Rights* 41.

⁷⁷⁹ Kunig (1982) 157.

⁷⁸⁰ Id.

4.2.4. Duties in the African Charter

The idea of combining individual rights and duties in a human rights instrument is not without precedent. In this regard, the Universal Declaration blazed the trail when it provided that ‘everyone has the duties to the community in which alone the free and full development of his personality is possible’.⁷⁸¹ The African Charter was intended to reflect an indigenous conception of human rights rooted in the African philosophy of law, the historical traditions and values of African societies and the multifarious needs of the African people. D’SA believed that it is these traditional notions and the incorporation of a number of distinctive features of African culture that give the African Charter a distinctive character among the international human rights instruments.⁷⁸²

4.2.4.1. Individual duties

The American Declaration of the Rights and Duties of Man⁷⁸³ refers to duties in five out of its six perambulatory paragraphs, and mentions individual duties in a separate chapter. The American Convention on Human Rights does not place a strong emphasis on duties. Individual duties are reduced to a chapter of one article.⁷⁸⁴ However, the African Charter is the first human rights instrument to articulate the concept of duty in a meaningful way.⁷⁸⁵

⁷⁸¹ See for example, Preambles of the two International Covenants, common para 1 and the Universal Declaration, Art 29.

⁷⁸² D’SA R.M. ‘Human and Peoples’ Rights: Distinctive Features of the African Charter (1985) 29 (1) *Journal of African Studies* 72, 81.

⁷⁸³ OAS Res. XXX, adopted by the Ninth International Conference of American States (March 30-May 2, 1948) Bogota, OAS, Off. Rec. OEA/Ser. L/V/1.4 Rev. (1965).

⁷⁸⁴ American Convention on Human Rights, Chapter V *Personal Responsibilities*, Art 32.

⁷⁸⁵ Address delivered by Léopold S. Senghor, former President of the Republic of Senegal on November 28, 1979 to a meeting of African Experts preparing the Draft African Charter on Human and Peoples’ Rights, OAU-DOC. CAB/LEG/67/5, 6, quoted in Benedek. Benedek W. ‘Peoples’ Rights and Individual Duties as Special Features of African Charter on Human and Peoples’ Rights’ in Kunig et al. (eds.) (1985) 59, 61.

In his opening address to the meeting of African Experts in Dakar, the former Senegalese President Léopold S. Senghor stated that:

Room should be made for the African tradition in our Charter on Human and Peoples' Rights, while bathing in our philosophy, which consists in not alienating the subordination of the individual to the community, in co-existence, in giving everyone a certain number of rights and duties. In Europe, human rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it. In Africa, the individual and his rights are wrapped in the protection of the family and other communities ensure everyone. Rights in Africa assume the form of rite which must be obeyed because it commands. It cannot be separated from the obligations due to the family and other communities. Therefore, contrary to what has been done so far in other regions of the world, provision must be made for a system of 'Duties of individual', adding harmoniously to the rights recognised in them by the society to which they belong and, by other men. I conclude: if we want to build the *homo africanus* of tomorrow, we should once again, assimilate without being assimilated'.⁷⁸⁶

The inclusion of duties in the African Charter reflects the position in traditional societies where individuals not only have rights, but are also subjected to accomplish certain duties.⁷⁸⁷

Gittleman viewed the inclusion of individual duties in the African Charter as a result of the influence and priorities of African socialist States,⁷⁸⁸ while M'Baye believed that they are part of the cultural elements of African societies.⁷⁸⁹

⁷⁸⁶ Address delivered by the former President of Senegal, Léopold Sedhar Senghor in Benedek (1985) 59, 61. President Senghor the late Collomb, who rightly observed: 'To live in Africa is to give up being an individual, particular, competitive, selfish, aggressive, concurrent, man is to live with others, in peace, in harmony, with the dead and living, with the natural environment and the spirits inhabiting or livening it up'. Id.

⁷⁸⁷ To support this argument, one can refer to the following statement: 'The part dealing with duties is an innovation. Until now, international instruments referring to the duties of individuals do so in a few words and this often betrays the authors' lack of conviction. It is necessary to point out here that if individuals have rights to claim, they have also duties to perform. In traditional African societies, there is no opposition between rights and duties or between the individual and the community. They blend harmoniously'. See *Memorandum of the Meeting of Experts for the Preparation of the Draft African Charter on Human and Peoples' Rights*, Dakar, 1979, 108.

⁷⁸⁸ Gittleman (1982) 672.

⁷⁸⁹ M'Baye K. *Les Droits de l'homme en Afrique 2nd* (Paris : Pedone, 2002) 214.

Glélé-Ahanhanzo contended that by including individual duties in the African Charter, the drafters sought to avoid a too far-reaching individualism, leading to irresponsibility and egoism, which they feared might be the side-effects of development.⁷⁹⁰ Bello and Degni-Segui contended that the drafters wanted to preserve African communal values. According to them, in traditional Africa, the individual is absorbed into the group and rights are inseparable from the idea of duty.⁷⁹¹ Degni-Segui noted that, one of the first steps on the way out of that situation is to stimulate the allegiance of citizens to the State and civic spirit.⁷⁹²

Similarly, El-Obaid and Appiagyei-Atua explained that the community helps the individual to exercise his or her rights, and the individual, in turn, ensures a contribution to general community development.⁷⁹³ According to Kodjo, it is claimed that living in Africa means abandoning the right to be an individual in favour of membership in the group, which necessarily entails certain duties towards the group.⁷⁹⁴ Huaraka argued that individual duties could act as a significant catalyst in the nation building of many African States.⁷⁹⁵ Duties could help to strengthen the tenuous fibres of statehood and nurture the sense of patriotism, and thus support the passage from a society based on clans and ethnic groups to a nation-State.⁷⁹⁶

The duty/rights concept in the African Charter has raised considerable. Buergenthal maintained that the inclusion of duties in the African Charter is nothing but an invitation for the imposition of unlimited restrictions on the enjoyment of rights.⁷⁹⁷ Fearing that the concept of duties could be used to suppress rights guaranteed by the African Charter, Haysom observed that the interpretation of a duty towards the community as meaning duty towards the state, lends itself to an autocratic style of government.⁷⁹⁸

⁷⁹⁰ Glélé-Ahanhanzo (1984) 525.

⁷⁹¹ Bello (1987) 33; Degni-Segui (1992) 722.

⁷⁹² Id.

⁷⁹³ El-Obaid and Appiagye-Atua (1996) 845.

⁷⁹⁴ Kodjo E. 'The African Charter on Human and Peoples' Rights' (1990) 11 *Human Rights Law Journal* 261, 276.

⁷⁹⁵ Huaraka T. 'Les Fondements des droits de l'homme en Afrique' in Lapeyre A. et al. (eds.) *Les dimensions universelles des droits de l'homme Les dimensions spirituelles et intellectuelles des droits de l'homme* (Bruxelles : Bruylant, 1990)248.

⁷⁹⁶ Id.

⁷⁹⁷ Buergenthal (1995) 178

⁷⁹⁸ Haysom N.R.L. 'African Charter : Inspirational Document or False Start' Paper presented at the Bill of Rights Conference, Victoria Falls, Zimbabwe, 14 December 1994, 6.

The individual duties are merely ethical obligations of a non-binding nature or a code of conduct, not capable of effective implementation.⁷⁹⁹ The African Charter strikes a fine balance between rights and duties, as well as in terms of relations between an individual and the community or the State.⁸⁰⁰ For Eze, at very best, duties could be seen as a programme to be considered by domestic legislation.⁸⁰¹ Sinkondo maintained that the inclusion of these duties in the African Charter is a strategy to undermine rights and to privilege the state at the expense of the individual.⁸⁰² Benedek⁸⁰³ wrote that :

Contrary to the Marxist conception of human rights, the African conception is not based on symmetrical rights and obligations between the individual and the State, and duties are not used to qualify existing rights. Duties are generally not corresponding to specific rights, the argument in favour of derogations on this basis might prove not to be very operational. There is some danger that the duty provisions be misused to defeat the individual rights of the African Charter, yet this danger should not be overestimated. The fact that similar duties form part of the domestic law of most African States, and their incorporation into the African Charter might actually make their use more transparent and even allow for some sort of international control.

Umozurike explained that in principle, it is a wholesome idea to complement rights with duties, yet the risk of abuse by some African regimes is a real one.⁸⁰⁴ While there are some seeds of truth in the words of these critics, one can think, however, that their truth does not lie in the fact that the state is a villain against which human rights law is the effective weapon, and hence individuals should not be called upon to discharge any duties with respect to it. The State is also the single most important agency in the promotion and protection of human rights at individual and collective levels. Rather, the merit of these critics lies in the fact that a scheme of individual duties is meaningless if its precise boundaries, content and conditions of compliance are impossible to ascertain. In the same vein, Ige⁸⁰⁵ put that:

Most commentaries about duties considered them to be too onerous, and focused on the possible use that can be made of them by States to effectively stomp the individual rights guaranteed. While there has been little action undertaken to test this aspect of the Charter, it is quite clear that the concept of duties is not necessarily antithetical of the respect of human rights. What is clear nevertheless is the need to approach the matter in such a fashion that the overall observation and protection of individual rights is not undermined by an undue emphasis on duties.

⁷⁹⁹ Glélé-Ahanhanzo (1984) 527

⁸⁰⁰ Id.

⁸⁰¹ Eze (1984) 215.

⁸⁰² Sinkondo (1994) 299.

⁸⁰³ Benedek in Kunig et al. (eds.) (1985) 85.

⁸⁰⁴ Umozurike (1988) 82.

⁸⁰⁵ Ige T. 'The African Charter on Human and Peoples' Rights' (1999) 23 *The Review* 2, 9.

For Mbiti,⁸⁰⁶

Only in terms of other people does the individual become conscious of his own being, his own duties, his privileges and responsibilities, towards himself and towards other people. When he suffers, he does not suffer alone but with the corporate group; when he rejoices, he rejoices not alone but with his kinsmen, his neighbours and relatives whether living or dead... Whatever happens to the individual happens to the whole group and whatever happens to the whole group happens to the individual. The individual can only say 'I am, because we are; and since we are, therefore I am'. This is a cardinal point in the understanding of the African view of human rights.

Making Mbiti's statement, 'I am, because we are, and since we are, therefore I am', his point of departure, Menkiti inferred that the African view asserts the ontological primacy of the community, that 'as far as Africans are concerned, the reality of the communal world takes precedence over the reality of the individual life histories, whatever these may be'.⁸⁰⁷ From the affirmation that the community takes precedence over the individual, Menkiti made three further inferences: first that in African view, 'it is the community which defines the person as person, not some isolated static quality of rationality, will, or memory'.⁸⁰⁸ Second, that the African view supports 'the notion of personhood as acquired',⁸⁰⁹ not merely granted as a consequence of birth, and third that 'as far as African societies are concerned, personhood is something at which individuals could fail'.⁸¹⁰

Tempels believed that individual become real only in their relationships with others, in a community or a group. It is the community which makes the individual to the extent that without the community the individual has no existence.⁸¹¹ Similarly, Gyekye also observed that community has a priority over the person.⁸¹² For him,

In so far as the cultural community constitutes the context or medium in which the individual person works out and chooses his or her goals and life plans, and, through these activities, becomes what he or she wants to be, ... the cultural community must be held as prior to the individual.

⁸⁰⁶ Mbiti J. *African Religions and Philosophy* (London: Heinemann Educational Publishers, 1969) 106.

⁸⁰⁷ Menkiti I.A. 'Person and Community in African Traditional Thought' in Richard A.W. (ed.) *African Philosophy: An Introduction* 3rd ed. (Lanham, MD. : University Press of America, 1984) 169, 171 and 180.

⁸⁰⁸ Menkiti (1984) 172;

⁸⁰⁹ Id., 174, 178 and 179.

⁸¹⁰ Ibid., 173.

⁸¹¹ Tempels P. *Philosophie Bantu* (Paris: Présence Africaine, 1959) 103.

⁸¹² Gyekye K. *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (Philadelphia: Temple University Press, 1995) 106.

In the search for an African understanding of the notion of duty-rights, one would like to refer to an African philosophy and way of life called *Ubuntu* or humanness. *Ubuntu* is a unifying vision or worldview enshrined in the Zulu maxim *umuntu ngumuntu ngabantu* ‘a person is a person through other persons’.⁸¹³ At bottom, this traditional African aphorism articulates a basic respect and compassion for others. It both describes human being as ‘being-with-others’ and prescribes what ‘being-with-others’ should be all about. The brief explanation of this African world view and way of life throw some light into concept of duties in the African Charter.

Individual duties to the family, community or State are not restrictive of individual rights. Rather, they contribute to the security and development of these entities, and they are a condition for the realisation of the rights provided in the African Charter. The individual duties contained in the African Charter could be seen as intended to re-create the bonds of the pre-colonial era among individuals and between individuals and the state. They represent a rejection of the individual who is completely irresponsible and opposed to society. In this regard, one agrees with Mutua, who maintained that:

The duty/rights conception of the African Charter could provide a new basis for individual identification with compatriots, the community, and the State. It could forge and instil a national consciousness and act as the glue to reunite individuals and different nations within the modern State and at the same time set the proper limits of conduct by State officials. The motivation and purpose behind the concept of duty in pre-colonial societies was to strengthen community ties and social cohesiveness, creating a shared fate and common destiny. This is the consciousness that the impersonal modern State has unable to foster. It has failed to shift loyalties from the lineage and the community to the modern State, with its mixture of different nations.⁸¹⁴

⁸¹³ *Ubuntu* is a Zulu word but all Bantu languages have similar words, such as *Muntu*, that stem from the same root and have or less the same meaning. Many definitions of *Ubuntu* have been given. See for example Broodryk J. ‘Is Ubuntu Unique’ in Malherbe J.G. (ed.) *Decolonising the Mind* (Pretoria: Research Unit for African Philosophy, 1995) 1, 5; Broodryk J. *Ubuntu Management and Motivation* (Johannesburg: Gauteng Department of Welfare/Pretoria: Ubuntu School of Philosophy, 1997) 1-2; Prinsloo E.D. *Ubuntu From a Eurocentric and Afrocentric Perspective and Its Influence on Leadership* (Pretoria: Ubuntu School of Philosophy, 1995) 2; Sindane J. *Ubuntu and Nation Building* (Pretoria, Ubuntu School of Philosophy, 1994) 1-2; The South African Governmental White Paper on Welfare officially recognised *Ubuntu* as ‘the principle of caring for each other’s well-being ... and a spirit of mutual support... Each individual’s humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual’s humanity. *Ubuntu* means that people are people through other people. It also acknowledges both the rights and responsibilities of every citizen in promoting individual and societal well-being’. Government Gazette, 02/02/1996, No. 16943, 18, para 1 – Quoted by Broodryk (1997) 1.

⁸¹⁴ Mutua (1995) 368.

Article 27(1) simply re-stresses the fact that the individual owes a duty to his family, the state and the community. Article 27(2) places a limitation on the exercise of rights by an individual for the protection of the rights of others, and in the interest of collective security, morality and the interests of others.⁸¹⁵ This is a normal fact of life, which shows that in practical reality there is no absolute right. Individuals are required to think of how the enjoyment of their rights in some circumstances might adversely affect the rights of others or the community at large. This duty is based on the presumption that the full development of individual rights is only possible when individuals take care of how their behaviours will impact on others. Article 27(2) deals with the level of care owed to neighbours and the community. The same philosophy is found in Article 28.⁸¹⁶ The duty of every person is to respect and consider his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance. These are facts that strengthen social interaction.

The duties spelled out in Article 29 re-emphasise responsibilities towards the family, community and the State.⁸¹⁷ There is nothing bad about an individual being reminded that he or she ought to respect his or her parents and provide them with necessary care and maintenance. This is a positive African cultural value, which has been codified for posterity.⁸¹⁸ It is the joy of the African parent to toil and train his or her child, with a great expectation that when that child becomes 'somebody', he or she will take care of him or her.⁸¹⁹ Similarly, an individual ought to serve his or her community with his or her mental and physical capabilities.⁸²⁰ This is the essence of community service, and it has been a long-standing practice in the African past. The same thing could be said of the duties not to compromise the security of the State, to strengthen social and national solidarity, especially when nation solidarity is threatened, and the duty to preserve, strengthen and defend the national independence and territorial integrity of one's country.⁸²¹

⁸¹⁵ African Charter, Art 27.

⁸¹⁶ Id., Art 28.

⁸¹⁷ Ibid., Art 29 .

⁸¹⁸ Nguema I. 'Universality and Specificity in Human Rights in Africa' (Nov./Dec 1989) *The Courier* 17, 18.

⁸¹⁹ Id.

⁸²⁰ African Charter , Art 29(2).

⁸²¹ Id., Art 29(3), (4) and (5).

Chege noted that the maintenance of social and national solidarity is of utmost importance in present-day Africa, where many modern States have collapsed or failed.⁸²² This study concurs with Hansungule who believed that the duties of the individual in the traditional setting are generally not enforceable. They are moral duties whose violation would not result in legal claims.⁸²³ Hansungule supported his reasoning by the following example, a person who does not take care of his grandmother cannot be taken to court for this failure but it is believed that 'his ancestors would laugh at him' i.e. he will not live long.⁸²⁴ For him, another way of enforcing the duties is through reliance on one another. Hansungule also observed that in many African societies, individuals often rely on one another to fulfil their needs and ambitions.⁸²⁵ Then, he concluded that:

A young man needs the assistance of his uncle to pay his bride price when parrying which will not be forthcoming if he did not respect him, help him in his endeavours or was regarded by the community to be truant or disrespecting. The question of the locus standing for these duties does not raise because they have their own method of enforcement in culture. Other duties however can be legally enforced. For example, they duty to pay tax has clear legal implications. Similarly the duty to contribute to the defence of one's country may include military service, which can be provided for in national legislation.⁸²⁶

Ouguergouz deplored that the African Charter does not adequately protect women, as a result, Article 29(7) could be used to abuse women's rights.⁸²⁷ Mutua saw these critics as exaggerated, because a progressive and liberal interpretation of the African Charter seems to leave no room for the discriminatory treatment of women.⁸²⁸ According to him, the African Charter should be read in reference to those traditional values that enhance the dignity of the individual and emphasise the dignity of motherhood and the importance of the female as the central link in the reproductive chain.⁸²⁹ Finally, Mutua believed that in many societies across pre-colonial Africa, women were highly valued as equals in the process of the regeneration of life.⁸³⁰

⁸²² Chege M. 'Between Africa's Extremes' (1995) 6 *Journal of Democracy* 44, 45. Somalia is an example of a country in which social and national solidarity was not only threatened, but fell apart.

⁸²³ Hansungule M. 'The African Charter on Human and Peoples' Rights : A Critical Review' (2000) 8 *African Yearbook of International Law* 265-331, 294 .

⁸²⁴ Id.

⁸²⁵ Ibid.

⁸²⁶ Ibid.

⁸²⁷ Ouguergouz (1993) 252.

⁸²⁸ Mutua (1995) 359.

⁸²⁹ Id., 360.

⁸³⁰ Ibid.

4.2.4.2. Duties of the State

It is to be noted that the notion of duty is not just one that is directed against the individual. In addition to general obligations applied to States, the African Charter prescribes duties for them. The state is under an obligation to assist the family. Article 25 imposes a duty on States to promote and ensure, through teaching, education and publication, the respect of the rights and freedoms contained in the African Charter, and to see that these rights and freedoms, as well as corresponding obligations, are understood. Article 26 places States under an obligation to guarantee the independence of the courts. The difference between individual and state duties lies in their implementation. Individual duties cannot be challenged before regional human rights mechanisms, while the duties of the state amount to obligations within the African Charter, upon which they can be challenged.

Most commentary about duties has considered them to be onerous, and has focused on the possible use that can be made of them by States to effectively stomp the individual rights guaranteed. While there has been little research conducted to test this aspect of the African Charter, it is quite clear that the concept of duties is not necessarily antithetical to respect for human rights. What is clear, nevertheless, is the need to approach the matter in such a fashion that the overall observation and protection of individual rights is not undermined by an undue emphasis on duties.

5. Conclusion

Following World War II, the United Nations emerged as a global mechanism for achieving international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. In an unequivocal way, therefore, the *Charter of the United Nations* signaled that human rights protection was no longer to be regarded as a matter exclusively for national observance, but one that must be of concern to all human beings and governments.

Since its creation in 1945, the UN has expanded tremendously. The effect of this expansion is especially apparent in the realm of human rights, as illustrated by steady evolution and multiplication of the UN's human rights standardisation efforts. With the UN General Assembly's adoption of the Universal Declaration of Human Rights in 1948, and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1966, the UN evinced a clear commitment to the promotion and protection of human rights. In addition to these three normative human rights instruments, numerous other treaties have been adopted to deal with specific global challenges. Increasingly, UN human rights standards and implementation mechanisms have developed into significant yardsticks for measuring states' conduct, performance and attitudes towards human beings, thus strengthening the global notion of the universality of human rights.

The commonly invoked justification for non-Western Countries' resistance to the UN human rights system is cultural relativism. Proponents of cultural relativism in the context of human rights discourses contend that the scope of the rights guaranteed to individuals in any society should be tested and determined by local cultural values. This term is used even within UN circles. It is common for State parties to the core UN human rights treaties to plead cultural relativism as a justification for manifest human rights violations.

As Tesón pointed out, States that have sought solace in cultural relativism to avoid responsibility for non-compliance with human rights norms have always found allies among both Western and non-Western writers.⁸³¹ The debate on universalism and cultural relativism should not be regarded with alarm or as necessarily symptomatic of a lack of commitment to human rights by those in non-Western countries. Attempts to question the normative framework of human rights, their cultural relevance, and the need for a cross-cultural recreation of norms, will not be silenced or wished away by universalists who are unwilling to engage in the debate.

⁸³¹ Tesón F. 'International Human Rights and Cultural Relativism' (1985) 25 *Virginia Journal of International Law* 869, 870.

An-Na'im and Deng are the earlier African scholars who considered that, the debate was just beginning, and its parameters were still to be defined and its course was still to be charted. According to them, the central issue in this debate was whether or not looking at human rights from various cultural perspectives that now coexist and interact within the world community promotes or undermines international standards.⁸³² In this debate, the majority of the sources, however, belong somewhere in the middle, recognising that since universalism exists, at least in relation to basic human rights concepts and principles, some space must be left open to allow for cultural and other adaptations of these principles.

In this regard, Pityana suggested that in reality international human rights standards make us all both universalists and cultural relativists.⁸³³ Symonides argued that an indication of a seemingly global consensus on the issue may be drawn from the Vienna Declaration of Action with an explicit recognition of both universalism and cultural relativism.⁸³⁴ The Vienna Declaration would seem to conclude, at least for now, the ongoing debate. It is in favour of a less radical universalistic approach put in a concrete form which, even though it does allow for some degree of cultural and other variations, still subjects them to a universal application. In this regard, one concurs with Englund, who noted that to disengage from universalism is to lose the argument from the outset.⁸³⁵

The African Charter balances universalism and cultural relativism. In the words of Matringe, the leading principle of the African Charter is the balance between tradition and modernity, not only between African tradition and the modernity of international law, but also between African modernity and the tradition of international law.⁸³⁶ For Degni-Segui, the recognition of universal rights is one way in which the African Charter expresses Africa's integration into universalism.⁸³⁷ Another is the repeated reference in the African Charter to universal norms and instruments.⁸³⁸

⁸³² An-Na'im A.A. and Deng F. 'Introduction' in An-Na'im and Deng (eds.) (1990) 9.

⁸³³ Pityana in Evans and Murray (eds.) (2002) 245.

⁸³⁴ Symonides J. *Human Rights: New Dimensions and Challenges* (Ashgate: Dartmouth, 1998) 25.

⁸³⁵ Englund H. 'Universal Africa' (2005) 3-4 *CODESRIA Bulletin* 11.

⁸³⁶ Matringe (1996) 16-17.

⁸³⁷ Degni-Segui (1991) 724.

⁸³⁸ Id.

This cultural relativism is certainly not only of a cultural kind but historical, political and economic specificities play an important role as well. Expressed in legal terms in the African Charter, the cultural relativism does not lead to any revolutionary features. The most important specific characteristics of the African Charter, peoples' rights and individual duties, have not been invented by the drafters of this instrument. These are elements that existed already in international human rights law, yet had never before elaborated in such detail in a binding instrument. Other innovations in the African Charter also follow existing patterns or have limited impact.

The role of peoples' rights in the African Charter is best explained by a combination of historical, political and economic factors. The cultural factor is merely complementary. This has an impact on the meaning of the term 'people' in the different provisions on peoples' rights. In the historical context of post-colonialism and the economic situation of underdevelopment, the peoples' rights in the African Charter have an important role as political claims in an international framework. In this sense, the peoples' rights are to be exercised on the international arena by African States. They express some of the main claims of the underdeveloped and formerly colonised world vis-à-vis the developed, former colonial powers. Yet, there is also a meaning at the internal level, where the people can claim from the State participation, development, etc. Peoples' rights express some of the most crucial needs of the African people and hence some of the main tasks of their governments. The people then mean population, or groups (ethnic or other) within that population. Yet rights of traditional intermediary groups (clans, tribes) are not taken into consideration. The enumeration of duties illustrates African specificities.

On the one hand, the African Charter emphasises the importance of economic, social and cultural rights by including them on the same level as civil and political rights. On the other hand, the list of these rights is a very short one, which omits the most basic rights of particular importance to Africa. It must be assumed that the starting point of the drafters in this regard was not that of the concrete needs of African people. In the light of African scarce resources, African States probably did not want to commit themselves too much in the social and economic field. Yet at the same time they want to focus on economic and social rights for political reasons in order to balance socialist and capitalist views and to stress the fact that the human rights situation in a given country is to be evaluated as a whole. The omissions can be explained by African culture or economic conditions.

African realities and values form the basis for the enunciation of some rights not found in the same shape in other human rights instruments, yet deviations from the mainstream do not go very far. The protection of the family for instance, the African traditional value probably best protected in the African Charter, does not include much more than can be found in international human rights instruments. In sum, African Charter is to be seen as a document of self-determination of new independent States, questioning mainstream international law, in the elaboration of which they had not participated. Yet this is done in a moderate way. Rather than rejecting universality or completely redrawing human rights, the purpose was to create an instrument that was more adequate to deal with the African context and in which particular rights would receive lesser attention concerning circumstances and sensibilities.

Chapter three: Enforcement mechanisms under the African human rights system

1. Introduction

The African Charter was adopted on 27 June 1981 and came into force on 21 October 1986. According to Article 30, an African Commission on Human and Peoples' was established 'within the OAU to promote human and peoples' rights and ensure their protection in Africa'. The treatment of the African Commission is certainly the most elaborate in the entire African Charter, as it takes up 32 Articles (Articles 30-61) and 120 rules of procedures.

At the 34th Ordinary Session of the OAU Assembly, held from 8-10 June 1998 in Ouagadougou, Burkina Faso, the Protocol to the African Charter on Human and Peoples' Rights for the Establishment of an African Court on Human and Peoples' Rights was adopted. This Protocol came into force on 25 January 2004. Although judges were elected, the Court had yet to become operational. One of the problems had to deal with was what to do with the African Court of Justice to be established as an organ of the AU. In July 2005, the AU Assembly decided that the African Court on Human and Peoples' Rights should be merged with the African Court of Justice. The efforts to realise this merger culminated in the adoption by the AU Assembly of the Protocol on the Statute of the African Court of Justice and Human Rights, at its 11th Ordinary Session held from 30 June-2 July 2008 in Sharm El-Sheik, Egypt. This Protocol is still to come into operation following its ratification by 15 Member States.⁸³⁹

⁸³⁹ Protocol on the Statute of the African Court of Justice and Human Rights, Art 9(1).

This chapter is divided into four sections. Section one introduces the chapter, section two deals the African Commission, section three discusses the new African Court of Justice and Human Rights. Challenges are analysed in the section four, while section five concludes the Chapter.

2. African Commission on Human and Peoples' Rights

2.1. Organisation of the African Commission

At the time of its inauguration on 2 November 1987, the African Commission did not have its own secretariat or premises, but was based at the secretariat of the OAU in Addis Ababa. On 12 June 1989, the Commission's secretariat and headquarters were inaugurated in Banjul, the Gambia.⁸⁴⁰ Article 31 of the African Charter states that the African Commission is composed of eleven members chosen from among African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and people's rights. Particular consideration is given to those with legal experience. Commissioners serve in their individual capacity, with not more than one national from the same Member State.⁸⁴¹

The eleven members of the African Commission are elected by secret ballot by the Assembly of Heads of State and Governments from a list of persons nominated by Member States of the African Charter.⁸⁴² The Secretary of the OAU (now the President of the Commission of the African Union) facilitates the nomination of members of the African Commission, by inviting Member States, four months before the elections, to make nominations. The Commissioners, on their own, elect the Chairperson and Vice-Chairperson for an initial period of two years, subject to re-election.⁸⁴³ The rules on the election and functions of the Chairperson and Vice-Chairperson are elaborated in rules 17-21 of the rules of procedure.

⁸⁴⁰ See The African Commission Resolution on the Construction of the Headquarters of the African Commission on Human and Peoples' Rights (ACHPR/Res.58 (XXX) 01.

⁸⁴¹ African Charter, Art 32.

⁸⁴² Id., Art 33.

⁸⁴³ Ibid., Art 42.

The African Commission is assisted by a Secretariat, lead by a Secretary appointed by the AU Commission.⁸⁴⁴ In addition, it is stated that the AU Commission shall ‘provide the staff and services necessary for the effective discharge of the duties of the Commission’ and that the AU will bear the costs of staff and services. The first members of the African Commission were elected at the 23rd Ordinary Session of the OAU Assembly held in Addis-Ababa, Ethiopia, from 27 to 29 July 1987. The African Commission was officially inaugurated on 2 November 1987.

The African Commission meets for two weeks twice a year, although there are provisions enabling it to meet extraordinarily if necessary. It is at these sessions that the bulk of the work of the African Commission is done, not only reporting on activities undertaken during the inter-session period, but also interacting with NGOs and State parties present at the meeting in terms of the immediate human rights situation in Africa.

A major part of the sessions is devoted to auditing the human rights situation on the continent over the past six months. The objective is to build strong and active continental organ that can work in tandem with all stakeholders including the State parties and all segments of the society, to serve the collective interests of the African people. The sessions are evidence of Commissioners dedication and collective commitment to this shared goal.

It is a clear indication that Africans together want to take effective control of their destiny in the twenty-first century, and proceed to build a new Africa. This reflects a readiness to take stock of our efforts, and measure African progress, so that Africans can bring together their experiences and redress errors, to ensure the Africans have an appropriate road map for an African renaissance, especially in the area of human and peoples’ rights.

⁸⁴⁴ African Charter, Art 41.

2.2. Mandate of the African Commission

The mandate of the African Commission is contained in Article 45 of the African Charter and comprises four basic functions: the promotion and protection of human and peoples' rights; the interpretation of the African Charter provisions; and the performance of any other duties that might be assigned to it by the AU Assembly.

2.2.1. Promotional mandate

Article 45(1) provides for the promotional mandate. The African Commission is enjoined to promote human and peoples' rights, which involves collecting documents and undertaking studies on human rights problems in Africa, organising seminars and disseminating human rights information, and encouraging national human rights institutions to do the same. As part of its promotional mandate, the African Commission formulates principles and rules on which African States can base their legislation, and in this effort, the African Commission is encouraged to collaborate with African and other international institutions sharing similar visions.

2.2.1.1. State reporting system

The State reporting system, as a mechanism to review State implementation of the provisions of human rights instruments, is not an innovation of the African system. It also forms part of the UN human rights system in which the obligation of reporting is more clearly spelt out than in the African Charter.⁸⁴⁵ The UN human rights treaty system encompasses seven treaties: International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child and, lastly, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families which has recently entered into force.

⁸⁴⁵ See for instance Art 40 of the ICCPR and Art 44 of the CRC.

Each of these conventions is associated with an independent expert body (treaty body) that monitors the implementation by states parties of their treaty obligations. These treaty bodies are: Committee on the Elimination of Racial Discrimination (CERD Committee), Committee on Economic, Social and Cultural Rights, Human Rights Committee, Committee on the Elimination of Discrimination against Women (CEDAW Committee), Committee against Torture (CAT Committee), and Committee on the Rights of the Child (CRC Committee). Also the UN Migrant Workers Convention provides for a treaty body to be known as the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, but it has not yet started working.⁸⁴⁶

During the course of the exercise of their functions the six established Committees have produced different kinds of documents (findings, output) of which the most relevant for the purposes of this study are: concluding observations/comments, views (where applicable) and general comments/recommendations. Their main characteristics are: concluding observations, view and general comments.

CERD, ICESCR, ICCPR, CEDAW, CAT and CRC each place upon State parties a legally binding obligation to submit periodic reports (country reports) on how they have implemented the convention guarantees and on the progress made in the enjoyment of treaty rights and freedoms.⁸⁴⁷ In the case of CERD, ICCPR, CEDAW and CAT individuals may submit individual communications to complain of violations of their rights under these treaties, provided that the State party has accepted the competence of the relevant treaty body to consider such complaints. The task of the treaty body is to determine, first, whether a complaint is admissible and, if need be, whether or not the State party has violated its treaty obligations. The treaty bodies' decisions on the merits are referred to as final views or suggestions and recommendations by the relevant instruments.

⁸⁴⁶ Adopted by United Nations General Assembly Res. 45/158 of 18 December 1990 (entered into force 1 July 2003) [MWC, Migrant Workers Convention]. For more information on the treaty bodies' composition, mandate and functions, see the relevant provisions of the treaties themselves and works of experts. See Alston P. and Crawford J. (eds.) *The Future of the UN Human Rights Treaty System* (Cambridge: Cambridge University Press, 2000). In contrast to the other treaty bodies, Committee on Economic, Social and Cultural Rights is not created by the treaty itself (which provides for the Economic and Social Council (ECOSOC) to be the supervisory body), but by a resolution adopted by ECOSOC (Res. 1985/17 of 28 May 1985).

⁸⁴⁷ See, Art 2(1) CERD; Art 2(1), Arts 23 and 24; Art 3 of the CEDAW; Art 2 (1) of the ICCPR, Art 2(2) of the ICESCR; Art 4 of the CRC and Art 2(1) of the CAT. Article 62 obligates Member States to submit, every two years, from the date on which the African Charter comes into effect for such members, a report on legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed.

It is clear, however, that the views have legal significance for the parties involved. Furthermore, views contribute to an important body of developing jurisprudence that is relevant to other states as well. In this respect, the complaints procedure established under the Optional Protocol to the ICCPR is generally considered the most authoritative. It has been argued that the jurisprudence of the Human Rights Committee ‘comes closest to being truly universal human rights jurisprudence.’⁸⁴⁸

The Human Rights Committee has ruled on number of cases with regard to African States. A number of leading members of the opposition party *Union pour la Démocratie et le Progrès Social (UDPS)* including the later Prime Minister Etienne Tshisekedi wa Mulumba has submitted complaint against the regime of President Mobutu in the former Zaïre. In most of cases the Committee found serious violations of the rights to personal liberty, physical integrity, privacy and movement and, in its finding, thus contributed to the international pressure on the Mobutu regime to improve its human rights situation.⁸⁴⁹

In another case, André Alphonse Mpaka-Nsusu, a Zairian national, living in exile. He claimed to be a victim of breaches by Zaire of articles 1, 9, 14 and 26 of the International Covenant on Civil and Political Rights. The facts as described by the author are as follows: on 21 November 1977 he presented his candidacy for the presidency of the *Mouvement populaire de la révolution (MPR)* and, at the same time, for the presidency of Zaïre in conformity with existing Zaïrian law. His candidacy was rejected.⁸⁵⁰ In formulating its views, the Human Rights Committee also takes into account the failure of the State party to furnish any information and clarifications necessary for the Committee to facilitate its tasks. In the circumstances, due weight must be given to the author’s allegations of violation of the covenant made against it and its authorities, and to furnish to the Committee the information available to it.

⁸⁴⁸ Schmidt M.G. ‘Does the United Nations Human Rights Programme Make a Difference?’ (1977) 91 *American Society of International Law Proceedings* 461, 463.

⁸⁴⁹ *F. Birindwa ci Bithashiwa, E. Tshiseki wa Mulumba v. Zaïre*, Communication No. 241/1987 and 242/1987 UN Doc CCPR/C/37/D/D/242/1987 (1989), paras 13-14.

⁸⁵⁰ *André Alphonse Mpaka-Nsusu v. Zaïre*, Communication No. 157/1983 (26 March 1986), U.N. Doc. Supp. No. 40 (A/41/40) at 142 (1986).

The Committee noted with concern that, despite its repeated requests and reminders and despite the State party's obligation under Article 4(2) of the Optional Protocol, no submission has been received from the State party. The Human Rights Committee, was of the view that these facts disclose violations of the Covenant, with respect to: Article 9, paragraph 1, because Andre Alphonse Mpaka-Nsusu was arbitrarily arrested on 1 July 1979, and detained without trial until 31 January 1981; Article 12, paragraph 1, because he was banished to his village of origin for an indefinite period; Article 19, because he suffered persecution for his political opinions; Article 25, because, notwithstanding the entitlement to stand for the presidency under Zairian law, he was not so permitted. The Committee, accordingly, was of the view that the State party was under an obligation, in accordance with the provisions of article 2 of the Covenant, to provide Mr. Mpaka-Nsusu with effective remedies, including compensation, for the violations that he has suffered, and to take steps to ensure that similar violations do not occur in the future.⁸⁵¹

Coming back to the African Charter neither specifies a body to consider State reports nor states the proposed content or format that these reports should take. Heyns noted that this silence was deliberate, in order to not jeopardise the process of ratification.⁸⁵² During its third Ordinary Session held in Libreville, Gabon, in 1988, the African Commission rectified this deficiency by formally requesting from the Assembly of Heads of State and Government the power to receive and examine State reports. As a means of dealing with State reports, the African Commission, at its fourth Ordinary Session held in Cairo, Egypt, in 1988, adopted the initial set of Guidelines for Periodic National Reports.⁸⁵³

These guidelines were, however, criticised for not being very useful, as they were too detailed and complex, making it difficult for Member States to comply with them.⁸⁵⁴ At its 23rd Ordinary Session, the African Commission adopted Revised Guidelines. The Revised Guidelines contain 11 points that States must take into account in compiling reports. This revision was done mainly to reduce the technicality required for State periodic reports.

⁸⁵¹ *André Alphonse Mpaka-Nsusu v. Zaïre.*, paras 10-11.

⁸⁵² Heyns (1999) 56.

⁸⁵³ See Promotion, Protection and Restoration of Human Rights, Guidelines for National Periodic Reports, ACHPR Doc. AFR/COM/HPR. 5(IV) (October 1988). Hereinafter referred to as the Old Guidelines for National Periodic Reports.

⁸⁵⁴ See Viljoen (2007) 371-372.

A number of critics have been raised against the State reports under the African the Commenting on these Revised Guidelines, Evans, Ige and Murray wondered whether they had made a great deal of difference.⁸⁵⁵ However, Viljoen still maintained that the Guidelines were too brief and too vague to be used as comprehensive Guidelines.⁸⁵⁶

To sum up, the reporting system is accorded a low priority (as a result, there are delays in the submission of State reports, as well as a low quality of reports and State representatives); difficulty or lack of coordination and cooperation between various governments, departments, agencies or levels of government and State human rights institutions participating in the preparation of reports; a lack of concrete mechanisms to prepare State reports; technical, financial and administrative constraints, such as the lack of qualified personnel and an absence of continuity of personnel; problems in the collection, classification and analysis of required data; lack of sufficient funds and translation of reports into the African Commission's official languages; concluding observations made by the African Commission while considering State reports are ignored by NGOs, the public, as well as other mechanisms dealing with human rights at the national level; and the passivity of NGOs and the media with respect to the late submission of reports, which makes it easier for governments to ignore their treaty obligations.

Much of the criticism levelled at the State reporting system is right. It is worth emphasising some of the issues raised. The African Commission encounters problems during the consideration of State reports, a procedure that takes place in public sessions of the African Commission. After having received a report through its Secretariat, it appoints one of its members as a rapporteur to study the report and to prepare a list of preliminary questions to be asked of the government representative from the reporting State. However, in practice, it may happen that the rapporteur did not attend the session.⁸⁵⁷

⁸⁵⁵ Amendments of the General Guidelines for the Preparation of Periodic Reports by States Parties, Doc./OS/27 (XXIII) (Hereinafter referred to as the Amended Guidelines), adopted at the 23rd Ordinary Session of the African Commission, April 20-29, 1998 in Banjul, The Gambia. Evans M. , Ige T. and Murray R. 'The Reporting Mechanism of the African Charter on Human and Peoples' Rights' in Evans and Murray (eds.) (2002) 50.

⁸⁵⁶ Viljoen (2007) 372.

⁸⁵⁷ At the 9th Ordinary Session two Commissioners, who acted as Rapporteurs, did not attend the session. This gave rise to difficulties, as no substitute had been appointed for Commissioner Ndiaye (Tunisia) and Commissioner Beye (Rwanda).

In order for a report to be considered, representatives of the State concerned are invited to attend the session.⁸⁵⁸ Rule 83 specifies that ‘representatives of the State parties to the Charter may participate in the sessions of the Commission at which the report shall be considered’. This rule is not mandatory. It was supplemented by a resolution adopted at the 29th Ordinary Session in June 1993 by the OAU Assembly. In this resolution, it is recommended that:

The State parties designate high ranking officials to act as focal points in the relation between the Commission and the States as such focal points would facilitate the follow-up on the Commission’s recommendations and contact between States and the Commission.⁸⁵⁹

At the 9th Ordinary Session, where the issue of the quality of State representatives was raised, Nguema⁸⁶⁰ noted that:

As to the quality of the representatives of the delegates that should defend the national report at the level of the Commission, we should not take into account their titles or their functions in their respective countries. The countries should know that when they send people to the Commission, they should be competent to give us explanations on the various questions. It is quite possible that an ambassador is in a position to do that. An ambassador may be a legal expert. But of course it is imperative that the Member States should know that the people they send should be sufficiently prepared to answer questions. They should be of a given calibre, so that when they go back, they are able to bring their influence to bear on the authorities to show that the observations we make are translated into action.

Similarly, Badawi suggested that it should be made clear in the letter inviting the State to the session that the representative should be sufficiently prepared to answer questions and to have a constructive dialogue with the Commission.⁸⁶¹

⁸⁵⁸ The Republic of Seychelles submitted its initial report in September 1994, and was due to present its report at the 17th Ordinary Session of the African Commission. Seychelles, however, failed to send any government representatives, and the examination of the report was delayed until the following session. Once more, Seychelles failed to send any representatives, despite repeated appeals from the Commission, for a number of sessions. Finally, during the 25th Ordinary Session held in May 1999, the Commission issued a Resolution concerning the Republic of Seychelles’ refusal to present its Initial Report (available at www.achpr.org, accessed on 16 July 2007). In this Resolution, the Commission ‘firmly condemned this unspeakable behaviour’ and called upon the OAU AHSG to consider appropriate measures to be taken against the Republic of Seychelles. Finally, the updated initial report of Seychelles was considered at the 39th Ordinary Session of the Commission. This behaviour by a State party also resulted in the decision by the Commission, at its 23rd Ordinary Session, to consider State reports of those States that failed to send representatives in absentia.

⁸⁵⁹ Quoted by Danielsen A. *The State Reporting Procedure under the African Charter* (Copenhagen: Danish Centre for Human Rights, 1994) 33.

⁸⁶⁰ Id.

⁸⁶¹ Danielsen (1994) 34.

In the past, complaints were made that States used to send low-level delegations to appear before the African Commission,⁸⁶² but this situation has changed for the better, and State parties are now represented by high-ranking officials, sometimes even by ministers of foreign affairs or justice.⁸⁶³ The consideration of reports has also been postponed by budgetary constraints, which resulted in a shortening of the period allocated for Ordinary Sessions of the Commission, in the delay of the examination of State reports.⁸⁶⁴ Due to a lack of resources in the past, reports were not made available in all the working languages of the African Commission, and as a result, not all members of the Commission could participate fully in the consideration process. Although the lack of resources is still an issue, the situation has improved, and reports are translated into English and French and are made available on the website of the African Commission.

The practice of adopting concluding observations constitutes a major step forward, perhaps even the most important step in the development of the reporting procedure. The fact that a body of eleven members reaches consensus on positive and negative development with regard to civil and political rights, economic, social and cultural rights, as well as collective rights in a particular State party is extremely important, as is the formulation of concrete suggestions and recommendations.

⁸⁶² According to Viljoen, 'government representation has been problematic in two respects: The specific representatives were sometimes not equipped to deal with the relevant issues and were often absent from the meeting scheduled to consider their country's report.... Unfortunately, most frequently States designate either a high ranking (political) figure not sufficiently conversant with the legal issues, or a legal expert devoid of any potential impact in the higher echelons of government'. He gave examples of the first failing, which occurred when Ghana, Libya, Tunisia and Zimbabwe sent their Ambassadors to Addis Ababa to present their reports, while Tanzania sent its Ministry of Foreign Affairs, and other States were represented by civil servants, mostly from the Ministry of Justice. Viljoen F. 'Review of the African Commission 1986- 1997' in Heyns C. (ed.) *Human Rights Law in Africa 1998* (The Hague: Kluwer Law International 2000) 96.

⁸⁶³ At the 39th Ordinary Session held in Banjul, The Gambia, the Minister of Foreign Affairs of the Central African Republic was amongst the government representatives presenting the Central African Republic's initial report.

⁸⁶⁴ The 32nd Session of the African Commission, held in October 2002 in Banjul, The Gambia, was shortened to a mere seven days due to budgetary constraints that could not be met by the host country. As a result, the examination of the State report of the Democratic Republic of Congo was delayed until the following session. At the following session, held in Niamey, Niger, the consideration of the report had to be delayed again, as even though there was full attendance of both civil society and government representatives at the previous session, no one could afford to attend this session. The report was finally considered in November 2003 at the 34th Ordinary Session held in Banjul, The Gambia.

Concluding observations emphasise positive developments and factors, as well as difficulties and problems that have been affecting the implementation of the African Charter, together with specific issues of concern regarding the application of provisions of the Charter. They are key outcomes of the reporting process, and could be understood as a vehicle through which the preparation of reports is transformed into policy-making and implementation.⁸⁶⁵ Scheinin argued that concluding observations can be sources of inspiration for a creative judge at the national level.⁸⁶⁶ Gallagher believed that concluding observations are means by which treaty bodies can seek to fulfil their basic objectives of encouraging and facilitating national implementation and compliance with international human rights standards.⁸⁶⁷

Concluding observations are tools for follow-up purposes, to be used by the State concerned, the African Commission itself and NGOs, NHRIs and other interested parties, who are supposed to observe the human rights implementation at the domestic level. In the past, the manner in which the African Commission concluded the consideration of reports was one of the most controversial issues. Individual Commissioners expressed views in the course of examining State reports, but no uniform position was taken by the Commission on the various issues. However, this practice has changed since the 29th session. Since then, after each consideration of a State report, the Commission formulates its collective opinions, known as concluding observations, and made recommendations. Apart from the structure, the contents of the concluding observations play a crucial role. According to Bayefsky, the success of the concluding observations depends on two elements: (a) their accuracy, as a rigorous assessment of human rights conditions, and (b) their functionality, as perceptive evaluations of needs and priorities.⁸⁶⁸

⁸⁶⁵ Bayefsky A. *The United Nations Human Rights Treaty System in the 21st Century* (The Hague: Kluwer Law International, 2000) 61.

⁸⁶⁶ Scheinin, M. 'The Work of the Human Rights Committee under the International Covenant on Civil and Political Rights and Its Optional Protocol' in Hanski R. and Scheinin M. (eds.) *Leading Cases of the Human Rights Committee* (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2003) 1, 3.

⁸⁶⁷ Gallagher A. 'Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners' in Alston P. and Crawford J. (eds.) *The Future of United Nations Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 201, 227.

⁸⁶⁸ Bayefsky (2000) 62.

Sometimes, recommendations or concluding observations of the African Commission are too broad, vague or difficult to implement. How then should the form and content of the concluding observations be developed in order to make their implementation within State parties easier? Should more emphasis be placed on legal analysis and argument, or on policy recommendations? Heyns and Viljoen argued this by saying that domestic policies in concluding observations are likely to have a meaningful impact, if observations and statements are of such a nature that a country's compliance can be easily evaluated.⁸⁶⁹ According to them, concluding observations should offer yardsticks to assess governments' compliance and performance, not only for human rights bodies themselves, but also for governments and NGOs.⁸⁷⁰

These yardsticks should be supported by substantive reasoning, in order to clearly explain why the treaty bodies arrived at these conclusions.⁸⁷¹ They would also prefer concluding observations to be as specific and action-oriented as possible, rather than verdicts on government's performance in the field of human rights. In their opinion, concluding observations should mainly contain recommendations on what the State should do in order to improve the promotion and protection of human rights, including realistic advice on how to deal with urgent issues, as well as target dates by which the State parties must adopt the recommended measures.

The UN treaty bodies dealing State reports with could also provide proposals and ideas for implementation, based on the achievements and experiences of other countries.⁸⁷² Moreover, Heyns and Viljoen emphasised that concluding observations should contain a more detailed analysis of State reports, including differences between the government's obligations arising from the relevant treaty and the progress that has been achieved, as well as the difficulties encountered.⁸⁷³ In this context, the treaty body could make its comments regarding whether or not the government's actions following prior observations have been satisfactory, and the extent to which the government is trying to involve NGOs and the general public in its efforts to implement the treaty concerned.

⁸⁶⁹ Heyns C. and Viljoen F. *The Impact of the United Nations Human Rights Treaties in the Domestic Level* (The Hague: Kluwer Law International, 2002) 448.

⁸⁷⁰ *Id.*, 197 and 574.

⁸⁷¹ *Ibid.*, 248.

⁸⁷² *Ibid.*, 197, 248, 331, 448, 541, 639.

⁸⁷³ *Ibid.*, 350, 639.

The mechanisms empowered to consider State reports under the UN system could also include, in their general observations and recommendations, a point-by-point listing of the observations made in previous reports with which there had been no compliance.⁸⁷⁴ Tistounet argued that overly-detailed observations may be criticised if they fail to emphasise important issues. In addition, they run the risk of containing technical or legal considerations which may not accurately reflect the legal or practical situation in the State concerned, thus providing the government with grounds for attacking the report.⁸⁷⁵

The approach advocated by Heyns and Viljoen may also be criticised on the grounds that it would result in longer concluding observations, which are hardly desirable or practical. Human rights mechanisms often adopt their concluding observations by consensus, which means that longer documents are likely to require more time for dealing with State reports (generally speaking, this is rarely the unique task of human rights mechanisms), ultimately resulting in a lower number of reports being considered per session. As for UN treaty bodies, their concluding observations are communicated to State parties concerned. By contrast, the African Commission does not include its observations in its Annual Activity Report. As a result, their impact cannot be of great importance, if they are not published in order to enable civil society at the national level, as well as regional and international NGOs, to monitor their implementation by the State concerned.

The combination of challenges faced by both State parties and the African Commission led Murray⁸⁷⁶ to conclude that the latter does not really monitor the ongoing situation in States through this system. One does not share this opinion. It should be recalled that the reporting system makes State parties to the African Charter accountable for their human rights policies before the African Commission. In one way or another, this system puts some sort of moral pressure on States, qualified by Viljoen as a means of ‘mobilising shame’.⁸⁷⁷

⁸⁷⁴ Heyns and Viljoen (2002) 448.

⁸⁷⁵ Tistounet E. ‘The Problem of Overlapping Among Different Treaty Bodies’ in Alston and Crawford (eds.) (2000) 383, 393.

⁸⁷⁶ Murray (2001) 278.

⁸⁷⁷ Viljoen (2007) 391.

The reporting system has more advantages than disadvantages. As one of its advantages, Viljoen and Heyns argued that because the preparation of a State report requires intergovernmental contact between the concerned ministries or departments, it widens the circle of governmental bodies concerned with ways of improving the human rights situation in the country - thus, it reduces the possibility of the embarrassing questioning of government practices in the international arena.⁸⁷⁸

Another advantage that they mentioned is that publicity given to the reporting system at its various stages helps to increase awareness of human rights, and encourages civil society, as well as the public, to exercise some pressure on the government if the report shows any violation of human and peoples' rights.⁸⁷⁹ According to them, however, in order for reporting to make a significant difference, it should be linked to policy-making and implementation.⁸⁸⁰ In this regard, they noted that if the reporting authority remained in an isolated position and adopted a formalistic approach to the process, little positive output for other national spheres in the executive, legislative and judicial branches can be expected.⁸⁸¹ They believed that if government and civil society take the reporting system seriously, it has a strong potential to enhance the impact of human rights treaties at the domestic level.⁸⁸²

In fact, African countries experience difficulties in complying with the reporting deadlines, guidelines regarding the quality of reports, and the implementation of the African Commission's findings, as well as those of other international bodies. The reporting process does not always function in the way it was intended, but this is hardly the case in African countries alone. Alston did not miss the point when he observed:

It is one thing to insist that respect for basic human rights cannot be contingent upon per capita gross national product (GNP), or any other comparable economic indicator; it is quite another to demand that poor countries will be able of willing to devote the same level of resources to reporting and complaints procedures as some developed States with strong internal human rights constituencies.⁸⁸³

⁸⁷⁸ Heyns and Viljoen (2002) 246.

⁸⁷⁹ *Id.*, 197.

⁸⁸⁰ *Ibid.*

⁸⁸¹ *Ibid.*

⁸⁸² *Ibid.*

⁸⁸³ Alston P. 'Beyond Them and Us: Putting Treaty Body Reform into Perspective' in Alston P. and Crawford J. (eds.) *The Future of United Nations Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 501, 520.

Delays in the submission of State reports remain another issue of concern. Since the entry into force of the African Charter, State parties' compliance with their reporting has been relatively poor. The African Commission has taken some steps, such as writing letters, adopting resolutions, appealing, offering to assist States when they have difficulties in preparing their reports, and even calling on specific States in a communiqué to submit their reports.⁸⁸⁴ However, the African Commission has been criticised for not responding effectively to the problem of poor or non-compliance by State parties.⁸⁸⁵

Considering the importance of the reporting system to the African Commission's monitoring of States' obligations under the African Charter, it is imperative for the African Commission to find ways of effectively addressing this problem. For instance, it should regularly update its website with regard to the status of submission of State reports and, most importantly, it should go beyond mere publication of the status of submission of State periodic reports in its Annual Activity Reports, by widely disseminating it at national level, as this can serve as a sort of 'naming and shaming', in order to compel defaulting States to honour their obligations.

2.2.1.2. Other promotional activities

The African Commission has attempted to make the most of its promotional mandate using available resources. Commissioners are engaged in extensive promotional activities and visits to State parties to the African Charter, based on a system of allocation of States to commissioners. Commissioners are expected to visit allocated States and organise seminars, conferences, etc. These promotional visits afford Commissioners an opportunity to engage with government officials and institutions, as well as civil society of State parties on the African Charter and human and peoples' rights in general.

⁸⁸⁴ Ankumah (1996) 108.

⁸⁸⁵ Evans, Ige and Murray in Evans and Murray (eds.) (2002) 44.

Visits increase the visibility of the African Commission on the ground, as well as the expert's authority. In contrast to the past, when States were reluctant to allow visits, they now have an incentive to cooperate, since they can obtain significant international recognition for their efforts. The African Commission has also held a number of conferences and seminars in collaboration with NGOs and National Human Rights Institutions. These have ranged from women's rights, impunity, prison conditions, fair trials, etc. Some themes from these conferences and seminars have often resulted in resolutions aimed at furthering the normative significance of the African Charter, such as those on the Protocol on the Rights of Women in Africa, as well as other initiatives.⁸⁸⁶

The African Commission has developed other mechanisms as such working groups and special rapporteurs. A combined reading of Article 46 of the African Charter and rule 28 of the 1995 rules of Procedures of the African Commission gives legal grounds for the establishment of special rapporteurs and working groups. Based on this, the African Commission has established special rapporteurs on various themes. From the specific mandates, it is clear that at least some of the special rapporteurs have complaint handling mechanisms, albeit informal ones. To date, six special rapporteurs have been appointed by the African Commission:

- (i) The Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions.⁸⁸⁷
- (ii) The Special Rapporteur on Prisons and Conditions of Detention in Africa.⁸⁸⁸
- (iii) The Special Rapporteur on Rights of Women in Africa.⁸⁸⁹
- (iv) The Special Rapporteur on Human Rights Defenders.⁸⁹⁰
- (v) The Special Rapporteur on Refugees and Internally Displaced Persons in Africa.⁸⁹¹

⁸⁸⁶ In view of the increase in and importance of promotional visits, there is a need for proper documentation of visits. Dankwa, a former commissioner, regretted that written accounts of all promotional visits by members of the African Commission cannot be obtained at the Secretariat. Dankwa in Evans and Murray (eds.) (2002) 336.

⁸⁸⁷ Appointed in 1994, see Annex VII, 8th Activity Report.

⁸⁸⁸ Appointed in 1996, see Annex VII, 10th Activity Report. The mandate empowers the Special Rapporteur to 'examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter'. As part of this mandate, the Special Rapporteur may 'at the request of the Commission, make recommendations to it as regards communications filed by individuals who have been deprived of their liberty, their families, representatives, by NGOs or other concerned persons or institutions' and 'propose appropriate urgent action'. It is further stated that the Special Rapporteur shall 'receive information from individuals who have been deprived of their liberty, their families or representatives, from governmental or non-governmental organizations and individuals'.

⁸⁸⁹ Appointed in 1999, see 11th Activity Report.

⁸⁹⁰ Appointed in 2004, see Final Communiqué of the 35th Ordinary Session, para 18. The mandate empowers the Special Rapporteur to 'seek, receive, examine and to act upon information on the situation of human rights defenders in Africa' and to 'cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental bodies, international and regional mechanisms of protection of human rights defenders, human defenders and other stakeholders'.

(vi) The Special Rapporteur on the Freedom of Expression in Africa.⁸⁹²

Special rapporteurs in the African human rights system differ from the special rapporteurs in the UN system. Although they may be lawyers, they do not have expertise in the areas in which they work, and they are not independent experts from outside the African Commission. Rather, they are Commissioners who personally undertake their mandates, in intersession, in order to promote human rights and investigate conditions affecting the protection of human rights in the thematic areas chosen by the African Commission.

They do not to work as effectively and efficiently as they would like, due to the chronic lack of resources in the African Commission. It is still hard to see how they represent an additional achievement of the African Commission by being responsive to order to prevent serious abuses, and even to save lives through urgent actions. Special rapporteurs do not provide high-quality diagnoses of individual country situations. They do not provide valuable conceptual analysis on key human rights issues linked to their respective mandates. Special rapporteurs do not serve as an early warning mechanism to draw attention to human rights crises.

Viljoen and Yonaba suggested that special rapporteurs should stay intact.⁸⁹³ The African Commission should established other mechanisms only when enough funds are available to ensure that this could be done in a dignified manner, which also does not compromise the resource needed by the African Commission or its mechanisms.⁸⁹⁴

⁸⁹¹ Appointed in 2004, see Final Communiqué of the 35th Ordinary Session, para 18. The mandate empowers the Special Rapporteur to ‘seek, receive, examine and act upon information on the situation of refugees, asylum seekers and internally displaced persons in Africa’; ‘undertake studies, research and other related activities to examine appropriate ways to enhance the protection of refugees, asylum seekers and internally displaced persons in Africa’ and ‘cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental and non-governmental bodies, international and regional mechanisms involved in the promotion and protection of the rights of refugees, asylum seekers and internally displaced persons’.

⁸⁹² Appointed in 2004, see Final Communiqué of the 36th Ordinary Session, para 43. The mandate of the Special Rapporteur on Freedom of Expression in Africa empowers the Rapporteur to ‘undertake investigative missions to Member States where reports of massive violations of the right to freedom of expression are made and make appropriate recommendations to the African Commission’ and ‘make public interventions where violations of the right to freedom of expression have been brought to his/her attention ... in the form of issuing public statements, press releases, urgent appeals’.

⁸⁹³ Viljoen F. and Yonaba S. *Review of the Procedures of the African Commission on Human and Peoples’ Rights*, unpublished document (2002) 38.

⁸⁹⁴ Id.

For Viljoen and Yonaba ,

When filling the position of an existing Special rapporteur, or any such future position, the Commission must consider the appointment of ‘outside’ experts. ...The possibility must be investigated that the Commission can greatly benefit from a highly motivated, competent, African, non-Commissioner to perform this function. As for the legal objections – ‘any appropriate means of investigation’, in Article 46 of the Charter, seem to be broad enough to allow such appointments.⁸⁹⁵

This suggestion came on right time, when taking into consideration the current composition of special rapporteurs and working groups of the African Commission.⁸⁹⁶ Harrington argued that a key obstacle for the special rapporteurs is their lack of visibility and low public profile.⁸⁹⁷ Because of their method of working, special rapporteurs do not get the recognition that is due to them. Individually or together, they need to become more visible. They need to be widely perceived as a system and tool in the African human rights system, not just by the African Commission, but also by governments and civil society at large. Their work needs to be transmitted more forcefully to the public.

The working groups supplement the work of special rapporteurs. They are established in the context of the promotional work on selected human rights themes by the African Commission. Members are independent experts and Commissioners who handle key functions.

⁸⁹⁵ Viljoen and Yonaba (2002) 38.

⁸⁹⁶ Sanji Mmasenono Monageng (Chairperson); Dr. Angelo Melo (Vice-Chairperson, Chairperson of the Working Group on Specific Issues Relating to the Work of the African Commission, member of the Working Group on Social and Economic Rights), Faith Pansy Tlakula (Special Rapporteur on Freedom of Expression), Reine Alapini Gansou (Special Rapporteur on Human Rights Defenders), Zainabo Sylvie Kayitesi (Chairperson of the Working Group of the Death Penalty), Catherine Dupe Atoki (Chairperson of the Follow-up Committee on Robben Island Guidelines) , Soyata Maiga (Special Rapporteur on the Rights of Women in Africa), Bahame Tom Mukirya Nyanduga (Special Rapporteur on Refugees and Displaced Persons in Africa), Mumba Malila (Special Rapporteur on Prisons and Conditions of Detention in Africa), Mussa Ngary Bitaye (Chairperson of the Working Group on Indigenous Communities/Populations), Yeung Kam John Yeung Sik Yuen (Chairperson of the Focal Point on the Rights of Older Persons in Africa).

⁸⁹⁷ Harrington J. ‘Special Rapporteurs of the African Commission on Human and Peoples’ Rights’, (2001) 2 *African Human Rights Law Journal* 247, 248. Evans and Murray came to the conclusion that ‘it is difficult to resist the conclusion that this has been a largely wasted opportunity and a matter of some considerable embarrassment for the reputation of the African human rights system in general and the African Commission in particular’ in Evans and Murray in Evans and Murray (eds.) (2002) 280, 289.

To date, the following Working Groups have been established:

- (i) The Working Group on Economic, Social and Cultural Rights.⁸⁹⁸
- (ii) The Working Group on Indigenous Populations and Communities.⁸⁹⁹
- (iii) The Working Group on the Death Penalty.⁹⁰⁰
- (iv) The Working Group on Specific Issues Relating to the Work of the African Commission.⁹⁰¹
- (v) The Working Group on the Implementation of the Robben Island Guidelines.⁹⁰²

Apart from conferences, seminars and the like, the African Commission has passed a number of recommendations and resolutions, many of which also serve promotional and protective functions.⁹⁰³ Country and thematic resolutions adopted serve to draw attention to human rights situations in particular States, as well as to highlight particular human rights issues affecting the continent.⁹⁰⁴ These resolutions marked a bold and courageous stand on the part of the African Commission, and a turning point in its institutional relationship with the AU. The interactive dialogue between the African Commission and the State parties subject to such resolutions demonstrates that these resolutions are an effective means of encouraging States to account for their conduct before the African Commission.

⁸⁹⁸ See 20th Annual Activity Report of the African Commission, para 35. Available at www.achpr.org.

⁸⁹⁹ Id., para 36. Among other things, the mandate empowers the Working Group to 'gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous populations and their communities and organisations, on violations of their human rights and fundamental freedoms; Undertake country visits to study the human rights situation of indigenous populations/communities; and Formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous populations/communities'. This would enable the Working Group to take action upon receiving letters and similar communications concerning violations.

⁹⁰⁰ See 21st Annual Activity Report of the African Commission, para 69. Available at www.achpr.org.

⁹⁰¹ This Working Group was established, following the 37th Ordinary Session of the African Commission, as a means of providing it with analytical support. The Working Group met in Pretoria in April 2006 to review the Rules and Procedures of the African Commission and the relationship between the African Commission and the African Court on Human and Peoples' Rights. It was vital that the African Commission identified the boundaries of its relationship with the African Court.

⁹⁰² See Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 23 October 2002, ACHPR Res.61 (XXXII) 02.

⁹⁰³ Nmehielle V.O. 'A Decade of Human Rights: Development of the African Human Rights System in the Last Decade' (2004) 11 *Human Rights Briefings* 6.

⁹⁰⁴ Not all the resolutions passed by the African Commission are country-specific or thematic. For example, see the list of resolutions adopted by the African Commission at its 40th Ordinary Session set out in the 21st Activity Report, para 69, including : Resolution on the Establishment of a Fund to be Financed by Voluntary Contributions for the African Human Rights System; Resolution on the Importance of the Implementation of the Recommendations of the African Commission; Resolution on the Appointment of a Commissioner as a Member of the Working Group on Indigenous Populations/Communities in Africa; Resolution on the Situation of Freedom of Expression in Africa; Resolution on the Adoption of the Lilongwe Declaration on Access to Legal Assistance in the Criminal Justice System; Resolution on the Composition and Operationalisation of the Working Group on the Death Penalty; Resolution on the Human Rights Situation in Darfur; and Resolution on the Situation of Women in the Democratic Republic of Congo.

Article 45(1)(a) of the African Charter enjoins the African Commission to ‘encourage national and local institution concerned with human and peoples’ rights...’, in addition to collecting documents, undertaking studies and research on African problems in the field of human rights and organising seminars, conferences and other such activities. In the same vein, the African Commission is mandated to ‘co-operate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights’.⁹⁰⁵ Under Article 55 of the African Charter, NGOs are among the entities that can submit communications other than those of State Parties to the Charter.

The provisions mentioned above give no indication of the status to be granted to NGOs under the African Charter. To fill the gap, the rules of procedure of the African Commission go far in recognising NGOs as deserving consultative and observer status as a supervisory mechanism. Rule 75 makes provision for NGO observer status.⁹⁰⁶ Similarly, rule 76 provides for consultation with NGOs.⁹⁰⁷

During its Second Ordinary Session, the African Commission took the decision to grant observer status to NGOs that met certain criteria that it had identified.⁹⁰⁸ NGOs with observer status⁹⁰⁹ and NGOs without observer status have been involved in strengthening the African human rights system, especially at the level of the African Commission, since it began functioning. In the era of human and peoples’ rights promotion and protection, NGOs have performed and continue to perform a myriad roles or functions.

⁹⁰⁵ African Charter, Art 45(1) (c).

⁹⁰⁶ According to this rule, ‘NGOs, granted observer status by the Commission, may appoint authorised observers to participate in the public sessions of the Commission and of its subsidiary bodies’.

⁹⁰⁷ Rule 76 reads as follows: ‘The Commission may consult the NGOs either directly or through one or several committees set up for this purpose. These consultations may be held at the invitation of the Commission or at the request of the organisation’.

⁹⁰⁸ The AHSG of the OAU, at its 34th Ordinary Session, requested the African Commission to review its criteria for granting observer status to NGOs. The need for revised criteria was motivated by the following arguments: (i) The fact that very few NGOs committed themselves to the African Commission, as their track record for submitting activity reports, as decided in Tunis, was dismal; (ii) The Commission was not adequately informed as to what NGOs were doing in the field of human rights; and (iii) The fact that some NGOs apparently misused donor funds. See AHG/Dec.126 (XXXIV) para 3. This led to the adoption of a ‘Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the field of Human Rights with the African Commission on Human and Peoples’ Rights’ at the 25th Ordinary Session of the African Commission held in Bujumbura, Burundi, in 1999. Annexed to this Resolution were the new criteria for granting and maintaining observer status. AHG/215 (XXXV) Annex IV, 16-18.

⁹⁰⁹ As of 28 November 2007, 375 NGOs have been granted affiliated status with the African Commission. See Final Communiqué of the 42nd Ordinary Session of the African Commission, held in Brazzaville, Republic of Congo, 15-28 November, para 27.

Motala highlighted the role of NGOs under the African system of human rights in the following headings: participation in sessions, media and publicity, complaints mechanism, State reporting procedure, assistance with regard to missions, workshops and seminars, elaboration of principles and standards, supporting the work of Special Rapporteur, supporting the secretariat, missions, and drafting human rights instruments.⁹¹⁰

Mutua was particularly critical of human rights NGOs. He contended that many of them are replicas of their northern counterparts in terms of their organisation, objectives, tactics and strategies. Indeed, they are largely dependent on Northern resources and support. While international NGOs have made positive contributions to, and some have worked in partnership with African NGOs.⁹¹¹

The African Commission is committed itself to supporting the establishment of national institutions in Africa. The affiliate status was granted to NHRIs at the 24th Ordinary Session of the African Commission held in Banjul, The Gambia, in 1998.⁹¹² The granting of affiliate status to NHRIs gives effect to Article 26 of the African Charter, and reinforces the fact that NHRIs should play an essential role in the implementation of the African Charter at a national level.⁹¹³ National institutions must formally apply to the African Commission for affiliate status, and must comply with the stipulated criteria.⁹¹⁴ NHRIs that enjoy affiliate status have duties and enjoy some privileges.

⁹¹⁰ Motala in Evans and Murray (eds.) (2002) 246. See also, Zeleza P.T. 'Human Rights and Development in Africa: New Contexts, Challenges and Opportunities' in Wohlgemuth L. and Sall E. (eds.) *Human Rights, Regionalism and the Dilemmas of Democracy in Africa* (Dakar: CODESRIA, 2006) 57, 79.

⁹¹¹ Mutua M.W. 'African Human Rights Organisations: Questions of Context and Legitimacy' in Zeleza and McConnoaghay (eds.) (2004) 192.

⁹¹² The Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa was adopted at the 24th Session.

⁹¹³ African Charter, Art. 26 reads as follows: 'States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter'.

⁹¹⁴ Resolution adopted at the 24th Ordinary Session, *Ibid.*, stipulates that NHRIs must adhere to the following criteria: 1) The national institution should be duly established by law, constitution or decree; 2) It must be a national institution of a State party to the African Charter; 3) The national institution must conform to the Principles relating to the Status of National Institutions, also known as the Paris Principles, adopted by the UN General Assembly under Resolution 48/144 of the 20th of December, 1993. Full affiliation requires full compliance with the Paris Principles. The criteria for full affiliation are, among others, independence, fulfillment of reporting obligations, implementation of some of the key tasks of national human rights institutions, and financial independence. See Paris Principles, Art. 3 (b), referred to above. As of 28 November 2007, 21 national human rights commissions have been granted affiliate status with the African Commission. See Final Communiqué of the 42nd Ordinary Session of the African Commission, held in Brazzaville, Republic of Congo, 15-28 November 2007, para 26.

For example, they must submit their activity reports to the Secretariat of the African Commission on a bi-annual basis. As for NGOs, this duty has never been fulfilled, and no sanction has been taken in this regard.⁹¹⁵

2.2.2. Protective mandate: examinations of communications

Article 45(2) of the African Charter specifies the protective mandate of the African Commission as ‘ensuring the protection of human and peoples’ rights under conditions laid down by the present Charter.’ Unlike the promotional mandate, for which it makes elaborate provision as to content in Article 45(1), one can assert that Article 45(2) sees the protective work of the African Commission as spanning the entire African Charter in terms of the specific rights, duties and obligations that have been established. The African Commission has identified two basic areas of its protective mandate, namely the examination of complaints or communications, which is further divided into State and other communications. According to the African Charter, there are two main categories of communications: namely communications from Member States (Articles 47-54) and other communications (Articles 55-59).

2.2.2.1. Inter-State communications and admissibility requirements

Under Article 47 of the African Charter, a Member State that ‘has good reasons’ to believe that another Member State has violated this instrument may communicate this in writing to the ‘other’ Member State, with a copy to the AU Commission and the Chairperson of the African Commission.⁹¹⁶ Rule 88 of the rules of procedure specifies that the communication shall contain ‘a detailed and comprehensive statement on the actions denounced as well as the provisions of the Charter alleged to have been violated’.

⁹¹⁵ According to Louw ‘the relationship between the African Commission and NHRIs is however not nearly as formalised or strong as is the relationship between the African Commission and NGOs. Until now NHRIs have only participated briefly, through the delivery of public addresses, in the sessions of the Commission, and have not participated actively in any of the other promotional or protective functions of the African Commission’. Louw L. *Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights*, unpublished LLD Thesis, University of Pretoria, Faculty of Law (2005) 186-187.

⁹¹⁶ African Charter, Art 47, ‘If a State Party to the present Charter has good reasons to believe that another State Party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary-General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.’

Within three months, the other Member State shall provide a written explanation containing relevant information on laws, procedures, as well as the redress or course of action available. This is further elaborated on in rule 90 of the rules of procedure.⁹¹⁷ In terms of Article 48, either State has the right to submit the matter to the African Commission if, within three months of the original communication being received by the other Member State, the matter has not been settled to the satisfaction of both States, this should be done via the Chairperson of the African Commission, and the other State should be notified. According to rule 91(2) of the rules of procedure, the issue should also be referred to the African Commission, should the other State fail to provide a reply within three months, as set out in Article 47 of the African Charter.

Instead of using the procedure set out in Articles 47-48 of the African Charter, a State can opt for the procedure set out in Article 49. According to this Article, a State may refer a matter directly to the African Commission if 'it considered that another State Party has violated the provisions of the Charter' by sending a written communication to the Chairperson of the Commission, with a copy to the AU Commission and the other State.

The rules of procedure contain further provisions on Article 47, negotiations in rules 88-92 and cases brought before the Commission under either Article 48 or Article 49 in rules 93-101. Rules 93-101 do not make a clear distinction between cases brought before the Commission under Articles 48 and 49. According to rule 93(2), both the Chairperson of the African Commission, the AU Commission and the relevant State Party should be notified of any communication, whether it was submitted under Article 48 or Article 49. Such notification should contain information on measures taken to resolve the question pursuant to Article 47, measures taken to exhaust domestic remedies, and any other procedures, if any, for the international investigation or settlement of the matter.

⁹¹⁷ Rule 90 – Reply and Time Limit: '1. The reply of the State Party to the Charter to which a communication is addressed should reach the requesting State Party to the Charter within 3 months following the receipt of the notification of the communication. 2. It shall be accompanied particularly by: a) Written explanations, declarations or statements relating to the issues raised; b) Possible indications and measures taken to end the situation denounced; c) Indications on the law and rules of procedure applicable or applied; d) Indications on the local procedures for appeal already used, in process or still open'.

Thus far, only one communication has been brought by a State against another State.⁹¹⁸ The Democratic Republic of Congo brought this case before the African Commission by sending a communication to the Secretariat of the African Commission with reference to Article 49 of the African Charter. Only upon a later request from the African Commission did the Democratic Republic of Congo notify the Secretary-General of the OAU and the defendant States. This gave the African Commission an opportunity to provide its interpretation of Articles 47-48, since Uganda and Rwanda argued that the case was inadmissible, simply because the Democratic Republic of Congo had failed to first notify them and the Secretary-General of the OAU.

In its decision, the African Commission stated that the procedure in Article 47 is not mandatory, and that there is no obligation under Article 48 to inform the Secretary-General of the OAU. The African Commission further argued that even when there is an obligation to notify the defendant States, the abstention from doing so does not in itself make the communication inadmissible, since it forwards a copy of the communication to the defendant States for comment in any event.⁹¹⁹

The African Commission reiterated the duty to exhaust domestic remedies, unless they would be unduly prolonged, but since the case concerned alleged violations by the defendants States on the territory of Democratic Republic of Congo, the African Commission found that no domestic remedies existed.⁹²⁰ It is worth noting that while both Rwanda and Uganda among their arguments of inadmissibility stated that the dispute in question was already pending before competent non-legal authorities of the OAU as well as other international bodies, the African Commission did not explicitly respond to this allegation in its decision on admissibility. As a result, it may be assumed that the African Commission did not consider this matter.

⁹¹⁸ Communication 227/99, *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, 20th Annual Activity Report of the African Commission.

⁹¹⁹ *Id.*, paras 54-61.

⁹²⁰ *Ibid.*, paras 62-63.

2.2.2.2. Other communications (Non-State or individual communications) and admissibility requirements

One of the greatest contributions of regional systems is the establishment of complaint mechanisms for judicial or quasi-judicial redress of human rights violations. Europe was the first to create a commission and court that could hear complaints, followed by the Americas and now Africa. The Inter-American Commission on Human Rights, after its inception in 1960, interpreted complaint mechanisms for each individual State, as well as for all of them.⁹²¹ This was deemed to include the power to take cognisance of individual petitions and use them to assess the human rights situation in a particular country, based on the normative standards of the American Declaration. The Inter-American system was thus the first to make the complaints procedure mandatory for all member states. For a communication to be admitted, there are admissibility requirements as stipulated in Article 56 of the African Charter.

(i) Identity of author

Communications must indicate the names and contact addresses of the authors.⁹²² The authors need not be victims, nor their families, or persons necessarily authorised by either.⁹²³ In addition, they do not need to be citizens or residents of a State Party to the Charter. Communications may be submitted by any person, whether individual or corporate. The name required is not the name of the person(s) whose rights have allegedly been violated, but of the person(s) submitting the complaint, who may be someone else.⁹²⁴ The name of the representative must be indicated if the communication is submitted by an NGO. Authors of communications may request the African Commission to preserve their anonymity with respect to the State against which a complaint has been made.

⁹²¹ Inter-American Commission on Human Rights, First Report 1960, OAS Doc. OAE/ Ser.L/II. 1, Doc. 32 (1961).

⁹²² African Charter, Art 56(1).

⁹²³ Communication 25/89, *World Organization Against Torture et al. v. Zaire (Merits)*.

⁹²⁴ It is stated directly in the decision in Communication 304/2005, *FIDH, National Human Rights Organisation (ONDH) and Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Senegal*, that 'the African Charter does not call for the identification of the victims of a Communication ... only the identification of the author or authors of the Communication is required'.

In other words, this *actio popularis* approach gives generous access to the African Commission to anyone who has an interest in human rights, whether a victim of a human rights violation or not. The African Commission has placed emphasis on the author of the communication and admits a communication even when all of the victims are not named in cases of widespread violations.⁹²⁵

(ii) Compatibility with OAU Charter (AU Constitutive Act) and African Charter

The communication should be ‘compatible with the Charter of the OAU (now the Constitutive Act of the AU) or with the present Charter’.⁹²⁶ This means that the communication should invoke the provisions of the African Charter alleged to have been violated, or the relevant principles in the AU Constitutive Act, and that the communication should illustrate a *prima facie* violation of the African Charter or some of the basic principles of the Constitutive Act of the AU.

(iii) Language of the communication

The communication must not be written in disparaging or insulting language directed against the State concerned, its institutions or the AU.⁹²⁷ At least one case was declared to be inadmissible because of the wording: ‘Paul Biya must respond to crimes against humanity... 30 years of the criminal neo-colonial regime incarnated by the duo Ahidjo/Biya ... regime of torturers.... Government barbarisms’.⁹²⁸ Unfortunately, the African Commission did not elaborate on what it would consider to be disparaging or insulting language and what weight such language should carry in relation to the seriousness of allegations contained in a communication.

⁹²⁵ Communications 25/89, 47/90, 56/91, 100/93 *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehowah v. Zaïre*.

⁹²⁶ African Charter, Art 56(2).

⁹²⁷ *Id.*, Art 56(3).

⁹²⁸ Communication 65/92, *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, Tenth Annual Activity Report of the African Commission.

Odinkalu and Christensen observed that this provision has been used by the African Commission to strike down an otherwise important communication that documented an egregious and massive violation of human rights in Cameroon.⁹²⁹ They also maintained that the decision of the African Commission set a dangerous precedent in making the provisions of Article 56(3) subjective to the evoked feelings of State Parties.⁹³⁰ They further contended that this decision amounted to a denial of the freedom of expression by a human rights implementation body.⁹³¹ They concluded that:

The so called insulting language of that communication could be the only way a victim of torture could express his or her pain. What is even more disturbing is that the African Commission did not find the allegations contained in the communication unsubstantiated. The fact that it based its admissibility decision on a broad interpretation of insulting and disparaging language gives a cause for concern. This is so because from all indications, Article 56 (3) will become a basis for the African Commission to declare a communication inadmissible even if the veracity of allegations contained in it is undoubted or uncontested.⁹³²

Mugwanya maintained that the language used in this communication was not offensive as such.⁹³³ Several violations of human rights, dignity and well-being have provoked victims to use strong language in their complaints.⁹³⁴ He further argued that what appears to be insulting language at first sight to an unaffected observer may be a response to trauma arising from the violations in question. Mugwanya suggested that this strict interpretation should be reconsidered.⁹³⁵ However, the wording ‘far from guaranteeing the independence of the Court in relation to my trial, the Government of Ghana has shown an irrevocable determination to have me found guilty by hook or crook and incarcerated’, was not considered to be disparaging or insulting, but merely ‘facts of allegations of African Charter violations; and expressions of the complainant’s fear in this regard.’⁹³⁶

⁹²⁹ Odinkalu and Christensen (1998) 225.

⁹³⁰ *Id.*

⁹³¹ *Ibid.*

⁹³² *Ibid.*

⁹³³ Mugwanya (2003) 366.

⁹³⁴ *Id.*

⁹³⁵ *Ibid.*

⁹³⁶ Communication 322/2006, *Tsatsu Tsikata v. Ghana*, 21st Annual Activity Report of the African Commission.

In Communication 268/2003, *Ilesanmi v. Nigeria*, the African Commission found that disparaging and insulting language must be aimed at ‘undermining the integrity and status of the institution bringing it into disrepute’.⁹³⁷ The author of the communication, who had alleged that various institutions of the State of Nigeria were corrupt, was declared to have used disparaging and insulting language since these institutions were brought into disrepute and were as a result rendered less effective.⁹³⁸

(iv) Communication not based exclusively on news

A communication must not be based exclusively on information from the mass media.⁹³⁹ This was considered in communications 147/95 and 149/96, *Sir Dawda K. Jawara v. The Gambia*, where the respondent State argued that the case was inadmissible, being based exclusively on news from the mass media. The African Commission rejected this argument after stressing the importance of the media in revealing human rights violations and stating that a communication does not become inadmissible because some aspects are based on news. Since the complainant had provided some information that did not appear to come from the media, the communication could not be said to be based exclusively on information from the mass media. The African Commission’s focus in this requirement is to establish the veracity of the information that complaint contains and what efforts the author made and were available in the circumstances to verify the information.

The African Commission ruled that:

While it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media ... There is no doubt that the media remains the most important, if not the only source of information. It is common knowledge that information on human rights violations is always obtained from the media... The issue should not be whether the information was obtained from the media, but whether the information is correct. Did the complainant try to verify the truth about these allegations? Did he have the means or was it possible for him to do so, given the circumstances of his case?⁹⁴⁰

⁹³⁷ Communication 268/2003 *Ilesanmi v. Nigeria*, Eighteenth Annual Activity Report of the African Commission, 2004-2005, Annex III, para 35.

⁹³⁸ *Id.*, para 40.

⁹³⁹ African Charter, Art 56(4).

⁹⁴⁰ Communication 147/95 and 149/96, *Sir Dawda K. Jawara v. The Gambia*, 13th Annual Activity Report of the African Commission, paras 24-26.

(v) Exhaustion of local remedies

A communication must not be submitted prior to ‘exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.’⁹⁴¹ In the communication, the claimant should indicate the steps taken to fulfil this requirement or, if this is not possible, indicate why this is the case. The African Commission stated that:⁹⁴²

They must provide some prima facie evidence of an attempt to exhaust local remedies ... applicants are expected to indicate, for instance, the courts where they sought domestic remedies. Applicants must indicate that they have had recourse to all domestic remedies to no avail and must supply evidence to that effect. If they were unable to use such remedies, they must explain why. They could do so by submitting evidence derived from analogous situations or testifying to a State policy of denying such recourse.

The requirement for exhaustion of local remedies is thus a generally accepted principle of international law to the effect that a State should have the opportunity to provide redress of a wrong under its own legal system before international redress may be invoked against that State. The International Court of Justice decided that:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which state has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the state where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own legal system.⁹⁴³

⁹⁴¹ African Charter, Art 56(5).

⁹⁴² Communication 299/2005, *Anuak Justice Council v. Ethiopia*: 20th Annual Activity Report of the African Commission.

⁹⁴³ See *Interhandel: Switzerland v. United States of America* (1959) ICJ 6, General List No.34, March 21-27.

Through its own jurisprudence, the African Commission declared that:

The rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matter through its own local system. This prevents the Commission from acting as a court of first instance rather than a body of last resort.⁹⁴⁴

The basis for the exhaustion of domestic remedies rule ensures that the African Commission will not become a court of first instance, a function that would undermine State sovereignty and would clearly be beyond the capacity of the African Commission. . . . Recourse is therefore only made to the African Commission if a victim of a human rights abuse has already sought justice within the State against whom the communication is brought, and dissatisfied with the outcome or is of the opinion that a violation of human rights is still being committed.⁹⁴⁵

The jurisprudence of the African Commission related to the exhaustion of local remedies has already been discussed extensively in the literature;⁹⁴⁶ this study will be limited to some relevant cases. In various cases, the African Commission has interpreted admissibility requirements liberally, thereby allowing victims access to its procedures. This interpretation is a clear response to the practical difficulties that face individuals in Africa, especially where there are serious or massive human rights violations that may preclude individual victims from pursuing national or international legal remedies on their behalf.⁹⁴⁷

In its Communication 147/95 and 149/96, *Sir Dawda K. Jawara v. The Gambia*, a domestic remedy must be available, effective and sufficient if the complainant is obliged to pursue it.⁹⁴⁸ If a State alleges that local remedies have not been exhausted, 'it has the burden of showing that the remedies that have not been exhausted are available, effective and sufficient to cure the violation alleged, if satisfied, moves to the complainant to show that the remedies were exhausted or the exceptions applied.'⁹⁴⁹

⁹⁴⁴ See *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les témoins de Jéhovah v. Zaïre*.

⁹⁴⁵ See, *Sir Dawda K. Jawara v. The Gambia*.

⁹⁴⁶ See for example, Udombana N.J. 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 (1) *The American Journal of International Law* 1-37; Vijojoen in Evans (eds.) (2002) 61-99.

⁹⁴⁷ See for example *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les témoins de Jéhovah v. Zaïre*, para 51.

⁹⁴⁸ *Jawara v. The Gambia*, paras 31-32.

⁹⁴⁹ *Id.*

A remedy is considered to be available if the complainant can ‘pursue it without impediment’.⁹⁵⁰ The word ‘available’ means ‘something is: Readily obtainable; accessible, or attainable, reachable; on call, on hand, ready, present; ... convenient, at one’s service, at one’s command, at one’s disposal, at one’s beck and call. In other words, remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant.’⁹⁵¹ This means that a remedy is not available if the complainant has reason to fear for his life or the like if he returns to his country or pursues the remedy. The African Commission’s jurisprudence is, however, not entirely clear on this point. *The Legal Defence Centre* case was declared to be inadmissible since the alleged victim, having been deported, was not able to present himself in The Gambia. It was declared in the decision that ‘the victim does not need to be physically in a country to avail himself of available domestic remedies, such could be done through his counsel’.⁹⁵²

A remedy is considered to be effective if ‘it offers a prospect of success’.⁹⁵³ The African Commission has taken the view that the rule regarding exhaustion of domestic remedies is dispensed with in cases of serious and massive violations of human rights. Thus, the Commission holds that it must read Article 56(5) in light of its duty to:

The Commission cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each individual complaint. This is the case where there are a large number of individual victims. Due to the seriousness of the human rights situation as well as the number of people involved, such remedies as might exist in the domestic courts are as practical matter unavailable or, in the words of the Charter, unduly prolonged.⁹⁵⁴

⁹⁵⁰ *Jawara v. The Gambia*, para 32.

⁹⁵¹ Communication 299/2005, *Anuak Justice Council v. Ethiopia*.

⁹⁵² Communication 219/98, *Legal Defence Centre v. The Gambia*. 13th Annual Activity Report of the African Commission.

⁹⁵³ Communications 147/95 and 149/96. In this case, the African Commission found that, as jurisdiction of the national courts had been voided by decrees, there was no prospect of success. A similar reasoning may be found in Communication 245/2002, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, where a ‘clemency order ... pardoning every person liable for any politically motivated crime’ denied the claimant the access to local remedies, para 56-57. See 21st Annual Activity Report of the African Commission.

⁹⁵⁴ *Id.*, para,57.

This exception clearly applies to precluding the need to exhaust domestic remedies in cases of mass displacement or influx. It also extends to situations of indiscriminate violations directed at or against refugee populations. The African Commission took this view in Communication 27/86, *Organisation Mondiale Contre la Torture et al. v. Rwanda*, involving the mass expulsion to Burundi by the then Rwandan Government of Ba Tutsi Burundian refugees. The African Commission held, on the question of admissibility, that ‘in view of the vast and varied scope of the violations alleged and the large number of individuals involved...remedies need not be exhausted.’⁹⁵⁵

A communication may also be declared to be admissible without the requirement of exhaustion of local remedies if the remedy is at the discretion of the executive. The motivation for this decision was that, according to the African Commission, it would be improper to insist that complainants seek remedies from sources which do not operate impartially, and have no obligation to decide according to legal principles.⁹⁵⁶ An exception to the exhaustion of domestic remedies rule exists if the jurisdiction of the ordinary courts has been ousted by a decree or through the legislation that also made recourse to court proceedings a criminal offence punishable by a term of imprisonment.⁹⁵⁷

The African Commission declared a communication that was initiated after more than sixteen year of fruitless domestic proceedings to be admissible.⁹⁵⁸ Similarly, it found a communication that was filed more than twelve years after a fruitless and still pending domestic appeal had been launched to be admissible.⁹⁵⁹ The *Union Nationale des Syndicats du Sénégal* case,⁹⁶⁰ which involved complaints about the violations suffered by the Senegalese trade union leader, Mademba Sock, Secretary of the *Syndicat Unique des Travailleurs de l'Electricité (SUTELEC)*, observing that the communication presents a *prima facie* case of a series of violations of the African Charter, the African Commission nevertheless declared the communication to be inadmissible due to the non-exhaustion of all domestic remedies.⁹⁶¹

⁹⁵⁵ *Organisation Mondiale Contre la Torture et al. v. Rwanda*, para 17.

⁹⁵⁶ Communication 60/91, *Constitutional Rights Project v. Nigeria* (in respect of Wahab Akamu, G. Adega and others).

⁹⁵⁷ Communication 101/93, *Civil Liberties Organization v. Nigeria* (in respect of the Nigerian Bar Association).

⁹⁵⁸ Communication 93/97, *John K. Modise v. Botswana*.

⁹⁵⁹ Communication 59/91, *Embga Mekongo Louis v. Cameroon*.

⁹⁶⁰ Communication 226/99, *Union Nationale des Syndicats Autonomes du Sénégal v. Sénégal*, 28th Ordinary Session of the African Commission, the 14th Annual Activity Report of the African Commission, Addendum.

⁹⁶¹ *Id.*, para 14.

The attitude of the African Commission in the *SUTELEC* case contrasts with its more positive interpretation in the *Avocats Sans Frontière*⁹⁶² case. In this latter case, the respondent State argued against the communication that ‘the complainant has not exhausted other local remedies which include ‘*le recours dans l’interêt de la loi*’, revision and the plea for pardon’. Rejecting this objection, the African Commission contended that:

The Complainant could only benefit from the first two remedies at the initiative of the Ministry of Justice and also as a result of discovery of new facts that may lead to reopening of the file. With regard to the plea of pardon, it is not a judicial remedy, but serves to affect the execution of a sentence.⁹⁶³

In the *John D. Oluko* case,⁹⁶⁴ the African Commission enunciated what it calls ‘the principle of constructive exhaustion of local remedies’, but did not go far in explaining what the meaning of this expression was. The complainant in this case claimed to be a student union leader who had been forced because of his political views to flee Kenya and go into exile in the Democratic Republic of Congo, where he was recognised as a refugee by the United Nation’s High Commissioner for Refugees. He alleged, among other things, that prior to being forced into exile, he had been arbitrarily arrested and detained for ten months in the basement cells of the Secret Service Department in Nairobi, Kenya, but, having fled the respondent State, was unable to pursue domestic remedies against it for this violation.

The African Commission enunciated its principle of constructive exhaustion of local remedies according to these facts, thereby confirming its previous suggestion that forced exile precludes or forecloses the exhaustion of local remedies for violations related to the situation of exile against the country of origin. Similarly, where the respondent State frustrated access to local remedies by repeatedly deporting the complainant from its territory, so that he was unable to launch an appeal against his conviction for over fifteen years, the African Commission took the view that ‘local remedies were unduly prolonged and the legal process wilfully obstructed by the government through repeated deportations of the complainant’.⁹⁶⁵

⁹⁶² Communication 231/99, *Avocats sans Frontières des Droits de l’Homme (on behalf of Gaëtan Bwampamyè) v. Burundi*, 14th Annual Activity Report of the African Commission on Human and Peoples’ Rights, Annex V, (2002) 77, para 22.

⁹⁶³ *Id.*, para 23.

⁹⁶⁴ Communication 232/99, *John D. Oluko v. Kenya*, 14th Annual Activity Report of the African Commission on Human and Peoples’ Rights, Annex V, (2002) 83, para 22.

⁹⁶⁵ *Modise* case, para 60.

Far from being understood to have laid down a firm rule, the African Commission clarified in the *African Legal Aid* case that:

It should not, therefore, be taken to have laid down a hard and fast rule that whenever a complaint finds himself outside the jurisdiction, the inescapable conclusion should be that the requirement of exhaustion of local remedies mandated by Article 56 does not apply.⁹⁶⁶

Lack of a legal remedies scheme can also make a remedy ineffective. In the *Purohit and Mooret* case⁹⁶⁷ brought on behalf of patients at mental institutions in The Gambia, there had been no possibility to obtain legal aid in order to pursue the matter in the local courts. The African Commission, while acknowledging that a literal interpretation of Article 56 could lead to another result, since domestic remedies existed if you could afford them, concluded that in the absence of legal aid services, the remedies were not realistic for the complainants, this particular category of persons, and therefore not effective - consequently, the case was admissible. In the *Institute for Human Rights and Development* case, one of the reasons why the African Commission found the domestic remedies not to be effective was that the Guinean courts would be 'severely overburdened if even a slight majority of victims chose to pursue legal redress in Guinea. Consequently, the requirement to exhaust domestic remedies is impractical'.⁹⁶⁸

A remedy is considered to be sufficient if 'it is capable of redressing the complaint'.⁹⁶⁹ Even if this is not clearly mentioned in the *Avocats Sans Frontières* case, this should be seen as a case in which the remedy, the possibility to ask for pardon, would not be capable of redressing the complaint.⁹⁷⁰

⁹⁶⁶ *African Legal Aid* case, para 38.

⁹⁶⁷ Communication 241/2001, *Purohit and Moore v. The Gambia*, Communication 241/2001. 16th Annual Activity Report of the African Commission.

⁹⁶⁸ Communication 249/2002, *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v. Guinea*. 20th Annual Activity Report of the African Commission. See also Communication 299/2005, where the African Commission declared that: 'Thus, in cases of massive violations, the State will be presumed to have notice of the violations within its territory and the State is expected to act accordingly to deal with whatever human rights violations. The pervasiveness of these violations dispenses with the requirement of exhaustion of local remedies, especially where the State took no steps to prevent or stop them'.

⁹⁶⁹ Communications 147/95 and 149/96.

⁹⁷⁰ Communication 231/99, *Avocats sans Frontières des Droits de l'Homme* (on behalf of Gaëtan Bwampamye) v. *Burundi*.

A remedy is insufficient if ‘its pursuit depended on extrajudicial considerations, such as discretion or some extraordinary power vested in an executive State official’.⁹⁷¹ Only remedies that are ‘of legal nature and not subordinate to the discretionary power of the public Authorities are relevant’.⁹⁷² The African Commission has taken a pragmatic and realistic view when it comes to admissibility requirements.

A communication was also considered to be inadmissible simply because the complainants failed to provide any information on steps taken before the local courts.⁹⁷³ It is clear that the requirement to exhaust local remedies is by far the most important condition for admissibility set out in Article 56 of the African Charter.

(vi) Reasonable time after exhaustion of local remedies

According to Article 56(6), communications must be submitted ‘within a reasonable period from the time local remedies are exhausted’. In the *Tsatsu Tsikata* case, the African Commission stated that:

This is quite related to the principle of the exhaustion of local remedies in accordance with Article 56(5). This means that the Commission estimates the timeliness of a Communication from the date that the last available local remedy is exhausted by the Complainant. In the case of unavailability or prolongation of local remedies, it will be from the date of the Complainant’s notice thereof.⁹⁷⁴

In practice, the question of the timeliness of communications has not been further elaborated in the jurisprudence of the African Commission. It is instructive to note, that the European and Inter-American systems stipulate a time period of six months after the final decision has been taken or the complainant was not notified of the final judgments.⁹⁷⁵

⁹⁷¹ Communication 299/2005, *Anuak Justice Council v. Ethiopia*.

⁹⁷² Communication 253/2002, *Antoine Bissangou v. Republic of Congo*, 21st Annual Activity Report of the African Commission.

⁹⁷³ Communication 221/98, *Alfred B. Cudjoe v. Ghana*, 12th Annual Activity Report of the African Commission.

⁹⁷⁴ Communication 322/2006, *Tsatsu Tsikata v. Ghana*.

⁹⁷⁵ See European Convention on Human Rights, Art 35 and American Convention, Art 46(1) (b).

(vii) Communications already settled by other international human rights mechanisms

The last and seventh condition is that a communication may not ‘deal with cases which have been settled by the States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity (now the Constitutive Act of the African Union) or the provisions of the present Charter’.⁹⁷⁶ In other words, a communication cannot be one that has already been, or is being, settled through another international body such as the UN Human Rights Committee, or even some organ of the AU. Like the condition in Article 56(6) that communications must be submitted within a reasonable time, the question of competing jurisdiction has not been a major problem.

2.2.3. Interpretive mandate

The African Charter gives the African Commission the power to interpret all its provisions at the request of a State Party, an institution of the AU or an organisation recognised by the AU.⁹⁷⁷ This provision assigns to the African Commission interpretative tasks other than the general interpretation of the African Charter, which it routinely embarks on in terms of its habitual promotional and protective mandates. Using this provision, the African Commission, on the one hand, has been able to determine the complaints that come before it, as well as to pass a number of resolutions on specific provisions of the African Charter.

Many of these resolutions serve to clarify some vague and ambiguous provisions. On the other hand, it seems as if this provision envisages the rendering of an advisory opinion to a State Party, an institution of the AU or an African organisation recognised by the AU. Identifying a State Party and an institution recognised by the AU is not a matter of concern. However, the African Charter is silent concerning the definition of an African organisation recognised by the AU. Nmehielle wondered whether Article 45(3) includes NGOs, whose presence in Africa may have been recognised by the fact that they have been given observer status by the African Commission, or is limited to inter-governmental or national organisations that have in one way or the other been endorsed by the OAU/AU.⁹⁷⁸

⁹⁷⁶ African Charter, Art 56(7).

⁹⁷⁷ Id., Art 45(3).

⁹⁷⁸ Nmehielle (2001) 181.

The question still remains, as neither the AU nor a State Party or institution recognised by the AU has asked the African Commission to interpret any of the provisions of the African Charter. As noted by Badawi, the use of this article would help in exhausting the potential of the African Charter, and make it a dynamic instrument which responds to African realities and needs.⁹⁷⁹

2.2.4. Other tasks

Article 45(4) of the African Charter requires that the African Commission performs ‘any other tasks which may be entrusted to it by the AHSO’. To date, the Assembly as a body has not entrusted any specific tasks to the African Commission. It is possible that in the near future, the AHSO might call upon the African Commission to perform certain tasks. This expectation arises from the fact that contrary to the OAU, the AU appears to be more committed to ensuring the protection of human rights. It is doing away with the domestic jurisdiction principle, and no longer considers human rights violations in Member States as being matters outside its areas of expertise. It is to be hoped that in situations of serious and massive violations of human rights, such as those that occurred in Rwanda, Sudan, Somalia the Democratic Republic of Congo, Chad and Angola, to mention but a few, the AU would call upon the African Commission to deal with these situations.

It is to be noted that the African Commission’s broad mandate makes it unnecessary for it to seek the Assembly’s approval for many initiatives. Indeed, since its seventh Ordinary Session held in 1990, it has taken its own initiatives, either in offering its services or dealing with cases in which there are serious and massive violations of human rights. In view of recent trends in the AU and the continuing wave of democracy on the continent, there is still reason to hope that the African Commission will continue to gain more credibility and legitimacy among African States, and will be called upon by the Assembly of Heads of State and Government to perform tasks provided for by Article 45(4) of the African Charter.

⁹⁷⁹ Badawi El-Sheik I.A. ‘The African Commission on Human and Peoples’ Rights: A Call for Justice’ in Koufa K. (ed.) *International Justice* (Athens: Sakkoulas Publications, 1997) 283, 287.

2.3. Case law of the African Commission

2.3.1. Civil and political rights

2.3.1.1. Right to respect of dignity and prohibition of torture, cruel and inhuman or degrading treatment

With regard to the scope of Article 5 of the African Charter, the African Commission pointed out that ‘the term cruel, inhuman or degrading treatment or punishment is to be interpreted as to extend the widest possible protection against abuses, whether physical or mental and that this prohibition is absolute.’⁹⁸⁰ The African Commission acknowledged that while treatment impugned as torture, cruel, inhuman or degrading treatment or punishment must be accorded a minimum level of severity, the determination of this minimum depends on several variables, including the duration of the treatment, its physical and mental effects and, where relevant, the age, sex and state of health of the victim.⁹⁸¹ In the same case, the African Commission concluded that detention in ‘a sordid and dirty cell under inhuman and degrading conditions without contact with the outside world was cruel, inhuman and degrading.’⁹⁸²

2.3.1.2. Right to liberty and security of every individual

In terms of Article 6 of the African Charter, it must be mentioned that the possibility for an appeal in the case of an arrest should exist before an independent body.⁹⁸³ The establishment of a tribunal under a decree may constitute a violation of Article 6 of the African Charter, when it is alleged that there are no appropriate possibilities for appealing against the decisions of the tribunal before a court of law.⁹⁸⁴ The detention of individuals for protesting against being tortured constitutes a violation of Article 6.⁹⁸⁵

⁹⁸⁰ *Huri-Laws v. Nigeria*, paras 40-41.

⁹⁸¹ *Id.*

⁹⁸² *Ibid.*

⁹⁸³ Communications 64/92, 68/92, 78/92, *Krischna Achutan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa v. Malawi)*, 8th Activity Report of the African Commission, para 108.

⁹⁸⁴ Communications 137/94, 139/94, 154/96, 161/97, *International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa Jr), Civil Liberties Organisation v. Nigeria*. The African Commission ruled that ‘to arbitrarily hold people critical of the government for up to three months without having to explain themselves and without the opportunity for the complainant to challenge the arrest and detention before a court of law is a violation of Article 6’.

⁹⁸⁵ Communications 25/98, 47/90, 56/91, 100/93 (joined), *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interfricaine des Droits de l’Homme, les Témoins de Jehovah v. Zaïre*, Ninth Annual Activity Report of the African Commission on Human and Peoples’ Rights.

The arrest of believers of a particular religion without any charges being brought against them also constitutes a violation of Article 6,⁹⁸⁶ as well as arrests and detentions based on ethnic origin alone.⁹⁸⁷ An arrest based on such grounds has to be considered as arbitrary. Detention is considered to be arbitrary when it is established that the applicant was held in prison after the expiration of his sentence.⁹⁸⁸ In the case where applicants are granted State pardons but not freed, a violation of Article 6 occurs.⁹⁸⁹ Particularly in the case of elections, the detention of individuals without any charges being brought against them constitutes an arbitrary deprivation of their liberty, and can therefore be considered as a violation of Article 6.⁹⁹⁰

Detention of a political figure for a long period without any charges or trial is considered to be arbitrary, and thus violates Article 6.⁹⁹¹ A government may state, in a written provision, the criteria which have to be met before the police can arrest someone. These criteria, however, may not allow individuals to be arrested for vague reasons.⁹⁹² Individuals may only be arrested for actions that they are presumed to have committed, not only upon mere suspicion.

2.3.1.3. Right to a fair trial

A number of cases have alleged violations of fair trial standards in criminal matters, and the focus here is in the context of the procedures of special courts and military tribunals. In the *Avocats sans Frontières* case, it was alleged that Gaëtan Bwampamyé was sentenced to death for the crimes of incitement to massacre and hindering the enforcement of public order in breach of fair trial guarantees in Article 7(1) of the African Charter.

⁹⁸⁶ Ibid. In this case, several Jehovah's witnesses were persecuted. The African Commission stated that 'the government has presented no evidence that the practice of their religion in any way threatens law and order. The arbitrary arrests of believers of this religion likewise constitute a contravention of Article 6 (...)'.

⁹⁸⁷ Communications 27/89, 46/91, 49/91, 99/93, *Organisation Mondiale Contre La Torture and Association Internationale des Juristes Démocrates, Commission Internationale des Juristes, Union Interafricaine des Droits de l'Homme v. Rwanda*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights, para 28.

⁹⁸⁸ Communication 39/90, *Annette Pagnouille* (on behalf of Abdoulaye Mazou) v. *Cameroon*, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights.

⁹⁸⁹ Communication 148/96, *Constitutional Rights Project v. Nigeria*, para 33.

⁹⁹⁰ *Constitutional Rights and Civil Liberties Organisation v. Nigeria*, para 25. In this case, applicants were detained for more than three years after the time of the elections, without charges being brought against them. According to the African Commission, this constituted an arbitrary deprivation of their liberty and thus violated Article 6 of the African Charter.

⁹⁹¹ Communication 64/92, 68/92, 78/92. *Krischna Achutan* (on behalf of Aleke Banda), *Amnesty International* (on behalf of Orton and Vera Chirwa v. Malawi) (joined) (8th Annual Activity Report, 1995). In this case, the victim was held in detention for 12 years. The fact that he had no access to the courts violated Article 6.

⁹⁹² *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of Episcopal Conference in East Africa v. Sudan*, para 107.

The relevant facts in this case were that Mr. Bwampamye was, on 25 September 1997, convicted and sentenced to death by the Criminal Chamber of the Appeal Court of Ngozi, Burundi, following conviction on multiple counts of incitement to massacre and hindering the enforcement of public order. Upon completion of the testimonies of witnesses at the trial on 3 June 1997, the Criminal Chamber, citing the volume of material before it, adjourned the case to 20 August 1997 for closing statements and addresses.

On the adjourned date, the prosecution, arguing that it needed more time to study the defence statement, refused to make its closing statement, in deference to which argument the Court further adjourned proceedings to 25 September 1997. On this day, the defence counsel was ill and unable to attend court, which proceeded without him and compelled the accused to defend himself, without the assistance of his counsel, despite his request for legal assistance. The Supreme Court dismissed his appeal on the grounds that he had no need for counsel at the address stage, because his counsel had already accomplished all the essential duties expected of a lawyer.⁹⁹³ The African Commission held that this was a violation of the equality of arms. It put forward the following arguments:

The right to fair trial involves fulfilment of certain objectives criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for the interests of justice, as well as the obligation on the part of Courts and tribunals to conform to international standards in order to guarantee a fair trial to all... The right to equal treatment by a jurisdiction, especially in criminal matters, means in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly, it entails the equal treatment of all accused persons by jurisdictions charged with trying them. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner.⁹⁹⁴

The *Civil Liberties Organisation* case involved a complaint against the trial and conviction by a Special Military Tribunal in 1998 of senior military officers, including the then Nigerian Vice-President. The trial, which took place in camera, was conducted by a military tribunal led by the then Nigerian Head of State, who also presided over the ruling Provisional Military Council empowered, in the absence of a right of appeal against the decisions of the Special Military Tribunal, to confirm or set aside the decisions of the Tribunal.

⁹⁹³ *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, paras 1-7.

⁹⁹⁴ *Id.*, paras 26-27.

The communication also alleged that the Chairman of the Special Military Tribunal was a member of the Provisional Military Council, and the accused persons were required to select their counsel from a list of military lawyers provided by the ruling military regime which they were accused of having attempted to overthrow. In concluding that these facts violated Article 7(1) (a) and (c) of the African Charter, the African Commission decided that:

The provisions of Article 7 should be considered non-derogable providing as they do the minimum protection to citizens and military officers especially under an unaccountable, undemocratic military regime. The Human Rights Committee in its General Comment No. 13 states that Article 14 of the ICCPR applies to all courts and tribunals whether specialised or ordinary. ... The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.⁹⁹⁵

The African Commission underlined the fact that the right to a fair trial is essential to the protection of all other human rights⁹⁹⁶, and ruled that:

It is desirable that in cases where the accused are unable to afford legal counsel, that they be represented by counsel at State expense. Even in such cases, the accused should be able to choose out of a list the preferred independent counsel, not acting under the instructions of government but responsible only to the accused.⁹⁹⁷

In the *Media Rights Agenda* case, Niran Malaolu, a civilian and editor of an independent newspaper in Nigeria, was convicted by the same Special Military Tribunal. With regard to the trial of civilians by special courts or military tribunals, the African Commission decided that this violated Article 7 of the African Charter, and that ‘they should not, in any circumstances whatsoever, have jurisdiction over civilians. In the same vein, Special Courts should not try offences that fall within the jurisdiction of regular courts’. The exclusion of the public from the trial is also contrary to Article 7.⁹⁹⁸ In the *Forum Conscience* case,⁹⁹⁹ the African Commission noted that the trial and execution on 19 October 1998 of 24 military officers convicted by a court martial of treason for overthrowing the elected government of Sierra Leone, following proceedings in which they were deprived of the right of appeal, was a violation of both the right to life in Article 4 of the African Charter, and of a fair trial guaranteed in Article 7(1) (a).

⁹⁹⁵ *Civil Liberties Organisations*, para 27.

⁹⁹⁶ *Id.*, para 30.

⁹⁹⁷ *Ibid.*, para 29.

⁹⁹⁸ *Media Rights Agenda*, para 62.

⁹⁹⁹ Communication 223/98, *Forum of Conscience v. Sierra Leone*, 14th Annual Activity Report of the African Commission on Human and Peoples’ Rights, Annex V (2002) 83.

The African Commission declared that:

The trial in issue was that of a purely military nature, i.e. for their alleged roles in the coup which overthrew the elected government. The Commission is however constrained to hold that the denial of the victim's right to appeal to competent national organs is a serious offence as this falls short of the requirement of the respect for fair trial standards expected of such courts. The execution of the 24 soldiers without the right to appeal is therefore a violation of Article 7(1) (a) of the Charter. This is more serious given the fact that the said violation is irreversible.... The rules and regulations governing court martial, to the extent that they do not allow the right of appeal offend the Charter.¹⁰⁰⁰

2.3.1.4. Freedom of religion

The African Commission dealt with freedom of religion in the *Prince* case,¹⁰⁰¹ the complainant alleged that his freedom of religion had been violated because he had to choose between adhering to his Rastafarian beliefs and his professional career as a lawyer. Finding that the relevant legislation constituted reasonable limitations to the right, the African Commission also stated that the principle of subsidiarity and the margin of appreciation doctrine do not minimise its oversight mandate.

Prince expected to become an attorney in the courts of South Africa. Having satisfied all the academic requirements of the South African Attorney Act, he applied to register, as a contract of community service, with the Law Society of the Cape of Good Hope. Under the same Act, registering articles of clerkship or performing community service, as Prince wanted to do, is another requirement that an applicant has to fulfil prior to being admitted as an attorney for practising before the High Court. However, the Act requires that the applicant should provide proof to the satisfaction of the Law Society that he or she is a fit and proper person. In his application to the Law Society, and as part of the legal requirements, Prince revealed not only that he had been convicted twice for possession of cannabis under the Drugs and Drug Trafficking Act, but also that he intended to continue using cannabis, as encouraged by his Rastafarian beliefs.

¹⁰⁰⁰ *Forum of Conscience v. Sierra Leone*, paras 17 and 20.

¹⁰⁰¹ Communication 255/2002 *Prince v. South Africa* in Heyns C. and Killander M. (eds.) *Compendium of Key Human Rights Documents of the African Union* Third ed. (Pretoria: Pretoria University Press, 2007) 239.

Because of these two facts, the Law Society found that Prince was not a fit and proper person to be admitted as an attorney, and as a result, his application was not approved. In Prince's view, the Law Society's refusal to register him meant that as long as he adhered to the principles of his Rastafarian faith, there was no way for him to be admitted as an attorney. Therefore, he brought the case before the African Commission, alleging violation of Articles 5, 8, 15 and 17(2) of the African Charter.

The African Commission considered that the restrictions in the two South African legislations on the use and possession of cannabis were reasonable, as they served a general purpose, and that the African Charter's protection of the freedom of religion was not absolute. The only legitimate limitations to the rights and freedoms contained in the African Charter are found in Article 27(2).¹⁰⁰²

According to the African Commission,

The limitation is inspired by well-established principle that all human and peoples' rights are subject to the general rule that no one has the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised elsewhere. And the reasons for possible limitations must be founded in a legitimate State interest and the evils of limitations must be strictly proportionate with and absolutely necessary for the advantages, which are to be obtained. It is noted that the respondent's State interest to do away with the use of cannabis and its abuse or trafficking stems from the fact that, and this is also admitted by the complainant, cannabis is an undesirable dependence-producing substance. For all intents and purposes, this constitutes a legitimate limitation on the exercise of the right to freedom of religion within the spirit of Article 27(2) *cum* Article 8.¹⁰⁰³

The *Prince* case is significant for a number of reasons. Firstly, because the African Commission tried to define the conditions and scope of possible restrictions on the manifestation of religion, and this could be applied by analogy to manifestations of culture, the principle of proportionality, and the principle of fair balance between various interests at stake, namely the rights and freedoms of others, avoiding civil unrest, and the demands for public order and pluralism.

Secondly, the African Commission implicitly saw the cultural element in the rites of a religion as being different from the religion itself - freedom of religion is inviolable by nature, but its manifestations may need to be reconciled according to the conditions mentioned above.

¹⁰⁰² *Prince v. South Africa*, para 43

¹⁰⁰³ *Id.*

Thirdly, such rites of one and the same religion may differ from society to society and are more in the domain of culture. This is true not only of Islam, but also of Christianity, Judaism and other religions. In analysing the conclusion reached by the African Commission as being reasonable, one can point out that what the African Commission did not touch upon in this case is the fact that freedom of religion, conscience and belief is only visible in a social context, and is therefore addressed by human rights law, through its manifestations.

Once the internal beliefs, religious or other, of a person are expressed in public, they become a legally protectible good. What would freedom of religion mean for a legal system without its manifestations? Therefore, it is these manifestations that the law and the State should protect or forbid. Similarly, what would the cultural identity of a person be to the legal system without its manifestations? While it is understandable that a well-meaning State must preserve public order in a multicultural society, the State's balancing act and regulatory power should be exercised with caution and subject to the rule of law.

In a comparative perspective, a case ruled by the European Court and underlined would have been of relevance for the African Commission to support his reasoning in the *Prince* case. The European Court of Human Rights has pronounced itself on issues of limitations to the display of religious symbols, namely regarding wearing of an Islamic headscarf in State educational institutions. In the case *Leyla Sahin v. Turkey*,¹⁰⁰⁴ the Court had to decide as to whether the prohibition by Turkish Law of the wearing of Muslim headscarf at State universities was a violation of religious freedom under Article 9 of the European Convention on Human Rights. The case is discussed below because of its linkage to cultural rights. The European Court underlined that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.¹⁰⁰⁵

¹⁰⁰⁴ *Leyla Sahin v. Turkey*, Application no. 44774/98, 29 June 2004, European Court of Human Rights, Fourth Section, Council of Europe.

¹⁰⁰⁵ *Id.*, para 60.

2.3.1.5. Freedom of expression

The importance of freedom of expression is demonstrated in the many cases considered by the African Commission involving violations of Article 9.¹⁰⁰⁶ Some of these cases are highlighted here. Article 9 of the African Charter provides for freedom of expression. According to the African Commission,

Article 9 reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the public affairs of his country.¹⁰⁰⁷

The African Commission also declared that Article 9 does not seem to permit derogation, no matter what the subject of the information or opinions, and no matter what the political situation of a country is.¹⁰⁰⁸ The failure to provide individuals with reasons for, for example, their deportation, constitutes a violation of Article 9(1).¹⁰⁰⁹ Since the African Charter does not provide for limitations of the right to express one's opinions, these kinds of limitations are not justified by emergencies or special circumstances.¹⁰¹⁰ Any limitations of the right to express one's opinions would make the protection of this right ineffective. International human rights law must take precedence over national laws, and limitations must therefore conform to the African Charter. Limitations can only be permitted if they comply with Article 27(2).

The African Commission held that 'a limitation may never have as a consequence that the right itself becomes illusory'. National law cannot set aside the right to express one's opinions, which is guaranteed at the international level.¹⁰¹¹ The prohibition of a publication, without giving the writer the opportunity to defend himself, and without proof that the publication is a threat to national security or public order, constitutes a violation of Article 9(2).

¹⁰⁰⁶ Article 9 of the African Charter reads as follows: '1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law'.

¹⁰⁰⁷ *Media Rights Agenda and Constitutional Rights Project v. Nigeria*.

¹⁰⁰⁸ *Id.*

¹⁰⁰⁹ Communication 212/98, *Amnesty International v. Zambia*.

¹⁰¹⁰ *Media Rights Agenda and Constitutional Rights Project v. Nigeria*. Any limitations of the right to disseminate one's opinions. As the African Commission declared it, 'this would make the protection of the right to express one's opinions ineffective'. International human rights law must take precedence over national laws and limitations must therefore conform to the African Charter. Limitations can only be permitted if they comply with Article 27(2). The African Commission held that 'a limitation may never have as a consequence that the right itself becomes illusory'.

¹⁰¹¹ *Constitutional Rights Project, Civil Liberties Organisation, Media Rights Agenda v. Nigeria*.

Harassment of the press not only has the effect of hindering certain persons from expressing their opinions, but also poses a risk that journalists and writers will subject themselves to self-censorship, in order to be allowed to carry on their work.¹⁰¹² The African Commission also found that there is an assumption that:

Criticism on the government does not constitute an attack on the personal reputation of the head of the State (...). People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether.¹⁰¹³

The case of the *Law Offices of Ghazi Suleiman v. Sudan*¹⁰¹⁴ gave the African Commission another opportunity to address issues related to the freedom of expression, and to express its opinions on the importance of this freedom to the promotion of democracy in Africa. This case can be seen as a landmark decision. Mr. Ghazi Suleiman, a Khartoum based, human rights lawyer, was invited by a group of human rights defenders to deliver a public human rights lecture in Sinnar, Blue Nile State in Sudan. He alleged that he had been prohibited from travelling to Sinnar, and was threatened by some State security officials that if he made the trip, he would be arrested. He claimed a violation of Article 9 of the African Charter. In considering this communication, the African Commission concluded that the government of Sudan violated his right to freedom of expression under Article 9 of the African Charter:

...In keeping with its important role of promoting democracy in the continent, the African Commission should also find that a speech that contributes to political debate must be protected. The above challenges to Mr. Ghazi Suleiman's freedom of expression by the government of Sudan violate his right to freedom of expression under Article 9 of the African Charter.¹⁰¹⁵

The African Commission missed the opportunity to build a normative understanding of democracy, the rule of law and good governance in terms of human rights. An in-depth understanding of democracy goes beyond the freedom of expression, and is about transparent, responsible, accountable and participatory government. Protection of human rights should also include protection of democracy. Therefore, it becomes necessary to develop an appropriate understanding of the relationship between human rights and democracy.

¹⁰¹² *Constitutional Rights Project, Civil Liberties Organisation, Media Rights Agenda v. Nigeria.*

¹⁰¹³ *Media Rights Agenda and Constitutional Rights Project v. Nigeria.*

¹⁰¹⁴ Communication 228/99, *Law Offices of Ghazi Suleiman v. Sudan*, 16th Annual Activity Report of the African Commission on Human and Peoples' Rights (2002-2003).

¹⁰¹⁵ *Law Offices of Ghazi Suleiman v. Sudan*, paras 48-52.

The African Charter provides substantial support for furthering an understanding of democracy, as it contributes to a definition of democracy that places concern for the dignity of the individual at the forefront, and is grounded in the emancipatory ideals essential to democracy. The Preamble of the African Charter makes this point clearly, by declaring:

Considering the Charter of the Organisation of African Unity, which stipulates that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.¹⁰¹⁶

Beetham explained that there is no simple way to summarise the nature of the relationship between the two concepts, owing to the enormous variation in the content of human rights.¹⁰¹⁷ Beetham then demonstrated how civil and political rights are integral to democracy, as the absence of the freedom of speech and association and the right to security of people would make any description of democracy contradictory.¹⁰¹⁸ For Beetham, without these freedoms, there would be no opportunity for even the most basic forms of participation, and no chance for popular control over the government.¹⁰¹⁹

2.3.1.6. Right of every citizen of equal access of public services in his/her State

Article 13(2) of the African Charter guarantees every citizen the right of equal access of public services in his/her State. The limitation of this right is often related to the fact that some public service positions may only be reserved for citizens in all State Parties to the African Charter. In this regard, Ankumah argued that this right is seemingly a civil and political right, if considered in relation to the right of every citizen to participate freely in the government of his State under Article 13(1) of the African Charter.¹⁰²⁰

¹⁰¹⁶ African Charter, Preamble, para 3.

¹⁰¹⁷ Beetham D. 'Democracy and Human Rights : Civil and Political, Economic, Social and Cultural' in Symonides J. (ed.) *Human Rights: New Dimensions and Challenges* (Dartmouth: Ashgate, 1998) 71, 71-72.

¹⁰¹⁸ Id. 189.

¹⁰¹⁹ Ibid.

¹⁰²⁰ Ankumah (1996) 141.

Against this background, Baderin argued that:

If access to public service is taken into account in relation to the right to work, it crosses into the realm of economic, social and cultural rights. Pursuant to Article 2 of the Charter, where certain public service positions are reserved for the citizens of a State, all citizens of that State must have equal access to such public service positions without distinction of any kind. The denial of a citizen's access to such public service positions will be a violation of an economic, social and cultural right of that citizen on grounds of discrimination.¹⁰²¹

The complainant in *Modise's* case alleged the deprivation of his Botswana citizenship, which had been acquired by descent.¹⁰²² John Modise claimed that he was born in 1936 to a father from the then colonial territory of Bechuanaland (later to become the independent State of Botswana), who was a migrant worker in South Africa, and his black South African wife. Mr. Modise went back to Bechuanaland shortly after his birth, where he lived with and was brought up by his father.

In 1978, following his involvement in the founding of an opposition political movement, the Botswana National Front, Mr. Modise was declared to be an undesirable immigrant, and was deported by the Botswana government to South Africa. Following the lodging of the communication in 1993, the government of Botswana granted Mr. Modise Botswana citizenship by registration, and he was registered in 1995 under a registration certificate issued by the President of Botswana. In re-opening the case, Mr. Modise disputed the existence of a settlement, arguing that as citizenship by registration deprived him of his right of access to the highest office in the country, the Presidency, and also deprived his children of Botswana nationality, it was not an appropriate remedy. In his opinion, there was no settlement. The African Commission was thus called upon to render a decision on the merits of this case. In the absence of specific guarantees of nationality in the African Charter, the African Commission considered the claims related to nationality in terms of what it regarded as a complaint against unlawful deportation.

¹⁰²¹ Baderin in Baderin and Mccorquodale (eds.) (2007) 150.

¹⁰²² *John K. Modise v. Botswana*, para 80.

The African Commission affirmed its power to protect the right to nationality, not only by finding that Mr. Modise was a Botswana national, but also by making it a matter of law under the African Charter, as this would violate Modise's rights to reside in, live in, leave and return to their countries under Articles 12(1) and (2) of the African Charter.¹⁰²³ The African Commission found that the denial of Mr. Modise's nationality, which rendered him stateless, violated his right to equal protection under the law, and to dignity, including the recognition of his legal status.¹⁰²⁴

In effect, the African Commission seems to suggest that nationality is a legal status protected under Article 5 of the African Charter. In reaching this conclusion, it declared: 'while the decision as to who is permitted to remain in a country is a function of the competent authorities of that country, this decision should always be made according to careful and just legal procedures and with due regard to the acceptable international norms and standards'.¹⁰²⁵

The African Commission also declared that deportation or expulsion affects not only other rights of the person deported, but also the rights of his or her relatives, and held that in this case, Mr. Modise's rights to property and family life were also violated.¹⁰²⁶ Considering the fact that Mr. Modise's troubles began after he formed an opposition party, the African Commission requested Botswana to recognise his nationality by descent, and concluded that granting Mr. Modise citizenship by registration was a denial of his right to participate in the public services and government of his country, to the extent that citizens by registration were by law ineligible to present themselves for election to the presidency of Botswana.¹⁰²⁷ The *Modise* case is significant in the sense that the African Commission protected his rights to public service positions, given in Botswana only to citizens by descent, which he was entitled to according to his descent.

¹⁰²³ *John K. Modise v. Botswana*, para 83.

¹⁰²⁴ *Id.*

¹⁰²⁵ *Ibid.*, para 83.

¹⁰²⁶ *Ibid.*, para 89.

¹⁰²⁷ *Ibid.*, para 96.

2.3.2. Economic, social and cultural rights

In addition to civil and political rights, the African Charter also contains a number of economic, social and cultural rights. The efforts to incorporate economic, social and cultural rights alongside civil and political rights within a single instrument gives credit to the African Charter for having provided a combination of these rights, which also confirms one of its distinctive African concept of human rights. However, compared to civil and political rights, the Commission has considered a few cases involving economic, social and cultural rights, but in these cases, it has engendered a progressive jurisprudence, some of whose aspects are unprecedented.

In his review of the African Commission's work, Odinkalu concluded that, while it clearly embodied and integrated normative framework that regards human rights as an interconnected set of obligations, however, the African Commission has been remiss in not according adequate priority to economic, social and cultural rights.¹⁰²⁸

2.3.2.1. Right of every individual to property

The African Commission considered several communications dealing with the right to property, provided for in Article 14 of the African Charter. These communications are significant because issues addressed are related to the closure, seizure and confiscation of private property and belongings by government agents. These cases also concern the forced surrendering of private property due to the arbitrary deportation of individuals.

In the *Modise*, the African Commission declared 'an encroachment of the Complainant's rights to property guaranteed under Article 14 of the African Charter, where Modise had, for political reasons, been denied of citizenship, deported from Botswana, and his belongings and property confiscated by the government'.¹⁰²⁹ In *Union Inter Africaine and Others v. Angola*,¹⁰³⁰ the complainants were West African citizens expelled from Angola in 1996, and lost their property in the process of expulsion.

¹⁰²⁸ Odinkalu (2001) 367.

¹⁰²⁹ *Modise v. Botswana*, para 96.

¹⁰³⁰ Communication 159/96, *Union Inter Africaine and Others v. Angola*, 11th Annually Activity Report of the African Commission on Human and Peoples' Rights, para 16.

The African Commission ruled that there was a violation of Article 14 of the African Charter, in the following reasoning:

The Commission concedes that African States in general and the Republic of Angola in particular are faced with many challenges, mainly economic. In face of such difficulties, States resort to radical measures aimed at protecting their nationals and their economies from non-nationals. Whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights. Mass expulsion of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations constitute a special violation of human rights. This type of deportations calls into question a whole series of rights recognised and guaranteed in the Charter; such as the right to property (Article 14).¹⁰³¹

In the same vein, in *Malawi African Association and Others v. Mauritania*,¹⁰³² a number of black ethnic groups from Mauritania, especially in the southern part, who criticised the Mauritanian government for marginalising them, were subjected to persecution by government officials. As a result, several thousands black Mauritians were expelled to Senegal in 1989. In the process, security forces were alleged to have confiscated land and livestock belonging to the expelled blacks and those who were forced to flee due to persecution. With respect to Article 14, the African Commission concluded that:

The confiscation and looting of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constitute a violation of the right to property as guaranteed under Article 14.¹⁰³³

In *Media Rights Agenda and Others v. Nigeria* and *Constitutional Rights Project and Others v. Nigeria*, the military regime of that time banned some newspapers, sealed off the newspaper companies' premises, prevented the proprietors and employees from accessing the premises, and confiscated copies of newspapers. The African Commission decided that both the sealing of newspaper premises and seizure of copies of newspapers violated the right to property, and that the grounds for doing so did not fall within the exception of public need or general interest of the community under Article 14.

¹⁰³¹ *Union Interafricaine and Others v. Angola.*, paras 16-17 and 20.

¹⁰³² Communications 54/91, 61/91, 98/93, 164/97, 210/98 in *Malawi African Association and Others v. Mauritania*, 12th Annual Activity Report of the African Commission on Human and Peoples' Rights.

¹⁰³³ *Id.*, para 128.

2.3.2.2. Right of every individual to work

The African Commission considered allegations of a violation of this right in the case of *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*.¹⁰³⁴ The complainant, a magistrate, was sentenced to five years' imprisonment by a military tribunal in Cameroon in 1984 because he had hidden his brother, who was later sentenced to capital punishment for an attempted *coup d'Etat*. The complainant continued to be placed under house arrest, although he served his sentence up to 1991, when he benefited from a law of amnesty.

The African Commission declared that:

By not reinstating Mr. Mazou in his former position after the Amnesty Law, the government has violated Article 15 of the African Charter because it has prevented Mr. Mazou to work in his capacity of a magistrate even though others who have been condemned under similar conditions have been reinstated.¹⁰³⁵

The African Commission recognised two main issues. First, that States have an obligation not to violate the right through arbitrary dismissals from work, a practice that is widespread in several countries and the approaches taken by the courts may provide little, if any, redress. Second, by requiring the State to reinstate the complainant, the Commission interpreted Article 15 as requiring States to take positive action to provide employment. These approaches may help in redressing widespread unemployment in Africa.

The *Mazou* case clearly revealed discrimination. However, the African Commission did not address the case with regard to Article 2 of the African Charter, while in its reasoning it mentioned that 'others who have been condemned under similar conditions have been reinstated'. It is clear from this that the non-reinstatement of Mr. Mazou was discriminatory, something that the African Charter does not allow. Non-discrimination and equality as broad overarching principles also encapsulate the right to work. The African Commission would have combined Articles 2 and 15 in order to support his reasoning.

¹⁰³⁴ *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*, para 29.

¹⁰³⁵ *Id.*

2.3.2.3. Right of every individual to enjoy the best attainable state of health

The right to health relates to the highest attainable standard of physical and mental health, it encompasses freedoms such as the right to control one's health and body, and entitlements (for example, to equality of access to health care), and consists of two basic components: healthy living conditions and health care. The case of *Purohit and Moore v. Gambia* is another landmark decision in the jurisprudence of the African Commission. In this case, the African Commission considered a mental health patient's complaint, as a person whose human rights are taken as a priority in most African countries.

One of the complainants, Paul Moore, a mental health advocate, was the victim of inhuman treatment of mental health patients in the psychiatric unit of the Royal Victoria Hospital in Gambia. The complaint was brought before the African Commission on behalf of current and future mental health patients at the unit. The communication alleged that the principal legislation governing mental health in Gambia, namely the Lunatics Detention Act of 1917, was outdated and contained no provisions on safeguards during diagnosis, certification and detention of the patient, no requirement of consent to treatment or subsequent review of continued treatment, no provision for legal aid, and no provision for a patient to seek compensation if his/her rights have been violated. The authors alleged violations of Articles 2, 3, 5, 7(1) (a), 13(1), 16 and 18(4) of the African Charter.¹⁰³⁶ In finding violations of all the alleged articles of the African Charter, the African Commission gave some insights into the development of international human rights law with regard to mental health patients. It concluded as follows:

The African Commission maintains that mentally disabled persons would like to pursue those hopes, dreams and goals just like any other human being.¹⁰³⁷ Like any other human being, mentally disabled persons or persons suffering from mental illness have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This should be zealously guarded and forcefully protected by all States party to the African Charter in accordance with the well established principles that all human beings are born free and equal in dignity and rights.¹⁰³⁸

¹⁰³⁶ *Purohit and Moore v. Gambia*, paras 30-31.

¹⁰³⁷ Referring to Art 3 of the Declaration on the Rights of Disabled Persons. UN General Assembly Res. 344 (XXX) of 9 December 1975, provides that 'Disabled persons have the inherent right to respect for their human dignity..., whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and as full as possible' (footnote retained).

¹⁰³⁸ *Purohit and Moore v. Gambia*, referring to Universal, Art 1, paras 54-57, 61.

With regard to the right to health, the African Commission declared that the enjoyment of this right is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all other rights.¹⁰³⁹ This right requires 'the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind'.¹⁰⁴⁰ The mental health patients deserve special treatment because of their condition and by virtue of their disability - they should be enabled not only to attain but also to sustain an optimum level of independence and performance.¹⁰⁴¹

In addition, the African Commission took into consideration the relevance of resources and realities facing African countries in their efforts to achieve the right to health. In this regard, it declared that:

Millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with problems of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on the part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.¹⁰⁴²

In light of the poor attention paid to the protection of the fundamental human rights of mental health patients in Africa, as well as all over the world, the observations made by the African Commission are highly commendable and should serve as inspiration in calling necessary attention to this aspect of human rights guarantees.¹⁰⁴³

The *Purohit* case, contrary to perceptions that the socio-economic rights obligations in the African Charter are immediate, has defined the obligations in a realistic manner, taking into account the resource constraints of African countries. This has brought the African Charter very close to the ICESCR.¹⁰⁴⁴

¹⁰³⁹ *Purohit and Moore v. Gambia*, para 80.

¹⁰⁴⁰ *Id.*

¹⁰⁴¹ *Ibid.*, para 81.

¹⁰⁴² *Ibid.*, para 100.

¹⁰⁴³ Baderin M.A. 'Recent Development in the African Regional Human Rights System' (2005) 5 (1) *Human Rights Law Review* 117-149, 140.

¹⁰⁴⁴ Mbazira C. 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6 *African Human Rights Law Journal* 333, 347.

This case is very important as far as it seeks to marry the regional human rights system with the international system.¹⁰⁴⁵ The African Commission did not explore the wealth of work related to the right to health that exists under the UN system.¹⁰⁴⁶ In its earlier case law, the African Commission concluded that the starvation of prisoners and their deprivation of blankets and clothing violated Article 16 of the African Charter.¹⁰⁴⁷ In *Malawi African Association and Others v. Mauritania*, referred to above, it was alleged that some political prisoners passed away in detention because of malnutrition and a lack of medical attention, and that ‘the cells were infested with lice, bedbugs and cockroaches and nothing was done to ensure the hygiene and provision of health care’.¹⁰⁴⁸

The African Commission declared that ‘the general state of health of the prisoners deteriorated due to the lack of sufficient food; they had neither blankets nor adequate hygiene. The Mauritania State is directly responsible for this state of affairs. ... Consequently, the Commission considers that there was violation of Article 16’.¹⁰⁴⁹

In *Media Rights Agenda and Others v. Nigeria*, as discussed above, it is alleged that a detainee was denied access to doctors and received no medical help, even though his health was deteriorating. The African Commission reasoned as follows: ‘the responsibility of the government is heightened in cases where the individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the activities of the authorities. To deny a detainee access to doctors while his health is deteriorating is a violation of Article 16.’¹⁰⁵⁰

¹⁰⁴⁵ Mbazira C. ‘The Right to Health and the Nature of Socio-Economic Rights Obligations under the African Charter: The Purohit Case (2005) 6 (4) *Economic Social Rights Review* 15.

¹⁰⁴⁶ Committee on Economic, Social and Cultural Rights, *General Comment 14*, The Right to Health, UN Doc.E/C.12/2000/4, paras 11-14. In this regard, the Committee on Economic, Social and Cultural Rights has adopted a broad conception of the right to health, recognising it as: ‘An inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels’. The scope of the right to health has also been clarified in the work of UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Report of the Special Rapporteur on the Right to Health, UN Doc. E/CN.4/2005/51.

¹⁰⁴⁷ *Malawi African Association and Others v. Malawi*, para 12.

¹⁰⁴⁸ *Id.*

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ *Media Rights Agenda and Others v. Nigeria*, para 91.

Similarly, in *International Pen and Others v. Nigeria*, it was alleged that Ken Saro-Wiwa was detained by the Respondent State without access to the medicine he needed to control his blood pressure, notwithstanding requests made by a qualified doctor. The African Commission declared that:

The State has a direct responsibility in this case. Despite requests for hospital treatment made by a qualified doctor, these were denied to Ken Saro-Wiwa, causing his health to suffer to the point where his life was endangered.... This is a violation of Article 16.¹⁰⁵¹

One would have expected the African Commission to further elaborate on the obligations of States with regard to the economic and social rights of prisoners, by taking international human rights standards into consideration.¹⁰⁵² An analysis of these communications reveals that the African Commission is willing to read some of the economic and social rights not guaranteed in the African Charter in relation to those provided for through a progressive interpretation of this instrument. By doing so, the African Commission gave substance and meaning to the concept of human dignity, provided for in Article 5, as the overarching principle contained in the African Charter.

2.3.2.4. Right to education

Right to education is directly linked to the ability of individuals to realise and exercise their rights and to be part of society. The right to education demonstrates the interdependence of rights, since it serves as both a political and socio-economic right. The Committee on the Economic, Social and Cultural Rights rightly states that regardless of how it is categorised, the denial of the right to education is extremely damaging, as it creates substantial obstacles to the ability of individuals to participate in decision-making processes impacting on their lives.¹⁰⁵³ There is no justification for denying the right to education or applying discriminatory policies in this area.

¹⁰⁵¹ *International Pen and Others v. Nigeria*, para 112.

¹⁰⁵² The following selected international treaties are relevant for prisoners : i) Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by Res. 663 (XXVI) of 31 July 1957 and 2076 (LXII) of 13 May 1977. ii) Basic Principles for the Treatment of Prisoners, adopted and proclaimed by the GA Assembly Res. 45/111 of 14 December 1990. iii) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by GA Res. 43/173 of 9 December 1989. iv) Code of Conduct for Law Enforcement Officials, adopted by GA Res. 34/169 of 17 December 1979, the International Covenant on Civil and Political Rights, as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁰⁵³ Committee on Economic, Social and Cultural Rights, *Croatia* UN Doc. E/C.21/Add 73, 27th Session, 30 November 2001, para 35.

A denial of education will have a significant impact upon the existence of democracy. If individuals are able to access education, they are also able to be active participants in their own development and contribute to the development of society. According to Nowak, education, understood in this sense as the freedom to gain and seek knowledge, provides individuals with the necessary intellectual and practical tools for engaging in decision-making processes and expressing opinions.¹⁰⁵⁴ He further argued that education is an important precondition for the exercise of many other rights, which in turn are essential to the existence of democracy.¹⁰⁵⁵ Veriava and Coomans noted that to deny access to education ‘essentially empowers individuals to participate in and interact in the societies in which they live with dignity and with equal opportunities. In this regard, the right to education holds a special place in the promotion and protection of human rights’.¹⁰⁵⁶

The African Commission addressed the violation of this right in the case of *Free Legal Assistance Group and Others v. Zaïre*. The complainants alleged that, owing to mismanagement of public finances, the government had failed to provide basic services, including the fact that the universities and secondary schools had been closed for two years. The African Commission concluded that: ‘the closure of universities and secondary schools constitutes a violation of Article 17’.¹⁰⁵⁷

Mbazira¹⁰⁵⁸ contended that:

The Commission should have seized the opportunity to elaborate on the right to education, especially considering the fact that Article 17 does not detail the content of this right. This is in comparison to Article 13 of the ICESCR, which details the right as comprising of compulsory and free primary education and access to secondary and higher education.

In this case, the African Commission did not determine whether or not all closure of secondary schools and universities amounted to the violation of Article 17. Although the right to education as provided in the African Charter does not contain a limitation clause, when students go on the rampage or use campuses as places for destabilising institutions of the State, closure may be justified.

¹⁰⁵⁴ Nowak M. ‘The Right to Education’ in Eide A. et al. (eds.) (1992) 245, 246. See also, Committee on Economic, Social and Cultural Rights, General Comment 13, the Right to education, UN Doc. E/C.12/1999/10, para 12.

¹⁰⁵⁵ Id.

¹⁰⁵⁶ Veriava F. and Coomans F. ‘The Right to Education’ in Brand D. and Heyns C. (eds.) *Socio-Economic Rights in South Africa* (Pretoria: Pretoria University Law Press, 2005) 63.

¹⁰⁵⁷ Veriava in Brand and Heyns. (eds.) (2005) 63.

¹⁰⁵⁸ Mbazira (2006) 345.

2.3.2.5. Rights to health, to a general satisfactory environment, housing and food

In 2001, the African Commission concluded consideration of a communication under Article 55 of the African Charter, which dealt with alleged violations of the Ogoni people's rights in Nigeria.¹⁰⁵⁹ In terms of the African Charter, these allegations included violations of Articles 2 (non-discrimination), 4 (right to life), 14 (right to property), 16 (right to health), 18 (family rights), 21 (right of people to freely dispose of their wealth and natural resources) and 24 (right of people to a satisfactory environment). The communication further alleged that the Nigerian government had condoned and facilitated these violations by placing the legal and military forces of Nigeria at the disposal of the oil companies.

Moreover, the complainants argued that the Nigerian government neither monitored operations of the oil companies nor required safety measures. The government had also disseminated information on the dangers posed by oil activities for the Ogoni communities. In addition, they argued that Nigerian security forces attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP) from 1993 to 1996.

They argued that the government failed to investigate these attacks and did not punish the perpetrators. In other words, it failed to exercise due diligence in this regard. The African Commission observed that the communication contained no information on domestic court actions to stop the violations, although Nigeria had incorporated the African Charter into its domestic law, thus allowing all the rights provided by this instrument to be invoked before the Nigerian courts. However, the African Commission noted that the military regime had enacted a number of decrees ousting the jurisdiction of the courts.¹⁰⁶⁰ As a result, no adequate domestic remedies could be said to exist. Furthermore, the failure of the government to respond to the communication, despite many requests by the African Commission, allowed the case to be considered according to the presumed truth of the allegations.

¹⁰⁵⁹ Communication 155/96 (*SERAC*). For the background information about the general human rights situation in Ogoniland, see Skogly S.I. 'Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria' (1997) 15(1) *Netherlands Quarterly of Human Rights* 47-60. Skogly dealt with a number of actors involved in the *SERAC* case, which illustrates that human rights concerns go beyond traditional dichotomy of individual versus State, and indeed enter the realm of private versus public in international law.

¹⁰⁶⁰ *SERAC*, para 41, citing Constitution Suspension and Modification Decree 1993 of Nigeria.

The African Commission found that none of the rationales for requiring exhaustion of local remedies justified finding the case inadmissible: firstly, if there were no effective domestic remedies, it was useless to afford domestic courts an opportunity to address violations, thereby avoiding contradictory judgments of law at national and international levels.¹⁰⁶¹ Secondly, since international attention to the problems of Ogoniland had given the Nigerian government enough notice and, over several decades, more than sufficient opportunity to provide domestic remedies for human rights violations, it was not premature to call the government to account before an international tribunal.¹⁰⁶²

In terms of the merits of this case, the African Commission first analysed what is generally expected of governments under the African Charter. It acknowledged four separate but interrelated obligations with regard to rights: to respect, protect, promote and fulfil them. According to the African Commission, these obligations universally apply to all rights and entail a combination of negative and positive obligations.¹⁰⁶³ The obligation to respect entails refraining from interference with the enjoyment of all fundamental rights.¹⁰⁶⁴

In relation to economic and social rights in particular, respect means that:

The State is obliged to respect the free use of resources owned or at the disposal of individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.¹⁰⁶⁵

The obligation to protect rights requires legislation and provision of effective remedies, in order to ensure that rights holders are protected against other subjects and political, economic and social interferences.¹⁰⁶⁶ The obligation to promote human rights involves such actions as promoting tolerance, raising awareness and building infrastructures.¹⁰⁶⁷ Finally, the obligation to fulfil human rights and freedoms requires the State to move its machinery towards the actual realisation of rights by, for example, directly providing, as necessary, basic needs such as food or resources that can be used for food, direct aid or social security.¹⁰⁶⁸

¹⁰⁶¹ *SERAC.*, para 37.

¹⁰⁶² *Id.*, para 38.

¹⁰⁶³ *Ibid.*, para 44.

¹⁰⁶⁴ *Ibid.*, para 45.

¹⁰⁶⁵ *Ibid.*, 45.

¹⁰⁶⁶ *Ibid.*, para 46.

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ *Ibid.*, para 47.

Since the States are generally burdened with the four above obligations in committing themselves to human rights instruments,¹⁰⁶⁹ it was incumbent on the African Commission to take these obligations into account in assessing the communication's allegations in relation to the African Charter and the relevant international and regional human rights instruments and principles.¹⁰⁷⁰

In considering the right to non-discrimination, the African Commission declared that the action of the Nigerian government amounted to a violation of Article 2 of the African Charter. The targeting and wanton violations of the Ogoni people, both individually and collectively, ran afoul of this provision.¹⁰⁷¹ In finding a violation of Article 4 of the African Charter, the African Commission observed that, given the widespread violations perpetrated by the government of Nigeria and private actors (whether accompanied by the government's blessing or not), the most fundamental of all human rights, the right to life, had been violated.

The terrorising and killing of Ogonis, along with the unacceptable levels of pollution and environmental degradation that destroyed farmlands and waterways, threatened not only the Ogoni way of life, but also their very existence.¹⁰⁷² Nwobike¹⁰⁷³ pointed out that:

Findings based on environmental degradation and its threat to, and destruction of Ogoni sources of livelihood was a positive step forward by the African Commission in the purposive interpretation of the right to life. It marked a departure from earlier decisions in which violations of the right to life were based on executions, assassinations, arrests and detentions without trial, torture and other acts that either threatened or actually harmed the individuals concerned. The right to life and respect for the dignity and integrity of all human beings, if expansively interpreted, will give an effective content to all guaranteed rights – economic, civil, political, social and cultural.

The issue of whether a group of people within a State may constitute 'a people' has long been a contested topic. In this case, however, the Ogoni were implicitly considered to be such. In assessing the right to health and to a generally satisfactory environment, laid down respectively in Articles 16 and 24.

¹⁰⁶⁹ *SERAC*, para 48.

¹⁰⁷⁰ *Id.*, 49.

¹⁰⁷¹ *Ibid.*

¹⁰⁷² *Ibid.*, 67.

¹⁰⁷³ Nwobike J.C. 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*' (2005) 1 (2) *African Journal of Legal Studies* 129, 135.

The African Commission emphasised that these rights obligate governments to desist from directly threatening the health and environment of their citizens. According to the African Commission, the government had not taken care to protect the inhabitants of Ogoniland against the harmful activities of the oil companies.¹⁰⁷⁴ This amounted to a violation of Articles 16 and 24. The nature of the peoples' rights to freely dispose of their wealth and natural resources was clearly brought out in this case. In finding a violation of Article 21, the African Commission declared that:

... Governments have duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may perpetrated by privates parties... This duty calls for positive action on part of the governments in fulfilling their obligation under human rights instruments.¹⁰⁷⁵ ... The Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastating affect the well-being of the Ogonis. ...

[T]herefore, is in violation of Article 21 of the African Charter.¹⁰⁷⁶

For supporting its reasoning, the African Commission referred to the judgment of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case.¹⁰⁷⁷ In the consideration of the rights to property and to family as the natural unit and basis of society, the African Commission recognises that although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of provisions protecting the right to enjoy the best attainable state of mental and physical health under Article 16, the right to property, and the protection accorded to the family, does not allow the wanton destruction of shelter, because when housing is destroyed, property, health and family life are adversely affected. Thus, the combined effect of Articles 14, 16 and 18(1) reads into the African Charter a right to shelter or housing, which the Nigerian government violated.¹⁰⁷⁸

¹⁰⁷⁴ *SERAC*, paras 53-54.

¹⁰⁷⁵ *SERAC* paras 56-57. Cassese explained that the right to dispose freely of natural resources places a duty upon States to ensure the use of these resources is 'in a manner which coincides with the interests of the people' and that this has a direct relation to political rights such as participation. See Cassese A. *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) 55-56.

¹⁰⁷⁶ *SERAC*, para 58.

¹⁰⁷⁷ In the opinion of the Inter-American Court, A State violates human rights when it allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the Convention. In addition, an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention. *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 19 July 1988, Series C, No 4, paras 166, 172.

¹⁰⁷⁸ *SERAC*, para 60.

According to the African Commission, the right to shelter implies first of all an obligation to respect people. As a minimum, this right obliges the Nigerian government to not destroy the houses of its citizens and to not obstruct efforts by individuals or communities to rebuild their lost homes. The right to shelter also implies an obligation to protect. This means that the government must protect its citizens from interference with their right to be let alone and to live in peace by non-State actors, such as oil companies, and guarantees access to legal remedies to challenge this interference. In the view of the African Commission, the Nigerian government violated both these obligations, which are qualified as being minimum obligations.¹⁰⁷⁹ The African Commission further argues that the right to housing also includes a right to be protected against evictions.

In the regard, the African Commission refers to the work of the Committee on Economic, Social and Cultural Rights.¹⁰⁸⁰ Furthermore, the African Commission stressed the importance of legal security of tenure as an essential guarantee against forced evictions.¹⁰⁸¹ It follows then that the Nigerian government was in violation of the relevant provisions of the African Charter.¹⁰⁸²

As with the right to housing, the right to food is not guaranteed in the African Charter. However, the African Commission combined Articles 4, 16 and 22 to encompass the right to food. According to the African Commission, the minimum core of this right requires the Nigerian government to comply with three minimum duties, which are the duty to not destroy or contaminate food resources; to not allow private actors to destroy or contaminate food resources; and to not prevent peoples' efforts to feed themselves. According to the African Commission, the Nigerian government violated all these three minimum duties.¹⁰⁸³

¹⁰⁷⁹ *SERAC*, para 60.

¹⁰⁸⁰ General Comment No 7 (1997) on forced evictions, UN Doc. E/1998/22, Annex IV, para 3. The Committee has defined forced evictions as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or the land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.

¹⁰⁸¹ *SERAC*, para 60. The concept of security of tenure as a feature of the right to adequate housing has been identified by the Committee in its General Comment on Article 11 (1) of the ICESCR. The Committee notes that 'instances of forced eviction are prima facie incompatible with the requirements of the Covenant'. General Comment No 4 (1991) on the right to adequate housing UN Doc E/1992/23, Annex III.

¹⁰⁸² *Id.*, para 63.

¹⁰⁸³ *Ibid.*, paras 64-66.

In sum, the African Commission found violations of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter. The African Commission appealed to the then new government of Nigeria to fully protect the environment, health and livelihood of the people in Ogoniland. In order to realise this, the government should, *inter alia*, halt the attacks on Ogoni communities, conduct an investigation into human rights violations, and prosecute officials of the security forces and the Nigerian National Petroleum Company. The government should also make adequate compensation to the victims, including relief and resettlement assistance, and undertake a cleanup of land and rivers polluted and damaged by the activities of oil operations. The government should also take measures to ensure that appropriate environmental and social impact assessments are undertaken in case of future oil development activities. Finally, the population should be properly informed about possible health and environmental rights.

The *SERAC* is significant in the development of jurisprudence on economic, social and cultural rights in Africa and elsewhere. Its contribution to the development of the international human rights law lies into four points. Firstly, it affirmed the indivisibility, interdependence and interrelatedness of human rights, by addressing all rights equally and in the same coherent text. In other words, it effectively and unequivocally rejects all arguments against the recognition of economic, social and cultural rights, as well as third generation rights. Secondly, the African Commission has further elaborated on the allegations of human rights violations related to economic, social and cultural rights, as well as collective rights.

The *SERAC* case goes beyond question the right of a group to seek the protection and enforcement of its rights. In this respect, Odinkalu noted that in the present case, collective rights (Articles 21, 22 and 24) facilitate the enjoyment of individual rights, but are also capable of being claimed by a group (the Ogonis).¹⁰⁸⁴ Thirdly, the African Commission effectively and unequivocally rejected all arguments against the recognition of economic, social and cultural rights. Coomans argued that this opinion counters the traditional views that economic, social and cultural rights only require positive obligations of the State to provide financial resources that cannot be subject to judicial or quasi-judicial review.¹⁰⁸⁵

¹⁰⁸⁴ Odinkalu (2001) 346.

¹⁰⁸⁵ Coomans F. 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 (3) *International Comparative Law Quarterly* 749, 757.

Fourthly, the African Commission interpreted the African Charter in a very progressive way, by combining the reading of provisions, to mean that the rights to food and housing are implicitly guaranteed in the African Charter. Scholars welcomed *SERAC* case in different ways. According to Coomans, overall, the decision of the African Commission in the present case is a welcome and positive contribution to a stronger protection of economic, social, cultural and collective rights in the African context. The condemnation of Nigeria government is clear and unequivocal.¹⁰⁸⁶

Chirwa described the *SERAC* case as a groundbreaking one which cuts across a wide spectrum of rights guaranteed under the African Charter on Human and Peoples' Rights.¹⁰⁸⁷ Nwobike believed that the decision of the African Commission in the *Ogoni* case represents a giant stride towards the manifestation and realisation of hope for change. This case represents also how the Charter can be interpreted generously to ensure the effective enjoyment of human rights.¹⁰⁸⁸ Van der Linde and Louw argued that: In deciding the *SERAC* case, the African Commission has paved the way for increasingly filing complaints based on socio-economic rights in addition to civil and political rights. The Commission has indicated that it will not hesitate to make thorough and detailed recommendations that urge governments to oblige with their socio-economic obligations, as set out in the African Charter, beyond the boundaries of available resources and progressive realisation.¹⁰⁸⁹

Even if the *SERAC* case is an additional development in terms of international human rights, it is not without shortcomings. It is to be noted that with regard to the right to food, the African Commission did not make full use of Article 60, as it had done in the assessment of the right to housing. The African Commission did not make reference to existing documents, particularly the General Comment of the Committee on Economic, Social and Cultural Rights.

¹⁰⁸⁶ Coomans (2003) 759.

¹⁰⁸⁷ Chirwa D.M. 'A Fresh Commitment to Implementing Economic, Social and Cultural Rights in Africa: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v. Nigeria' (2002) 3 (2) *Economic Social Rights Review*, online at: www.communitylawcentre.org.za/ser/esr2002/2002sept_africa.php#africa, (last accessed 15 August 2008).

¹⁰⁸⁸ Nwobike (2005) 145.

¹⁰⁸⁹ Van der Linde M. and Louw L. 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the *SERAC* Communication' (2003) 3 *African Human Rights Law Journal* 167, 186. See also, Shelton D. 'Decision Regarding Communications 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria)' (2002) 96 *The American Journal of International Law* 937- 940, 939-940.

Analysing this case, Nwobike wrote that the African Commission failed to make a categorical statement on the right to development, through its silence on the desirability of holding transnational corporations accountable for human rights violations. Nwobike further noted that the institutional weakness of the African Commission in terms of its inability to enforce its decisions.¹⁰⁹⁰ Although the African Charter emphasises on the right to development in its Preamble¹⁰⁹¹ and Article 22,¹⁰⁹² the reading of the communication shows that the complaints did not allege a violation of these rights, leaving the African Commission to deal only with the allegations contained in the communication.

A consideration of the right to cultural development of Ogoni people could have been meaning on the content of this rights.¹⁰⁹³ Concerning the human rights violations caused to the activities undertaken by the Oil Company, the African Commission would have support his reasoning by referring to the duties contained in the African Charter. Invariably the most serious tensions in the African human rights system are between the individual, the group, and the State. This point was best articulated in the introduction of the notion of duties of the individual as opposed to the argument that an individual only has rights. The African human rights system forcefully took up the adage 'I am because we are' and argued that it was meaningless in the African context to adopt the notion of the autonomised individual divorced from his or her social community.

The individual had several duties, all of which are given expression in the African Charter, including the duties to the family, the community, the State, and humankind as a whole. The discussion on the content of the African Charter demonstrated above that onerous burden of duties had been imposed on the individual. With hindsight, however, and especially economic growth, there was a need to revisit the issue of duties.

¹⁰⁹⁰ Nwobike (2005) 141.

¹⁰⁹¹ 'Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'. Preamble of the African Charter, para 7.

¹⁰⁹² Id., Art 22 '1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development'.

¹⁰⁹³ The Inter-American Court has upheld the norm of the survival of indigenous peoples as distinct cultures. See Doc. OEA/Ser.L/V/II.62, Doc. 10 Rev. (1993), OAS Doc. OEA/Ser. L/V/II, Doc. 26 (1984) (Case No. 7964 (Nicaragua) ; Case No. 761 (Brazil) , Inter-Am. Commission Res. No. 85 (March 5, 1985) Annual Report of the Inter-American Commission on Human Rights, 1984-1985, OAS Doc. OEA/Ser. L/V/II.66, Doc. 10, Rev. 1, 24, 31 (1985).

In the case *SERAC v. Nigeria*, the African Commission took up this issue in an action that was brought concerning the despoliation of the environment by the Nigerian government in complicity with Oil companies such as Shell. It is one's contention that a great deal of conceptual support can be drawn from the African Charter's articulation of the notion of duty. This is particularly true with respect to the case of duty of non-State actors (such as Multinational Corporations) to economic, social, and cultural rights, and to the third generation rights (to peace, development, and a healthy environment). African States do not take kindly groups that stand in opposition to them, whether they come from civil or political society. Political monopoly is still the order of the day whether it is sought through legal or extra-constitutional methods. This obviously raises the issue of the state of local community, minority groups or indigenous communities and their place in the democracy as well as human rights debate.

2.3.3. Group rights

The African Commission has considered the right to family life in a number of cases which alleged the separation from family due to detention, without contact with his family, and illegal deportation. In *Union Inter Africaine des Droits de l'Homme and Others v. Angola*, which alleged the illegal deportation of some West African nationals from Angola, the African Commission argued that 'the State violated its obligations under Article 18 paragraph 1. By deporting victims, thus separating some of them from their families, the Defendant State has violated and violates the letter of this text'.¹⁰⁹⁴ The *Constitutional Rights Project and Civil Liberties Organisation* case alleged that several human rights, pro-democracy activists and opposition politicians were detained by the government and denied access to their families. In this regard, the African Commission pronounced that 'it is a violation of Article 18 to prevent a detainee from communicating with his family'.¹⁰⁹⁵ In the same vein, in the *Malawi African Association and Others* case, the African Commission noted that arbitrarily holding people in solitary confinement and thereby depriving them of their right to a family life constitutes a violation of Article 18.¹⁰⁹⁶

¹⁰⁹⁴ *Union Inter Africaine des Droits de l'Homme and Others v. Angola*, para 17.

¹⁰⁹⁵ *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, para 37.

¹⁰⁹⁶ *Malawi African Association and Other v. Mauritania*, para 124.

The case of *Amnesty International v. Zambia*, to the African Commission, held that a State on ‘the forcible expulsion of the complainants by the Zambian government has forcibly broken up the family as stipulated in Article 18(1) and 18(2) of the Charter.’¹⁰⁹⁷ In the *SERAC* case mentioned above, the African Commission linked the right to family life to the right to housing or shelter, even though the latter right is not specifically guaranteed in the African Charter, and concluded that when housing is destroyed, property, health and family life are adversely affected.

Article 18(4) of the African Charter provides that ‘the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs’. This case is a landmark one, because the African Commission addressed issues linked to a population group whose human rights in general are not viewed as a priority in human rights discourse and policies in African countries.

2.3.4. Peoples’ rights

2.3.4.1. Peoples’ right to equality

In the *Legal Resources Foundation* case,¹⁰⁹⁸ the complainant alleged that the requirement in the Constitution of Zambia (Amendment Act of 1996) that anyone who wants to stand for the presidency of the Republic has to prove that both parents are or were Zambians by birth or decent is, *inter alia*, a violation of Article 19 of the African Charter. The respondent State rejected this allegation, arguing that ‘Article 19 of the African Charter relates to the principle of self-determination by the mere mention of the term ‘peoples’’.¹⁰⁹⁹ In its decision, the African Commission pronounced that ‘recourse to Article 19 of the Charter was mistaken, and thus the section dealing with peoples cannot apply in this instance’.¹¹⁰⁰ The reason for this finding was not, however, the same as the objection that the State raised. It was rather because the case did not fulfil the elements necessary to require the application of peoples’ rights in the African Charter.¹¹⁰¹

¹⁰⁹⁷ *Amnesty International v. Zambia*, para 59.

¹⁰⁹⁸ Communication 211/98, *Legal Resources Foundation v. Zambia*, 14th Annual Activity Report of the African Commission on Human and Peoples’ Rights, para 49.

¹⁰⁹⁹ *Id.*

¹¹⁰⁰ *Ibid.*, para 73.

¹¹⁰¹ Dersso S.A. ‘The Jurisprudence of the African Commission with Respect to Peoples’ Rights’ (2006) 6 *African Human Rights Law Journal* 358, 374.

In the *Legal Resources Foundation* case, the African Commission, in order for peoples' rights in the African Charter to apply, it would require evidence that 'the effect of the measure was to affect adversely an identifiable group of Zambian citizens by reason of their common ancestry, ethnic origin, language or cultural habits'.¹¹⁰² This offers the elements required to invoke the application of the term 'peoples' to a section of the population of a State.¹¹⁰³ This approach does not attribute peoplehood to any group of persons. It can be inferred from this test that a group qualifies to be a people only if it consists of persons who are bound together by reason of common ancestry, ethnic origin, language or cultural habits.¹¹⁰⁴

Viljoen¹¹⁰⁵ argued that:

Finding violations on other grounds, the Commission found that Article 19, as a provision dealing with 'peoples' cannot apply. Success on that basis, the Commission reasoned, depends on evidence that an identifiable group of Zambian citizens by reason of their common ancestry, ethnic origin, language and cultural habits was adversely affected. By adopting this approach, at least in that particular instance, the Commission gives a clear indication that a linguistic or ethnic sub-set of the population may qualify as a 'people'.

With respect to the finding in the *Mauritania Widows* case, Viljoen noted that even if unsuccessful in terms of the facts, it could be described as giving groups such as black Mauritians the opportunity to rely on this right in order to launch a Charter-based attack against Arab domination.¹¹⁰⁶

2.3.4.2. Peoples' right to existence and self-determination

The impact of the concept of peoples' right to self-determination is nowhere more evident than in the African continent. Africa emancipated itself from the shackles of colonialism, racial oppression and apartheid through reliance upon this concept. The term 'peoples' and 'the right to self-determination' therefore forms a vital element within the constitutional working of independent African States as well as in the regional approach represented collectively. A number of State constitutions support the principle of peoples' rights, and the regional approach is reflected through a wide range of treaties including the African Charter.

¹¹⁰² *Legal Resources Foundation*, para 73.

¹¹⁰³ Dersso (2006) 374.

¹¹⁰⁴ *Legal Resources Foundation*, para 73.

¹¹⁰⁵ Viljoen (2007) 244.

¹¹⁰⁶ *Id.*

At the international level, ICCPR and ICESCR begin Article 1 with a statement on the right to self-determination, which provides all peoples with the right to ‘freely determine their political status and freely pursue their economic, social and cultural development’, along with the right ‘to freely dispose of their natural wealth and resources’ for their own ends. The right to self-determination has had a heavily disputed history. Rosas argued that there is evidence and support of the idea of an internal dimension to self-determination, which provides that the population of a State has the right to participate in determination of the self in both political and popular terms.¹¹⁰⁷

The inclusion of self-determination in the African Charter suggests that the principle behind it, the ability of individuals to participate collectively in determining their lives, is directly applicable to the rights guaranteed, as the process of self-determination includes civil, and political rights, economic, social and cultural rights, as well as peoples’ rights. In this regard, Cassese explained that the right to freely dispose of natural resources places a duty upon States to ensure that the use of these resources is ‘in a manner which coincides with the interests of the people’, and that this has a direct relation to political rights such as participation.¹¹⁰⁸

In the *Jawara* case,¹¹⁰⁹ the complainant, a former Head of State of the Gambia, who was overthrown in a military coup in 1994, alleged that the military coup was ‘a blatant abuse of power... by the military junta’ that violated the Gambian peoples’ right to self-determination. He claimed that ‘the policy that the people freely choose to determine their political status, since independence has been hijacked by the military and that the military has imposed itself on the people’. In this regard, the African Commission ruled that:

It is true that the military regime came to power by force, albeit, peacefully. This was not through the will of the people who have known only the ballot box since independence, as a means of choosing their political leaders. The military coup was therefore a grave violation of the right of Gambian people to freely choose their government as entrenched in Article 20(1) of the Charter.¹¹¹⁰

¹¹⁰⁷ Rosas A. ‘The Right to Self-Determination’ in Eide et al. (eds.) (1992) 114.

¹¹⁰⁸ Cassese A. *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) 55-56.

¹¹⁰⁹ *Jawara v. The Gambia*, para 73.

¹¹¹⁰ *Id.*

One agrees with Viljoen, who observed that the ‘Commission again did not seek to define the concept of ‘peoples’, but used it to refer to all Gambians eligible to vote, seemingly favouring the ‘State-centred’ understanding of ‘peoples’.¹¹¹¹ Through this decision, it can be said that the protection of democracy is one of the important means of ensuring the protection of peoples’ rights by way of good governance.

The African Commission dealt with the right to self-determination in the case of *Katangese Peoples’ Congress v. Zaïre*.¹¹¹² The case was dismissed at the admissibility stage, on the grounds that it was incompatible with the African Charter. However, the African Commission considered substantive issues related to the right to self-determination. The complainant, President of the Katangese Peoples’ Congress, one of the Zaïrian provinces, requested the African Commission to recognise, among other things, the independence of Katanga, and to secure the expulsion of Zaïre from Katanga. The African Commission’s decision rejected this application, holding that it had the obligation to uphold the territorial integrity and sovereignty of African States.¹¹¹³ Furthermore, the African Commission’s decision recognised that this right may be exercised not only in response to colonialism, but also by groups within independent African States in response to oppression or persecution.¹¹¹⁴ Ankumah believed that oppressed groups ‘within sovereign African States should be entitled to seek redress from the Commission’.¹¹¹⁵

The African Commission also declared that the exercise of the right to self-determination is not limited to becoming independent or making territorial changes to a State (secession), but also includes a wide range of participation in internal governance.¹¹¹⁶ While acknowledging that the African Charter does not define the term ‘people’, the African Commission declared that self-determination may be exercised in several ways, namely: independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people, but must be fully cognisant with principles such as sovereignty and territorial integrity.¹¹¹⁷

¹¹¹¹ Viljoen (2007) 246.

¹¹¹² Communication 75/92, *Katangese Peoples’ Congress v. Zaïre*, 8th Annual Activity Report of the African Commission on Human and Peoples’ Rights, paras 24, 25 and 27.

¹¹¹³ *Id.*, para 27.

¹¹¹⁴ *Id.*

¹¹¹⁵ Ankumah (1996) 165.

¹¹¹⁶ *Katangese Peoples’ Congress v. Zaïre*, para 27.

¹¹¹⁷ *Id.*

Dersso¹¹¹⁸ highlighted that:

In this decision, the African Commission identified two versions of self-determination. The first is self-determination for all Zairians as a people, which it said was not the issue in the case. The other is self-determination for a section of the population of a State, that is, the Katangese, with was central to the communication. As regards the latter, the Commission emphasised the interplay between self-determination and the principles of sovereignty and territorial integrity of States.

Dersso also maintained that in the Casamance case, the African Commission did not explain the defining features of ‘peoplehood’ and whether the people of Casamance possess the said features.¹¹¹⁹ The African Commission also considered the peoples’ right to self-determination in relation to the Senegalese separatist movement of Casamance.¹¹²⁰ Having analysed the positions of both government and separatist movements, the African Commission rejected the claim of the separatists for the independence of Casamance from Senegal as lacking pertinence.¹¹²¹

2.3.4.3. Peoples’ right to economic, social and cultural development

The communication lodged by the Democratic Republic of the Congo (DRC) against Burundi, Rwanda and Uganda on 9 March 1999 was the first ever inter-State complaint to be decided by the African Commission.¹¹²² It is also the first complaint to be heard by the African Commission that raised violations of human rights, including sexual violence, during an armed conflict, thus bringing international humanitarian law into play.

¹¹¹⁸ Dersso (2006) 365.

¹¹¹⁹ Dersso (2006) 366-367.

¹¹²⁰ African Commission Report on the Mission of Good Offices to Senegal of the African Commission on Human and Peoples’ Rights Tenth Annual Activity Report (1996-1997) Annex VIII reprinted in Murray R. and Evans M. (eds.) *Documents of the African Commission on Human and Peoples’ Rights* (Oxford: Oxford University Press, 2001) 530.

¹¹²¹ *Id.*, 536.

¹¹²² Communication 227/99, *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.

The decision taken in this case preceded the 2005 judgement of the International Court of Justice in the case concerning Armed Activities in the Territory of the Congo (*DRC v. Uganda*)¹¹²³, which related with the same events and dealt with the use of force, violation of human rights and international humanitarian law. The DRC alleged, *inter alia*, that it was the victim of an armed aggression perpetrated by Burundi, Rwanda and Uganda in contravention of the Charters of the UN and OAU (the AU).

Furthermore, the DRC claimed that grave and massive violations of human and peoples' rights had been committed by the armed forces of these three States in areas where armed opposition groups had been active since 2 August 1998, and attributed responsibility for the activities of these groups to Burundi, Rwanda and Uganda. According to the DRC, Articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22 and 23 of the African Charter had been breached, together with provisions of the ICCPR, the Geneva Conventions I-IV of 1949, as well as the Additional Protocol I on the Protection of Victims of International Armed Conflicts of 1977.

With regard to the issue of sexual violence, the African Commission found that the rape of women and girls, as alleged and not refuted by the respondent States, was prohibited under Article 76 of Additional Protocol I,¹¹²⁴ and offended the African Charter and the International Convention on the Elimination of All Forms of Discrimination against Women.¹¹²⁵ The African Commission thus held that the rape of women and girls was a violation of the African Charter on the basis of Articles 60 and 61.¹¹²⁶

¹¹²³ ICJ Report 2005, 168. At the same time as initiating proceedings against Uganda, the DRC had also instigated proceedings against Burundi and Rwanda. However, these proceedings were discontinued at the request of the government of the DRC. See ICJ Press Release 2001/2, Armed Activities on the Territory of the Congo (*Democratic Republic of Congo v. Burundi*) and (*Democratic Republic of the Congo v. Rwanda*). The two cases were removed from the list at the request of the DRC on 1 February 2001. Proceedings against Rwanda were recommended in May 2002, but in February 2006, the Court found that it did not have jurisdiction to hear the case. See Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*) ICJ Reports 2006, 6.

¹¹²⁴ This provides that 'women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault'.

¹¹²⁵ *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*, para 86.

¹¹²⁶ *Id.*

As the issue of sexual violence is endemic to both times of peace and war in Africa, it is to be noted that the African Commission could have provided a strong elucidation of the law applicable to sexual violence in the framework of the African Charter, by, for instance, relying on the application of the Committee on the Elimination of Discrimination Against Women's General Recommendation No. 19 related to Violence Against Women.¹¹²⁷

A final, noteworthy element of the African Commission's decision is its condemnation of the indiscriminate dumping of and/or mass burial of victims of massacres and killings perpetrated against the peoples of the eastern province of the DRC. In particular, the African Commission gave further insight into the concept of traditional African values under the African Charter, declaring that:

The Commission further finds these acts barbaric and in reckless violation of Congolese peoples' rights to cultural development guaranteed by Article 22 of the African Charter, and an affront on the noble virtues of the African historical tradition and values enunciated in the preamble to the African Charter. Such acts are also forbidden under Article 34 of the Protocol I Additional to the Geneva Conventions of 1949, which provides for respect for the remains of such peoples and their gravesites.¹¹²⁸

However, the African Commission did not define what African values are, thus escaping the debate on universalism and cultural relativism of human rights. The biggest question would have been what are African cultural values, and how to protect them. Is it every cultural value that must be protected? What happens when the cultural practices violates fundamental human rights? Which takes precedence? In other words how can the universal standards be made primary when the many cultures and traditions of the various communities on the continent still regard some practice as sacrosanct? The debate may be somewhat sterile with respect to practices such as female mutilation, but there are huge questions with regard to several other practices such as virginity testing, widowhood rites, and childhood, forced marriages. The expression of African cultural values is not value-free or ungendered. Many African cultures either valorise highly masculinist practices or they marginalise, demean, or victimise between emphasizing a cultural value approach, while being wary of the often racist and patronising frameworks within which such debates are often couched.

¹¹²⁷ Committee on the Elimination of Discrimination Against Women's General Recommendation No. 19 on Violence Against Women, 29 January 2002, HRI/GEN/1/Rev.7, 246.

¹¹²⁸ *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*, para 87.

2.3.4.4. Peoples' right to peace and security

Peace and security are necessary requirements for the realisation of human and peoples' rights in any African State. While the need for the maintenance of international peace and security is an important aspect of international law, the specific provision of the right of all peoples to national and international peace and security is unique to the African Charter. This right may be seen as an enabling right for all other rights guaranteed in the African Charter, because without peace and security, a State cannot fully realise human and peoples' rights for its populace. In the case of *Association Pour la Sauvegarde de la Paix au Burundi*,¹¹²⁹ the complainants alleged a violation of Article 23 on the grounds that 'Tanzania, Zaïre and Kenya sheltered and supported terrorist militia' that were attacking Burundi. The respondent States denied this allegation and the African Commission found no violation of this right, on the grounds that the sanction imposed on Burundi was in conformity with the OAU Charter and international law.

3. African Court of Justice and Human Rights

3.1. Historical background

Following a proposal by the then Chairperson of the Assembly of the AU and Head of the Federal Republic of Nigeria, President Olusegun Obasanjo, the AU decided to integrate the African Human Rights Court and the Court of Justice of the African Union. Underlying this decision was the concern at the growing number of AU institutions, which it could not afford to support.¹¹³⁰ It was also decided that 'the African Court on Human and Peoples' Rights and the African Court of Justice should be integrated into one Court' and the Chairperson was requested to work out the modalities on implementing this decision and submit a report to the next session.¹¹³¹ The AU Assembly also decided that a draft protocol for the establishment should be prepared for consideration at the next ordinary session of the AU Executive Council and Assembly and accepted the offer by Judge Bedjaoui, to prepare a draft.

¹¹²⁹ Communication 157/96, *Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaïre and Zambia*, 17th Annual Activity Report of the African Commission on Human and Peoples' Rights.

¹¹³⁰ Decision on the Seats of the AU, Doc Assembly/AU/Dec. 45 (III) para 4.

¹¹³¹ *Id.*, para 5.

A panel of legal experts met in Addis Ababa, Ethiopia from 13-14 January 2005 to consider the decision and make recommendations. This panel drafted a protocol entitled, 'Draft Protocol on the Integration of the African Court on Human and Peoples' Rights and the Court of Justice of the AU.' This was presented to the Executive Council of the AU at the summit in Abuja, Nigeria, January 2005. The AU Commission recommended that the integrity of the jurisdiction of the two courts should be retained while at the same time making it possible to administer the protocols through the same court by way of special chambers, and the necessary amendments to both protocols be effected through the adoption of a new protocol by the AU Assembly of Heads of States and Governments.

At the January 2005 AU Summit, the Executive Council decided to refer the report of the Permanent Representatives Committee (these are ambassadors to the AU in Addis Ababa, Ethiopia) and the AU Commission's reports to a meeting of legal experts from governments for their recommendations, which would be presented at the next ordinary session of the AU in July 2005.

Further and importantly, the Executive Council decided that the operationalisation of the African Court should continue without prejudice. A meeting of government Legal Experts took place in Addis Ababa, Ethiopia from 29th March to 1st April 2005 to consider these documents. Acknowledging the complexities involved in creating an integrated judicial system, the meeting recommended that (1) the operationalisation of the African Court should continue, (2) the ratification of the protocol establishing the Court of Justice of the AU should continue until it comes into force, and (3) that only then should the process to integrate the two courts resume. The body of government experts further recommended that the AU should determine the seat of and elect judges to the African Court. At the July AU Summit in Sirte, Libya, the Assembly of Heads of State and Government decided that the African Human Rights Court should be set up and the processes towards putting it in operation should begin. The Assembly further decided that the African Human Rights Court, and the merged court, will be headquartered in the East African region. Only States that have ratified the protocol establishing the African Human Rights Court can qualify to offer to host the Court.

From 21st to 25th November 2005, a working group on the draft single legal instrument relating to the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union met to examine the draft document. During the 6th Ordinary Session of the AU Executive Council 16-21 January 2006 in Khartoum, it was decided to request the Member States' comments no later than 31 March 2006 in order for the Permanent Representatives' Committee and the legal experts of the Member States to finalise the draft at a joint meeting in time for the draft to be submitted at the sessions of the AU Executive Council and Assembly in the summer of 2006.

The meeting of the Permanent Representatives' Committee and the legal experts took place on 14-19 May 2006 in Banjul. It was not possible for the States to reach an agreement and, as recommended by the AU Executive Council, the AU Assembly decided that a meeting of the African ministers of justice should be held to solve the outstanding issues and make recommendations to the AU Executive Council in January 2007.¹¹³²

During the Summit the Executive Council of the AU at its 13th Ordinary Session considered the Draft single legal instrument on the merger of the African Court on Human Rights and Peoples and the Court of Justice of the AU as finalised by the meeting of Ministers of Justice/Attorneys General held in Addis Ababa, Ethiopia, 14-18 April 2008. The Executive Council approved the recommendations of the Ministers of Justice/Attorneys General without amendments.

¹¹³² The outstanding issues were:(i) Should the representation of men and women on the merged court be equal, as set out in Article 7(3) of the Protocol for the African Court of Justice, or merely adequate, as set out in Article 14 (3) of the Protocol for the African Court? (ii) Should the representation of judges from the five African sub-regions be equal (at least two from each sub-region), as set out in Article 3(6) of the Protocol for the African Court of Justice, or is it sufficient that each of the sub-regions are merely represented, as set out in Article 14(2) of the Protocol for the African Court? Should the mandate of the merged court be almost unlimited, as implied by Article 19 of the Protocol for the African Court of Justice? (iii) Should NGOs, NHRIs and individuals have direct access to the merged court, or should access be limited as is the case under the Court Protocol?(Allegedly, Zimbabwe, Tunisia and Egypt were against giving direct access, with Zimbabwe being the most vehement opponent. On the other hand, South Africa, Senegal, Ghana and Burkina Faso were allegedly not prepared to accept a protocol that did not contain provisions for direct access); (iv) Should the States be allowed to make reservations when ratifying the new protocol,¹¹³² or should the practice hitherto followed with respect to African human rights instruments be adhered to, meaning that reservations cannot be made? (v) Should States have to ratify the new protocol even if they had already ratified either the Protocol for the African Court or the Protocol for the African Court of Justice, or could the protocol for the merged court become binding upon signature for States having ratified either Protocol?

The processes for establishing a new regional court for Africa, the African Court of Justice and Human Rights was completed and concluded at the 11th AU Summit, held in Sharm El-Sheik, Egypt, in July 2008, where the Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights. The new Court is the main judicial organ of the AU.¹¹³³

The AU's decision to merger the two Courts was highly controversial. Among those to voice concern were the African Commission, activists and scholars. The African Commission warned that the two Courts had 'essentially different mandates and litigants and that the decision could have a negative impact on the establishment of an effective African Court on Human and Peoples' Rights.'¹¹³⁴

In a submission to the AU, the Coalition for an Effective African Court on Human and Peoples' Rights raised key legal and practical issues that significantly affect the establishment of the African Court, the legal instrument of which is already in force. Three issues emerged from this decision, namely: (i) How to achieve a merger with minimal interference with the momentum behind the establishment of an African Court on Human and Peoples' Rights. (ii) The effect of merger on the ongoing process of ratification of the Protocol establishing the African Court on Human and Peoples' Rights, including, in particular, the instruments of ratification that have already been lodged by contracting parties. And, (iii) The status of practical developments in the creation of the African Court on Human and Peoples' Rights (whose legal instrument was already in force), in contrast with the Court of Justice of the AU, whose enabling legal instrument was still on the process of ratification).¹¹³⁵ Murray remained prudent in expressing her opinion, she appeared to be sympathetic to the position of human rights activists to the merger as, in reaction to the minimisation of costs presented as the main benefit of the merger, and she proposed a search for alternative funds to be achieved through cuts in military spending.¹¹³⁶

¹¹³³ See Assembly/AU/Dec.196 (XI), Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the African Court of Justice Doc.Assembly/AU/13 (XI).

¹¹³⁴ African Commission on Human and Peoples' Rights, Res. 76(XXXVII)05: Resolution on the Establishment of an Effective African Court on Human and Peoples' Rights, adopted in Banjul, The Gambia on 11 May 2005.

¹¹³⁵ The Coalition for an Effective African Court on Human and Peoples' Rights *Legal and Institutional Issues Arising from the Decision by the Assembly of Heads of State and Government of the African Union to Integrate the African Court on Human and Peoples' Rights and the Court of Justice of the African Union* (October 2004), available at www.africancourtcoalition.org (visited on 29 August 2008).

¹¹³⁶ Murray (2004) 68-69.

If this proposition is hard to reject in an era of the fashionable advocacy of demilitarisation, it remains unrealistic for the many African countries of the continent still facing unrest, whereby security and consequently military spending remains a legitimate preoccupation of concerned governments.¹¹³⁷ This is true for those countries still facing or recovering from civil wars, such as all the countries of the Great Lakes region, Sudan, Sierra Leone, Central African Republic, and Chad, but also many others seen as relatively stable but facing insurrectional movements and/or dealing with armed radical groups.

While supporting the merger of two courts, Kindiki¹¹³⁸ outlined legal and operational difficulties. According to him:

While the Assembly's decision to merge the two courts has to be implemented, being a decision of the supreme organ of the Union, it nevertheless poses at least four legal hurdles that need to be addressed. The first is purely an interpretational issue, while the other three are legal and operational difficulties.

The two Courts have different jurisdictional bases. Second, the two courts were at different stages of development, the Protocol on the African Court entered into force, judges elected while the Protocol establishing the Court of Justice was being ratified.¹¹³⁹

To be elected to the African Court of Human Rights an individual is required to be a jurist of high moral character and recognised practical, judicial or academic competence and experience in the field of human rights and peoples' rights (Article 11(1) of the Protocol), for the Court of Justice the qualifications are more general (Article 4 of the Protocol Establishing the African Court of Justice).¹¹⁴⁰

Kindiki believed that the idea of a single pan-African Court may be favoured for the following five reasons. First, a single court would avoid splitting of resources, both human and financial, towards maintaining two courts.¹¹⁴¹ Second, a single Court will result in simplicity and is an antidote to the growing phenomenon of proliferation of international judicial institutions.¹¹⁴²

¹¹³⁷ Murray (2004) 69.

¹¹³⁸ Kindiki in Vijoer (ed.) (2006) 133.

¹¹³⁹ *Id.*, 134-135

¹¹⁴⁰ *Ibid.*, 137.

¹¹⁴¹ *Ibid.*, 138.

¹¹⁴² *Ibid.*

Third, it would be interesting to see the interface between human rights and economic matters in the operations of a merged African Court.¹¹⁴³ Fourth, the proliferation of continental courts with overlapping mandates gives rise to a serious risk of conflicting jurisprudence, as the same rules of law might be given different interpretations in different cases. An integrated pan-African court offers opportunities for developing a unified, integrated, cohesive, and, hopefully, indigenous jurisprudence for Africa.¹¹⁴⁴ Fifthly and finally, Kindiki¹¹⁴⁵ argued that:

Integration of the two courts will synchronise the judicial system in Africa. Both courts operating under one umbrella court will have regional focus and will operate under the auspice of a common international organisation – the AU. Moreover, they will operate under standards and regulations that are least compatible if not similar to one another. This presents ample opportunities for synergies between them.

Taking into consideration the fact that in the international law, sovereign States are entitled to do what they want for establishing human rights mechanisms, one concurs with Gutto, who held, the decision by the Assembly of Heads of State and Government to integrate the two courts into one may have been motivated by good intentions, possibly the desire to consolidate and rationalise the judicial institutions of the Union, cutting costs and sharing of library and other resources. In principle there is nothing wrong in harmonising the work of the two courts while keeping their respective mandates, competencies and specialisation. But this must be done openly and within the law.¹¹⁴⁶

Sceats¹¹⁴⁷ highlighted advantages and disadvantages of the merger. Advantages include: (i) It is cost-efficient – maintaining one court instead of two will save millions of dollars each year for the cash-strapped AU.¹¹⁴⁸ (ii) Human rights may achieve heightened status within the AU now that they form an important focus for the AU's principal judicial organ.¹¹⁴⁹ (iii) It avoids

¹¹⁴³ Kindiki in Vijoer (ed.) (2006) 138.

¹¹⁴⁴ Id., 139, quoting Udombana (2000) 192.

¹¹⁴⁵ Ibid.

¹¹⁴⁶ Gutto S.B.O. 'The Legal Status and Implications of the Decision by the Assembly of Heads of State and Government to Integrate the African Court of Justice and the African Court on Human and Peoples' Rights into One Court' (January-March 2004) *Africa Legal Aid* 15, 17.

¹¹⁴⁷ Sceats S. 'Africa's New Human Rights Court: Whistling in the Wind?' (March 2009) 9(1) *International Law Briefing Paper* 1, 5-6.

¹¹⁴⁸ Id.

¹¹⁴⁹ Ibid.

the problem of the partially duplicate human rights jurisdiction of the African Court on Human Rights and Peoples' Rights and the African Court of Justice.¹¹⁵⁰

(iv) It makes it more likely that human rights will permeate all of the jurisprudence of the Court. This is especially interesting to observers in the light of increasing overlap in the case law of the European Court of Human Rights (set up the Council of Europe) and the European Court of Justice (set up by the European Union); merger of the two African Courts is likely to stimulate cross-pollination of this sort from the outset.¹¹⁵¹ (v) AU Member States are more likely to submit to judicial oversight of their human rights performance because they will want access to the Court's general dispute resolution services, and it is not possible to sign up to the Court while opting out of its human rights jurisdiction.¹¹⁵² (vi) Potentially stronger enforcement – the agreement establishing the new merged Court contains stronger provisions on enforcement. Among other things, it clarifies that the AU Assembly may impose political and economic sanctions on States which have failed to comply with any judgment.¹¹⁵³

Disadvantages of the merger include: (i) A chaotic beginning to Africa's new human rights enforcement machinery – the fact that two separate courts are being established at the same time is sure to generate confusion within African and beyond.¹¹⁵⁴ (ii) A risk that the human rights section of the merged Court will acquire 'second class' status – human rights issues may be perceived as less significant than the border disputes and other matters of 'high State' which are likely to occupy the general section.¹¹⁵⁵

While agreeing with Sceats, this study adds that the existence of two Courts naturally would have been a source of confusion with regard to the nature and scope, and potential overlap. This would also raise serious issues of duplication of judicial functions, conflicting interpretations, competing jurisdiction, and superfluous bureaucracy.

¹¹⁵⁰ Ibid.

¹¹⁵¹ Sceats (2009) 5-6.

¹¹⁵² Id., 6. (The Protocol establishing the African Court on Human and Peoples' Rights entered into force in 2004, it has been ratified by fewer than half of the AU's Member States).

¹¹⁵³ Sceats (2009) 6.

¹¹⁵⁴ Id.

¹¹⁵⁵ Ibid.

3.2. Organisation and composition of the Court

Once entered into force, the new Protocol replaces the two protocols establishing the African Court of Human and Peoples' Rights on the one hand, and of the African Court of Justice of the AU on the other hand.¹¹⁵⁶ It shall enter into force 30 days after the deposit of the instruments of ratification by 15 Member States of the AU.¹¹⁵⁷ References made to the Court of Justice in the Constitutive Act of the AU 'shall be read as references to the African Court of Justice and Human Rights'.¹¹⁵⁸

Although, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights shall 'remain in force for transitional period not exceeding one year or any other period determined by the Assembly, after entry into force of the present Protocol, to enable the African Court on Human and Peoples' Rights to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the African Court of Justice and Human Rights'.¹¹⁵⁹

It is provided under Article 17 of Protocol that 'the General Affairs Section shall be competent to hear all cases submitted under Article 28 of the Statute save those concerning human and/or peoples' rights issues, while the Human Rights Section shall be competent to hear all cases relating to human and/or peoples rights'. This provision contrasts with the Constitutive Act, given the fact that the General Affairs Section has the mandate to interpret any part of the Constitutive Act; it may therefore be called upon to consider the human rights issues contained among the principles and objectives of the Union under Articles 3 and 4 of the Constitutive Act. Judges will be elected from two lists, A and B, with 8 Judges eligible for election in each list. List A containing the names of candidates having recognised competence and experience in international law; and list B containing the names of candidates possessing recognised competence and experience in human rights law.¹¹⁶⁰

¹¹⁵⁶ Protocol on the Statute of the African Court of Justice and Human Rights, Art 1.

¹¹⁵⁷ *Id.*, Art 9.

¹¹⁵⁸ *Ibid.*, Art 3.

¹¹⁵⁹ *Ibid.*, Art 7.

¹¹⁶⁰ Protocol on the Statute of the African Court of Justice and Human Rights, Art 6.

Another key change that affects the African Court of Justice and Human Rights is an increase in the number of Judges from 11 to 16 with each geographical region, represented by 3 Judges with the exception of the Western region which will be represented by 4 Judges.¹¹⁶¹ But this represents a decrease compared to two separate courts. The Judges of the Court are elected by secret ballot by the Executive Council, and appointed by the Assembly. It is interesting to observe that the Protocol makes it clear that the Assembly should give due consideration to adequate gender representation and equitable representation of the regions and the principal legal traditions of the continent in the nomination of the candidates.¹¹⁶² All the Judges except the President and the vice-President perform their functions on a part-time basis.¹¹⁶³

3.3. Jurisdiction of the Court

3.3.1. Contentious jurisdiction

Contentious jurisdiction is the most important task of the African Court of Justice and Human Rights. The Court possesses jurisdiction in cases and disputes concerning the interpretation and application of a number of AU instruments as well as all its human rights instruments. Compared to the European and Inter-American Courts of Human Rights, the African Court of Justice and Human Rights is empowered to consider a greater variety of human rights cases. Besides dealing with classic disputes related to civil and political rights, the Court will hear cases related to violations of socio-economic rights. It may also enforce group and peoples' rights over such disputes as their economic, social and cultural development, use of their natural resources, peace and a general satisfactory environment. The promotion and protection of economic, social and cultural rights will also be crucial to the achievement of the strong African system of human rights.

¹¹⁶¹ Statute of the African Court of Justice and Human Rights, Art 3.

¹¹⁶² Protocol on the Statute of the African Court of Justice and Human Rights, Art 7.

¹¹⁶³ Id.

3.3.1.1. Jurisdiction *ratione materiae*

According to the Article 28 of the Statute of the African Court of Justice and Human Rights, that,

The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relates to: a) The interpretation and application of the Constitutive Act. b) The interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organisation of African Unity. c) The interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned; d) Any question of international law; e) All acts, decisions, regulations and directives of the organs of the Union; f) 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; g) The existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; and h) The nature or extent of the reparation to be made for the breach of an international obligation.

The Protocols on the African Court and on the Statute of the African Court of Justice are almost similar according to the jurisdiction *ratione materiae*. The slight difference appears only on the fact that the first Protocol mentions only the African Charter, the Protocol and puts all human rights instruments under the umbrella of 'any other relevant human rights instruments ratified by the States concerned'. The new second Protocol expressly names African Charter, itself, the African Charter on the Rights and Welfare of the Child and the Protocol on the Rights of Women in Africa.¹¹⁶⁴ It can be argued that the specific mention of these instruments is of particular interest to the Court. The future of Africa lies in its children and the protection of their rights, in peace and in war.

Violence against women and girls remained pervasive and only countries were considering laws to address the problem. The pervasiveness of gender-based violence continued to place women and girls at risk of HIV/AIDS directly or through obstructing their access to information, prevention and treatment.

¹¹⁶⁴ Protocol on the African Court, Art 3.

Among other conventions that could be relevant in the African context, are the Cultural Charter for Africa,¹¹⁶⁵ which may be seen to underpin the rights to culture and education protected by Article 17 of the Charter. The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa which refers to the African Charter in its preamble, and could be seen as fleshing out obligations that to some extent would follow from Articles 16 and 24 of the African Charter. The OAU Convention on the Prevention and Combating of Terrorism,¹¹⁶⁶ which contains a provision excluding acts for liberation and self-determination from the definition of terrorism (Article 3), could be said to supplement Article 20 of the African Charter. In addition, the OAU Convention for the Elimination of Mercenarism in Africa¹¹⁶⁷ might be relevant in certain cases concerning Article 4 of the African Charter. There are other relevant instruments which are still on the process of ratification, such the African Charter on Democracy, Elections, and Governance, as well as the African Youth Charter.¹¹⁶⁸

This open-door provision means that the African Court of Justice and Human Rights will enforce international human rights instruments such as ICCPR, ICESCR, CERD, CAT, CEDAW and CRC, provided that these have been ratified by the State concerned. In one's view, the ability of the Court to deal with human rights violations will depend to a large extent on its ability to liberally and creatively analyse the legal issues and apply available standards not only from the African Charter, but also from other international human rights instruments.

¹¹⁶⁵ Adopted by the OAU Assembly at its 13th Ordinary Session, 2-6 July 1976 in Port Louis, Mauritius, and entered into force on 19 September 1990.

¹¹⁶⁶ Adopted by the OAU Assembly at its 35th Ordinary Session 12-14 July 1999 in Algiers, Algeria, and entered into force on 6 December 2002.

¹¹⁶⁷ Adopted by the OAU Assembly at its 14th Ordinary Session 2-5 July 1977 in Libreville, Gabon, and entered into force on 22 April 1985.

¹¹⁶⁸ Adopted by the AU Assembly at its 7th Ordinary Session, 1-2, 2006 in Banjul.

In their respective studies on the Protocol on the African Court on Human and Peoples' Rights related to contentious jurisdiction, scholars expressed different views that need to be recalled here. Quashigah¹¹⁶⁹ argued that:

The African Court would be able to handle cases arising under other human rights instruments particularly the African Economic Community Treaty and the ECOWAS systems which both have human rights aspects. It may be of interest also to note that these two economic community instruments i.e. the AEC and the ECOWAS Treaties, also made provision for the establishment of specific courts.

According to Naldi and Magliveras¹¹⁷⁰:

Article 3(1) is innovative. The article would appear to extend the jurisdiction of the Court over any treaty which impinged on human rights in Africa, for example, the OAU Convention on Refugees, and the African Charter on the Rights and Welfare of the Child, but also UN instruments such as the International Covenants on Human Rights.

They further contended that even sub-regional instruments such as the ECOWAS and SADC treaties could become justiciable before the African Court.¹¹⁷¹ Udombana believed that an aggrieved person who is not adequately covered by the African Charter may bring a case in terms of the Protocol under any other international treaty that provides a higher level of protection.¹¹⁷² Additionally, he noted this does not of course prohibit the Courts from looking at each other's decisions. It does not even preclude them from looking at the decisions of other human rights agencies.¹¹⁷³

Other scholars were more critical and emphasised on the fact that Article 3 (1) only refers to other relevant human rights instruments. Eno explained that it would not be within the competence of the Court to impose a treaty obligation on States that have not assumed the duty themselves.¹¹⁷⁴

¹¹⁶⁹ Quashigah. E.K.. 'The African Court of Human Rights: Prospects in Comparison with the European Court of Human Rights and the Inter-American Court of Human Rights' in *African Society of International and Comparative Law - Proceedings of the Tenth Annual Conference*, Addis Ababa, Ethiopia 3-5 August 1998, 59, 61-62.

¹¹⁷⁰ Naldi and Magliveras (1996) 435.

¹¹⁷¹ Naldi and Magliveras (1996) 435.

¹¹⁷² Udombana (2000) 90.

¹¹⁷³ Id.

¹¹⁷⁴ Eno R.W. 'The Jurisdiction of the African Court of Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223.

Heyns suggested that:

If this interpretation [of Article 3(1)] is correct, and followed by the Court, it will cause jurisprudential chaos. It will mean that all human rights treaties ratified by a state party to the Protocol in the past will become justiciable, and future ratification will have the same consequence. States might be deterred not only from ratification of the Protocol, but from ratification of any human rights treaty. In one swoop, Africa will have jumped from a region without a Court, to a region where all human rights, whether they are of UN, AU or other origin, are enforced by a regional Court, even though UN itself does not enforce them through a Court of law.¹¹⁷⁵

Then, Heyns concluded that:

It would be highly unusual for an institution from one system (AU) to enforce the treaties of another system (UN). Depending on the specific treaties that have been ratified by the State in question at any point in time, its obligations will differ from those of the other states under the jurisdiction of the Court. Certain treaties, such as the Covenant on Economic, Social and Cultural Rights, have not been drafted with a view towards judicial enforcement.¹¹⁷⁶

In the same way, Österdahl¹¹⁷⁷ wrote that:

In theory it could be of the great importance, especially if other human rights treaties add a lot in terms of substance to the original human rights convention, the African Court in our case. In practice, however, applying any other convention than its own would seem to create more difficulties than it solves for the African Court. A more realistic but not necessarily less effective way would be to let the African Court be inspired by other human rights instruments and let this inspiration colour the interpretation of the African Charter.

Van Der Mei rejected that the broad reading of Article 4 because it could lead to situations in which the African Court will interpret certain treaty provisions differently than the oversight organs that have been established by the other human rights instruments in question, and that this carries with it the risk of ‘jurisprudential chaos’.¹¹⁷⁸

¹¹⁷⁵ Heyns C. ‘African Regional Human Rights System: In Need of Reform?’ (2001) 2 *African Human Rights Law Journal* 167.

¹¹⁷⁶ Id.

¹¹⁷⁷ Österdahl I. ‘The Jurisdiction *Rationae Materiae* of the African Court of Human and Peoples’ Rights: A Comparative Critique’ (1998) 7 *Revue Africaine des Droits de l’Homme* 132, 138-140.

¹¹⁷⁸ Van Der Mei A.P. ‘The New African Court on Human and Peoples’ Rights: Towards an Effective Human Rights Protection Mechanism for Africa?’ (2005) 18 *Leiden Journal of International Law* 113, 120.

Van Der Mei did not support this argument. For him, fears for a jurisprudential chaos are largely exaggerated. There are simply no indications that the proliferation of international oversight organs in the last decades has led to great or disturbing discrepancies.¹¹⁷⁹ He explained that they are not only inevitable but, especially in relation to non-African Courts and organs, they might even be desirable.¹¹⁸⁰ In interpreting for example the ICCPR, Van Der Mei noted that the African Court ought to consider and follow the views expressed by the UN Human Committee, but the possibility to deviate from the reasoning and conclusions of European, Inter-American or other international bodies may enable the African Court to have regard to specific African concerns, African traditions and African conditions.¹¹⁸¹

Van Der Mei further suggested that the African Court should not seek originality for originality's sake and follow other non-African jurisprudence where it deems this is in Africa's and Africans' interests.¹¹⁸² He noted where, however, it is convinced that human rights protection in African demands another interpretation than the one given elsewhere, the African should not hesitate to do so and even emphasise this.¹¹⁸³ Additionally, he maintained that by ratifying the Protocol, African States have knowingly and willingly committed themselves to Article 3 and the *travaux préparatoires* leave no doubt that this provision was intended to confer on the Court the power to apply treaties other than the Charter and the Protocol.¹¹⁸⁴

¹¹⁷⁹ In this regard, see Van Der Mei quoting the following observations made by the Inter-American Court of Human Rights: 'the possibility of conflicting interpretations is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated. Such Courts have jurisdiction to apply and, consequently, interpret the same body of law. Here it is therefore, not unusual to find that on certain occasions courts reach conflicting or at least different conclusions in interpreting the same rule of law'. Inter-American Court H.R. *Other Treaties Subject to the Consultative Jurisdiction of the Court* (Art 64 of the American Court on Human Rights), Advisory Opinion OC-1/82 of 24 September 1982, Series A No. 1, para 50. Van Der Mei (2005) 120.

¹¹⁸⁰ *Id.*

¹¹⁸¹ *Ibid.*

¹¹⁸² *Ibid.*

¹¹⁸³ *Ibid.*

¹¹⁸⁴ *Ibid.* The Cape Town Draft indicated that the drafters intended to confer on the Court a broader competence than on the Commission. The Draft defined the substantive scope as to cover 'any other applicable African human rights instruments'. During the Addis Ababa meeting, this provision was amended so as to apply to 'any other relevant human rights instrument'. None of the represented States objected to this change. See Report of the Third Government Legal Expert Meeting (enlarged to include diplomats) on the Establishment of an African Court on Human and Peoples' Rights, 8-11 December 1997, Addis Ababa, Ethiopia, Doc. OAU/LEG/EXP/AFC/HPR/RPT (III) Rev. 1, para 16. Footnote retained.

The fact that other human rights instruments ratified by African States concerned fall within the jurisdiction of the African Court of Justice and Human Rights presents a number of possible outcomes. Depending on how this body will interpret that mandate, it is likely to give wider notice to international legal resources, standards and norms than is currently the practice with the African Commission. In so doing the African Court of Justice will make use of alternative legal resources from other international and regional standards. Employing such diverse legal tools has the potential to give a wider meaning to the fundamental human and peoples' rights that restricting its sources of law to the African Charter. For instance the Protocol on the Rights of Women in African enshrines important provisions which eliminate all forms of discrimination against women in Africa.

Equally important, the African Court of Justice and Human Rights can hear cases that could be submitted by the Committee on the Rights and Welfare of the Child on violations of the children rights as protected by the African Charter on the Rights and Welfare of the Child in Africa. To sum up, Article 28 is alive with possibilities and potential for the African Court of Justice and Human Rights to protect victims of human rights violations on the continent in line with international standards.

3.3.1.2. Jurisdiction *ratione personae*

Article 29 of the Statute names entities empowered to submit cases to the Court on any issue or dispute provided for in Article 28. These are: a) State Parties to the Protocol; b) The Assembly, the Parliament and other organs of the Union authorised by the Assembly; c) A staff member of the AU 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.

Article 30 adds other entities empowered to submit cases to the Court as follows: a) State parties to the Protocol; b) The African Commission on Human and Peoples Rights; c) The African Committee of Experts on the Rights and Welfare of the Child; d) African Intergovernmental Organisations accredited to the Union or its organs; e) African National Human Rights Institutions; f) Individuals or relevant Non-Governmental accredited to the AU or to its organs, subject to the provisions of Article 8 of the Protocol.¹¹⁸⁵

¹¹⁸⁵ Art 8 of the Protocol read as follows: '... 3. 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

(i) State parties to the Protocol

These combined provisions on access to the Court seem to give primacy to State parties as they are expressly mentioned on the three clauses on automatic access to the Court. These provisions are State-centric. A number of concerns should be raised here. Robinson noted that States are generally unwilling to surrender or succumb to structures and processes that would pin them down to international scrutiny.¹¹⁸⁶ For Robinson, this is premised on the idea of sovereign States which recognises the autonomy of States in decision making and freedom from the power of others, including scrutiny.¹¹⁸⁷ Article 30 is the legal basis for inter-State complaints. In this regard, Schachter noted that inter-State complaint mechanism proceeds from the premise that a breach of a human rights treaty should be regarded as involving a ‘non-material’ injury to other parties, whether or not they are specifically affected by the breach.¹¹⁸⁸ Every State has an international duty to ensure the observance of these norms; they are, as decided in the *Barcelona Traction* case, obligations *erga omnes*.¹¹⁸⁹

Leckie believed that in practice, however, the inter-State complaints procedure has generally had an unhappy history of disuse.¹¹⁹⁰ Leckie further said although provided by a number of international human rights instruments, States have been very reluctant to use or accept it.¹¹⁹¹ Finally Leckie argued this is because of the political or economic sensitivity of such complaints, the risk being hostility and souring of political and economic relations between the States involved.¹¹⁹² This mechanism can be abused by some States for extraneous reasons.¹¹⁹³ Juma suggested that African States should emulate the practice obtained in the European human rights system on the inter-State complaints procedure.¹¹⁹⁴

competence of the Court to receive cases under Article 30 (f) involving State which has not made such a declaration’.

¹¹⁸⁶ Robinson F. ‘The Limits of a Rights-Based Approach to International Ethics’ in Evans T. (ed.) *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1990) 58, 63.

¹¹⁸⁷ *Id.*

¹¹⁸⁸ Schachter O. *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991) 206.

¹¹⁸⁹ *Barcelona Traction* case, ICJ Reports (1970) 32. The International Court of Justice stated that in obligations relating to ‘the basic rights of the human person all States can be held to have a legal interest in their protection; they are obligations *erga omnes*’.

¹¹⁹⁰ Leckie S. ‘The Inter-State Complaints Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?’ (1988) 10 *Human Rights Quarterly* 249, 250.

¹¹⁹¹ *Id.*, 251-255. See ICCPR (Art 41); CAT (Arts 21-22); CEDAW (Arts 11-14); American Convention (Arts 44-45); African Charter (Art 49); European Convention (Arts 24-25).

¹¹⁹² *Ibid.*, 255.

¹¹⁹³ *Ibid.*

¹¹⁹⁴ Juma D. ‘Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher Turned Gamekeeper’ (2007) 4 (2) *Essex Human Rights Review* 1, 11.

(ii) Organs of the African Union

(a) Assembly of Heads of State and Government

The Assembly is the supreme organ of the Union.¹¹⁹⁵ Its decisions are ‘by consensus or, failing which, by a two-thirds majority of the Member States of the Union.’¹¹⁹⁶ The Assembly’s powers include determining the common policies of the Union,¹¹⁹⁷ considering reports and recommendations from other organs of the AU,¹¹⁹⁸ establishing any organ of the Union¹¹⁹⁹, monitoring the implementation of Union policies and decisions,¹²⁰⁰ and appointing and terminating the appointment of the judges of the Court of Justice.¹²⁰¹ It is expected that the Assembly will be able to bring a human rights case against a Member State before the African Court of Justice.

(b) Executive Council

The Executive Council ‘shall be composed of the Ministers of Foreign Affairs or such other Ministers or Authorities as are designated by the Governments of Member States’.¹²⁰² The Executive Council is the diplomatic organ of the AU, receives project proposals from the Specialised Technical Committees, and advises the Assembly on any proposal for the amendment or revision of the AU Act.¹²⁰³ It reports to the Assembly.¹²⁰⁴ One of its functions is to coordinate and make decisions on policies, such as ‘social security, including formulation or mother and child care policies.’¹²⁰⁵ However, Executive Council’s role in promoting human rights is not spelt out anywhere and, therefore has to be imaginatively and creatively culled from its constitutive texts. In practice, the Executive Council has been empowered to deal with human rights issues, such as considering activity reports of the African Commission, election of Commissioners, etc. Presumably, it would be responsible for dealing with the case on behalf of the Assembly.

¹¹⁹⁵ AU Constitutive Act, Art 6(2).

¹¹⁹⁶ *Id.*, Art 7(1).

¹¹⁹⁷ *Ibid.*, Art 9 (1) (a).

¹¹⁹⁸ *Ibid.*, Art 9(1) (b).

¹¹⁹⁹ *Ibid.*, Art 9 (1) (d).

¹²⁰⁰ *Ibid.*, Art 9 (1) (e).

¹²⁰¹ *Ibid.*, Art 9 (1) (h).

¹²⁰² AU Constitutive Act, Art 10 (1).

¹²⁰³ *Id.*, Art 15.

¹²⁰⁴ *Ibid.*, Art 13(2).

¹²⁰⁵ *Ibid.*, Art 13 (k).

(c) Pan-African Parliament

One of the major developments in continental governance in this decade has been the constitution and subsequent launch of the Pan African Parliament (PAP). The reference to the promise that the PAP has for human rights highlights the fact that there is a new wind sweeping across the continent, with two strong currents clearly discernible within it. The first is the commitment of African Heads of State to move from rhetoric to praxis in its approach to its responsibilities. The second is a recognition, acceptance and promotion of human rights as fully entitled to Africans constitutes effective part of the wider problems that should be dealt with.

The PAP was constituted in terms of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament. The Protocol was adopted in Sirte, Libya, on 2 March 2001, and came into force on 14 December 2003 and the PAP was officially launched on 18 March 2004, in Addis Ababa, Ethiopia. The Preamble to the Constitutive Protocol gives some ideas as to the thinking behind the creation of the PAP. Among other things, the PAP was established:

To provide common platform for African peoples and their grassroots organisations to be more involved in discussions and decision-making on the problems and challenges facing the continent' and to ensure effectively the full participation of the African peoples in the economic development and integration of the continent.¹²⁰⁶

Among the objectives of the PAP, the ones that are most relevant to the present enquiry are facilitating effective implementation of the policies and objectives of the continental organisation; promoting principles of human rights and democracy in Africa; encouraging good governance, transparency and accountability; and promoting peace, security and stability. The PAP is also charged with strengthening continental solidarity and building a sense of common destiny among the peoples of Africa, facilitating co-operation and development in Africa, and promoting collective self-reliance and economic recovery.¹²⁰⁷

¹²⁰⁶ Preamble to the Protocol to the Treaty Establishing the African Economic Community Relating to the Establishment of the Pan-African Parliament.

¹²⁰⁷ PAP Constitutive Protocol, Art 3.

While it is envisioned that ultimately the PAP will have legislative powers, these powers are yet to be defined by the Assembly, and this will only be done after the first term of the PAP's existence, and in the wake of a Conference of State parties to review the operation and effectiveness of the Constitutive Protocol together with the PAP that it establishes. Consequently, at the moment the PAP only has advisory functions and consultative powers.¹²⁰⁸

In addition, the PAP has general powers 'to perform such other functions as it deems appropriate to achieve the objectives of the AU'.¹²⁰⁹ The PAP thus has additional undefined wide-ranging powers that can be used to promote and undertake a number of actions required to address the many challenges facing the continent in the area of human rights. The PAP is a vehicle for introducing changes that would otherwise be unthinkable some years before, and for having human rights issues discussed by an empowered audience that can actually influence human rights matters. It can create new opportunities for promoting human rights by providing a forum from which to speak about some of these issues.

The PAP can thus become a mechanism for carrying along even those countries that might otherwise be unwilling to even consider certain human rights options. The PAP can provide persuasive authority that may help to move the whole continent in a new direction in the area of human rights. It can do this by either generating its own opinions, or submitting cases to the African Court of Justice and Human Rights. Viewed from this angle, the PAP can make a real contribution to the protection of human rights in Africa.

¹²⁰⁸ PAP Constitutive Protocol, Art 3.. The PAP's advisory powers include: (i) Examining, discussing or expressing an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs, and making any recommendations it may deem fit relating to *inter alia*, matters pertaining to respect of human rights, the consolidation of democracy, as well as the promotion of good governance and the rule of law. (ii) Making recommendations aimed at contributing to the attainment of the objectives of the AU and drawing attention to the challenges facing the integration process in Africa as well as the strategies for dealing with them; and (iii) Promoting the programmes and objectives of the AU in the Member States, as well as coordinating and harmonising policies, measures, programmes and activities of the Regional Economic Communities and Member States as appropriate.

¹²⁰⁹ *Id.*, Art 3.

(d) Peace and Security Council

The Peace and Security Council (PSC) of the African Union was established pursuant to the Protocol Establishing the Peace and Security Council Protocol.¹²¹⁰ According to Article 2 of the PSC Protocol, it is established by the AU Assembly pursuant to Article 5(2) of the Constitutive Act of the AU, meaning that the PSC is an organ of the AU. The PSC is a standing decision-making body for the prevention, management and resolution of conflicts. It provides a continent-wide security system for conflict and crisis situations.¹²¹¹ It is supported by a 'Panel of the Wise, a Continental Early Warning System, an African Standby Force and a Special Fund. Among the objectives of the Peace and Security Council is to protect human rights and fundamental freedoms.¹²¹²

One of the objectives of the PSC is to 'promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctify of human life and international humanitarian law, as part of efforts for preventing conflicts'.¹²¹³ Moreover, according to Article 4(c) of the PSC Protocol, one of the guiding principles is 'respect for the rule of law, fundamental human rights and freedoms, the sanctify of human life and international humanitarian law'. The PSC Protocol provides under its Article 6, that the PSC shall act within peace and security promotion, peacemaking, peace support interventions, peace building and post-conflict reconstruction, and humanitarian action and disaster management. Its broad powers are described in Article 7. It shall, among other things, be responsible for peacekeeping and similar missions,¹²¹⁴ make recommendations for interventions under Article 4(h) of the Constitutive Act of the AU, institute sanctions when an unconstitutional change of government takes place, etc.

¹²¹⁰ Protocol relating to the Establishment of the Peace and Security Council of the African Union adopted on 10 July 2002 in Durban, South Africa, and entered into force on 26 December 2003.

¹²¹¹ *Id.*, Art 2.

¹²¹² *Ibid.*, Art 3(f).

¹²¹³ Protocol relating to the Establishment of the Peace and Security Council of the African Union.

¹²¹⁴ As an example of an intervention can be mentioned the authorisation of a 462 persons large deployment of military and police to Comoros as the African Union Mission for support to the elections in the Comoros (AMISEC) at its 47th meeting on 21 March 2006.

In the wordings of Article 7(m) of the PSC Protocol,

The PSC shall follow-up with the framework of its conflict prevention responsibilities, the progress towards the promotion of democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law by Member States.

Participating in preventing disputes and conflicts should be welcomed as well as some national policies may lead to genocide and crimes against humanity. According to Article 19 of the PSC Protocol,

The Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples' Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council.

At the brainstorming meeting on the African Commission 9-10 May 2006, one recommendation was that the African Commission 'should explore the possibility of the Peace and Security Council of the AU (PSC) to enforce the decisions of the African Commission on Human and Peoples' Rights within the framework of Article 19 of the PSC Protocol'.¹²¹⁵ Another recommendation was for the African Commission to initiate consultations with, among others, the PSC establish ways to formalise their relationship and develop common programmes. At that meeting, it was also acknowledged that at the time, no formal relationship existed between the PSC and the African Commission. Apart from this, the 19th to the 24th activity reports covering the period July 2005 to December 2008; do not contain any references to cooperation between the African Commission and the PSC.

The PSC would be able to submit cases to the African Court of Justice and Human Rights under the provision enabling AU's organs to do so. It could be argued that if the Peace and Security Council decides that bringing a case before the African Court of Justice and Human Rights will help to prevent disputes, conflicts or policies that may lead to genocide or crimes against humanity, then the Peace and Security Council will have the mandate to do so.

¹²¹⁵ See the report of this meeting, as contained in the 20th Activity Report of the African Commission on Human and Peoples' Rights.

(e) The Economic, Social and Cultural Council

The Economic, Social and Cultural Council (ECOSOCC) is one of the organs of the AU. It is ‘an advisory organ composed of different social and professional groups of the Member States of the Union’.¹²¹⁶ The Statutes of the ECOSOCC were adopted by the AU Assembly at its 3rd Ordinary Session, 6-8 July 2004 in Addis Ababa, Ethiopia.¹²¹⁷

The objectives, as set out in Article 2 of the ECOSOCC Statutes, are to promote dialogue between all segments of the African people; forge strong partnerships between governments and civil society; promote participation of civil society in AU policies and programmes; support policies and programmes promoting peace, security, stability, development, and integration in Africa; ‘promote and defend a culture of good governance, democratic principles and institutions, popular participation, human rights and freedoms as well as social justice’; promote and strengthen African civil society. Among its functions ‘as an advisory organ’, ECOSOCC shall contribute to the promotion of human rights, the rule of law, good governance, democratic principles, gender equality and child rights.’¹²¹⁸

ECOSOCC shall be composed of different social and professional groups, representing, among others, women, children, the elderly, the disabled, professional groups, NGOs, communities, and cultural organisations, including groups from the African Diaspora.¹²¹⁹ ECOSOCC shall consist of 150 civil society organisations,¹²²⁰ elected following consultations in all Member States. The highest organ is the General Assembly, consisting of the 150 civil society organisations. It is empowered ‘to formulate opinions and provide inputs into the policies and programmes of the African Union’, ten Sectoral Cluster Committees shall be established, one of them being for political affairs and covering human rights; rule of law, democratic and constitutional rule; good governance; power sharing; electoral institutions; humanitarian affairs and assistance, and so on.

¹²¹⁶ AU Constitutive Act, Art 22

¹²¹⁷ See Assembly/AU/Dec. 42 (III)

¹²¹⁸ ECOSOCC Statute, Art 7.

¹²¹⁹ *Id.*, Art 3.

¹²²⁰ *Ibid.*, Art 4.

ECOSOCC is potentially a very important organ in that it is a host for the participation of NGOs who can help encourage and facilitate the involvement of the African peoples in the integration and development of the continent. Since ECOSOCC is 'to contribute to the promotion of human rights,'¹²²¹ submitting cases before the African Court of Justice is a way to defend the culture of human rights. However, because the ECOSOCC is defined as advisory, it is unlikely that those human rights issues and voices will be able to have a truly major impact.

(f) African Union Commission

The AU Commission is one of the organs of the AU.¹²²² It is the Secretariat of AU and as the executive and administrative arm of AU. According to its Strategic Plan 2004-2007, it sees itself as the engine of AU.¹²²³ The AU Commission consists of a Chairperson, one or more deputies and the Commissioners, assisted by the necessary staff.¹²²⁴ Currently, the AU Commission consists of ten Commissioners, including the chairperson and the deputy. The AU Commission is based at the AU Headquarters in Addis Ababa.

The AU Commission has some specific tasks with respect to the African human rights mechanisms as it appoints the Secretary and provides the staff and services necessary to their functioning.¹²²⁵ The AU Commission handles all formalities with respect to ratification and amendment of the African Charter,¹²²⁶ the Protocol on the African Court,¹²²⁷ the Child Charter, the Protocol on the Rights of Women, and the Protocol on the African Court of Justice and Human Rights. The AU Commission has direct access to the African Court of Justice and Human Rights.

¹²²¹ ECOSOCC Statute, Art 7.

¹²²² *Id.*, Art 5.

¹²²³ Available at www.africa-union.org (last visited, 23 December 2008).

¹²²⁴ AU Constitutive Act, Art 20.

¹²²⁵ See African Charter, Art 41, Child Charter, Art 40. In contrast, the African Court appoints its own Registrars and staff (Art 24 of the Protocol), but in the start-up phase of the African Court, the AU Commission assisted the African Court. This is the same for the African Court of Justice and Human Rights. See, Statute of the African Court of Justice and Human Rights, (Art 22).

¹²²⁶ African Charter, Art 68.

¹²²⁷ Protocol on the African Court, Art 35.

According to its Strategic Plan 2004-2007, the AU Commission's Action Area 2 is Good Governance, Peace and Human Security. Strategy 1 under this Action Area includes standard setting and promoting a political culture based on, among other things, human rights. As part of this strategy, the AU Commission *inter alia*, assists in building the capacity of Member States to realise human and peoples' rights, promote respect for women's rights, and create an African democracy and human rights observatory. The work with respect to human rights is mainly concentrated in the Department for Social Affairs, assisting the African Committee of the Rights and the Welfare of the Child, among other tasks, and the Directorate of Women, Gender, and Development. Consequently, there is much scope for collaboration between the AU Commission and the human rights mechanisms, respectively. Such collaboration is also necessary due to the close ties between the AU Commission and human rights mechanisms and because of the role of this organ described as 'engine' for the whole of AU. As such, it is expected that the AU Commission will submit cases before the African Court of Justice.

It is understandable for the PAP and other organs of the AU Court to receive an authorisation from the AU Assembly for bringing cases to the Court. This is an impediment to the Court's effectiveness. This requirement is inconsistent with the philosophy of human rights. There is an imbalance of power between the Assembly and other organs. Munya noted that the Assembly is the organ with real power; the other organs are just ancillaries to the Assembly with no meaningful powers of their own.¹²²⁸ For Munya, this asymmetry of power and monopolisation of initiative by the Assembly has not worked well for the OAU.¹²²⁹

The Assembly, which is comprised of the Heads of State and Government of all AU Member States, controlled virtually all policy-making, budgetary, and election of judges. There is still scepticism about the ability of the AU Assembly to effectively address large-scale human rights violations. According to Udombana, African Heads of State operated on understanding: 'watch me kill my people, and I will watch you kill yours'.¹²³⁰

¹²²⁸ Munya P.M. 'The Organisation of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation' (1999) 19 *B.C. Third World Law Journal* 537, 586-587.

¹²²⁹ *Id.*

¹²³⁰ Udombana N.S. 'Can the Leopard Change Its Spots? The African Union Treaty and Human Rights' (2002) 17 *American University International Law Review* 1177, 1217.

The AU Assembly is still regarded as ‘the Dictators club’. Reynolds described it as ‘a trade union of criminals’.¹²³¹ In the past, some Member States did speak out against the Assembly willingness to turn a blind eye to glaring human rights atrocities. For example, in 1986, Ugandan President Yoweri Museveni said:

Over a period of 20 years three quarters of a million Ugandans perished at the hands of governments that should have protected their lives ... for which Ugandans... felt a deep sense of betrayal. ... The reason for not condemning such massive crimes has supposedly been a desire not to interfere in the internal affairs of a Member State, in accordance with the Charters of the OAU and the United Nations. We do not accept this reasoning because in the same organs there are explicit laws that enunciate the sanctity and inviolability of human life.¹²³²

Discussing the AU’s attitude with regard to human rights, Sceats¹²³³ argued that:

Since its creation in 2002, the AU has been justifiably criticised for being slow to act against persistent human rights violators. However, the previous dogmatic approach to preserving State sovereignty may be beginning to fade in some quarters, as the deployment of AU peace-keeping forces to conflict zones in Burundi and Somalia demonstrates. Moreover, it appears that the idea of human rights has started to gain legitimacy among the political classes, even if compliance in practice is still a major problem. For example, attempts by the Sudanese President Omar Al-Bashir to assume the rotating Chairmanship of the AU in both 2006 and 2007 were successfully blocked because of concerns over human rights abuses in the Darfur region.

There still remain other matter of concerns with regard to the granting of an authorisation to lodge cases to the African Court of Justice and Human Rights. Who is entitled to grant the said authorisation? Is the AU Chairperson or the AU Commission, the Council of Ministers *per* delegation? What will happen is the person entitled to grant the authorisation is involved directly or indirectly to the alleged human rights violation, which is to be submitted to the Court? What will happen if the AU Assembly refuse to grant an authorisation, how to obtain an authorisation in the inter-summit period?

¹²³¹ Reynolds P. ‘African Union Replaces Dictators’ Club’ BBC News, July 8, 2002, available at www.news.bbc.co.uk/1/hi/world/Africa/2115736.stm (visited on 29 November 2008).

¹²³² Quoted in Amnesty International *The Organisation of African Unity and Human Rights* (London: Amnesty International, 1991) 3.

¹²³³ Sceats (2009) 3.

(iii) African Commission of Human and Peoples' Rights and African Committee on the Rights and the Welfare of the Child

The regional human rights commission is a common characteristic in almost all the regional human rights systems, with exception of the European human rights system. While there is no model for the structure and functions of regional human rights commissions, these mechanisms have a general function of providing technique for monitoring human rights in a region through State reporting, country reports, visits and consideration of individual as well as inter-State complaints.

An overarching goal of the Protocol establishing the African Court of Justice and Human Rights is to create an institutional framework for complementarity between the Court, and the African Commission on Human and Peoples' Rights and the African Committee on the Rights and the Welfare of the Child. The Court, it is envisaged, will complement and reinforce the protective mandate of the two mechanisms. It is clearly declared in the Protocol that:

Firmly convinced that the establishment of an African Court of Justice and Human Rights shall assist in the achievement of the goals pursued by the African Union and that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of a judicial organ to supplement and the mission of the African Commission as well as the African Committee of Experts on the Rights and Welfare of the Child.¹²³⁴

In this respect, the African Commission and the African Committee of Experts have been granted the automatic right to submit cases to the Court. One believes that this provision is particularly important, as it is likely to be the main entry point to the African Court of Justice and Human Rights. The access to the Inter-American Court on Human Rights is opposite to the one provided under the new Protocol. Harris and Livingstone noted under the Inter-American human rights system, individual communications started at the Commission, and any person, group of persons or NGO may lodge petitions before this mechanism.¹²³⁵ In terms of Articles 44 and 50(1) of the American Convention, cases lodged to and determined by the Commission may be submitted to the Court by the State party concerned or the Commission, the only entities with the right to stand on contentious cases before the Court.

¹²³⁴ See Protocol on the Statute of the African Court of Justice and Human Rights, Preamble, para 5.

¹²³⁵ Harris D.J. and Livingstone S. (eds.) *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998) 57.

The Inter-American Court justified the relevance of the Commission in the following words:

Considering that individuals do not have standing to take their case to the Court and that a Government that has won a proceeding in the Commission would have no incentive to do so, in these circumstances the Commission alone is in a position, by referring the case to the Court, to ensure the effective functioning of the protective system established by the Convention. In such a context, the Commission has a special duty to consider ...[seizing] the Court.¹²³⁶

The right to direct access granted to the African Commission and the African Committee of Experts raises some concerns discussed below. Firstly, notwithstanding the principle of complementarity provided for in the Protocol of the African Court of Justice and Human Rights, the two mechanisms are not put under any legal obligation to exercise their right to submit cases before the court. Considering a similar question on whether the Inter-American Commission has a legal duty to lodge cases for adjudication, the Inter-American Court held that ‘there is no legal obligation to do so’.¹²³⁷

The Protocol is unclear about the relationship between the court and the two bodies in such cases to be referred by both. Questions such as whether there are any criteria for the category of cases to be submitted at the African Court. At what stage should the African Commission and the African Committee lodge a case? For example, if a case is submitted after consideration of admissibility requirements, should the court still examine the question? Can the two institutions lodge cases to the Court as an appeal by an individual or NGO? Can the Court refer back cases submitted by the two bodies for consideration of admissibility requirements? The practice and the rules of procedure will likely respond to these questions.

Secondly, unlike the African Court of Justice and Human Rights whose jurisdiction *ratione materiae* extends the African Charter and the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on the Rights of Women in Africa, and any other legal instrument relating to human rights, ratified by the State Parties concerned’. The two bodies have only mandate to consider cases respectively alleging violation of the African Charter and the African Charter on the Rights and Welfare of the Child. As a result, cases alleging violations respectively of these two instruments may not be received before these bodies.

¹²³⁶ Inter-Am. Ct.H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Series A. No. 5, 86 (1985) para 25.

¹²³⁷ *Id.*

Discussing the Protocol on the African Court, Harrington believed that cases alleging violations other than those in the African Charter may not be admissible before the African Commission, and even so, many potential cases that may otherwise be candidates for adjudication before the court may be choked off at the African Commission.¹²³⁸ Thirdly, the two bodies function on part-time base. The African Commission holds only two sessions every year, and may hold an extraordinary if there is need.

According to Rules 2 and 3, of the Rules of Procedure of the African Committee on the Rights and the Welfare of the Child, the Committee shall hold two ordinary sessions annually and may convene extraordinary sessions. Unless otherwise decided, the sessions shall be held at the AU Headquarters (Rule 4). They may be seized on alleging serious violations of human rights and requiring urgency when they are in intersession period. Consequently, the cases will be submitted to court with delay. Furthermore, it has been argued in this study that interim measures order by the African Commission are relatively weak and African States do not take these measures seriously.

The Protocol is silent on whether or not the African Commission and the African Committee may submit to the Court the cases in favour of individuals or NGOs, where a given State defies their respective rulings related to the interim measures. It appears that the provision gives them the opportunity to lodge cases with a potential of being landmark precedents. Consequently, it should be expected that while dealing with such cases, the two mechanisms to will give up their jurisdictions in favour of the court, since their findings are not binding.

(iv) African Intergovernmental Organisations

The Protocol grants the right to lodge cases before the African Court of Justice and Human Rights to African Intergovernmental Organisations. A noticeable innovation in the Protocol is the granting of this right not only to African Intergovernmental Organisations accredited by the AU itself, but it extends this right to those accredited by its organs. This provision comes at a time when there has been an increase in the number of intergovernmental institutions in Africa.

¹²³⁸ Harrington in Evans and Murray (eds.) (2002) 322-326.

Sands and Klein noted that from an understanding of the law of international organisations, intergovernmental organisations, while variant in nature, are institutions whose members include States and/or other international or regional organisations created by treaty or other formal agreement as a separate legal personality from its members.¹²³⁹ Following this broad conception of an intergovernmental organisation, it should be assumed that those whose functions are not executive but rather judicial or quasi-judicial or legislative have also competence to refer cases to the Court.

These include the AU and its family organisations, as well as Sub-regional Intergovernmental Organisations such as Arab Maghreb Union (AMU), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Inter-governmental Authority on Development (IGAD), the Southern African Development Community (SADC), Economic and Monetary Community of Central Africa (CEMAC), Indian Ocean Commission (IOC), Southern African Customs Union (SACU), Economic Community of the Great Lakes Countries (CEPGL), Community of Sahel-Saharan States (CEN-SAD), Mano River Union (MRU), Organisation for the Harmonisation of Business Law in Africa (OHADA), to name but a few.

The innovation here is that an intergovernmental does not need to be a purely human rights organisation, but rather any African Intergovernmental Organisation accredited to the AU or its organs. Weston believed that the intergovernmental organisations have the potential to improve the human rights contours in Africa as the engagement of States on mutual tasks will most likely result in the enlargement of cooperation in the realisation of human rights, even though not originally contemplated as a function.¹²⁴⁰

¹²³⁹ Sands P. and Klein P. (eds.) *Bowett's Law of International Institutions* 5th Ed. (London: Sweet and Maxwell, 2001) 16, 17. The same comments are to be found in the writings of other commentators. See generally, Schermers H.G. and Blokker N.M. (eds.) *International Institutional Law* 3rd Revised Ed. (The Hague: Martinus Nijhoff Publishers, 2001) 39-40 and Karns M.P. and Mingst K.A. (eds.) *International Organisations: The Politics and Process of Global Governance* (Boulder: Lynne Rienner Publishers, 2004) 7-10.

¹²⁴⁰ Weston B.H. et al. 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20 (4) *Vanderbilt Journal of International Law* 587, 589.

Commenting on the same provision under the Protocol to the African Court, Juma believed that granting of right to submit cases before the Court is likely intended to influence African Intergovernmental Organisations in Africa to adopt the rights-based approach; otherwise they also stand to be impeached for their human rights practices.¹²⁴¹ Although it is conceded that intergovernmental institutions in Africa are increasingly appropriating an oversight role in human rights, the utility of this provision cannot be granted. This is because most intergovernmental organisations are the venue of ‘high’ politics, and may not be independent of their members.¹²⁴²

(v) National human rights institutions

Contrary to the Protocol on the African Court, the new Protocol extends its competence *ratione personae* to African National Human Rights Institutions. It is far to say that most African governments do not like independent national institutions. They tend to look on them with suspicion and resent their independence. This is unfortunate. It is submitted that African governments must do everything to ensure the independence and credibility of their autonomous constitutional bodies. An effective national institution must be readily accessible to the widest possible number of the people it is intended to serve.

According to one definition, national human rights institutions (NHRIs) are independent entities which have been established by a government under the constitution or by a law, and entrusted with specific responsibilities in terms of the promotion and protection of human rights.¹²⁴³ These institutions can take many forms: national human rights commissions, ombudsman offices and public interest or other human rights advocates.¹²⁴⁴ Gallagher has observed that, in practice, they are neither judicial nor law-making, and that their functions commonly include an advisory function (with regard to government policy and practice on human rights); an educative function (oriented towards the public); and what may be termed an impartial investigatory function.¹²⁴⁵

¹²⁴¹ Juma (2007) 14.

¹²⁴² *Id.*, 14-15.

¹²⁴³ Gallagher A. ‘Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners’ Resources’ in Alston P. and Crawford J. (eds.) *The Future of United Nations Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 201, 202.

¹²⁴⁴ See General Comment No. 10 (19) of the Committee on Economic, Social and Cultural Rights, para 2.

¹²⁴⁵ Gallagher in Alston and Crawford (eds.) (2000) 203-204.

The interesting thing is that the advisory function of a national human rights institution is usually accompanied by the responsibility to monitor implementation and compliance with international human rights treaties.¹²⁴⁶ Indeed, in the Paris Principles, one of the responsibilities of NHRIs is: ‘to promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.’¹²⁴⁷

Insufficient funding from government has been one of the reasons for the inability of the NHRIs to make their service delivery more efficient and effective. However, they receive substantial funding from other sources such as the Western embassies, European Union, International NGOs etc. The donor community and other agencies are willing to give financial and technical assistance to human rights institutions which have proved to be independent and credible. One of the challenges facing the NHRIs such the South African Human Rights Commission is the heavy workload it has to handle.¹²⁴⁸

From the experience of South Africa and Ghana, the establishment of NHRIs should be encouraged throughout Africa. However, the institutions can play an important role in submitting cases to the African Court of Justice and Human Rights only if they are established under the right legal framework, granted broad functions and powers and are independent from the control and influence of Executive, Legislative and Judiciary. In this respect, it is not sufficient that their independence is guaranteed under the Constitution or a statute. Their independence from control or influence by any power must be respected. The members of such institutions must themselves prove their independence and impartiality. However, it is important to stress that independence does not mean confrontation with the executive, legislative or judicial powers. The cooperation is essential without compromising independence. There must, of course, be a certain minimum amount of political will to ensure the functioning of these institutions.

¹²⁴⁶ Gallagher in Alston and Crawford (eds.) (2000) 202.

¹²⁴⁷ The Paris Principles Relating to the Status of National Institutions, GA Res. 48/134 (1993), para 3 (b) of the first section ‘Competences and Responsibilities’.

¹²⁴⁸ The inordinate number of petitions received is due mainly to its extensive functions, functions that in other jurisdictions would be shared among two or more different institutions. The fact that the Commission’s services, which are provided by professional lawyers and investigators, are delivered free coupled with its formal procedure has made it more attractive forum. See Pityana N.B. ‘National Institutions at Work: The Case of the South African Human Rights Commission’ in Hossain K. et al (eds.) *Human Rights Commissions and Ombudsman Offices National Experiences Throughout the World* (The Hague : Kluwer Law International, 2000) 627, 637.

A key challenge for domestic human rights institutions in Africa is to overturn the often-automatic presumption of their complicity with government. It is inevitable that NHRIs will need to weather doubts over their independence and good faith.¹²⁴⁹ It is hoped that African NHRIs will become relevant conduits of cases to the Court. However, key challenges for NHRIs in Africa are to overturn the often-automatic presumption of their complicity with government. It is inevitable that they will need to weather doubts over their independence and good faith; indeed taking history as a guide, accusations of this kind are appropriate, and even desirable, in the African context. The more effective African NHRIs will likely use the Court as a lever when pressuring governments to comply with international human rights norms.

(vi) Individuals and NGOs

Sceats noted that the question of who can submit complaints in the Human Rights Section of the African Court of Justice is obviously crucial, more than any other factor, which will determine the flow of human rights cases to be the Court.¹²⁵⁰ Sceats¹²⁵¹ further argued:

The worth of any institutions designed to tackle human rights abuses must ultimately be evaluated by its ability to make a difference on the ground for victims and potential victims. The reality is that, like the AU itself, the African Court of Justice and Human Rights will be very distant from the lives of African people, and judging by the decision to deny direct access for individuals and NGOs, this may be just what many African governments intend.

Conspicuously absent are individuals and NGOs for these claimants the Protocol provides for an optional jurisdiction. Regrettably, at a very late stage in negotiations African States opted to deny direct access to individual victims of human rights violations and NGOs. According to the Article 8 of the Protocol on the Statute of the African Court of Justice and Human Rights, ‘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 Court to receive cases under Article 30(f) involving a State which has not made such a declaration. Article 30(f) read as follows: ‘individuals or relevant Non-Governmental Organisations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol.’

¹²⁴⁹ Zimble D.S. ‘Conclusion : Towards an Effective Human Rights Architecture in Africa ?’ in Akopari J. and Zimble D.S. (eds.) *Africa’s Human Rights Architecture* (Sunnyside: Fanele,2008)284, 289.

¹²⁵⁰ Sceats (2009) 9.

¹²⁵¹ Id., 14.

On one hand, what constitutes ‘NGO accredited to the AU or its organs’ is subject to debate. AU is an organisation, which functions through its organs. Why can it grant ‘accreditation to NGOs’ on the same feet with its organs? On the other hand, these NGOs face an additional requirement of accreditation to the AU or its organs, meaning that those without accreditation will not be able to access the Court, contrary to the African Commission where there is no such requirement. As for the Protocol to the African Court, the new Protocol is very restrictive compared to what obtains under the Inter-American system. Under this system only NGO legally recognised in one or more Member States of the OAS may lodge cases with the Inter-American Commission.¹²⁵²

Sceats contended that this development was orchestrated by a group of States including Egypt and Tunisia and seems to have been motivated by a distrust of human rights NGOs.¹²⁵³ In June 2008, the Coalition for An Effective African Court on Human and Peoples’ Rights sent an open letter respectively to the AU Assembly and Executive Council condemning the denial direct automatic access to individuals in particular as:

A step back in access to justice for all in Africa that dilutes the effectiveness of the continental judicial system and runs contrary to the provisions on access to justice in several international human rights instruments.¹²⁵⁴

This critic is justified in the light of experience of the African Commission where NGOs are the main complainants. They have played and continue to play a central role in the protection of human rights in Africa so far, the restrictions in the new Protocol constitute a serious shortcoming to such protection. It is difficult to foresee a situation where all or even a majority of State parties that ratify the Protocol will make a declaration under Article 30(f), mostly when taking in to account the current trend of making declarations with the Protocol of the African Court.¹²⁵⁵

¹²⁵² American Convention on Human Rights, Art 44.

¹²⁵³ Sceats (2009) 9.

¹²⁵⁴ Coalition for An Effective African Court on Human and Peoples’ Rights, *Open Letter to the AU Assembly of Heads of State and Government, 11th Ordinary Session, and the Executive Council of Ministers, 13th Ordinary Session, 20 June 2008*. Available at www.africancourtcoalition.org (visited on 20 January 2009).

¹²⁵⁵

Furthermore, the number of individual communications the African Commission that have been brought to the African Commission received, one would have like the African Court of Justice to receive several petitions from individuals in order of getting better redress through binding judgements. To these petitioners, restriction of access constitutes a blow to their hopes. Article 30(f) deviates from international practices. Consequently, this provision is to be considered as retrogressive. The primary objective of the protective mandate of the Court is to offer individual victims, complainants or their representatives a mean for the consideration of their claims.

The limitation of individuals' and NGOs' access to the Court has generated considerable criticism with regard to the African Court. Mutua explained that:

While limiting the access of NGOs and individuals to the Court may have been necessary to get States on board, it is nevertheless disappointing and a terrible blow to the standing and reputation of the Court in the eyes of most Africans. After all, it is individuals and NGOs, and not the African Commission, regional intergovernmental organisations, or State parties, who will be the primary beneficiaries and users of the Court.¹²⁵⁶

Mutua also maintained that:

The proposed Court is not meant to be an institution for the protection of the rights of States or AU organs. A human rights Court is primarily a forum for protecting citizens against the state and other agencies. This limitation will render the Court virtually meaningless unless it is interpreted broadly and liberally.¹²⁵⁷

In the same vein Kaguongo¹²⁵⁸ contended that:

Given that individual complaints have played such a central role in the protection of human in Africa so far, the restrictions in the Protocol constitute a serious shortcoming to such protection. It is difficult to foresee a situation where all or even a majority of State parties that ratify the Protocol will make a declaration under Article 34(6). Taking into consideration the number of communications the Commission has received, even with the non-binding nature of its decisions, one may expect that a court will receive many more petitions from individuals who hope to get better redress through binding judgments. To these petitioners, restriction of access constitutes a blow to their hopes.

¹²⁵⁶ Mutua (1999) 354.

¹²⁵⁷ Id.

¹²⁵⁸ Kaguongo W. 'The Questions of *Locus Standi* and Admissibility Before the African Court on Human and Peoples' Rights' in Viljoen F. (ed.) *The African human rights system: Towards the co-existence of the African Commission on Human Rights and African Court on Human Rights Judiciary Watch Report* (Nairobi: The Kenyan Section of the International Commission of Jurists, Konrad Adenauer Stiftung, 2006) 77, 82-83.

Similarly, Mutoy¹²⁵⁹ observed that:

Quoi qu'il en soit, le projet du Protocole va plus loin que le système interaméricain, quant à ce qui concerne la participation de l'individu à la procédure devant la Cour. Elle demeure cependant en-deçà des avancées effectuées par le système européen.

The restrictive access of individuals and NGOs to the African Court, in contrast to the unfettered access of State Parties, and the granting of optional jurisdiction in cases lodged by individuals and NGOs, is paradoxical, indeed a fundamental flaw.¹²⁶⁰

For Steiner, a scheme of access to a human rights court, in which primacy is given to the State, defies the conventional understanding of international human rights law.¹²⁶¹ Tomuschat argued that even though the debate on the foundations, scope and content of universal human rights has hardly been settled, there is agreement that the concept of human rights developed largely to protect an individual or groups of individuals from inimical conduct of the State.¹²⁶² In this regard, Mutua contended that human rights are conceived as an antidote for taming the predatory State.¹²⁶³ For him, the same State cannot be relied upon to act as the primary protector of these rights.¹²⁶⁴ Douzinas wrote that reliance on the State as the primary protector of human rights is 'the best illustration of the poacher turned gamekeeper'.¹²⁶⁵

The restriction is contrary to the intent of the internationalisation of human rights and the development of the regional human rights system as a complementary layer for supranational protection. Henkin explained that historically, the treatment of persons within a State's territory was regarded as the State's prerogative.¹²⁶⁶ According to him, human rights were similarly regarded as domestic matters, only within the competence of the State concerned.¹²⁶⁷

¹²⁵⁹ Mubiala M. 'Contribution à l'étude comparative des mécanismes régionaux Africain, Américain et Européen de protection des droits de l'homme' (1997) *Revue Africaine des Droit International Comparé* 42, 53.

¹²⁶⁰ Juma (2007) 3.

¹²⁶¹ Steiner H.J. 'International Protection of Human Rights' in Evans M.D. (ed.) *International Law* (Oxford: Oxford University Press, 2003) 760.

¹²⁶² Tomuschat also expressed the same view - see Tomuschat C. *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003) 375.

¹²⁶³ Mutua (2001) 221.

¹²⁶⁴ Mutua (1996) 594, referring to the State as the 'basic obligor' of human rights.

¹²⁶⁵ Douzinas C. *The End of Human Rights* (Oxford : Hart Publishing, 2000) 6-23.

¹²⁶⁶ Henkin L. *The Age of Rights* (New York: Columbia University Press, 1990) 14.

¹²⁶⁷ Id.

Henkin further argued that this approach applied until after the Second World War, when human rights issues entered the international arena and were articulated largely under the aegis of the United Nations.¹²⁶⁸ Henkin concluded that this era marked the beginning of the ‘full blown’ internationalisation of human rights, and since then, human rights has remained one of the most conspicuous subjects in international law.¹²⁶⁹

According to Marks and Weston, supranational protection is regarded as containing the State and ensuring inter-State accountability for human rights.¹²⁷⁰ In Tucker’s view, the regional layer of protection must ‘exercise authority... broader than the sovereign State...’¹²⁷¹ Tucker noted, in other words, that the idea of regional human rights systems is to provide an external mechanism for protecting individuals from the State, at an intermediate level between the municipal and global systems.¹²⁷² They must therefore, in principle, be accessible to the individual, and be seen as being independent of the State.¹²⁷³ Whereas it is acknowledged that the Court will have optional jurisdiction with respect to these contentious cases, once lodged, there should be no fetters in the way of an individual seeking redress, as long as the individual has sought and exhausted local remedies, or can demonstrate that such are unavailable.¹²⁷⁴

Steiner and Alston held that there are requirements that access to supervisory mechanisms established by the regional human rights system is liberal, both for the individual as the complainant on the one hand, and the State as the repository of the duty to enforce the rights guaranteed under the regime on the other hand.¹²⁷⁵ Shelton believed that when a victim of alleged human rights violations has exhausted local remedies and feels that there has been no adequate or appropriate redress, the individual, in principle, should have unfettered access to a supranational mechanism superior to the State.¹²⁷⁶

¹²⁶⁸ Henkin (1990) 15.

¹²⁶⁹ Id.

¹²⁷⁰ Marks S.P. and Weston B.H. ‘International Human Rights at Fifty: A Foreword’ (1998) 8 *Transnational Law and Contemporary Problems* 113, 115. Bilder joined Marks and Weston by supporting the same view. See also Bilder R. ‘An Overview of International Human Rights Law’ in Hannum H. (ed.) *Guide to International Human Rights Practice* 3rd ed. (New York: Transnational Publishers, 1999) 1, 3.

¹²⁷¹ Tucker C. ‘Regional Human Rights Models in Europe and Africa: A Comparison’ (1983) 10 *Syracuse Journal of International Law and Commerce* 135, 139.

¹²⁷² Id.

¹²⁷³ Ibid.

¹²⁷⁴ See Inter-American Court H.R., Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion OC-11/90 of 10 August 1990 (Series A, No. 11).

¹²⁷⁵ Steiner and Alston (eds.) (2000) 136.

¹²⁷⁶ Shelton D. *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999) 20.

Koh explained that this is indeed the underlying principle that animates international human rights law. It also follows that in order to play this complementarity role, international and regional human rights mechanisms must be accessible to all players in the equation of enforcement, individuals and NGOs included.¹²⁷⁷ Koh further suggested that the enforcement of international law does not unilaterally lie in States, but rather in the ‘transnational legal process’ of interaction, internationalisation, interpretation and application by States, individuals, NGOs and other non-State actors.¹²⁷⁸

Hathaway observed that the reality is that even though States (and contracting intergovernmental organisations) are bound by the principle of *pacta sunt servanda* to give effect to their international legal obligations, there is no guarantee for such commitment, particularly in human rights treaties.¹²⁷⁹ Harrington contended that African States are likely to be reluctant to submit cases to the Court, let alone permit individuals and NGOs to petition the Court by signing declarations, at least initially.¹²⁸⁰

The individuals are the main users of human rights courts, and as such, they should have unfettered access to these institutions. Furthermore, NGOs have played a crucial role in the African human rights system, as evidenced by the fact that most of individual communications before the African Commission have been lodged at the initiative of these NGOs. What, then, needs to be done to allow individuals and NGOs in Africa to access the African Court of Justice and Human Rights in view of its Protocol constraints? If individuals and NGOs are to access this body through the African Commission, this will require an amendment of the African Commission’s rules of procedure. Discussing the same matter concerning the Protocol on the African Court on Human Rights and Peoples’ Rights, Viljoen foresaw three probable scenarios for facilitating such access.¹²⁸¹ Firstly, the African Commission could act as a mere conduit for individuals and NGOs cases to the African Court. Secondly, the African Commission could also first access if a matter is admissible and whether it raises pertinent issues that deserve the African Court’s adjudication.

¹²⁷⁷ Koh H.H. ‘Transnational Legal Process’ (1996) 75 *Nebraska Law Review* 181, 183.

¹²⁷⁸ Id.

¹²⁷⁹ Hathaway O.A. ‘Do Human Rights Treaties Make a Difference’ (2002) 111 *Yale Law Journal* 1935, 1936.

¹²⁸⁰ Harrington in Evans and Murray (eds.) (2002) 330.

¹²⁸¹ Viljoen (2004) 25-35.

That way the African Commission would be acting like a sieve and only submitting cases with it is convinced presents contentious issues. Mutua also favoured this approach. He suggested that the African Court should be the regional forum that builds human rights jurisprudence of far-reaching continental interpretation and application.¹²⁸² Thirdly, the African Commission could submit cases where it has failed to reach an amicable settlement between parties. Such an option is available before the Inter-American Commission on Human Rights when a settlement becomes elusive.¹²⁸³ The best thing to do is one where there is a complete division of labour between the two bodies. The African Commission should retain the promotional activities, and the African Court should have exclusive jurisdiction over individual cases. The same holds true for the relationship between the African Commission and the African Court of Justice and Human Rights.

3.3.2. Advisory jurisdiction

3.3.2.1. Who can request an advisory opinion?

Article 53 of the Protocol provides that:

1. The Court may give an advisory opinion on any legal question at the question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council, the Financial Institutions or any other organ of the Union as may be authorised by the Assembly.
2. A 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.
3. A request for an advisory opinion must not be related to a pending application before the African Commission or the African Committee of Experts.

The African Commission and the African Committee should be included under the terms ‘or any other organ of the Union’. The African Court of Justice and Human Rights is an organ of the AU and, taken literally, this would imply that the Court, on its own motion, may identify issues for interpretation and decide to deliver an advisory opinion.

¹²⁸² Mutua (1999) 362.

¹²⁸³ Vijojoen (2004) 25-35. Rules of procedure of the Inter-American Commission, Art 44 provides that : ‘when a State has not complied with the recommendations of the Commission, the Commission shall refer the case to the court, unless there is reasoned decision by an absolute majority of the members of the Commission to the contrary’.

If the Court were to have this right, however, then it would use the words Judge Cançado who noted ‘be tantamount to transforming itself, *ultra vires*, into an international legislator.’¹²⁸⁴ Compared to the Protocol on the African Court,¹²⁸⁵ the new Protocol is very restrictive. It is surprising to note that the African Intergovernmental Organisations accredited to the African Union or to its organs, and NHRIs are not mentioned among the entities entitled to request for an advisory opinion, however, they are entitled to lodge cases before the same Court. The drafting history of the Protocol nowhere reveals why these entities have not been granted standing and one wonders whether the issue was well thought through.

A request of advisory opinion must be authorised by the AU Assembly. This should be seen as another way of consolidating its power on human rights matters. This is unfortunate that would have been avoided, giving that the advisory opinions are not legal binding decisions. The AU Assembly has a reputation of failing to condemn human rights abuses in Africa, it is doubtful to see if it will willingly grant authorisation for advisory opinions. The Protocol on the African Court of Justice does not mention whether the Court, by contrast to the Inter-American Court,¹²⁸⁶ may deliver opinions on the compatibility of national legislation or practices with international law and, if so, whether national Courts as organs of the State, may also request such opinion. With respect to the African Court, Hopkins wrote that this is a potentially significant point.¹²⁸⁷ The possibility of the national Courts’ obtaining clarification from the African Court on the compatibility of national rules and measures could contribute to the objective application of human rights treaties and the development of universal human rights jurisprudence for the African content.¹²⁸⁸ Naldi and Magliveras believed, in the light of the resistance of African States to interference in their internal affairs, it is far from certain whether the African Court will be willing to give opinions on the compatibility of domestic laws with international human rights law.¹²⁸⁹

¹²⁸⁴ Inter-American Ct.H.R., *Reports of the Inter-American Commission of Human Rights* (Article 51 of the American Convention of Human Rights), Advisory Opinion OC- 15/97 of November 14, 1997, Series A No. 15, Opinion Judge Cançado, para 37.

¹²⁸⁵ Protocol to the African Court, Art 4 read as follows : ‘At the request of a Member State of the AU, any of its organs, or any African Organisation recognised by the AU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate of dissenting decision.’

¹²⁸⁶ American Convention, Art 64(2).

¹²⁸⁷ Hopkins K. ‘The Effect of the African Court on the Domestic Legal Orders of African States’ (2002) 2 *African Human Rights Law Journal* 234.

¹²⁸⁸ Id.

¹²⁸⁹ Naldi and Magliveras (1998) 440.

3.3.2.2. Subject matter to advisory opinion

Article 53(1) referred to above provides that ‘the Court may give an advisory opinion on any legal question ... ’ The material scope is unclear in the sense that what constitutes legal question is vague. In light of the Protocol’s objectives, it is assumed that the Court should interpret this notion broadly. In this regard, the African Court of Justice and Human Rights may define the scope of this provision by drawing on an advisory opinion delivered by the Inter-American Court on the same question:

Any provision dealing with the protection of human rights sets forth in any international treaty applicable in the African States, regardless of whether it be bilateral or multilateral, whatever be the purpose of such a treaty, and whether or not, non-Member States of the inter-American system are or have become parties thereto.¹²⁹⁰

As for the Inter-American Court, it is hoped that the Court will be able to deliver opinions on any treaty provision, the only requirement being that it is ‘directly related to the protection of human rights in a Member State in inter-American system’.¹²⁹¹

3.4. Remedies and enforcement of the decisions

After finishing its deliberations in a case, the judges of the African Court of Justice and Human Rights have 90 days to render their judgment.¹²⁹² A quorum of six Judges is sufficient to reach a decision at the General Section and the Human Rights Section.¹²⁹³ It is possible to dissent.¹²⁹⁴ The judgments of the Court are final and not subject to appeal, however, it is possible for the Court to review a decision in the light of new evidence,¹²⁹⁵ and the Court can also be asked to interpret its own decisions.¹²⁹⁶

¹²⁹⁰ Inter-American Ct.H.R., *Other Treaties Subject to the Consultative Jurisdiction of the Court* (Article 64 of the American on Human Rights), Advisory Opinion OC- 1/82 of September 24, 1982, Series A No. 1, para 52.

¹²⁹¹ *Id.*, para 21.

¹²⁹² Protocol on the Statute of the African Court of Justice and Human Rights, Art 43.

¹²⁹³ *Id.*, Art 21(2).

¹²⁹⁴ *Ibid.*, Art 44.

¹²⁹⁵ *Ibid.*, Art 48.

¹²⁹⁶ *Ibid.*, Art 47.

In addition to being read in open Court, the judgments shall be notified to the parties, to all AU Member States and the AU Commission. The Executive Council shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.¹²⁹⁷ In its judgements, the African Court of Justice and Human Rights is not limited to merely finding that a violation was committed; it shall also make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.¹²⁹⁸ Apart from awarding financial compensation or reparation, this provision should give the Court the power to demand certain actions, for instance release of detainees unlawfully held or the repeal or change of a provision of national law that is contrary to the relevant human rights instrument.

According to Article 46(3), the State parties shall comply with the judgments made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution. The judgments of the African Court of Justice and Human Rights are binding on the States and executable.

Where a party has failed to comply with a judgment, the Court shall refer the matter to the AU Assembly, which shall decide upon measures to be taken to give effect to that judgment. The Assembly may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act.¹²⁹⁹ This is a noticeable innovation compared to the Protocol on the African, which provides that the AU Executive Council shall monitor the judgment's execution on behalf of the Assembly.¹³⁰⁰

Furthermore, in its report to the regular session of the AU Assembly, the Court shall specify, in particular, the cases in which a State has not complied with the Court's judgement.¹³⁰¹ The AU Assembly consists of Heads of State and Government, irrespective of whether such States have ratified the Protocol or not, the Assembly will hopefully be as much involved in securing the execution of judgments.

¹²⁹⁷ Protocol on the Statute of the African Court of Justice and Human Rights, Art 43(2) and (3).

¹²⁹⁸ Id., Art 45 and 28 respectively read as follows : 'Without prejudice to its competence to rule on issues of compensation at the request of a party by virtue of paragraph 1(h), of the Article 28 of the present Statute, the Court may, if it considers that there was a violation of a human or peoples' rights, order any appropriate measures in order to remedy the situation, including granting fair compensation'. Art 28(1) (h): 'The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to: ... the nature or extent of the reparation to be made for the breach of an international obligation'.

¹²⁹⁹ Protocol on the Statute of the African Court of Justice and Human Rights, Art 46(5) and (6).

¹³⁰⁰ Protocol on the African Court, Art 29(2).

¹³⁰¹ Protocol on the Statute on the African Court of Justice and Human Rights ,Art 57.

In order to the African Court of Justice and Human Rights to be effective, it is hoped that the African States will respect its decisions without waiting for the AU Assembly to use its powers of adopting sanctions. Although the AU Assembly has powers to call upon States to respect decisions of the AU institutions, it is imperative that States themselves feel obliged to respect those decisions and take the relevant actions. Granted, in absence of amicable implementation of the decision, it is expected that the AU Assembly will be proactive in enforcing the African Court of Justice and Human Rights' decisions by all necessary means.

That could include imposition of sanctions as provided for in its Constitutive Act. According to Article 23(2) of the AU Constitutive Act:

Any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

Since the African Court of Justice and Human Rights is an organ of the AU, mandated to make binding decisions, it must be assumed that the AU Assembly will have the right to subject a State that does not comply with a judgment of the Court to sanctions. Whether or not the Assembly will be willing to do so is a different matter of concern.

The African Court of Justice and Human Rights also has the mandate to adopt provisional measures in cases of extreme gravity and urgency.¹³⁰² An example of such measure could be to request a State not to carry out an execution if a case is pending about possible human rights violations in connection with a death sentence. Since the African Court of Justice is a true Court with the ability to make binding judgements, it must also be assumed that provisional measures adopted under Article 35 will be binding on the States.

Article 46(3), provides for the States' undertaking to comply with the judgments of the African Court of Justice and Human Rights. As a result, it may be argued that decisions by an AU body mandated to make binding decisions, and consequently, provided the political will be there, the AU Assembly could impose sanctions for non-adherence.

¹³⁰² Protocol to the Statute on the African Court of Justice and Human Rights , Art 35.

4. Challenges facing the African human rights system

4.1. Challenges facing the African Commission and the African Court of Justice and Human Rights

4.1.1. Common challenges

The African Commission faces a number of challenges since its functioning to now. By extension, these challenges may be equally true for the African Court of Justice and Human Rights if it is not established as an effective and independent new Court as the most appropriate institution to adequately protect human and peoples' rights in accordance with the Protocol and international standards. The challenges may be summarised as: (i) The lack of independence and impartiality of the Commissioners who are governmental employees in their own countries, some in charge of dealing with human rights cases in their countries;¹³⁰³ (ii) lack of professionalism, (iii) the part-time nature of the African Commission and the lack of regular attendance by Commissioners to all or part of the session.¹³⁰⁴ (iv) The lack of resources that have severely handicapped the African Commission and forced it to rely on donors from outside Africa, rather than on the regular contributions of the AU;¹³⁰⁵ and (v) the failure of the African Commission to adequately enforce its decisions.¹³⁰⁶ Insufficiency of remedies explains why the African Commission usually gives open-ended decisions which fall short of providing specific remedies or guidance to State parties on improving their human rights records; and (vi) dependence on political organs.

4.1.1.1. Lack of independence and impartiality

The African Charter does not mention the word 'independence'; Article 31(1) states that:

The Commissioners shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.

¹³⁰³ See for example, Nmehielle (2001) 172-173.

¹³⁰⁴ In this regard, see Umozurike U.O. 'The Complaint Procedures of the African Commission on Human and Peoples' Rights' in Gudmundur et al. (eds.) (2001) 707, 712.

¹³⁰⁵ The African Commission itself has commented on this challenge in its Annual Activity Report. See, African Commission on Human and Peoples' Rights, Fifteenth Annual Activity Report of the African Commission 2001-2002, paras 25-26.

¹³⁰⁶ Welch C.E. Jr. *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organisations* (Pennsylvania: University of Pennsylvania Press, 1995) 150-151.

The independence and impartiality of the African Commission is a topic which has been dealt with extensively in the literature. In his analysis of the independence of the African Commission, Rembe feared that the involvement of the Assembly of Heads of States and Government in the election of members of the African Commission raised doubts about the effectiveness of this body, as it appeared to be a subordination of this mechanism to the A OAU Assembly of Heads of State and Government.¹³⁰⁷ According to Gye-Wado, the caution was that, being elected by politicians, as represented in the Assembly, it must be apt, to block the possibility of making such appointments mere extensions of political largesse.¹³⁰⁸ However, Gye-Wado did not propose how to address this issue.

Wing and Smith noted the African Commission suffered severely from a lack of independence, resulting in a rather 'nepotistic relationship between the African Commission and its Member States, instead of the Commission acting as an objective and critical observer of human rights violations.¹³⁰⁹ Not only are the Commissioners appointed by the Heads of State, most Commissioners are drawn from the ranks of their respective countries' governments.¹³¹⁰ As a result, Commissioners are often confused that their role is that country advocate instead of impartial observer.

In this regard, Hansungule¹³¹¹ wrote:

Some Commissioners have been so ignorant of their roles that they tried to comment on the State report of their countries in support of the report or to chip in to assist the representatives and had to be stopped by the Chair. The Charter states that Commissioners would be impartial which means they do not represent their countries.

There were Commissioners who were ambassadors, ministers, ambassadors, Attorney-General, senior officials and so on, in their countries while serving at the African Commission.¹³¹²

¹³⁰⁷ Rembe N.S. *The System of Protection under the African Charter on Human and Peoples' Rights: Problems and Prospects* (Lesotho: Institute of Southern African Studies, National University of Lesotho, 1991) 25.

¹³⁰⁸ Gye-Wado O. 'The Effectiveness of the Safeguard Machinery for the Enforcement of Human Rights in Africa' (1992) 2 *Journal of Human Rights Law and Practice* 142, 154.

¹³⁰⁹ Wing and Smith (2003) 61.

¹³¹⁰ Id.

¹³¹¹ Hansungule (2001) 324.

¹³¹² Ben Salem was appointed to France as Consul and as ambassador of his country (Tunisia) to Senegal, Turkey and Geneva. Rezzag-Bara served as the Algerian ambassador to Libya. The former chairperson, Sawadogo served as Commissioner while holding the position of the ambassador of Burkina Faso to Senegal. Chigovera was Commissioner, while holding the position of Attorney-General of Zimbabwe.

Welch believed that the physical distance between the Commission's headquarters in Banjul and the OAU's seat in Addis Ababa may convey the political benefit of greater independence, but it also carries the cost of less attention.¹³¹³ The seriousness of this problem was underscored by the participants of the International Commission of Justice Workshop on NGOs Participation which preceded the African Commission's 10th Session in October 1991, when they adopted a specific recommendation regarding the independence of the African Commission:

In view of the need to avoid situations of possible conflict of interest regarding the discharge of the Commission's mandate and to preserve the independence of the Commission should have due regard to the incompatibility of certain governmental functions with membership of the Commission.¹³¹⁴

The conflict of interest was also recognised by a member of the Commission, Nguema,¹³¹⁵ who observed that:

Today some of its [The African Commission] members are ambassadors. But they must be independent: they swear on oath of independence. But an ambassador represents his Head of State, and he cannot have an opinion that differs from his Head of State, on this point, we are not well-equipped for being chosen members of the Commission.

Analysing the independence and impartiality of Commissioners, Viljoen and Yonaba¹³¹⁶ rightly contended that:

One of the requirements for being chosen as a Commissioner is a person's 'impartiality'.¹³¹⁷ The African Charter does not refer to independence as a requirement, though. 'Impartiality' denotes the ability to decide and act without bias, that is, without an interest in the outcome of a matter. The ability to be impartial is closely linked to being independent. 'Independence' in this context means that a person is not dependent on (or closely linked to) the authority of a person or institution other than himself (herself)... In short, a lack of independence leads to a perception of impartiality. ... The independence of the Commissioners may be compromised by their being closely linked to a government or holding a particular position within a State.

¹³¹³ Welch Cl. E. Jr. 'Human Rights and African Women: A Comparison of Protection under Two Major Treaties' (1993) 15 *Human Rights Quarterly* 549, 562.

¹³¹⁴ Conclusions and Recommendations of International Commission of Jurists, African Commission on Human and Peoples' Rights, African Centre for Democracy and Human Rights, Workshop on NGOs' Participation in the Work of the African Commission, Banjul, The Gambia, 5-7 October 1991.

¹³¹⁵ Interview with Nguema I. *Terra Viva*, March 1998, No. 15.

¹³¹⁶ Viljoen. and Yonaba (2002) 39.

¹³¹⁷ African Charter, Art. 31 (1).

The effectiveness of the African Commission has been attributed to its perceived lack of independence. This is mainly against the backdrop of its membership, relationship with the Assembly of Heads of State and Government of the AU, and funding.¹³¹⁸ Since its establishment in 1987, the Commission has been served by Attorney-Generals, Ambassadors, Ministers, Judges, Court advocates and University lecturers. The nomination of persons holding government office as Commissioners has seriously undermined its independence and credibility.¹³¹⁹ This has normally led to a conflict of interest in the discharge of their activities especially when considering issues that relate to ones nominating State.¹³²⁰

For Mukundi ,¹³²¹

While it is true that government officials may exercise their mandate without States influence it is important that the public is confident and feels that by virtue of ones position in government they act independently which in most instances in the public eye would be seem difficult. This has raised queries in the sphere of public opinion on some Commissioners' capacity to redress human rights violations on the continent without States influence.

Apart from what is set out in Article 31 of the African Charter, there are no formal criteria for election to the African Commission. In a *Note Verbale* of the Ministers of Foreign Affairs to Member States on 29 March 2007, inviting them to submit candidates for the five seats on the African Commission for election at the 11th Ordinary Session of the AU Executive Council from 28-29 June 2007 in Accra, Ghana, the AU Commission elaborated on the criteria set out in Article 31. In addition to requesting Member States to ask nominees to provide information on their judicial, practical, academic, activist, professional and other experiences in the field of human and peoples' rights (to include information on political and other associations relevant for eligibility and incompatibility), the AU Commission suggested that nominees be asked to submit statements indicating how they fulfilled the criteria for eligibility contained in the African Charter.

¹³¹⁸ Mukundi G.W. 'A Critical Examination of the African Charter on Human and Peoples Rights: Towards Strengthening the African Human Rights System to Enable It Effectively Meet the Needs of the African Population' in Viljoen F. (ed.) *The African human rights system: Towards the co-existence of the African Commission on Human Rights and African Court on Human Rights Judiciary Watch Report* (Nairobi: The Kenyan Section of the International Commission of Jurists, Konrad Adenauer Stiftung, 2006) 2, 19.

¹³¹⁹ Id.

¹³²⁰ Ibid.

¹³²¹ Mukundi in Viljoen (ed.) (2006) 19-20.

The AU Commission then pointed to a statement by the Advisory Committee of Jurists made with respect to the establishment of the Permanent Court of International Justice.¹³²² After the election at the 11th Ordinary Session of the AU Executive Council from 28-29 June 2007, the African Commission had members from Benin, Botswana, The Gambia, Mali, Mauritius, Mozambique, Nigeria, Rwanda, South Africa, Tanzania and Zambia, seven of which, including the Chairperson and Vice-Chairperson, were women. This excluded both the Northern and Central regions of Africa, in favour of the Southern, Western (both with four Commissioners) and eastern (three Commissioners) regions. This could undermine the credibility of the African Commission when it comes to dealing with issues in countries in the northern and Muslim parts of Africa.

The four Commissioners elected in 2005 all seemed to live up to the criterion of independence at the time of election, three being lawyers in private practice¹³²³ and one being the head of an independent commission.¹³²⁴ Similarly, the five commissioners who were elected in 2007 also seemed to live up to the criteria, three being practitioners lawyers,¹³²⁵ one being a Chief Justice,¹³²⁶ and one being the president of a national human rights institution.¹³²⁷ One of the commissioners elected in 2005, Mumba Malila of Zambia, was appointed Attorney General in his home country in November 2006. This has not led to his resignation as commissioner. It must in any event be clear that, according to the principles set out in the *Note Verbale*, Commissioner Malila would no longer be eligible.

¹³²² The Advisory Committee of Jurists in the Establishment of the Permanent Court of Justice had pointed out that a member of government, a minister or under-secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal advisor to the foreign office, though they would be eligible for appointment as arbitrators to the Permanent Court of Arbitration of 1899, are certainly not eligible for appointment as judges upon our court'. See Assembly AU/Dec. 84 (V) on the Election of Members of the African Commission in Sirte, Libya, 4-5 July 2005. On the election of judges of the African Court on Human and Peoples' Rights, see Assembly/AU/Dec.100 (VI) in Khartoum, Sudan, 23-24 January 2006.

¹³²³ Ms. Reine Alapini-Gansou (Benin), Mr. Musa Ngary Bitaye (The Gambia) and Mr. Mumba Malila (Zambia).

¹³²⁴ Ms. Faith Pansy Tlakula (South Africa), Chief of the Electoral Officer of the South African Electoral Commission.

¹³²⁵ Ms. Soyata Maiga (Mali), Ms. Catherine Dupe Atoki (Nigeria) and the re-elected Ms. Angela Melo (Mozambique).

¹³²⁶ Mr. Yeung Sik Yuen (Mauritius).

¹³²⁷ Ms. Zainabu Sylvie Kayitesi (Rwanda).

On the other hand, Commissioners are currently appointed by means of laborious diplomatic effort, carried out almost exclusively and in an exclusionist manner by respective ministries of foreign affairs. Interest in proposing competent, independent candidates is tainted by issues that are clearly political and by exchanges of favours between States. Thus States do not always propose the most qualified individuals.

To ensure independence of Commissioners, they recommended themselves that the African Commission should be totally independent of any entity, be it public or private. Therefore, during elections of members of the African Commission, State parties should not elect candidate holding portfolios that might impede their independence as members of the African Commission.¹³²⁸ State parties should implement the AU Guidelines on nominations to such bodies.¹³²⁹ The AU Commission has formulated a criteria aimed at addressing the question of incompatibility to ensure the independence of Members nominated by Member States to its organs and institutions.

Article 12 of the Protocol on the Statute of the African Court of Justice and Human Rights provides that the independence of the judges shall be fully ensured in accordance with international law. Oputa¹³³⁰ suggested that:

The independence of the judges is not intended for the intended for the personal benefit of the judges. It exists for the interest of the organisation they represent. It is intended to give the Court the honour, prestige, integrity and unrestrained liberty to do justice. It enables to be bold in their pronouncements, to rise above passion, popular clamour and the politics of the moment and to exercise 'freedom in thought and independence in action.

A related hurdle is that how to secure, in practical terms, the independence of the court.¹³³¹ For him, the court must be insulated from all manner of political wrangling by Member States; it must be given absolute autonomy.¹³³² This will ensure greater justice in the decisions and opinions of the court.¹³³³

¹³²⁸ Report on the Brainstorming on the African Commission (2006) 4.

¹³²⁹ Mukundi in Viljoen (ed.) (2006) 20.

¹³³⁰ As quoted by Udombana in Udombana N.J. *The African Regional Human Rights Court: Modelling Its Rules of Procedure* (Copenhagen: The Danish Centre for Human Rights, 2002) 144.

¹³³¹ Id.

¹³³² Ibid.

¹³³³ Ibid.

It is the only way the court can dispassionately enforce the provisions of the African Charter and other relevant international human rights instruments, without fear or favour, affection or ill will.¹³³⁴ The role of the Court should be like a mirror that shows all that presents itself without discrimination. It is also the only way in can offer effective remedies to victims.¹³³⁵

4.1.1.2. Lack of professionalism

One way in which the African Commission has tried to address the lack of adequate staffing of the Secretariat, as mentioned above, is the acceptance of volunteers, interns and personnel on secondment, and funded by organisations, countries in and outside Africa. However, many of these personnel are non Africans, sometimes student without knowledge on the African human rights system, and necessary experience. This has attracted an elaborate analysis by some African scholars such as Ankumah, to the effect that has given rise to fundamental challenges, such as lack of professional in its work, which undermines the legitimacy and credibility of the African Commission.¹³³⁶

If Western donors and sponsors were genuinely sincere in the human rights of Africans, they should sponsors Africans to work at the African Commission, rather non-Africans.¹³³⁷ She emphasised that Africans could have direct input in the work of the African Commission, because of the need to develop African human rights jurisprudence, especially as the African Charter provides for the African Commission to be inspired by African traditions and values, in addition to international norms, in the resolution of rights disputes.¹³³⁸ Nmehielle¹³³⁹ argued that:

... While it is necessary that foreign donors should give preference to sponsoring Africans, one would think that the time has come for Africa to take its obligations more seriously. Nothing stops African organisations sponsoring Africans to work at the Commission. Various NGOs receive massive supports, which they spend on non viable projects in the name of justifying the spending of the funds. Some of these funds should be used for staffing the Commission with competent African scholars.

¹³³⁴ Udombana (2002) 144.

¹³³⁵ Id.

¹³³⁶ Ankumah (1996) 33.

¹³³⁷ Id..

¹³³⁸ Ibid., 34.

¹³³⁹ Nmehielle (2001) 186.

In the past, the lack of professionalism on the part of Commissioners (politicians, diplomats, many people without a legal background at all) has led to the situation that quality of the African Commission's jurisprudence has been variable, some of its decisions are not supported by clear and persuasive reasoning. To address efficiently the lack of professionalism under the African Commission, there is a need to appoint only Commissioners with a clear legal background.

With regard to the African Court of Justice and Human Rights, it is still early to say whether or not it may face the lack of professionalism. However, the African Court of Justice will have to consider a whole variety of cases ranging from administrative cases, to economic integration issues to human and peoples' rights violations and so on. The relevant field of law are so diverse that it would be difficult to find judges who have expertise in each of these fields. This might result to the lack of professionalism. In Europe various calls have been to streamline the work of the European Court of Human Rights in Strasbourg and that of the Court of Justice in Luxembourg.

On the other hand, any human rights body as the African Commission demonstrated may be politically dominated as much by lack of resources and staff.¹³⁴⁰ Indeed, a court lacking a library, paper, computers, printers, translators, and so on may face the lack of professionalism.¹³⁴¹ This is another challenge that may impede the independence of the African Court of Justice and Human Rights. On the other hand, since international human rights law is dynamic and moves with changes in the continent, it will be necessary that judges of this new body to be regularly trained for the purpose of updating their knowledge.¹³⁴² Indeed, there is a knowledge that comes with experience; but opportunities should additionally be created for the judges to attend seminars and other relevant meetings, both inside and outside Africa.¹³⁴³

¹³⁴⁰ Borrowed from Udombana (2002) 146.

¹³⁴¹ Id.

¹³⁴² Ibid.

¹³⁴³ Ibid.

To deal adequately with the potential lack of professionalism, once the new Court will be functional, means should be given, especially at the earlier stage of its functioning, for the judges to visit their counterparts in the Inter-American Court and both European Court of Human Rights and the European Union Court of Justice in order to share and benefit from their experiences.

The judges may also need to be provided with language training since; at least, a working knowledge of one or two of the official languages of the Court will be of great value to the performance of their duties.¹³⁴⁴ Judges should also be trained on the use of electronic office equipments, such as computer appreciation and Internet application. These are not luxuries; they should be seen as the lowest common denominator of an effective Court.¹³⁴⁵ This holds true for members of the African Commission.

The qualifications of Commissioners are decisive for a successful carrying out the African Commission's mandate. The role of Commissioners is important not only for the fulfilment of their mandate but also for the work of the African human rights system as a whole. It is therefore important to maintain the highest possible professionalism and that the most qualified candidate is appointed to fulfil the tasks. In addition to developing and maintaining a roster for such purpose, the national parliaments should be involved in the process of selecting candidates from a broad list ensuring a gender distribution and the widest possible representation of all sectors of the society and make suggestions.

4.1.1.3. Part-time nature of the work

The Commissioners work on part-time meaning that they can only do so much while on duty of Commissioners.¹³⁴⁶ They handle different and full-time position in their different countries.¹³⁴⁷ There is still a possibility that conflict of interest may arise in some cases. Commissioners are already saddled with enormous tasks in their home States only to be saddled in addition with the enormous work of the African Commission.¹³⁴⁸

¹³⁴⁴ Borrowed from Udombana (2002) 146.

¹³⁴⁵ Id.

¹³⁴⁶ Hansungule (2000) 298.

¹³⁴⁷ Id.

¹³⁴⁸ Nmehielle (2001) 173.

It is not uncommon to notice as many as between four and five Commissioners being absent from the Commission's sessions.¹³⁴⁹ This could possibly be as a result of other engagements, which sometimes may be related with State matters.¹³⁵⁰ Part-time nature of the work of the African Commission and the African Court of Justice may have negative impact on their independence. While the Protocol on the Statute of the African Court of Justice and Human Rights may structurally protect the independence of judges, their complete independence may be threatened by the part-time status because they will be more committed to their full-time work. As result a, the work with the human rights body will appear as a secondary work with consequences such as little commitment.

4.1.1.4. Lack of resources or underfunding

Article 41 of the African Charter provides that: 'the Secretary General of the OAU (President of the AU Commission' shall appoint the Secretary of the Commission. He shall provide the staff and services necessary for the effective discharge of the duties of the Commission. The OAU (AU) shall bear cost of the staff and services'. However, the funding/financial situation of the African Commission remains a cause for concern.

Due to the weak economies of many of its Member States, the AU has failed to meet its financial obligations.¹³⁵¹ This is perhaps a reflection of the importance or lack thereof the Member States attach to human rights. It is also due to weak economies of many OAU Member States.¹³⁵² Budgetary constraints have oftentimes forced Commissioners to abandon idea of organising promotional activities, such as seminars, visits, ect. in State parties.¹³⁵³ Financial matters have taken up substantial spaces at the Commissions bi-annual sessions, thus, instead of using those limited periods to deliberate on important aspects of its mandate, the African Commission spend time discussing strategies for survival.¹³⁵⁴

¹³⁴⁹ Nmehielle (2001) 173.

¹³⁵⁰ Id.

¹³⁵¹ Ankumah (1996) 28

¹³⁵² Id.

¹³⁵³ Udombana (2002) 140.

¹³⁵⁴ Id.

In several occasions, the African Commission lamented its lack of some needed human and material resources.¹³⁵⁵ The African Commission has tried to address this challenge by accepting the services of legal officers and volunteers funded outside the AU. Until December 2008, the AU provided the African Commission with only two legal officers, a Secretary, a finance officer, two drivers, a documentation officer, a security guard and a cleaner. To keep operations at the secretariat functional at the barest minimum level, the secretariat has been forced to resort to extra-budgetary sources of funding from International Organisations, donor countries and NGOs.

In this regard, Mukundi¹³⁵⁶ believed that:

The African Commission is grossly understaffed and regrettably does not function as a respectable entity should. The effective functioning of the African Commission is a subject of great concern. The AU has not fulfilled its obligations to provide the staff and services necessary for the effective discharge of the Commission's duties as mandated. The reliance on donor funding is at least two fold: uncertainty and unreliability; and the possible derogation or perceived derogation of the Commission's independence. ...

To promote human and peoples' rights and ensure their protection in Africa, a vast continent of 53 independent States, the current staff strength is clearly inadequate. The African Commission considers at least fifty communications at each Ordinary Session and a lot of research goes in finalising a communication. Given the workload of the special mechanisms each of them should have a full time legal officer to coordinate their activities. From time to time, special rapporteurs have been provided with legal officers on short term basis. The staff provided to the African Commission by the AU is clearly inadequate to effectively supporting its very broad mandate. At the same time, it should be kept in mind that the effectiveness of the Secretariat is critical for the success of the African Commission.

As regards to material resources, ordinarily the African Commission should be provided with an adequate budget to enable it to maintain an efficient Secretariat and to finance its activities. There is no gainsaying the fact that the Secretariat needs adequate manpower and infrastructural resources for effective working of the African Commission.¹³⁵⁷

¹³⁵⁵ See for example, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999/2000 (2000) 11.

¹³⁵⁶ Mukundi in Vijoed (ed.) (2006) 22.

¹³⁵⁷ Nmehielle (2001) 186.

The primary responsibility in achieving this lies with the AU.¹³⁵⁸ Having established the mechanism, the organisation must strive to fulfil its obligations towards it. Africans cannot blame outsiders for its inability to meet its obligations.¹³⁵⁹

On the other hand, for the Secretariat to effectively support the African Commission in the execution of its mandate, it would need the following proposed staff structure, made pursuant to Executive Council Decision EX.CL/322 (X) on the 21st Activity Report of the African Commission adopted at its Tenth Ordinary Session held from 25-26 January 2007 in Addis Ababa, Ethiopia.¹³⁶⁰ The AU should provide adequate resources to ensure the smooth operation of the African Commission in discharging its mandate.¹³⁶¹ Use of extra budgetary allocations should be encouraged given the limitation of available resources but channelled through a common pool possibly the AU ensure transparency and accountability.¹³⁶²

A corollary to the above discussion is the question of funding of the African Court of Justice and Human Rights. African States have a poor record of providing adequate funding to the continent's human rights mechanisms and this may become a challenge for the African Court of Justice and Human Rights, particularly if it will attract high case load. The Protocol provides that expenses of the Court, emoluments and allowances for the judges and the budget of Court shall be borne by the AU.¹³⁶³

A basic and perennial problem facing many supranational institutions in Africa has been finance.¹³⁶⁴ And this is because African States have routinely defaulted in meeting their financial obligation to the regional body.¹³⁶⁵ The arrears may cause not only the AU to be stillborn but the Human Rights Court as well. On the other hand, if African States are faithful in meeting their financial obligations to the AU, it should be possible for the Union to fund its institutions effectively, including the Court.¹³⁶⁶

¹³⁵⁸ Nmehielle (2001) 186.

¹³⁵⁹ *Id.*

¹³⁶⁰ The Decision 'calls on the Commission of the AU in collaboration with the African Commission on Human to propose a new structure for the latter to the next Ordinary Session of the Executive Council taking into consideration the broad mandate of the African Commission on Human and Peoples' Rights.'

¹³⁶¹ Mukundi in Vijoen (ed.) (2006) 23.

¹³⁶² *Id.*

¹³⁶³ Protocol on the Statute on the African Court of Justice and Human Rights, Arts 23 and 26.

¹³⁶⁴ Udombana (2002) 136.

¹³⁶⁵ *Id.*

¹³⁶⁶ Ankamah B. 'African Union in Danger of Being Stillborn' (June 2002) *New African* 16, 20.

The African Court of Justice and Human Rights should not suffer from resources and funding, since it will exist to complement the protective mandate of the African Commission and the African Committee on the African Charter on the Rights and the Welfare of the Child. For instance, the AU will have to pay travel and subsistence expenses of the judges while on official duties. The judges and other administrative staff should be sufficiently remunerated in order for them to be motivated. All this requires funding and resources.

4.1.1.5. Remedies and enforcement of decisions

With regard to inter-State communications, the African Commission shall, in line with Articles 52 and 53 draw up a report containing facts and findings that it finds useful, and make recommendations to the AU Assembly. Rule 101 of the rules of procedure clarify that 'the report shall concern the decisions and conclusions that the Commission will reach'. Concerning other communications, in addition to Article 58 of the African Charter, rule 120 of the rules of procedure states that the African Commission shall prepare observations on admissible cases and communicate them to the AU Assembly and the relevant State party.

The AU Assembly can then request an in-depth study and a factual report, accompanied by findings and recommendations. In general, the report contains the decisions of the African Commission, describing facts, the complaint, the procedure and the law, both related to admissibility and, if relevant, merits, as well as findings and recommendations. The report is included in an annual activity report, and submitted to the AU Assembly in conformity with Article 54 of the African Charter. In practice, the African Commission submits its report to the AU Executive Council. The question is whether do the recommendations made by the African Commission become binding once the report has been adopted and published? There is no clear response from the African Charter in this regard. However, there would not be much purpose in making recommendations to the AU Assembly unless it was presumed that the AU could act on such recommendations.

Article 6(2) of the AU Constitutive Act states that 'the AU Assembly is the supreme organ of the AU.' One of the tasks of the AU Assembly is to 'make, receive, consider and take decisions on reports and recommendations from the other organs of the Union'. It is not explicitly mentioned in the AU Constitutive Act that the decisions of the AU Assembly are binding on Member States.

However, the fact that the AU Assembly is the supreme organ of the AU would mean that its decisions are binding for other AU organs and Member States. In this regard, Article 23(2) of the AU Constitutive Act provides that:

Any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

The decisions by the AU Assembly are to be regarded as decisions of the AU. Since there are sanctions against Member States failing to comply with such decisions, it can be said that such decisions are binding, because it is absurd to sanction Member States for failing to comply with non-binding decisions. The concern remains, however, whether or not the adoption by the AU Assembly or the AU Executive Council (*per* delegation) entails an endorsement of the decisions by the African Commission on inter-State and individual communications, in such a way that they become binding as decisions of the AU itself.

There is no positive answer, since the AU Assembly has never taken any steps to force any Member State to comply with a decision by the African Commission with regard to a communication, and because there is no mechanism that can enforce binding decisions. When adopting an annual activity report, it would not seem that the AU Assembly or the AU Executive Council makes any specific assessment of each point of law contained in the report, but rather that it assumes that this has been the work done by the African Commission at a given time; and the correct procedures *vis-à-vis* Member States have been followed, and that the report may therefore be published.

Although the decisions of the African on communications lack formal binding force of a ruling of a court of law, Murray wrote that they have a persuasive authority akin to the opinions of the UN Human Rights Committee.¹³⁶⁷ A study by Viljoen and Louw 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.¹³⁶⁸

¹³⁶⁷ Murray R. 'Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights' (1997) *International and Comparative Law Quarterly* 412, 248.

¹³⁶⁸ Viljoen F. and Louw L. 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 (1) *American Journal of International Law* 1-34.

This same study also concluded that it is political rather than legal factors that are most likely to determine compliance levels.¹³⁶⁹ This is the other challenge confronting the African human rights system. While African States are clearly willing to establish human rights institutions, they often lack the political will to submit themselves to a true scrutiny by these mechanisms, as battles over access suggest, or to reform their practices when these are found to have violated human rights.¹³⁷⁰ Anyangwe argued that an expectation of compliance does appear to have been engendered.¹³⁷¹

The African Court of Justice and Human Rights has power to enforce its judgements against States that have violated the provisions of the African Charter, the African Charter on the Rights and the Welfare of the Child, the Protocol to the African Charter on the Rights of Women in Africa and any other relevant human rights instrument ratified by States concerned. Where a party failed to comply with a judgment, the Court may refer the case to the Assembly, which will decide on measures to be taken to give effect to that judgment.

This approach is in accord with international law and practice. In this regard, Udombana held that the binding nature of judgements rendered by international bodies, however, does not equal to effective enforcement of such decisions, which is a function to be carried out by political bodies.¹³⁷² Thus, enforcing court decisions is a political, rather than a judicial duty. However, competence of the Council of Ministers or Assembly, a political body, to deal with human rights issues is still suspect.

4.1.1.6. Dependence on political organs

Effective working of African human rights mechanisms depends in some measure on the extent to which the State parties, and the AU, want to use them to promote human rights and to ensure their protection on the continent. One of the major challenges facing the African Commission is that the President of the AU Commission has a larger role to play in its activities.

¹³⁶⁹ Vijoen and Louw (2007) 101 (1) 1-34.

¹³⁷⁰ Sceats (2009) 14.

¹³⁷¹ Anyangwe (1998) 625.

¹³⁷² Romano as quoted in Udombana (2003) 834.

He or she appoints not only the secretary of the African Commission but he or she also mandates to ‘provide the staff and services necessary for the effective discharge of the duties of the Commission’.¹³⁷³ Additionally, under the African Commission’s Rules of Procedure, almost all duties that facilitate and assist the African Commission in the performance of its duties are vested in the President of the AU Commission. One concurs with Udombana, who contended that this is not good enough for an institution that is supposed to be independent, functioning as a watchdog on State parties on human rights issues.¹³⁷⁴ The AU Assembly or its Chairman are empowered to request the African Commission to undertake in depth studies of human rights situations amounting to emergencies serious or massive violations of human and peoples’ rights duly reported to them by the African Commission.¹³⁷⁵ Again the African Commission has a duty to perform any task, not specified under the African Charter, which may be assigned to it by the AU Assembly.¹³⁷⁶

On the other hand, a much raised challenge in the African human rights system which brings the efficacy of the African Commission into question relates to the principle of confidentiality.¹³⁷⁷ Amoah¹³⁷⁸ rightly argued that:

The Commission has so far tied its own hands by adopting a strict approach towards the issue of confidentiality. It has tended not to disclose the names of States against whom complaints have been made. This rather strict adherence to the principle of confidentiality has tended to shield the work of the Commission from the public view and scrutiny. The end result has been protection of States parties but exposure of the Commission to charges of ineffectiveness and lack of certainty about the end result of its work. Both situations undermine the confidence of the general public regarding the Commission’s effectiveness and relevance.

¹³⁷³ African Charter, Art 41. See also Rules of Procedure of the African Commission, Rule 22 defining the functions of the OAU Secretary-General.

¹³⁷⁴ Udombana (2002) 145.

¹³⁷⁵ African Charter, Art 58.

¹³⁷⁶ *Id.*, Art 45 (4).

¹³⁷⁷ Article 59 of the African Charter reads : ‘1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide. 2. However, the report of the activities of the Commission shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government. 3. The report of the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government’.

¹³⁷⁸ Amoah (1992) 235-236.

It is important to note that significant improvements have taken place in respect of how the African Commission interpreted the principle of confidentiality although much remains to be done.¹³⁷⁹ In particular, the Seventy Activity Report of the African Commission discloses the status of cases submitted to the African Commission. The report was considered and published by the OAU.¹³⁸⁰ The dependence of the African Commission to the AU Assembly of Heads of State and Government took another dimension because of what has been seen as the Assembly's political interference in the African Commission's task. This was in light of the Assembly's decision to suspend the publication of the African Commission's 17th Activity Report, at its 4th Summit in Addis Ababa, Ethiopia¹³⁸¹ and certain aspects of the 19th Activity Report before publication, at the Assembly's 6th Summit, January 2006, Khartoum, Sudan.¹³⁸²

The decision to suspend the suspend the publication of the 17th Activity Report was taken after the Zimbabwe protested that the report did not incorporate its response to the findings of the African Commission on a fact finding mission which was part of the Annual Activity Report's annexes.¹³⁸³ This was despite the fact that the African Commission had solicited time and again the said response to no avail before its inclusion in the Annual Activity Report.¹³⁸⁴ The deletion of certain aspect of the 19th Activity Report was at the behest of the States mentioned in the said resolutions.¹³⁸⁵ This was also despite the fact that the resolutions on the human rights situation of the said States like many other resolutions in the activity reports had been adopted by the African Commission in accordance with its rules of procedure.¹³⁸⁶

¹³⁷⁹ Ankumah (1996) 39-40

¹³⁸⁰ Id., 40.

¹³⁸¹ Assembly/AU/Dec. 49 (III).

¹³⁸² The AU Assembly decided : 'to adopt and authorise, in accordance with Article 59 of the African Charter on Human and Peoples' Rights, the publication of the 19th Activity Report of the African Commission on Human and Peoples' Rights and its annexes, except for those containing the Resolutions on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe. It calls upon the African Commission on Human and Peoples' Rights to ensure that in future, it enlists the responses of all States parties to its Resolutions and Decisions before submitting them to the Executive Council and/or the Assembly for consideration; and requests States parties, within three (3) months of the notification by the African Commission on Human and Peoples' Rights, to communicate their responses to Resolutions and Decisions to be submitted to the Executive Council and/or the Assembly...'.
¹³⁸³ Mukundi in Viljoen (ed.) (2006) 21.

¹³⁸⁴ Id.

¹³⁸⁵ Ibid.

¹³⁸⁶ Ibid.

In light of the concerns raised above with regard to the annual activity reports of the African Commission, it has been suggested that:

The African Commission should clarify its status, and dialogue with the Assembly to ensure that the perceived or actual interference in its work is addressed with finality. States should also desist from putting undue pressure on the Assembly while all along they have failed to cooperate with the African Commission by responding to its requests for compliance or information.¹³⁸⁷

4.1.2. Challenges facing the African Commission (*inter alia* overlapping protective mandate with the African Court of Justice and Human Rights)

One of the most immediate challenges will be the relationship between the African Commission and the African Court of Justice and Human Rights. As for the Africa Court, the African Court of Justice and Human Rights is to complement the protective mandate of the African Commission . The two bodies are therefore expected to deliberate and discuss how to harmonise their mandates in order to avoid possible conflicts and overlaps. In the case of the African Court and the African Commission, the two mechanisms have agreed to hold meetings to discuss common areas of interest, failure to forge a close working relationship could have serious consequences, particularly as it seems likely that the African Commission will end up feeling cases to the African Court.

Another major concern remains the possible overlaps and conflicts of jurisdiction between the African Court of Justice and Human Rights and the African Commission and the sub-regional courts of justice that have mushroomed in the recent past in Africa and have also human rights mandate.¹³⁸⁸ There are possible jurisdictional overlaps and conflicts that demand urgent resolution to ensure that the courts do not duplicate efforts and are effective in protecting human rights in Africa. It is left to the judges to determine how such overlaps will be resolved. There is a possibility that a matter may be brought before a sub-regional court and subsequently to the African Court of Justice and Human Rights.

¹³⁸⁷ Mukundi in Viljoen (ed.) (2006) 21.

¹³⁸⁸ See, for instance, the 1993 ECOWAS Treaty (Art 4); the 1994 COMESA Treaty (Art 6); the 2000 EAC Treaty (Art 7); and the 2001 SADC Treaty (Art 4). The ECOWAS Court of Justice is established by sections 6 and of the ECOWAS Treaty, the EAC Treaty is established under Art 9 of the EAC Treaty, the SADC Tribunal is established by Art 9 of the SADC Treaty, and the COMESA Court is established by the Art 7 of the COMESA Treaty.

A question the raises as to whether the sub-regional courts can be regarded an international tribunal, thereby precluding determination of the matters before the African Court of Justice and Human Rights. In the event they are considered in this way, matters before these courts would not be entertained by the African Court of Justice and Human Rights on the grounds that they have already been deliberated upon by another international tribunal. With regard to the African Court, Mukundi suggested that it is imperative that the sub-regional courts share their rules of procedure in order to avoid possible loop-holes that could potentially hamper the effectiveness of the African Court.¹³⁸⁹

Discussing the same concern with regard to the African Commission and the African Court, Odinkalu acknowledged that another potential difficulty is the interpretation of the African Charter by these sub-regional treaty-monitoring bodies. That may entail the bodies applying directly the African Charter provisions in a dispute, or alternatively relying on the African Charter and the jurisprudence of the African Commission and the African Court as a source of law.¹³⁹⁰

In his opinion, the interpretation of the sub-regional treaty monitory bodies may differ from that of the African Commission or that of the African Court.¹³⁹¹ In view of the possibility of different outcomes depending on which forum a litigant decides to take a case to, there is need for proper co-ordination and harmony amongst the available platforms for vindication fundamental human rights.¹³⁹² The same can be said about the African Court of Justice and Human Rights.

¹³⁸⁹ Mukundi G.W. (ed.) *African Court on Human and Peoples' Rights: Ten Years on and still on Justice* (London: Minority Rights Group International, 2008) 15.

¹³⁹⁰ Odinkalu C.A. 'Complementarity, Competition or Contradiction: the Relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa', presentation to Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights, Gaborone, Botswana, 9-10 December 2003, available at: www.africancourtcoalition.org/content_file/files/chidionComplementarity.doc , 10, (visited on 17 April 2010).

¹³⁹¹ Odinkalu (2003) 10.

¹³⁹² Id.

Inevitably, the multiplicity of the sub-regional courts, partly a consequence of the failure to operationalise the African Court more speedily raises the possibility of ‘forum shopping’ in a bid to maximise on available choices of outcomes.¹³⁹³ That is particularly so where the different platforms are likely to issue varied decisions on matters before them. It is therefore imperative that these institutions share information and cooperate on matters of common interest. According to Odinkalu, such cooperation will ensure that,

These institutions are in a position to anticipate and respond to cases of unwarranted forum shopping. By sharing jurisprudence in completed cases, they will also be able to minimise the opportunities for contradictory jurisprudence on African Charter.

To illustrate the necessity of this cooperation, one refers on a case decided by the SADC Tribunal. *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe*.¹³⁹⁴ Land reform in Zimbabwe began after the signing of the Lancaster House Agreement in 1979 in an effort to more equitably distribute land between the historically disenfranchised blacks and the minority-whites who ruled Zimbabwe from 1923 to 1979. Government-orchestrated land invasions began in February 2000. The Zimbabwean government formally announced a ‘fast track’ resettlement program in July 2000, stating that it would acquire more than 3,000 farms for redistribution. Mike Campbell purchased Mount Carmel in 1974 (full title vested in 1999). In July 2001, amid large-scale land invasions by ‘war veterans’, Campbell received a government notice to acquire Mount Carmel in the district of Chegutu, but the notice was declared invalid by the High Court. In July 2004, a new notice of intent to acquire Mount Carmel was published in the official Government Gazette, but no acquisition notice was actually issued.

However, two months later, according to court filings, ‘persons purported to occupy the farm on behalf of Zanu PF spokesman Nathan Shamuyarira, claiming the former minister had been allocated the farm’. After three more preliminary notices to take the farm were published in 2004, Campbell applied to the High Court for a protection order.

¹³⁹³ Odinkalu (2003) 10.

¹³⁹⁴ *Mike Campbell (PVT) Ltd and Others v. The Republic of Zimbabwe*, SADC Tribunal Case No. 2/2007 (hereinafter *Campbell*).

The Zimbabwean Parliament passed two amendments to the Constitution of Zimbabwe: one on 19 April 2000 (Amendment 16),¹³⁹⁵ and the other on 14 September 2005 (Amendment 17).¹³⁹⁶ The two amendments authorized the seizure of white-owned farmlands without compensation. Since 2000, the Zimbabwean Government has expropriated a string of white-owned commercial lands without compensation.¹³⁹⁷ Campbell initiated proceedings in the Supreme Court of Justice on May 15, 2006, challenging the validity of Amendment 17.¹³⁹⁸ On October 11, 2007, before the Supreme Court of Zimbabwe had delivered its judgment in the case, Campbell filed an application with the SADC Tribunal Campbell and other applicants challenging the taking by the State of their agricultural land as well as applying for interim measures in terms of Article 28 of the SADC Tribunal Protocol.

On 13 December 2007, the SADC Tribunal granted the interim measure, which ordered Zimbabwe to refrain from taking any step or permitting any step, directly and indirectly, to interfere with the peaceful residence on, and beneficial use of, the land in question.¹³⁹⁹ Subsequently, other persons joined as parties in the proceedings against the Government of Zimbabwe. *The Mike Campbell (Pvt) Limited and William Michael Campbell* case and the cases of the 77 other applicants were then consolidated in one case.

¹³⁹⁵ Constitution of Zimbabwe Amendment No. 16, Act 5 of 2000.

¹³⁹⁶ Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005. Amendment 17 was added to Zimbabwe's Constitution on September 14, 2005 to vest ownership of certain categories of land on the Zimbabwean government and to eliminate the courts' jurisdiction to hear any challenge to the land acquisitions. Section 16 B (2) of Amendment 17 read in the relevant part as follows/

- (a) all agricultural land... [reference to national gazettes where specific agricultural lands for resettlement purposes are identified] ... is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and
- (b) No compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

¹³⁹⁷ Constitution of Zimbabwe para 16 (A) (1) states that: 'in regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with programme of land reform, the following shall be regarded as of ultimate and overriding importance:

- a) Under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation.
- b) The people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the independence of Zimbabwe in 1980;
- c) The people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land accordingly:
 - (i) The former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and
 - (ii) If the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

¹³⁹⁸ *Mike Campbell (Pvt) Ltd and Others v. The Minister of National Security Responsible for Land, Land Reform and Resettlement and the Attorney-General* (SC 49/07) (2007).

¹³⁹⁹ *Mike Campbell (PVT) Limited and Another v. The Republic of Zimbabwe*, Case No. SADCT 2/07, para 8.

The Supreme Court of Zimbabwe issued a decision in the case on January 22, 2008, dismissing Campbell's challenge. The Supreme Court ruled that: (i) race was not an issue in the case, because neither the relevant provisions of Section 16B of the Constitution nor the land acquisitions made reference to race or color; (ii) the Government of Zimbabwe has an inherent right to compulsorily acquire property, and (iii) the legislature has full power to change the constitution. The Court also stated that an 'application to a court of law to challenge a lawful acquisition would in effect be an abuse of the right to protection of law'.¹⁴⁰⁰

Campbell and other applicants filed an application with the SADC Tribunal to challenge the legality of acquisition of certain agricultural land by Zimbabwean Government. The SADC Tribunal concluded that it had jurisdiction to hear the case because the dispute concerned 'human rights, democracy and the rule of law,' which are binding principles for members of the SADC. The SADC Tribunal granted an interim measure ordering the government of Zimbabwe to take no steps, directly or indirectly, to evict Campbell from the farm or interfere with his use of the land. The Tribunal's decision addressed four main issues: (i) Whether the Tribunal had jurisdiction to hear the case; (ii) whether the plaintiffs had been denied access to domestic courts in violation of the SADC Treaty; (iii) whether the Zimbabwean government had discriminated against the plaintiffs on the basis of race, and (iv) whether the plaintiffs were entitled to compensation.¹⁴⁰¹

The SADC Tribunal decided that it had jurisdiction to hear the case, because Amendment 17 had eliminated the plaintiffs' access to the domestic courts, and the plaintiffs were therefore entitled to seek remedy before the Tribunal. The SADC Tribunal found that the plaintiffs had been deprived of their right to a fair hearing before being deprived of their rights. On the racial discrimination issue, the SADC Tribunal ruled, even though Amendment 17 did not explicitly refer to white farmers, its implementation affected white farmers only and, consequently, constituted indirect *de facto* discrimination or substantive inequality.

¹⁴⁰⁰ *Campbell (Pvt) Ltd and Others v. The Minister of National Security Responsible for Land, Land Reform and Resettlement and the Attorney-General.*

¹⁴⁰¹ *Id.*, paras 16-17.

The SADC Tribunal also ruled that the differentiation of treatment meted out to the applicants also constituted discrimination as the criteria for such differentiation were not reasonable and objective but arbitrary and based primarily on considerations of race. The SADC Tribunal ruled that, implementing Amendment 17, the Government of Zimbabwe had discriminated against the applicants on the basis of race and thereby violated its obligation under Article 6(2) of the SADC Treaty. Finally, the SADC Tribunal concluded that the plaintiffs were entitled to compensation for the expropriation of their lands.¹⁴⁰²

After concluding that Amendment 17 was discriminating against the applicants indirectly on the basis of race, Justice Mondlane only uttered the following dictum:

We wish to observe here that if (a) the criteria adopted by the respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands; and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalised individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the applicants would not constitute racial discrimination.¹⁴⁰³

In his dissenting opinion, Justice Tshosa disputed that the discrimination was indirectly racial and insisted that, for the purposes of Amendment 17, classifications only targeted certain lands and not certain people:

Amendment 17 targets agricultural land and the applicants are affected not because they are of white origin but because they are the ones who own the land in question. Thus, the target of Amendment 17 is agricultural land, not people of a particular racial origin. This means that in implementing the Amendment it was always going to affect those in possession of the land, be they white, black or from any other racial background.¹⁴⁰⁴

¹⁴⁰² *Campbell*, paras 49-53.

¹⁴⁰³ *Id.*, para 53.

¹⁴⁰⁴ *Ibid.*, Dissenting Opinion, para 3.

On the issue of compensation, the SADC Tribunal rightly ruled that the absence of compensation for the expropriations of white-owned farmlands rendered the expropriations unlawful.¹⁴⁰⁵ In so doing, the SADC Tribunal complied with international standards. Analysing the contribution of *Campbell* case to expropriation law, Zongwe argued that:

The precedential value of *Campbell* is equivocal on the question as to the extent to which a country can expropriate property to correct the economic inequalities caused by colonisation. On the one hand, *Campbell* clearly creates an exception. It implies that, if they are based on race and do not compensate the plaintiffs, expropriations can be illegal even if they are part of policies aimed at redressing economic inequalities brought about by colonialism.¹⁴⁰⁶

On the other hand, *Campbell* loses sight of the general exception that post-colonial expropriations to redress economic inequalities are lawful. As a matter of principle, the failure by the SADC Tribunal to contextualise the Zimbabwean expropriations as a form of affirmative action policies or an exception to the general prohibition on discriminatory expropriations contradicts foreign investment law and creates a constitutional crisis in the SADC region.¹⁴⁰⁷

Additionally, Zongwe contended that unlike most African countries that achieved political independence in the 1960s, Zimbabwe, South Africa and Namibia are unique on the continent in that the black majority reclaimed political power from the white minority fairly recently.¹⁴⁰⁸ Namibia and South Africa have provisions in their constitutions which exempt affirmative action policies and other measures to redress past injustices from the general prohibition on racial discrimination.¹⁴⁰⁹ According to Zongwe, the *Campbell* case creates a crisis by suggesting that these policies and measures potentially or actually violate their obligations under the SADC Treaty.¹⁴¹⁰ However, Zongwe recognised that the between Zimbabwe and its Namibian and South African counterparts is the orderly, gradual and procedurally fair process that characterises land redistribution in Namibia and South Africa.¹⁴¹¹

¹⁴⁰⁵ *Campbell*, para 57.

¹⁴⁰⁶ Zongwe D.P. 'The Contribution of *Campbell v Zimbabwe* to the Foreign Investment Law on Expropriations' Research Paper 50/2009 5 (9) *Comparative Research in Law and Political Economy Series 27*, available at <http://ssrn.com/abstract=1516564> (accessed on 20 April 2010).

¹⁴⁰⁷ *Id.*

¹⁴⁰⁸ *Ibid.*

¹⁴⁰⁹ *Ibid.*

¹⁴¹⁰ *Ibid.*

¹⁴¹¹ *Ibid.*, 28.

In this regard, one concurs with Zongwe because race-based expropriations are not unlawful, as a matter of principle, if they aim at redressing the economic inequalities caused by a colonial past. Race-based expropriations to correct the effects of colonialism are an exception to the non-discrimination principle, but expropriations as an exception to the non-discrimination principle are unlawful if the expropriating State does not pay compensation to the plaintiffs. For instance, if the expropriating State confiscates the plaintiff's property.

On 20 June 2008, the applicants referred to the SADC Tribunal declaring that the Government of Zimbabwe in contempt.¹⁴¹² The SADC Tribunal declared that the Government of Zimbabwe had failed to comply with its previous decision. The SADC Tribunal stated that it would report its finding to the Summit of the SADC.¹⁴¹³ Mike Campbell applied to register the Tribunal's judgment of November 28, 2008 in the High Court on December 23, 2008, but the application was not accepted with no reasons given. Over a hundred prosecutions of white farmers continue because they remain on their lands.¹⁴¹⁴ The High Court issued orders in April 2009 to evict the invaders on Mount Carmel, but nothing was done by the police to enforce the orders. No mention of the Tribunal's decision was made at the SADC's Summit in early September 2009. After February 2009, Mike Campbell, Ben Freeth and his family received threats from invaders.¹⁴¹⁵ Mike Campbell and his wife were eventually forced out of their home and Mount Carmel was invaded. Ben Freeth's and Mike Campbell's homesteads were destroyed in fires on August 30, 2009 and September 2, 2009, respectively.¹⁴¹⁶

Zimbabwe's Justice Minister wrote to the SADC Tribunal to inform of Zimbabwe's withdrawal from the Tribunal in a letter written on August 7, 2009, arguing that it did not have jurisdiction over Zimbabwe because the Tribunal's Protocol has not yet been ratified by two-thirds of the total members of the SADC, as required by the organization's treaty, and stated that Zimbabwe would no longer be bound by any of the SADC Tribunal's past or future judgments.¹⁴¹⁷

¹⁴¹² *Mike Campbell and Others v. Zimbabwe*, Contempt of Court Ruling, Case No. 3 of 2009.

¹⁴¹³ *Id.*

¹⁴¹⁴ *Ibid.*

¹⁴¹⁵ Ruppel O.C. and Bangamwabo F.-X. 'The SADC Tribunal: A Legal Analysis of Its Mandate and Role in Regional Integration' in *Namibian Economic Policy Research Unit* (eds.) *Monitoring Regional Integration in Southern African: Yearbook 2008* (Windhoek: Nepu, 2008) 7.

¹⁴¹⁶ Chimhavi D. 'Prize Zim Farm Attacked', NEWS 23, 3 September 2009, available at: www.new24.com/Content/Africa/Zimbabwe (accessed on 20 April 2010).

¹⁴¹⁷ *Id.*

4.3.1. Potential challenges to the African Court of Justice and Human Rights

4.1.3.1. Temporary co-existence of the African Court of Human Rights and the African Court of Justice and Human Rights

The 11 inaugural and current judges of the African Court were sworn on the 2 July 2006 by the AU Assembly in Banjul, the Gambia. They were elected by the Assembly on its 6th Summit held in Soudan, on January 2006. As of April 2010, the African Court held fifteen Ordinary Sessions.¹⁴¹⁸ The African Court also ruled on one case¹⁴¹⁹ which will be summarily discussed below.

On December 15, 2009, the African Court on Human and Peoples' Rights issued its first ever judgment. The Court convened to consider a petition filed by Michelot Yogogombaye encouraging the dismissal of charges pending in Senegal against former Chadian president Hissein Habre. Yogogombaye is believed to have been a minister for a short time under Habre's former regime.

Yogogombaye was born on October 1, 1959. He is the founding president of the *Rassemblement Démocratique pour la Paix et la Liberté au Tchad* (RDPL), an opposition political party in Chad. He is also the self proclaimed president of the military rebellion in Europe against the current Chadian regime. In the late 1980's, while Habré was still in power, Yogogombaye was arrested but freed some two weeks later, even though he seems to have been a supporter of Habré's regime. In December 1990, after Idriss Déby won the presidential election against Hissein Habré, Yogogombaye maintained some political activities until 1992 when he quickly fled the country for Switzerland, where he currently resides. It appears therefore that he has consistently and openly supported Habré. In August 2008, he even stated that he was ready to testify before the Senegalese judges to support "[his] President, El-Hadj Hissein Habré".

¹⁴¹⁸ For more information on the sessions of the African Court, see its web site: www.african-court.org

¹⁴¹⁹ Application No. 001/2008 in the Matter of *Michelot Yogogombaye v. The Republic of Senegal* (Judgment).

The purpose of the preceding consideration of the applicant is twofold. First, it is difficult to make sense of the interest Yogogombaye has in the case against Habré which would have supported his application, thus giving him standing. In addition, it is clear that Yogogombaye has a political agenda which led him to file the application in the first place. In that context, his adherence to the military opposition against the current regime in Chad is a key additional element. In his application, Yogogombaye argued that being a citizen of Chad is sufficient grounds for the jurisdiction *ratione personae* of the Court, and such argument could have been easily dismissed.

The application was dated August 18, 2008, delivered to the African Union Commission (AUC) by e-mail on August 19, 2008, and addressed to the African Court both directly and indirectly (through the AUC). But it was only effectively delivered to the African Court on December 29, 2008 (with a cover letter dated November 2008 from the Legal Counsel) through the African Union Commission. In the application, Yogogombaye requested that the African Court order the discontinuance of the case against Habré in Senegal, particularly on the bases of a purported violation of the non-retroactivity principle and alleged political abuse of the universal jurisdiction principle. Yogogombaye also requested the use of *Ubuntu*, a typically African means for conflict resolution. The aim of the application is certainly to put an end to the saga against Habré and to free Habré after years of house arrest.

The pleadings of the Republic of Senegal were centred on the African Court's lack of jurisdiction on the basis that Senegal has not consented to the right of individuals to lodge cases against it before the African Court. The African Court's December 15th judgment seems quite straightforward as well as in line with the pleadings of Senegal. The 1998 Protocol establishing the Court states that an individual can only lodge a case against States who have made a declaration to the effect of granting individuals such right. In the present case, despite a statement by the applicant to the contrary, the African Court found that the Republic of Senegal has never granted individuals the right to lodge any case against it before the African Court. Such a simple response does not warrant six months of deliberation, let alone nearly twelve months of deliberation. In fact, in his separate opinion Judge Ouguergouz, producing a reason very much enriched by his prior experience at the International Court of Justice, stated that the Applicant ought to know why it took so long for the African Court to come to a decision.

Judge Ouguergouz went on to detail his own thorough analysis of the complexity of the case as far as jurisdiction is concerned. In that framework, he developed the concept of *forum prorogatum*, which would have led the Judges to think that the Republic of Senegal, through its attitude, seems to have consented to the proceedings. He consequently questioned whether any application should ever have just been dismissed by the Registry when it could not be excluded that the State would consent to such application. While the argument remains technical, even though quite well explained, it is difficult for one to satisfy oneself with this first judgment of the African Court.¹⁴²⁰

Although the simplicity of the questions posed by the African Court would seem to warrant simple and clear responses, it took almost a year for the African Court to come up with a decision. In addition, the judgment was only 13 pages long, with some three pages dedicated to an elucidation of the African Court's actual reasons and the remaining pages being devoted to the facts and procedural details. What message does such management of the first case convey to the individuals in Africa? Will the Africans and the residents in Africa still believe that the African Court is going to do justice to them? The African Court will need to improve its pace in deciding cases and the calibre of its reasoning.

Moreover, there have been issues with the transparency of the proceedings; for instance, the judgment reveals that some interim orders were made during the course of the proceedings. But none of those orders were ever made public even though nowhere in the judgment was it stated that they were confidential. Moreover, the references in the judgment to those orders were missing, and one cannot trace them for a comprehensive understanding of the case and the procedure. The same can be said for the case file: the documents of the proceedings (especially the application and the pleadings) have not been published to the best of our knowledge even though the African Court has not stated whether they are confidential or not. However, those documents are summarized in the judgment without any further explanation. The question is can justice be seen to have been served in such circumstances? The African Court will gain respect, prestige, and good publicity if its judges and civil servants streamline the African Court's procedure and policy.

¹⁴²⁰ Judge Ouguergouz, Separate opinion, 5.

Finally, one might wonder whether the parties were duly informed of the issuance of the Judgment as neither of the two was present. It seems unlikely that such absence should be analyzed by a lack of interest from each of them, especially from the Applicant's side. In conclusion, this judgment was slightly deceptive, but one must hold on to the hope that in serious cases, possibly regarding Burkina Faso or Mali, the two countries that have granted individuals the power to lodge applications against them, the African Court will be able to substantially serve justice.

Before this decision, it was difficult to comprehend why the African Court on Human and Peoples' Rights, two years since its judges were appointed, was still not operational. It was imperative that the African Court begins without further delays its core functions of adjudication human rights cases on the continent rather than just meeting to talk about how to set up the Court, a function that should have been left to bureaucrats. The effective functioning of the African Court leads to the decision by the AU Assembly to merge the two will cause threat to the coexistence of the two courts. A one-year transitional period, during which time the African Court is already operational will not be enough for the transfer of its prerogatives, assets, rights and obligations to the fused court.

4.1.3.2. Coverage and accessibility

Beyond the challenges mentioned above, it is also not clear whether many African people are aware of the remedies available to them through these sub-regional courts. An even more pressing question is whether the majority of citizens could afford to seek redress in these courts assuming that all remedies at the national level had been exhausted and these individuals are aware that such an opportunity is available to them. Clearly, the simple answer to this question is that only a very limited number of citizens would be in a position to do so. Moreover, because most of the African human rights enforcement mechanisms lack institutions of *pro deo* legal representative which offer individuals the opportunity to seek remedies against States when their rights have been violated, it is hard to imagine that many people could ever afford the legal costs that would be incurred by taking on their respective governments in bids to seek redress for violations of their rights.

The question of whether individuals are even aware of the remedies at their disposal is perhaps more importantly, human rights mechanisms are often elite-driven and therefore far-removed from and inaccessible to ordinary citizens. Unless this challenge is urgently addressed, any subsequent Endeavour to establish regional human rights bodies, will not likely bear fruit.

As soon as the Protocol on the Statute of the African Court of Justice and Human Rights, all cases pending before the African Court will be transferred to the Human Rights Section of the new Court.¹⁴²¹ While all AU Member States have ratified the African Charter, and are thus subject to oversight by the African Commission, some of States have ratified the Protocol on the African Court, and none have ratified the merger agreement establishing the African Court of Justice and Human Rights as of 31 December 2008.¹⁴²² A ratification campaign is urgently required to ensure AU wide coverage for the new Court.¹⁴²³

As for the African Court of Human and Peoples' Rights, the exclusion of individual and NGOs to submit cases before the African Court of Justice and Human Rights will be a major challenge that will impede the effectiveness of this Court.¹⁴²⁴ It remains to be seen whether more African States will make the declaration recognising the competence of the Court to receive cases submit by individuals and NGOs. Other concerns relate to the availability of free legal aid, support of victims and witnesses.¹⁴²⁵

4.1.3.3. Other challenges

One of those challenges is that judicial mechanisms are, by nature, reactionary in most cases. Although the decisions and actions of judicial mechanisms have a deterrent and preventive effect, they often come into the picture after grave human rights violations have been committed. For instance, human rights violations are being reported in the Darfur region, the African Court of Justice and Human Rights will not save the victims of these violations. However, it may deter many others from doing the same. In addition, the African human rights mechanisms need a political will on the part of leaders.

¹⁴²¹ Protocol to the Statute of the African Court of Justice and Human Rights, Art 5.

¹⁴²² As of 31 May 2009, 25 States have ratified the Protocol on the African Court, no one ratified the Protocol on the Statute of the African Court of Justice and Human Rights.

¹⁴²³ Sceats (2009) 12.

¹⁴²⁴ Id.

¹⁴²⁵ Ibid., 13.

The second challenge is that international judicial mechanisms are constantly criticised as being too costly and too slow. The African Court of Justice and Human Rights will face this criticism. It might be necessary to educate the African population, including African leaders, at this early stage, that the mechanism is very important, that it is one of the most feared mechanisms and that investment in it will realise good results in the future. They also need to understand that, by its nature; a cost takes time before to deliver a decision and uses resources.

Cooperation with States is another challenge that the African Court of Justice and Human Rights will face. Some States are too poor to assist the Court; others are too powerless to assist. There are many other challenges that one can refer to, but it suffices to throw in the few referred to above as food for thought. How will the Court investigate and enforce jurisdiction over events taking place in parts that are under rebel control? How it will deal with States that refuse to cooperate? Looking at the challenges, one thinks that it was wise for the drafters of the Protocol on the Statute of the African Court and Human Rights to make the Court complementary to the African Commission and the African Committee on the Rights and the Welfare of the Child.

4.1.4. Challenges facing the African Charter and need for amendment

The African Charter adopted in 1981 is undoubtedly in the words of Nguema, an important link in the momentous work that African has undertaken in its march towards humanity.¹⁴²⁶

Nguema also argued:

But like of conquests, the Charter is not simply an end itself; above all, it is a point of departure for which every day that goes by must serve, on the one hand, to consolidate what has already been achieved, and on the other hand, to shed light on perspectives because the life of the Charter is not a static and linear process, but a 'constant challenge'.¹⁴²⁷

¹⁴²⁶ Nguema I. 'Human Rights Perspectives in Africa: The Roots of A Constant Challenge' (1990) 11(3-4) *Human Rights Law Journal* 261.

¹⁴²⁷ Id.

According to Kéba M'Baye,¹⁴²⁸ the father founding of the African Charter,

The Charter constitutes the actual result which could be attained at the time of its adoption, bearing in mind the great disparity characterising the political and economic situation of Africa. Powerful internal currents simmered away beneath the surface and the Charter bears the stigma of these Animist, Islamic, traditional and Christian currents, to name only some of them. The Charter gathered all these seeds to its breast and created a product which is a result of their cross-fertilisation.

Similarly, René Degni-Segui,¹⁴²⁹ called the African Charter, '*le minimum possible plutôt que le maximum souhaitable* (the minimum possible rather than the maximum desired). Now that the African Charter is in force, it is incumbent upon all stakeholders and role-players to implement it fully. Certainly, the African Charter can be improved upon, as it undeniably possesses the crucial tenets of a legal instrument that is capable of protecting human rights.¹⁴³⁰

Its improvement, however, calls for innovative methods, such as the promulgation of additional protocols and treaties, amending, or creatively interpreting its inadequate or flawed provisions.

As noted above, the African Charter does not contain a number of rights guaranteed in other international human rights instruments. For example, it does not protect the right to privacy (the right to respect for private and family life, home, and correspondence), the right to an adequate standard of living, the right to rest and leisure, the right to financial compensation in the event of a miscarriage of justice, the right to reply to public disparagement, the right to name, the abolition of the death penalty, to name, but a few, nor interdict forced or compulsory labour. There is no right to vote and be elected in periodical elections by secret ballot, nor does the African Charter embody democratic concepts such as universal suffrage and free and fair elections.¹⁴³¹ The right of a national not to be expelled and the right to marry are omitted, while the right to fair trial suffers from various shortcomings.

¹⁴²⁸ M'Baye K. (ed.) *Les droits de l'homme en Afrique* (Paris: Pedone, 1992) 267. See also Sock R. 'The Case for an African Court of Human and Peoples' Rights: From a Concept to a Draft over 33 Years' (1994) (April-March 1994) *African Topics* 9.

¹⁴²⁹ Degni-Segui (1991) 699.

¹⁴³⁰ Ouguergouz (2003) 797.

¹⁴³¹ In its 19th Ordinary Session, the African Commission adopted a resolution on Electoral Process and Participatory Governance. Applauding elections in Benin, the Sierra Leone, and the Comoros as part of the transition to democratic rule in these countries, the Commission asserted that elections are the only means by which people can elect democratically the government of their choice in conformity with the Charter. It called on governments to take measures to ensure the credibility of electoral processes, and stressed the duty of States to provide the material needs of the electoral supervisory bodies. See Ninth Annual Activity Report, Annex VII, 9.

The many claw-back clauses tend to water down the contents of the rights and give wide powers to States to derogate from their human rights obligations. Finally, there is a need to address the various claw-back clauses that tend to water down the contents of the guarantees. A general limitation clause would be ideal. A derogation clause should be added to regulate State action before and during emergencies. The adoption of other human rights instruments should be hailed as a positive step towards the right direction as far as strengthening of the African Charter and the African human rights system is concerned.

On the other hand, it is unfortunate to vest a power in the Assembly to authorise the African Commission's publication of its annual report. The African Commission's rules of procedure presuming that publication is permitted unless directed otherwise is commendable.¹⁴³² Underlying this challenge is the general recognition that publicity is an effective form of sanction against human rights violations and therefore as much of it as possible should be made applicable to the offending States. Although the African Commission has amended its Rules of Procedure, one believes that the only way to overcome this challenge is to amend the African Charter.

The African Commission must remain independent from the Assembly, the members of which are often the targets of human rights claims, and the AU must not impose restrictions that hinder or compromise its work. The Commission's financial dependence on the AU hampers the African Commission's general activities. The AU's considerable control over the activities of the African Commission and its say as to what activities the Commission may be undertake need to be revised. In addition, the current working relationship between the Commission and the AU Assembly gives powerful States the ability to moderate or even silence the findings of the African Commission. Impartiality and independence of action are central to the effective functioning of an organ charged with the protection of human rights. Indeed, the adoption of these instruments proves that the African Charter, after all, was not intended to be a static instrument. The demand for its reform began barely within five years of its existence.¹⁴³³

¹⁴³² Rule 77 of the African Commission's Rules of Procedure.

¹⁴³³ For a comprehensive discussion on the calls for reforming the African Charter, see Mbondenyi M. 'Improving the Substance and Content of Civil and Political Rights under the African Human Rights System' (2008) 17 (2) *Lesotho Law Journal* 39.

4.1.4. Other challenges to the protection and promotion of human and peoples' rights in Africa

4.1.4.1. Civil and inter-State wars

In his Agenda for Peace, Boutros Ghali¹⁴³⁴ underlined the relation of independence between peace and respect of human rights in the following words:

The sources of conflict and war are pervasive and deep. To reach them will require our utmost effort to enhance respect for human rights and fundamental freedoms, to promote sustainable economic and social development for wider prosperity, to alleviate distress and to curtail the existence and use of massively destructive weapons.

Kofi Annan believed that arms proliferation feeds and exacerbates armed conflicts, which are not only a question of security but also one of human rights and of development.¹⁴³⁵ President Blaise Compaoré, then Chairperson of the OAU maintained that security goes hand in hand with economic development. It goes hand in hand with social development, with democratisation and human rights.¹⁴³⁶ It was even more vigorously and solemnly acknowledged by the OAU Assembly of Heads of State and Government as follows:

The concept of security must embrace all aspects of society including economic, political, and social and environmental dimensions of the individual, family, and community, local and national life. The security of a nation must be based on the security of the life of the individual citizens to live in peace and to satisfy basic needs while being able to participate fully in societal affairs and enjoying freedoms and fundamental human rights.¹⁴³⁷

The OAU Grand Bay Declaration had earlier acknowledged that 'observance of human rights is a key tool for promoting collective security, durable peace and sustainable development as enunciated in the Cairo Agenda for Action on re-launching Africa's socio-economic transformation'.¹⁴³⁸

¹⁴³⁴ Ghali B.B. *An Agenda for Peace – Preventive Diplomacy, Peacemaking and Peace-Keeping*, Report of the Secretary General, A/45/1993, 23 March 1993, para 5.

¹⁴³⁵ Annan K. *We the Peoples: The Role of the United Nations in the Twenty-first Century*, Report of the Secretary General, The Millennium Assembly of the United Nations, A/54/2000, 27 March 2000, paras 238-239.

¹⁴³⁶ See 20th Conference of Heads of State of France and Africa, address by President Compaoré B. , 27 November 1998.

¹⁴³⁷ AHG/Decl. 4 (XXXVI), Conference on Security, Stability, Development and Cooperation in Africa Solemn Declaration, adopted by the OAU AHSG at its Thirty-Sixth Ordinary Meeting held in Lomé, Togo, 10-12 July 2000, para 10(b).

¹⁴³⁸ Grand Bay, Mauritius Declaration. The Cairo Agenda for Action was adopted by the 31st Ordinary Session of the AHSG of the OAU held in Cairo, 26-28 June 1995.

Another challenge that affects the realisation of human rights in Africa is the high level of internal conflicts and political strife. The story of Africa is a story of a diverse culture and people who are always in conflict. Ethnic distrust and rivalry has continued to slow down the pace of development and realisation of human rights in Africa. Since 1970, more than 30 wars have been fought in Africa, the vast majority of them intra-state in origin. In 1996 alone, 14 of the 53 countries in Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide, and resulting in more than 8 million refugees, returnees and internally displaced persons.¹⁴³⁹

The consequences of these conflicts have seriously undermined Africa's efforts to ensure long-term stability, prosperity and peace for its people.¹⁴⁴⁰ There have been armed conflicts in a number of African countries. There is no doubt that such conflicts lead to widespread human rights violations, economic decay and poverty.

Inevitably this leads to economic collapse as economic activities are abandoned, infrastructure is destroyed and social services are disrupted or neglected. Moreover, conflict leads to death, disability and poor health. The ironically-named Democratic Republic of Congo (DRC), which has, in its history as an independent State had one 'free and democratic election' has been embroiled in a conflict that has been called 'Africa's First World War' and taken an immense toll of more than one million lives, giving the DRC the highest crude mortality rate in the world today.

¹⁴³⁹ Ouguerouz (2003) 333.

¹⁴⁴⁰ Annan K. 'The Cause of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa' General Assembly, Security Council Fifty-second Session, Fifty-third year, Report of the Secretary-General on the Work of the Organisation of African Unity); reproduced in (1998) 10 *African Journal of International and Comparative Law* 549.

Analysing on the conflict in the Democratic Republic of Congo, Mangu¹⁴⁴¹ contended that:

The Congolese conflict was both internal rebellion against an authoritarian regime that did not care for the rights of the people and also a foreign aggression of the DRC by some of its Eastern neighbours, namely Rwanda and Uganda, with the complicity of the most powerful actors on the international scene. From human rights perspective, the war in the DRC resulted in the violation of nearly all human and peoples' rights in the African Charter that is the cornerstone of the African human rights system. Regrettably, while it was clear that massive human rights violations were being committed by all parties involved in the conflict as well as their respective allies, no communication was filed with the African Commission that therefore played no significant role in the protection of the rights of peoples of the Congo.¹⁴⁴²

The scale of violations such as extrajudicial executions and unlawful killings, the profligate use of the death penalty, torture and ill treatment of opponents, disappearances, the ubiquity of prisoners of conscience, the widespread use of detention without trials, as well as the scale of human rights abuses by armed opposition groups make human rights an ongoing and vital challenge for the establishment of peace, stability, and essential conditions for economic, social, and cultural development. It is clear that so long as impunity for crimes against humanity and grave violations of human rights occur, it will not be easy to see a significant transformation of the African landscape. Political stability is a necessary ingredient for human rights protection.¹⁴⁴³ Africa is very short supply of that and Africa is going to have a huge human rights problem for a long time to come. As a result, a great deal is at stake in the AU process.¹⁴⁴⁴

Inter-State and civil wars continue to pose serious challenges. African countries must be helped strengthen their capacity to prevent conflict, at local and national levels. Whenever States fail to prevent conflict, priority must be to protect civilians. The parties to conflict, not only States but also non-State actors need to be constantly reminded of their responsibility under international human rights and humanitarian law, to protect civilians from violence. It should be recognised that translating this into concrete actions will not be easy.

¹⁴⁴¹ Mangu A.M.B. 'The Conflict in the Democratic Republic of Congo and the Protection of Rights under the African Charter' (2003) 3 (1) *African Human Rights Law Journal* 235, 262.

¹⁴⁴² Id.

¹⁴⁴³ Mubangizi J. and O'shea A. 'An African Court on Human and Peoples' Rights' (1999) *South African Yearbook of International Law* 256, 269.

¹⁴⁴⁴ Id.

In many of the conflicts in Africa, civilians, including women and children, are no longer just caught in the crossfire. They become the direct targets of violence and rape, as war is waged against a whole society. There is need to ensure peace, order and stability coupled with the observance of the principles of democracy in Africa. The existence of these conditions should serve to create a climate in which human rights and freedoms are best respected and preserved; and to that extent the African Commission's mandate of promoting them and ensuring their protection is made easier.

In order to have conditions leading to this kind of climate it is necessary to urge the opposing groups in the State parties involved in internal strife and armed conflict to try to settle their disputes through amicable or peaceful means. In this regard calls should be made to the regional and international communities to intensify the on-going efforts in the search of peace and stability in the troubled countries through mediation and other peaceful means. Consequently, African States should be encouraged to adjust their home institutions to conform with the current political changes taking place in the world, which have ushered in multiparty democracy.

4.1.4.2. Problems of democratic consolidation

Problems of democratic consolidation are another challenge facing the African human rights system. It is undeniable truth that respect for human rights is the foundation of all democratic societies. As a matter of fact, democracy is well on its way to becoming a global entitlement, a right and an entitlement that increasingly should be promoted and protected by collective international will. Democracy can provide a critical building block for State reconstruction. Indeed, despite all of the difficulties associated with establishing a democracy, devastating social crisis and, in the worst instances, human rights crimes, there is no feasible alternative to democracy as the core principle for nation-building.

The basis for long-term peace is a meaningful and well-developed democracy with clean and transparent elections. Many human rights are directly linked to the election procedures themselves, such as the right to vote and the right to stand as a candidate, the right to campaign freely without being intimidated or in fear of your life. All agree that formal elections would be a sham without what constitutes an open debate: freedoms of expression, association and assembly.

These freedoms are indeed necessary in order for people to be able to monitor, criticise and exert popular control over the Executive. At the same time, repression of peaceful dissent, even the smallest minority, is an affront and hurts democracy. In other words, there is an obvious interrelationship between democracy and human rights. Democracy will be stronger the more human rights are respected. That is African human rights mechanisms should be allowed to observe and monitor elections in respective States.

It is already widely recognised that the protection of human rights is an international concern. This has been one of the greatest achievements of our time, and one that was certainly not obvious when the Universal Declaration was drafted Sixty years ago. The principle that the UN or indeed the AU and other international organisations have a right and indeed a duty to act in defence of human rights has gradually been established. The adoption of human rights treaties with their monitoring structures and their ratification by States, have decisively contributed to this development. The international reach of human rights protection is an obvious part of the principles that all human beings have the same inherent value and that the rights are universal. Those that cannot defend their rights themselves need and deserve support from the outside.

In this regard, one thinks about the situation in the Republic of South Africa which has raised a number of important problems related to the consolidation of democracy, especially the issue of Xenophobia against migrants from other countries. No one would have thought that the world would be witnessing Africans chasing other Africans on the streets, some of them even being killed. South African authorities failed to show leadership by rigorously upholding national, regional and international law standards by fulfilling their responsibility to protect innocent civilians.

There are other disturbing threats to the consolidation of democracy and enjoyment of human rights in Africa. There is also a particular concern about the recent revision of some national constitutions. For instance, the Algerian Constitution which resulted to the lack of term limits for President Bouteflika, through constitutional manipulation. Term extensions additionally have knock-on effects, undermining a range of other governance goals, such as efficient and effective civil services, free and fair elections, a strengthened judiciary, and enhanced roles for parliaments.

Repression of dissent continued in Ethiopia, where authorities are among those that use a licensing/accreditation system to restrict the work of journalists and consequently impinged on the freedom of expression. In this country, opposition party leaders, journalists and human rights defenders are prisoners of conscience and tried on capital charges such as treason, and armed conspiracy. In Sudan, the tendency is resort to military solutions for problems that are primarily democratic in nature and rooted in social and economic marginalisation. This militarised approach to politics undermines the broader objective of democratic governance, risks fanning extremism and ethnic nationalism, and can fuel broader crises that counteract efforts to build a common nationhood. Corruption remains the rule rather than the exception in many of these States with Nigeria and Cameroon. The resurgence of coup d'Etat in some countries, such as Mauritania, Madagascar, Guinea, Niger is also a matter of concern.

There is problem of leadership. Most of Africa's problems could be blamed on certain past and current leaders. Most of African leaders lack vision of human rights . They are part of the problem rather than he solution. In his key address, Ali Mazrui¹⁴⁴⁵ questioned:

Who killed African democracy? The cultural half-caste who came in from Western schools and did not adequately respect African ancestors. Institutions were inaugurated without reference to cultural compatibilities, and new processes were introduced without respect for continuities. Ancestral standards of property, propriety and legitimacy were ignored.

When writing up new constitution for Africa these elites would ask themselves, 'How does the House of Representatives in the United States structure its agenda? How do the Swiss cantons handle their referendum? I wonder how the Canadian federation would handle such an issue?' On the other hand, these African elites almost never asked, 'How did the Banyoro, the Wolof, the Igbo or the Kikuyu govern themselves before colonisation? In the words of the Western philosopher Edmund Burke, 'People will not look forward to posterity who never look backward to their ancestors'.¹⁴⁴⁶

¹⁴⁴⁵ Mazrui A.A. 'Who Killed Democracy in Africa ? Clues of the Past, Concerns of the Future' (2002) 9 (1) *Development Policy Management Network Bulletin* 15, 20.

¹⁴⁴⁶ Id.

This is why the African Charter on Democracy, Elections and Governance should be ratified.

Mbapndah and Ngonji¹⁴⁴⁷ argued that:

Though Democracy may not provide a magic wand to solve all of Africa's problems, it might nevertheless offer the people the best guarantee to put in place leaders who best represent their aspirations and who are answerable to their vote. Democracy, free and fair elections, good governance, and socio-economic reconstruction will augur such prospects. The Charter was adopted as a sign that Africans are aware of the stakes. Scrupulous respect for its provisions will mean giant leaps in the right direction with opportunities for Africa to occupy its rightly place in the community of civilised nations.

The African governments usually made commitment to the promotion of the rule of law. The practical effect of this commitment has not been fully realised largely because of their inability to translate the rule of law ideals into practical benefit to the African peoples. An illustrative example would be the state of the justice sector and the depressing controversies that still plague the elections. The genuineness of the African governments' commitment to the rule of law is further questioned by their failure to ratify the African Charter on Democracy, Elections and Governance three years after its adoption. The reluctance of African governments to ratify this instrument is reflective of their lukewarm attitude towards the Charter exhibited by Heads of State and Government around Africa. The question that readily comes to mind is 'why adopt the Charter if there is no intention of ratifying it'?

African governments need not delay further in ratifying this important instrument. Our avowed commitment to the rule of law and dark history of military and one party dictatorship requires enthused spirit towards the ratification of this instrument. There is a need to champion the campaign of promoting this Charter around Africa. Its uniqueness and the timing of its adoption provides solid base in reshaping the Africa rule of law landscape. The Charter holds promise of liberation to millions of Africans who have been subjugated by dictatorial and insensitive leadership. The African Charter on Democracy proclaims a new dawn of democracy rooted in the rule of law. It represents our date with history. Now is the time for our governments to give practical content to their professed commitment to the rule of law. They have a moral responsibility to ratify and domesticate this instrument.

¹⁴⁴⁷ Mbapndah L.A. and Ngonji E.N. 'Applying the African Charter on Democracy, Elections and Governance to Dictatorship: The Cameroonian Experience' (2008) 2 (1) *Cameroon Journal on Democracy and Human Rights* 59, 67.

4.1.4.3. Poverty

Poverty also affects enjoyment of human rights in many ways including undermining of democracy. Democracy can hardly work in conditions where the people are poor and ignorant. Based on African experiences with past elections in countries as such Kenya, Nigeria, Togo and so on, the poor and illiterate may be influenced to sell their votes for a mere pittance. Giving a lecture at the University of Toronto, Nyerere asked:

What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced, will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity.¹⁴⁴⁸

As Acheampong once said: ‘one man one vote is meaningless unless accompanied by one man with bread’.¹⁴⁴⁹ A part from the subversion of the independence of the voter, poverty and ignorance do not provide a fertile ground for advocacy and the promotion of human rights. The people are either too concerned with the practical details of where the next meal would come from, or are steeped in apathy. This works against the emergence of a robust and proactive African human rights system that would also work for the consolidation the rule of law and democracy.

Poverty challenges the promotion and enforcement of socioeconomic rights in Africa is also the prevalent poverty. This has to be seen in the context of the point made earlier that many socioeconomic rights reflect specific areas of basic needs or delivery of particular goods and services. In this regard, Mubangizi argued that all the social phenomena that have a significant impact on human rights, poverty probably ranks highest.¹⁴⁵⁰ He further added that poverty is in itself a violation of human rights.¹⁴⁵¹

¹⁴⁴⁸ As quoted in Shivji (1989) 26.

¹⁴⁴⁹ Quoted in Amnesty International *Background Paper on Ghana* (London: Amnesty International, 1974) 9.

¹⁴⁵⁰ Mubangizi J.C. ‘Know Your Rights : Exploring the Connections between Human Rights and Poverty Reduction with Specific Reference to South Africa’ (2005) 21 *South African Journal of Human Rights* 32.

¹⁴⁵¹ Id.

Nowhere is this more true than on the African continent where about 315 million (one in two people) survive on less than one dollar per day, 33% of the population suffer from malnutrition, 50% have no access to hospitals or doctors and the average life expectancy is about 41 years.¹⁴⁵² The problem of poverty, particularly in Africa, is unfortunately compounded by other factors. These include low levels of education, widespread unemployment, poor political and economic policies, natural disasters and quite significantly, pandemics such as HIV/AIDS.

In particular context of socioeconomic rights, the inescapable link between poverty and HIV/AIDS cannot be overemphasised. Although HIV/AIDS has reached pandemic proportions in many parts of the world, the situation is much worse in Africa. According to the United Nations AIDS Epidemic Update, in 2006 almost two-thirds (63%) of all people affected with HIV/AIDS were living in Sub-Saharan Africa (an estimated 24.7 million).¹⁴⁵³ The impact of poverty and HIV/AIDS occurs not only in terms of human toll and suffering, but also in terms of human rights and health care. As such, socio-economic rights norms such as the rights to health, access to housing, food, water and social security become extremely relevant.

5. Conclusion

The African human rights system has been in existence for more than twenty-two years since the entry into force of the African Charter of Human in 1986. The African Commission, one of the existing supervisory institutions, on the other hand, has existed for twenty-two years, having inaugurated on November 1987 in Addis Ababa, following the election of its members by the 23rd Ordinary Session of the Assembly earlier in July of that year. Until the establishment of the African Court, the African Commission was the primary supervisory organ of the African system.

¹⁴⁵² For more facts on poverty in Africa, see UNDP Facts on Poverty in Africa, available at www.africa2015.org/factspoverty.pdf (accessed on 24 November 2008).

¹⁴⁵³ See *2006 AIDS Update*, available at www.unaids.org/en/HIV_data/epi2006/ (accessed on 24 November 2008).

The African Commission is established under Article 30 of the African Charter to promote human rights and ensure their protection in Africa. Over the past twenty years, one saw an African Commission has passed through various stages in organising itself to carry out its mandate under Article 45 of the African Charter. The early years of the African Commission up to 1993 were to difficult years in which it proceeded cautiously in carrying out its mandate with very little zeal vis-à-vis the obligation of Member States under the African Charter.

The African Commission has tried to make the most of its promotional mandate within available resources by engaging Commissioners in several activities and country visits, establishing working and special rapporteurs on specific human rights themes, and examining States' reports. With regard to the State reporting obligations of Member States, despite the simplification of the Guidelines on State reporting, a number of States never submitted their first reports, second and subsequent which are therefore long overdue.

Some improvements are needed with regard to the State reporting system if this system is to have a noteworthy impact on human rights conditions on the continent. There is a need to create a system of incentives and disincentives. African States have not been very diligent regarding submission of State reports. To change this tendency, adopting a system that contains an incentive or applies negatives reinforcement to bring about a certain pattern of conduct will salvage the system. The role of such an approach to serve as catalyst in prompting State compliance should not be underestimated.

Another approach would be to empower the African Commission to produce and adopt a country report in the absence of State reporting. The assumption is that it would prompt States to submit reports on time to avoid the harassment of being subjected to country reporting. The preparation of such country reports can benefit a great deal from the participation of local NGOs, which are already playing a major role in the State reporting system by providing shadow reports that the African Commission utilises when it examines State reports. The production of country reports instead of the expected State reports serve as disincentive to failure to report or delay in reporting. The importance of power of country reports is evident from the experience of the Inter-American Commission of Human Rights. The African Commission should exploit its mandate to carry out a site visit to prepare its country reports.

It should also be born in mind that the African Commission should also learn from the weakness of the country reports of the Inter-American system and should take clear stands in its reports. Increased publicity of State reports or even country reports can play even greater role that they are playing now. Another frequently encountered problem in the State reporting has been the content of State reports. Lack of uniformity with respect to the content of State reports has been a persistent problem and one that needs remedying if the State reporting system is to produce any meaningful results. The African Commission has tried to ameliorate the problem by revising guidelines as to the contents of State reports. However, these guidelines did not help a lot.

The most vibrant aspect of the African Commission's mandate is the protective function, which is provided for by Article 45(2) of the African Charter. The African focussed one area of its protective work, namely examination of inter-State and other communications. The *Democratic Republic of Congo v. Uganda and Rwanda* referred to above has offered the African Commission the only opportunity so far to deal with an inter-State communications. In considering individual communications, the African Commission has contributed significantly to the development of legal principles aimed at solving problems relating to human rights and fundamental freedoms in Africa. Many decisions were made in the area of civil and political rights. With regard to economic, social and cultural rights, the African Commission delivered a groundbreaking decision in the *SERAC* case. Unfortunately, the African Commission's decisions lack enforceability, and are routinely ignored by States.

The Protocol establishing the African Court on Human and Peoples' Rights adopted on 10 June 1998 and entered into force on 1 January 2004. This was a welcome development, especially because since the signing of the African Charter, the African human rights system had been rightly criticised for its lack of effective enforcement mechanisms. The Key purpose for establishing the African Court on Human and Peoples' Rights was to complement and strengthen the protective mandate of the African Commission.

Its jurisdiction extend to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocol, and any other relevant instrument ratified by the Member States concerned. The African Court is also competent to give advisory opinions on any relevant to the African Charter or any other relevant human rights instrument.

The effectiveness of the African Court depends on the independence and competence of the individuals who constitute its bench. The African Court is expected to be an impartial arbiter between individuals and States that violate their fundamental human rights. Under such circumstances judges of the African Court must be individuals of impeccable ethical character, independence and competence, as laid down in the protocol.

The African Court of Justice and Human Rights can hear cases submitted before it by the following bodies: the African Commission, a State which has lodged a complaint at the African Commission; a State against which a complaint has been lodged at the African Commission; a State in which its citizen is the alleged victim of a violation; and African Intergovernmental Organisations. Individuals and NGOs can apply directly to the Court on the cases alleging violations of rights under the instruments referred to above, as long as States concerned have agreed to be bound by the Protocol after having made a separate declaration which allow the Court to hear such cases. By providing an enforcement mechanism to instruments that do not have similar procedures of their own, African States would enjoy a system of enforcement more robust and comprehensive than any other regionally or internationally. However, it is still too early to tell whether, the African Court will actually strengthen the African human rights system.

On its creation, the African Court on Human and Peoples' Rights found itself in competition with another legal organ provided for in the AU Constitutive Act, the AU African Court of Justice. In an effort to rationalise its institutions before it could even deal with its first case, the AU Assembly of Heads of State and Government resolved in July 2004 that the African Court should merge with the African Court of Justice.

In July 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights. This new Court is still to become operational as the Protocol establishing it needs to be ratified by 15 States AU Member States to enter into force. The ratification of this Protocol will pave the way for the election of the first judges who will then adopt their rules of procedure in order to start their work and deliver on a much broader mandate which includes that of the merged African Court of Justice and the African Court on Human and Peoples' Rights.

Hopefully, the African Court of Justice and Human Rights will contribute to the strengthening the African human rights system by making it more effective. The prospects are good, but there are challenges that must be overcome in order to make the African human rights system more effective system of protection of human rights in Africa.

The challenges mentioned above are not insurmountable; efforts have been made since the adoption of the African Charter and the African Commission started its work; there is a new commitment to human rights under AU, NEPAD and APRM which also manifested through the creation of the African Court of Human and Peoples' Rights now to merge with the African Court of Justice to become the African Court of Justice and Human Rights. Accordingly, one should conclude on an Afro-optimistic note because prospects are good for the protection and promotion of human rights in Africa.

Chapter four: General findings and conclusions

1. Introduction

The establishment of the UN in 1945 prompted an interest in human rights.¹⁴⁵⁴ The UN Charter attests to a faith in fundamental rights, specially in the dignity and ultimate worth of the person, and recites among its purposes the 'the promotion and encouragement' for those rights 'for all without distinction as to race, sex, language, or religion'.¹⁴⁵⁵ The UN Charter assigns to the General Assembly the task of conducting studies and making recommendations to realise these purposes. The UN Charter also commits the UN to 'promote universal respect for and observance of, human rights and fundamental freedoms, with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations'.¹⁴⁵⁶ Particular organs of the UN give advice on how to promote human rights and fundamental freedoms. Member States pledge to take joint and separate action in cooperation with the UN to achieve the desired conditions of social stability and well-being'.¹⁴⁵⁷

¹⁴⁵⁴ UN Charter, Arts 1, 8, 13, 56, 62 and 68.

¹⁴⁵⁵ Id.

¹⁴⁵⁶ Ibid.

¹⁴⁵⁷ Ibid.

It is due largely to the assumed obligation to take joint and separate action that in 1948, the Universal Declaration was adopted. This Declaration was followed by a number of conventions, which spell out specific rights in accordance with the common standard elaborated in the Universal Declaration. The assumed obligation was also the impetus for the establishment of regional human rights systems and the elaboration of certain regional human rights instruments such as the 1950 European Convention for the Protection of Human Rights and Fundamental freedoms, the 1969 American Convention on Human and Peoples' Rights. Similarly, in 1981, African States adopted the African Charter.

The African Charter has almost enjoyed 'universal acceptance in Africa' as it has been ratified by all AU Member States. The African Charter together with other instruments: the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa, the African Charter on the Rights and the Welfare of the Child, the Protocol on the Rights of Women in Africa, the Protocol to the African Court and now the Protocol on the State of the African Court of Justice and Human Rights, form the African human rights system, which is the subject of this study.

2. Summary and Findings

2.1. Summary

The title of the study is African human rights system: Challenges and Prospects. The African human rights system, as we know it has been in existence for almost 24 years since the entry into force of the African Charter. The African Commission, the currently existing supervisory institution, on the other hand, has existed for almost 23 years, having been inaugurated on 2 November, 1987 in Addis Ababa, following the election of its members by the 23rd Ordinary Session of the Assembly of Heads of State and Government earlier in July of that year. This study was limited to the institutional and normative developments within the African system since its inception up to June 2009.

This study was divided into four chapters. Chapter one examined introductory issues, followed by the second chapter, which dealt with the debate on the universalism and cultural relativism of human rights, with particular emphasis on the African perspective. Chapter three was devoted to the Enforcement Mechanisms under the African system, with particular attention to the African Commission and the African Court of Justice and Human Rights. Challenges facing these bodies were also discussed and prospects were given in order to make the African system of human rights more effective. Chapter four ends with findings and conclusions. These findings are expected to provide a basis for new research works in order to improve the African human rights system and make it more effective.

Chapter one reminded us that human rights in Africa must be grounded in its political and history, and more importantly, in the continent's history of nationalism and anti-colonialism. This chapter sought to argue that, contrary to the view of most Western liberal-rights theorists, human rights did exist in the pre-colonial African societies. All agreed that colonialism worsened the human rights of Africans by destroying the pre-colonial societies which respected human rights to some extent.

Human rights discourse was an important tool of independence movements. As a result, several constitutions embodied a bill of rights. Commitment to human rights remained rhetorical, however, often sacrificed in the name of ideology, tradition or institutions. After independence had been achieved in many countries, new ideologies offered the opportunity for divorcing human rights from nationalism and domestic constitutions. This influenced the institutional accommodation of human rights in Africa in the OAU. The OAU played a role in defeating colonialism and apartheid, but its 1963 Charter did not confer upon the OAU organs a specific human rights task. It has been argued that the AU Constitutive Act places human rights at the centre of the AU's objectives and work. AU organs like the Assembly, the Executive Council, the Commission, the Pan-African Parliament, the Economic and Cultural Committee, the Peace and Security Council all have been entrusted with a human rights mandate.

Statement of the problems underlined the new context in which the African human rights mechanisms evolve. It has been noted that the emerging context with globalisation, democratisation and the new regionalist impulses, resulting in the fact that the state of human rights in Africa has somewhat improved.

On the other hand, however, the HIV/AIDS pandemic, the armed conflicts, widespread and deepening poverty and other scourges of great magnitude still pose formidable challenges for human rights. At the institutional level, the AU replaced the OAU. The African Court of human rights has been established, before it starts functioning, the AU decided to merge it with the African Court of Justice giving birth to African Court to the African Court of Justice and Human Rights. The mandates of these courts partly overlap with that of the African Commission.

There appeared to be broad agreement that modern international human rights law owes its development to the UN and its instruments. In spite of this broad agreement and the significance of the concept of human rights, the nature and content of human rights is as controversial today as in 1948 when the Universal Declaration was adopted. The following concepts have been defined : ‘system or systems’, ‘African human rights system’, ‘human rights’, ‘challenges and prospects’. The expression ‘African system on human and peoples’ rights in Africa refers to the regional system of norms and institutions for enforcing human and peoples’ rights.

The African human rights system consists of a number of normative instruments including the African Charter on Human and Peoples’ Rights; the OAU Convention Governing Specific Aspect of Refugee Problems in Africa; the African Charter on the Rights and Welfare of the Child; the Protocol to the African Charter on the Rights of Women in Africa; and the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples’ Rights, the Protocol on the Statute of the African Court of Justice and Human Rights, which is still to come into force, the African Convention on the Conservation of Nature and Natural Resources the Bamako Convention on the Ban of the Import into Africa and the Control of Tran-boundary Movement and Management of Hazardous Wastes in Africa; as well as the African Charter on Democracy, Elections and Governance. These instruments elaborate the human rights principles, modalities for their promotion and protections, and in some cases, enforcement mechanisms are set up. For instance, the African Charter establishes the African Commission while the African Charter on the Rights and Welfare of the Child establishes the Committee of Experts on the Rights and Welfare of the Child.

Chapter two discussed the unavoidable debate on universalism and cultural relativism of human rights. The starting point was that dealing with international human rights it is necessary to be conscious of the values embodied. In recent decades as human rights have become more important in international politics and human rights instruments have become more numerous, there has been alongside these developments a growing debate about the legitimacy of the entire concept of human rights.

Universalism of human rights has been divided into two schools. Moderate universalists tried to prove universalism by stating that the human rights standards in international instruments are really present in all cultures. For example Alston¹⁴⁵⁸ argued that:

Most of the concerns dealt with in the Universal Declaration of Human Rights had long been recognised within the varying conceptions of human dignity which are an integral part of the world's major religious and cultural traditions.

Strong universalists argued that some cultures, expressly non-Westerns cultures have no indigenous concepts of human rights, or that the concept of cultural relativism they relied on was a danger to human rights, and for that reason the international norms now existing should be universal. Working from the conviction that all people are equal, it was necessary as an ethical matter to believe in the same human rights for all people, regardless of their culture. Simply to brand human rights as a Western invention can be regarded as disservice towards the people in the non-Western countries. In any case, culture is not a static entity. It is responsive to conflict among individuals or social groups and it can change as a result of structural developments and of individuals being exposed to and adopting new ideas.

At this point there was a very important aspect to keep in mind. Particular cultures and traditions are part of what we are as humans but one cannot use them uncritically. One has to be careful about the model for understanding culture. Cultures do not only shape the reality and influence the process of acquiring values, but they are also dynamic, changing over time as new situations arise. They do not only forge the identity of a people but they can also be misappropriated by some powerful elements within the culture and turned into an oppressive reality for the people. There is a constant need for a critical reinterpretation and re-evaluation of cultural traditions.

¹⁴⁵⁸ Alston P. 'Are Human Rights Universal or Eurocentric' (1984) 3 *Development: Seeds of Change* 1, 6.

Any universalism that excludes particular cultures is empty of any meaning. The understanding and promotion of human rights has also to be culturally and historically contextualised. Cultural relativism, instead of being seen as a threat to universalism, was seen as a resource for closer cross-cultural understanding and collaboration. The idea which opposes universal human rights is cultural relativism. Cultural relativists criticise human rights by stating that they do in fact not, as claimed, constitute a universal concept. Anthropologists and others have argued that human rights are based on ideas that developed in the West, and that there is thereby a problem in applying them to non-Western cultures. Radical cultural relativists have pointed out that in different societies the whole relation of individuals to the society is different.

Most African scholars did not, however take the view of strong cultural relativism, but try to reach a compromise between international standards and the values and cultures. An example is An-Na'im who recognised that cultural legitimacy is important for human rights to be respected, and that the current international standards are lacking this legitimacy in certain important aspects. For him, we must therefore examine these standards honestly, working to gain universal legitimacy for those that do not have it, but also being willing to change the international standards if there is truly no consensus.¹⁴⁵⁹ His approach recognised that there will never be complete agreement on certain aspects of human rights, but that a sensitive cross-cultural dialogue can improve consensus and thus enforcement in many areas.¹⁴⁶⁰

Through the assessment of cultural relativism, it has been argued that the concept of universalism came into prominence after World War II. With the adoption of the Universal Declaration, countries all over the world discussed and negotiated values that would become the basis for human rights. The assessment outlined that a core concept of human rights is that those rights belong to everyone, no matter of what status that person holds in society. This notion of universalism underpins human rights. Every individual has a claim to enjoyment of human rights, wherever the individual resides. Human rights did not originate without considerable input by diverse cultures. Human rights are, internationally agreed values, standards or rules regulating the conduct of States toward their own citizens and toward non-citizens.

¹⁴⁵⁹ An-Na'im A.A. (1992) 6.

¹⁴⁶⁰ An-Na'im A.A. 'Towards a Cross Cultural Approach to Defining International Standard of Human Rights' in An-Na'im and Deng (eds.) (1990) 38-39.

Human rights are, in the words of the preamble of the Universal Declaration, a ‘common standard of achievement for all peoples and all nations’. These rules, which States have imposed upon themselves, serve to restrict their power to act toward their entire population. While universalism implied that some moral requirements are the same for everyone, it does not imply that we all have a moral requirement to be the same or that we have any moral requirement that discourages cultural relativism.¹⁴⁶¹ A human rights approach indicated that it is important to pay attention to the political uses of claims of cultural relativism.

This study advocated for the moderate universalism, there was a need to move towards concept of strong universalism and strong cultural relativism. To explain this, one used Ellacuria’s notion of historicisation of norms. It is insufficient to justify human rights only on the basis of human nature, natural law, positivism or transcendent human dignity. Human rights need to be contextualised within the historical and cultural experiences of different societies. The universal dimension of human rights cannot be established independently from the richness of cultural diversity. It is through participation of every culture and tradition in a transcultural dialogue that people can arrive at a universalism of human rights that is not purely formal but that has some clear content to it.

Human rights belong to all human beings. It is of course important to be sensitive to the fact that cultures may differ from one another in the priority they place on the various rights, but deny people internationally recognised rights on these grounds is not justified.¹⁴⁶² An Afrocentric conception of human is a valid worldview. Its significance to the discourse on cultural relativism of human rights however, demands careful consideration.¹⁴⁶³ Rather than being the basis for abrogating or delegitimising the emerging universal human rights regime, it should be inform the cross-fertilization of ideas between Africa and the rest of the world.¹⁴⁶⁴ The present challenge for Africanist human rights scholars generally is to articulate for the international human rights community, an African sense of human rights or dignity, which flows from the African perspective, but one that the rest of the international community can also use. With the sanctity of Western individualist paradigms of human rights, particularly in the promotion of social and economic rights.¹⁴⁶⁵

¹⁴⁶¹ Tilley J. ‘Cultural Relativism’ (2000) 22 (2) *Human Rights Quarterly* 501, 503.

¹⁴⁶² Ibhawoh in Zeleza and McConaughay (eds.) (2004) 38.

¹⁴⁶³ Id.

¹⁴⁶⁴ Ibid.

¹⁴⁶⁵ Ibid.

Looking on how a given human rights instrument can be specific while adhering into the principle of universalism, the African Charter on Human and Peoples' Rights was taken as an example. It has been argued that this instrument reconciles universal human rights standards with an African understanding of the relationship between the individual and the community. Hence the African Charter combines a traditional focus on individual rights with explicit protections for the collective rights of peoples, and an insistence that the enjoyment of rights implies the performance of duties on the part of everyone. In terms of individual rights, the African Charter guarantees civil and political rights, (such as the right to liberty, freedom of expression and the prohibition of torture) as well as economic, social and cultural rights (such as the right to health and the rights to work). This is a major contrast with other international human rights instruments. As one of the official OAU documents stated:

All that could be said about this document.... is that it strives to secure certain flexibility, equilibrium, and to emphasise certain principles and guidelines of our Organisation as well as the aspirations of the African peoples. It seeks not to isolate man from society but as well as society must not swallow the individual. Such is the African wisdom that was to be recalled from the very beginning of the proceedings.¹⁴⁶⁶

Nevertheless, this can only be translated into behaviour through the development of civil society with subsidiary groups that will allow for the participation of all in the life of Africa. Chapter three was devoted to the enforcement mechanism under the African human rights system. The African Commission was established by virtue of Article 30 of the African Charter and its mandate essentially the promotion and protection of human rights and peoples' rights in Africa, as stated under Articles 30 and 45. In the fulfilment of its promotional mandate, the African Commission aims to create an awareness and understanding of human rights among the African people as well as disseminating information to all interested parties and stakeholders.

Commissioners undertake promotional missions to Member States in order to meet with the Government, NGOs and human rights defenders at a national and local level, thereby assessing the human rights situation in the country. The goal is to heighten awareness of the African Charter and the African Commission at a grass-roots level but it also provides some form of accountability, albeit limited, that the government should respond to.

¹⁴⁶⁶ OAU Doc. AHG/102/XVI, Nairobi, June 1981, 22.

Moreover, the African Commission collects documents and undertakes research on State parties, particular African issues affecting the recognition and implementation of human rights and, in addition, organises seminars in partnership with NGOs in relation to such. Under the African Charter, the African Commission can consider alleged violations of the rights guaranteed in two different ways: through inter-State and non-State communications. In the consideration of non-State or individual communications, the African Commission must first make sure that in the matters referred to it, all internal remedies have been exhausted, unless the legal process is unduly protracted. The African Commission can then require any relevant information from the government involved and from other sources, and organise a contradictory debate. The African Commission enables both NGOs and individuals to file communications. This right to collective action is a major step forward.

Opening up to NGOs and individuals was the African Commission's main claim to innovation. In its 21 years of existence, the African Commission has received more than 500 individual communications emanating from NGOs and individuals. Individuals may submit cases on their own and also on other individuals' behalf. NGOs may do the same on behalf of individuals and of groups, and may also assist them. This would suggest the actual number of people afforded effective protection by the African Commission is larger than the number of formal complaints. Africa's scheme has proved remarkably well adapted to its citizens' lower awareness of rights and remedies. Indeed, most of the individual communications over alleged abuses received by the African Commission have been filed by NGOs rather than individuals.

Outlined in Article 62 of the African Charter is the State reporting procedure under which State parties are required to submit reports containing information on the human rights situation within the country, as implementation of the rights contained in the African Charter. The initial report is due two years after ratification of the African Charter, with periodic reports due every two years thereafter. In practice, however, State parties have failed to submit their reports and consequently, in order to encourage compliance, the African Commission has permitted Member States to combine overdue reports. There are still, several States who are yet to submit their initial reports.

The lack of compliance has been attributed to a number of factors. For instance two years period for submitting State reports, while other international human rights instruments provide for a period of four years. The guidelines for submitting State reports seen as too long and complicated to apply; even the revised guidelines dealt with this concern only partly. In some, African States generally have a poor record of compliance with obligations under international human rights treaties. Many of the States lack the skills, personnel and resources required to comply with the complex web of obligations and norms undertaken by them through these treaties.

Central to the fulfilment of its mandate to promote and protect human rights in Africa is the cooperation between NGOs and the African Commission itself. NGOs provide vital information as to the actual human rights situation prevailing in the countries where they operate and thereby provide what is effectively a second opinion to that which may or may not have been given by the Member State. NGOs have also been essential to the effective functioning of the special rapporteurs through the provision of funding and the publications of reports. NGOs with observer status have access to the African Commission during public sessions and can also bring communications to the same body. Attendance at the sessions also provides a useful opportunity to meet and liaise with other NGOs. The participation of NGOs at the sessions is limited to oral statements and interventions on particular items on the agenda and these are reflected in the report of the session, although this is not a public document.

The African Commission also has criteria for granting of affiliate status to NHRIs. Essentially, these are national bodies established by Governments to monitor the promotion and protection of human rights in the country. NHRIs are obliged to comply with the Paris Principles and also submit a report to the African Commission every two years. The benefits arising out of affiliate status are no different to those arising as a result of observer status to NGOs, effectively amounting to little more than access to the African Commission and a right to participate at its public sessions, as well as the right to receive copies of its publications.

Chapter three also analysed the Protocol on the Statute of the African Court of Justice and Human Rights. The court will comprise 16 Judges; eight of them must be experts in human rights law and the other eight may have expertise in general affairs. Independence and impartiality of justice are guaranteed. They are prohibited from taking other roles which would conflict with their duties; however, divided loyalties may be a problem in practice.

Judges will not be appointed to the new Court until the Protocol enters into force. Although the independence of the judges is theoretically guaranteed for the new Court, in fact all will serve on a part-time basis, with the exception of the president and vice-president. Its jurisdiction is potentially wide, extending to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the African Charter on the Rights and the Welfare of the Child, the Protocol to the African Charter on the Rights of Women in Africa or any other legal instrument relating to the human rights, ratified by the State parties concerned. This might for instance involve the 1969 OAU Convention on the Status of Refugees.

The Court will also decide whether or not it has jurisdiction in a case. In addition to strong interpretative powers, the Court may also provide advisory opinions. Only AU organ namely mentioned: the Assembly, the Parliament, the Executive Council, the PSC, ECOSOCC, the Financial Institutions or any other organ are entitled to request an advisory opinion. African Commission and African Committee of Experts on the African Charter on the Rights and the Welfare of the Child should be put under the umbrella of 'any other organ'. By contrast, NHRIs and African International Organisations are excluded. Any request of advisory opinion must be authorised by the AU Assembly. The involvement of the Assembly in human rights matters has been criticised as consolidating its power. This will render the related provision almost impossible to be used.

The State parties to the Protocol, the AU Assembly, the PAP and other organs of the AU authorised by the Assembly, the African Commission, the African Committee of Experts on the Rights and Welfare of the Child, African Intergovernmental Organisations accredited to the Union or its organs, African National Human Rights Institutions are all granted direct access to the Court.

However, individuals and NGOs are conspicuously absent. Their access to the court is contingent on State parties' special acceptance of the relevant provisions. In this regard, the new court stands where its European counterpart started decades ago. This exclusion has been criticised as being against the new trend in human rights law where individuals and NGOs, are considered among key actors and should be granted the direct access to international human rights mechanisms.

The composition, organisation, jurisdiction, and enforcement of the decisions of the African Court of Justice and Human Rights have been examined. Accordingly, it has been observed that, no publicity is provided for the court's annual reports, where it is specifically required to mention whether any Member State has failed to comply with a court judgment. Its judgment is final and must be rendered within three months after deliberations are completed. However, revisions are possible if new facts come to light. The African Court of Justice and Human Rights court must transmit judgments to the AU Executive Council. In the event of a violation, it must provide remedies, including the payment of fair compensation or reparation. The African Court of Justice and Human Rights may also prescribe provisional measures in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons.

There is a difference with the African Commission because the court's judgements are binding and final. The AU Executive Council shall monitor execution of judgements on behalf of the Assembly. States are obliged to guarantee their execution. Compliance will be monitored by the Court itself and any failure by a State to implement a judgment may be referred to the AU Assembly, which will decide on the action to be taken. Crucially, the Assembly has power to impose sanctions, including economic sanctions, on any non-complaint State, though this is likely to be invoked only in exceptional circumstances. One may only have to wait and see whether or not this can be applied in practice.

The common and particular challenges that face the African Commission may face the African Court of Justice and Human Rights were discussed. The common challenges include the lack of independence and impartiality, lack of professionalism, part-time nature of the work, lack of resources or underfunding, unenforceability of decisions, and dependence on political organs. A particular challenge facing the African Commission: the overlapping of its protective mandate with the new Court was also discussed.

The temporary-coexistence of both the African Court of Human Rights and the African Court of Justice and Human Rights , coverage and accessibility to the new court have also been discussed as particular challenges. Other challenges to the protection and promotion of human and peoples' rights in Africa: human rights education, poverty, civil and inter-State wars, problems of democratic consolidation.

It is hoped that once the court starts working as a continental institution, it will create a strong jurisprudence of African human rights, providing an important foundation for the principles of good governance and accelerated development. This chapter was concluded with an Afro-optimistic view by arguing that these challenges are not insurmountable. From the adoption of the African Charter to now, efforts have been made to overcome these challenges and the prospects are good for the protection and promotion of human rights in Africa.

2.2. Findings

This study aimed to re-emphasise the debate on the universalism and cultural relativism with focus on the African perspective and advocating adherence in the moderate universalism of human rights. It also aimed to evaluate the ways in and extent to which the African human rights system has been achieved in Africa, taking into account the debate on the universalism and cultural relativism of human rights on the one hand. Although the focus ultimately what happens the under African Charter and its monitoring body the African Commission, the role and contribution of other regional human rights instruments and mechanisms such as the new African Court of Justice and Human Rights of are also analysed.

This study aimed to look for ways of improving the African human rights system by identifying challenges. In other words, this study aimed at analysing the forgotten aspects under the African human rights system, namely the challenges and prospects. Many studies referred to in the review of the literature have often criticised the African system as being weak and ineffectual, without proposing ways to overcome challenges encountered in the system.¹⁴⁶⁷ Therefore the study also aimed at being an important ingredient in the literature as it invited the policy-makers directly or indirectly to measure the concrete effects of the African human rights in relation to the objectives assigned to it, and to take appropriate corrective measures. In this connection, the goal was to contribute to ensuring an effective regional human rights system for upholding the rule of law, human dignity and human rights.

¹⁴⁶⁷ See for example Welch C.E. Jr. 'The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment' (1992) 14 *Human Rights Quarterly* 42, 43; Rehman J. *International Human Rights Law A Practical Approach* (Harlow: Pearson Education, 2003) 265.

Although, the African system of human rights still faces a number of challenges, a lot has been done and it is wrong to continue to see the African system as weak and ineffectual.¹⁴⁶⁸ The study of the African human rights system is a significant exercise because it provided an opportunity to understand the efforts that are being made by all stakeholders to work towards protection and promotion of human rights in Africa. Furthermore, this study analysed the existing mechanisms in the form of the African Commission, the African Court of Justice and Human Rights a recent innovation within the AU framework. The significance of the study also is that it has provoked and stimulated other reflection on the African system of human rights. With respect to the research questions raised in the study, it is hoped that further research may be conducted.

Hopefully the aims of this study have been achieved. This study owes a great debt to human rights scholars who wrote earlier on the African human rights system. Without their contribution to the field, this study could not have been written. This account, however, departs considerably from traditional approaches to the study of the African human rights system, both in content and in methodology. It included many topics and actors not often considered in a study on the African human rights system, and offers familiar topics under a new AU organisational structure.

This study proceeded from a new orientation to the AU to human rights practice more generally. Why the difference, the evolving content of human rights, the growing diversity of actors in the African human rights system and the changing nature of human rights practice reflect a shift in the way this system has tended to address human rights challenges. This study has presented a view that reflected the reality of post-OAU existence.

This work is also part of a series on African human rights system designed to be a source for practitioners and researchers alike. In this sense, it could help them to reflect on other areas of close connection to this work. However, given the time constraints and space limitations, not every detail of every procedure could be discussed, nor could every human rights mechanism be analysed. Taking human rights more tangible, this work has included primary documents and provided specific illustrations of case law.

¹⁴⁶⁸ Doebber C.F.J. 'A Complex Ambiguity : The Relationship between the African Commission on Human and Peoples' Rights and Other African Union Initiatives Affecting Respect for Human Rights' (2003) 13 (7) *Transnational Law and Contemporary Problems* 7, 8.

The study analysed challenges and prospects for the African human rights system, an issue chosen because it has received comparatively less attention by scholars yet remains a vibrant area of great interest for further research. Ultimately, the study sought to provide meaningful engagement with the African human rights system as it operates.

To sum up, the study has provided: (i) A comprehensive and current overview of the African human rights system;(ii) Explored the role played by greater diversity of actors and mechanisms in this system;(iii) Outlined the potential role of other AU structures in human rights promotion and protection;(iv) Introduced the relevant debate on the reform of the system; and (v) Include concise resources for further research.

A number of questions have been asked. How does international human rights law respond to the phenomenon of cultural relativism? Can we respect culture and protect human rights at the same time? How far does the African Charter, its formulation of rights and freedoms, depart from or conform to, existing or desired regional and international standards and practices in the field of human rights? To what extent does the African Charter embody values that are inherently 'African' in the sense that they are not shared by other regions? Put differently, does the African Charter contain principles and norms which are African in origin, for instance, customary norms or does it embody certain values that are imperative to the socio-economic concern of African States?

The African Charter has been operational for twenty-two years, to what extent the African human rights system meets the expectations raised on its adoption? To what extent has the African Commission proved effective in executing its mandate? In other words, since its establishment, how has the African Commission been fulfilling its mandate? What has it achieved? This study critically evaluates the African Court and assesses its potential impact on the African human rights system. It probes the powers of the court and asks whether a clear and mutually reinforcing division of labour between it and the African Commission could be developed to more effectively promote and protect human rights in Africa. For example, should the mandate of the African Commission be limited primarily to promotional activities, and the African Court exclusively given the protective function? What relationship should the court have to the African Commission? What does the transformation of the OAU into the AU in 2002 mean for human rights? What are the challenges and the prospects of the African human rights system?

How does international human rights law respond to the phenomenon of cultural relativism? Can we respect culture and protect human rights at the same time? Largely through the ongoing work of the UN, the universalism of human rights has been clearly set up and recognised in international law. This consensus is embodied in the language of the Universal Declaration itself as a 'common standard of achievement for all peoples and all nations'. This statement is echoed in the Vienna Declaration and Programme of Action as referred to above. However, universalism of human rights does not impose one cultural standard, rather one legal standard of minimum protection necessary for human dignity. Like most areas of international law, universalism a modern achievement, new to all cultures. Human rights are neither representative of, nor oriented toward, one culture to the exclusion of others.

Out of this process, universalism emerged with sufficient flexibility to respect and protect cultural diversity and integrity. The flexibility of human rights to be relevant to diverse cultures is facilitated by the establishment of minimum standards and the incorporation of cultural rights in various instruments as discussed above. Every human being has the right to culture, including the right to enjoy and develop cultural life and identity. Cultural rights, however, are not unlimited. The right to culture is limited at the point at which it infringes on another human right.

No right can be used at the expense or destruction of another, in accordance with international human rights law. This means that cultural relativism cannot be invoked or interpreted in such a way as to justify an act leading to the denial or violation of universal human rights. As such, claiming cultural relativism as an excuse to violate or deny human rights is an abuse of the right to culture.

How far does the African Charter, its formulation of rights and freedoms depart from or conform to, existing or desired regional and international standards and practices in the field of human rights? To what extent does the African Charter embody values that are inherently 'African' in the sense that they are not shared by other regions? Put differently, does the African Charter contain principles and norms which are African in origin, for instance, customary norms or does it embody certain values that are imperative to the socio-economic concern of African States? The African Charter has been operational for twenty-two years, to what extent the African human rights system meets the expectations raised at the time of its adoption?

The answer may be summarised in the following lines. The African Charter is based on the following four main principles: African civilisations and culture, African conception of law, African socio-political factors, and international normative standards of human rights. Prior to its drafting, late president Senghor of Senegal stressed his wish for the African Charter to reflect African traditions and customs while at the same time taking into consideration international norms of human rights.

This wish was expressed in the preamble in which Member States took into consideration ‘the virtues of their historical tradition and the values of the African civilisation which should inspire and characterise their reflection on the concept of human and peoples’ rights. The African Charter imposes a duty on State parties to promote and protect morals and traditional values protected by the community¹⁴⁶⁹ (Article 17(3)). In the African concept of human rights law, rights and duties were perceived as an integral part of the law, hence the emphasis in the African Charter on the individual’s duties to the family, society, State and other legally recognised communities, including the international community.

Unlike the Western conception of human rights which centres largely on the individual, it was argued that under the African legal philosophy the community is an important subject of law and thus it formed a corner stone of the African Charter. Another aspect of this conception was the perception that in the African setting conflicts were best resolved through reconciliation rather than contentious procedures.

At the same time, the African Charter upholds international human rights standards to which most Member States had committed themselves to adhere. Before the drafting process, President Senghor advised the experts to be careful not to draft a charter for the ‘African Man’ and emphasised that humankind is one. The emphasis on the universality of humankind was confirmed in the preamble of the African Charter which expresses this commitment, while Article 60 of the African Charter requires the African Commission to draw inspiration from the international law on human and peoples’ rights. Thus the African Charter is a reflection of an attempt to adopt universal standards while maintaining space of particular cultures, merging traditional values with modern concepts, especially on the provisions for individual rights.

¹⁴⁶⁹ African Charter, Art 17(3).

The distinctive features of the African Charter consist on the fact that it is a comprehensive instrument encapsulating almost all the conceivable human and peoples' rights. The African Charter protects both individuality of the human person and his or her collective. Whereas other human rights instruments focus mainly on protecting the individual side of the human person, it goes one step further by affording protection to the group interests as well as the individual. The second feature that distinguishes the African Charter from others human rights instruments is the character of the standards.

First and foremost, most standards have been limited. There are only a handful of standards in the African Charter that are not limited to claw-back clauses. Besides the right to equality and to non-discrimination, other rights and freedoms entail some form of limitation expressed either within the guaranteeing provision or in the general limitation clause in Article 27. The latter states that 'the rights and freedoms of each individual shall be exercised with due respect to the rights of others, collective security, morality and common interest.'

The third feature is the fact that the African Charter does not contain a derogation clause. This principle is a characteristic feature of human rights instruments and is used to deal with emergencies, war situations and similar events when it is not possible for the State to assure to its citizens the same minimum level of protection as in peacetimes. Another related question is to what extent has the African Commission proved effective in executing its mandate? In other words, since its establishment, how has the African Commission been fulfilling its mandate? What has it achieved?

It is wrong to conclude that the African Commission has not made a valuable contribution to the protection of human rights. Indeed, the African Commission has extended human rights protections to areas where no other international human rights body has tried to do. Ondikalu was able to conclude on an upbeat note that on 'its interpretation of the Charter, the Commission has been mostly positive and sometimes even innovative'.¹⁴⁷⁰ Murray was of the view that the African Commission has been 'dynamic' in its interpretation of its protective mandate.¹⁴⁷¹

¹⁴⁷⁰ Odinkalu (1998) 402.

¹⁴⁷¹ Murray (1997) 414.

The development of the African Commission's jurisprudence is a natural progression of its protective mandate. The individual complaint mechanism under Article 55 of the African Charter has been the basis of its case-law and can be regarded as the most significant development, particularly in terms of the number of complaints, the shaking off of the early 'oath of secrecy' regarding every aspect of complaints, the early lack of legal reasoning and jurisprudential depth in the African Commission's decision, and reluctance to progressively interpret the African Charter.

Through the analyse of case law of the African Commission, it has been said this body has decided on over 400 cases since its establishment, many of which suffered from lack of jurisprudential depth and influence around the continent. In recent times, however, the African Commission has begun to deploy progressive comparative analytical skills in dealing with issues of human rights violations alleged before it.

One of the most important jurisprudential contributions of the African Commission is the case *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* where the African Commission not only positively ruled on the enforceability of economic, social and cultural rights, but became innovative in protecting rights not ordinarily provided in the African Charter through comparative use of international human rights law principles. The African Commission has also been very pragmatic in the application of the admissibility requirements, particularly, the exhaustion of local remedies principle under the African Charter, making them more compatible with progressive rules of international human rights law. Similarly, the African Commission has rather set the standard for reviewing State limitation of human rights. The African Commission's bravery in reaching this decision is remarkable, a feature of the passage of time and maturity of the African system.

However, the African Commission's remedy jurisprudence has been lacking. Its finding of a violation on the part of a State party to the African Charter does not necessarily afford a remedy to the victim. In many situations, the African Commission has found that a victim is entitled to compensation, but failed to determine what the compensation should be thus leaving it to the State in question to configure what it should do. The lack of a concrete provision under the African Charter in this regard does not make it easier for victims of human rights violations.

However, the African Commission could still be innovative in building robust remedy jurisprudence in accordance with the general principles of international human rights law. The African Charter's provisions on the 'rights' of 'peoples' are specifically related to the collective enjoyment of certain rights; namely, the inalienable right to self-determination and socio-economic development; to exercise autonomy over their wealth and natural resources; to economic, social and cultural development; to national and international peace and security; and to a satisfactory environment. Since the notion of 'collective rights' and 'duties' surfaced in the African Charter in 1981, there has been no pronouncement or definition of the scope of these concepts by the African Commission, the treaty monitoring body for the African Charter.

In this regard, one concurs with Olowu who noted that the uncertainty over what constitutes 'peoples' within the context of 'collective rights' in the African Charter has ensured that the concept of collective rights remains one of the weakest aspects of that regional treaty.¹⁴⁷² It is also interesting to note that no national court in Africa has made a pronouncement on these concepts.¹⁴⁷³ Similarly, the notion of the 'duties' enunciated in the African Charter has remained exhortatory, conferring no enforceable obligation on anyone. Although these provisions were originally considered to be the expression of indigenous African cultural values, time has proven that they are merely cosmetic moral code.¹⁴⁷⁴

It was instructive to observe that while there has been such a negligible development of jurisprudence on the idea of collective rights in the African context, the UN, even apart from the guarantees of equality and non-discrimination in its core human rights treaties, provides a platform for the further development of instruments on peoples' rights.¹⁴⁷⁵

¹⁴⁷² Olowu D. 'Emerging Jurisprudence on Economic, Social and Cultural Rights in Africa : A Critique of the Decision in SERAC & Another v. Nigeria (2005) 2 (1) *Turf Law Review* 29, 40. See also, Oloka-Onyango J. 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa' (2003) 18 *American University International Law Review* 851, 893–895. Oloka-Onyango observed that: The African Commission is generally coy about addressing issues that relate to the question of self-determination ... Prior to the Ogoni case, the Commission had only declared admissible one communication concerning the right to self-determination...' 893.

¹⁴⁷³ *Id.*

¹⁴⁷⁴ *Ibid.*

¹⁴⁷⁵ Permanent Sovereignty over Natural Resources, GA Res. 1803 (XVII), UN GAOR, 17th sess., 1194th plenary meeting. UN Doc A/RES/1803 (XVII) (14 December 1962); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, UN Doc A/RES/47/135 (3 February 1993) ('Declaration on Minorities'); Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, signed 28 June 1989, 1650 UNTS 383 (entered into force on 5 September 1991).

Equally importantly, collective rights have been elucidated and have been accorded at least ‘some juridical force’ through the UN human rights system.¹⁴⁷⁶ Notwithstanding this weakness, the meetings of the African Commission continue to be an important platform which provides Commissioners an opportunity, to discuss what they are able to do and ask themselves what has been achieved, or to identify areas where they failed in the promotion and protection of human and peoples’ rights over the past 21 years.

The ordinary sessions also provide States and other stakeholders alike, to reflect on the prevailing human rights situation on the continent at the material time, and deliberate constructively the way forward in terms of how the situation can be addressed. A major part of African Commission’s sessions is devoted to auditing the human rights situation on the continent over the past six months. The objective is to build strong and active continental organ that can work in tandem with all stakeholders including the State parties and all segments of the society, to serve the collective interests of the African people. The sessions are evidence of Commissioners’ dedication and collective commitment to this shared goal. It is a clear indication that Africans together want to take effective control of their destiny in the twenty-first century, and proceed to build a new Africa. This reflects a readiness to take stock of our efforts, and measure African progress, so that Africans can bring together their experiences and redress errors, to ensure the Africans have an appropriate roadmap for an African renaissance, especially in the area of human and peoples’ rights.

It has been found that the African Commission has improved its working relations with NGOs. African Commission also grants observer status to NGOs that satisfy minimum criteria to enable them to participate actively during its ordinary sessions. Members of civil society contribute and propose means and strategies to resolve various issues of a human rights nature in Africa. Civil society organisations, through NGO forum, prepare and submit draft resolutions on the human rights issues for the African Commission’s consideration and possible adoption. Some of these resolutions have condemned States’ complicity in human rights violations, such as in Darfur, Zimbabwe, Nigeria and Rwanda.

¹⁴⁷⁶ Some of the pertinent jurisprudence on this point includes *Sandra Lovelace v. Canada*, UNHRC, Communication No. 24/1977, UN Doc CCPR/C/13/D/24/1977 (30 July 1981); *Ilmari Lämsman et al v Finland*, UNHRC, Communication No. 511/1992, UN Doc CCPR/C/52/D/511/1992 (8 November 1994), on the rights of minorities; *Grand Chief Donald Marshall et al (Mikmaq People) v. Canada*, UNHRC, Communication No. 205/1986, UN Doc CCPR/43/D/205/1986 (3 December 1991), on the collective right to self-determination.

Through the resolutions, States have been urged to respect and protect human rights defenders, women, refugees and internally displaced persons, minorities and indigenous peoples.¹⁴⁷⁷ In accordance with Article 62 of the African Charter, States are required to submit periodic reports to the African Commission for consideration. State reporting has provided a forum for State parties to account for the human rights situation in their countries. The State reporting exercise brings the African Commission as well as the State parties together to dialogue and find solutions to the problems of human rights in their respective countries.

African States are now taking seriously the work of the African Commission, as is evident in the increasingly high-ranking State officials who personally represent, thoroughly engage, and respond to queries as well as points of clarifications during the State reporting. The African Commission in turn presents the State with concluding observations comprised of recommendations and information on how the State can meet its obligations under the African Charter. Regardless of these efforts, State practices have been very varied. African States have been neither diligent on timely reporting nor provided relevant and sufficient information in their State reports.

The problem does not end with timely submission of reports. The content and form of the reports pose another problem for the efficiency of this mechanism. The reports submitted substantially vary in both content and length. The difference between reports means a big difference in the content and specificity of the reports. In other words, lack of uniformity in regard to the content of the reports has been persistent problem and one that needs remedying if the State reporting mechanism is to produce any meaningful results.

The African Commission has also employed other special mechanisms, such as special rapporteurs and working groups to carry out its promotional mandate and undertake specific activities on various thematic human rights issues of concern in Africa. Some of these mechanisms have raised the profile of the African Commission and made gains in its protection and promotion of human rights. However, special rapporteurs are still appointed by the African Commission itself among its members although some of them do not have expertise on the area of their mandates.

¹⁴⁷⁷ See the web site of the African Commission for the reading of the decisions: www.achpr.org

It has been argued that African human rights mechanisms discussed (namely the African Commission and the African Court of Justice and Human Rights) face a number of common and specific challenges. In terms of common challenges, there are lack of independence and impartiality, lack of professionalism, part-time nature of the work, lack of human and financial resources, enforceability of decisions and heavy dependence on political organs. Concerning the African Commission, the following challenges have been identified and discussed: The African Commission's success in protection human rights on the continent is severely undermined by a number of challenges.

First, is the challenge of the African Commission an independent body? In the past the African Commission's membership comprised high-ranking government official, including ambassadors, attorneys general and cabinet ministers. Such a composition raised questions, at least in the public perception, concerning the independence of the said officials in handling their positions, even if the African Charter provides that they are elected in their personal capacity as mentioned above.

Related to the challenge of independence is the question of funding to the African Commission. Over the years the African Commission has decried the inadequacy of the resources that were made available by the AU for the execution of its mandate. Taking into consideration its vast mandate, the African Commission has depended on extra-budgetary funding from donors due to the insufficiency of the funds it receives from the AU. In 2008, the AU decided to increase the budgetary allocation to the African Commission in order to ensure that the African Commission ended its dependence on erratic donor funding.¹⁴⁷⁸

One of the other persistent challenges on the work of the African Commission is lack of awareness of its existence and mandate amongst African peoples. Ankumah argued that the effectiveness of the African Commission has been hampered by lack of publicity regarding its work.¹⁴⁷⁹

¹⁴⁷⁸ See the speech by the Vice-Chairperson of the African Commission on Human and Peoples' Rights, Mrs Angela Melo, delivered at the opening ceremony of the 43rd Ordinary Session of the African Commission? Ezulwini, Kingdom of Swaziland, available at www.achpr.org (visited on 19 May 2008).

¹⁴⁷⁹ Ankumah (1996) 21.

Discussing the promotional activities of individual Commissioners as assigned by the Commission, Nmehielle pointed out that they are only carried out during the inter-sessional period, and the Commissioners concentrate on visiting universities and other institutions of higher learning in the countries assigned to them, giving lectures on the African Charter, African human rights issues and the work of the Commission.¹⁴⁸⁰ While it is good to go to these institutions, the fact is that majority of the people are outside these places.¹⁴⁸¹ It is no exaggerate to say that the majority of Africans ignore not only about their rights, but also about the work of the Commission.¹⁴⁸² In this respect, Cheru contended that education is the cornerstone of human development.¹⁴⁸³

One agrees with Ankumah who argued that there is the need to extend the Commissioners' promotional activities to rural areas, where the illiteracy rates are quite high. People in rural areas are hardly aware of their rights, which they oftentimes see as a favour from governments.¹⁴⁸⁴ Kisanga suggested that publicising the African Charter should not focus on the potential victims of human rights violations. It must in the first place be made known to government functionaries who are charged with its implementation.¹⁴⁸⁵

In the case of the African Court of Justice and Human Rights, Sceats believed that the enormous size of African in geographical and population terms coupled with widespread illiteracy means that raising awareness of the African Court of Justice and Human Rights at the grassroots level will prove very challenging.¹⁴⁸⁶ It is important that the Court holds sessions outside Tanzania and undertakes promotional visits to Member States; however, the awareness-raising efforts of civil society and NHRIs will almost certainly be pivotal.¹⁴⁸⁷

¹⁴⁸⁰ Nmehielle (2001) 179.

¹⁴⁸¹ Id.

¹⁴⁸² Ibid.

¹⁴⁸³ Cheru F. *African Renaissance* (London : Zed Books, 2002) 64. Muntarborn and Shaw also expressed the same view. See respectively Muntarborn V. 'Education for Human Rights' in Symonides J. (ed.) *Human Rights Dimensions and Challenges : Manual on Human Rights* (Aldershot: Ashagate Publishing/UNESCO, 2004) 33, 34; Shaw M.N. *International Law* 2nd ed. (Cambridge: Grotius Publications, 1986) 173.

¹⁴⁸⁴ Ankumah (1996) 21.

¹⁴⁸⁵ Kisanga R.H. 'Fundamental Rights and Freedoms in Africa : The Work of the African Commission on Human and Peoples' Rights in Peter C.M. and Juma I.H. (eds.) *Fundamental Rights and Freedoms in Tanzania* (Dar es Salaam: Mkuki Na Nyota Publishers, 1998) 25, 34.

¹⁴⁸⁶ Id.

¹⁴⁸⁷ Ibid.

There is a pressing need to increase peoples' awareness of their rights and freedoms as enshrined in the African Charter and other relevant instrument, for the simple reason that a person can only value his or her rights and freedoms, and take the necessary steps to protect them, only if he or she is aware of those rights and freedoms in the first instance.¹⁴⁸⁸ Such awareness can be done or increased through a number of ways. It can be done by mounting human rights literacy campaign through the media including the press, radio and television, public lectures and seminars and by incorporating in the syllabus the teaching of human rights at all levels of education in the country.¹⁴⁸⁹

One of the greatest challenges to the effectiveness of the African Commission's protective mandate is related to the lack of implementation and enforcement of its recommendations to State parties. Indeed, this is one of the frustrations expressed by victims of human rights violations. Related the issue of enforcement of the African Commission's recommendations is the lack of a formal follow-up mechanism. When the AU Assembly adopts the African Commission's activity reports, this body publishes the report but does not follow-up to ensure that the recommendations contained therein are implemented.¹⁴⁹⁰ At the present, the African Commission's follow-up is made through diplomatic *notes verbales*, during field missions and during its ordinary sessions when State delegates are present. In view of the results achieved, this approach has proved to be unsatisfactory.¹⁴⁹¹

Finally, cases before the African Commission take years to be considered. Several postponements of cases at the African Commission are the norm. This is mainly due to the short period of time Commissioners meet each year to consider cases, as well as its other activities. The African Commission sits twice a year in its ordinary sessions (15 days per session). Consideration of cases is normally allotted to about two or three days each session.

¹⁴⁸⁸ Kisanga R.H. 'Fundamental Rights and Freedoms in Africa: The Work of the African Commission on Human and Peoples' Rights' in Peter C.M. and Juma I.H. (eds.) *Fundamental Rights and Freedoms in Tanzania* (Dar es Salaam: Mkuki Na Nyota Publishers, 1998) 25, 32.

¹⁴⁸⁹ Id.

¹⁴⁹⁰ Mukundi G.W. *African Court Human and Peoples': Ten Years on and Still no Justice* (London: Minority Rights Group International, 2008) 11.

¹⁴⁹¹ Mukundi G.W. and Ayinla A. 'Twenty Years of Elusive Enforcement of the Recommendations of the African Charter on Human and Peoples' Rights: A Possible Remedy' (2006) 6 (2) *African Human Rights Law Journal* 465.

The lack of appropriate allocation of times and dates when cases will be heard by the African Commission means that quite often, victims, potential witnesses and their counsels waste a lot of time and resources hanging around the venues of the African Commission's session, unsure if their cases will be heard. That has the effect of limiting the capacity of certain individuals and groups, especially the poor, to take cases to the African Commission.

It should be recognised that this research has been conducted before the entry into force of the Protocol on the Statute of the African Court and Human Rights. Meaning that this study had not sought to predict what will happen, but what can happen. In other words, the study does not argue that all that have been projected in terms of common challenges will happen; rather, it has elected to see the glass as being half-full and ask what needs to be done to fill it. In this regard, it is well to remember the dictum famously recounted by Senator Edward Kennedy in his eulogy at the funeral of his slain brother Robert Kennedy: 'some men see things that are and ask 'why' I dream of things that never were and ask 'why not?'¹⁴⁹²

Other challenges facing the African human rights system include the need of human rights education and public awareness of the rights and freedoms enshrined in African human rights instruments (with particular attention to the African Charter), poverty, inter-State and civil wars, and problems related to the consolidation of democracy. Prospectively, Africa is going through a tremendous and interesting phase. The introduction of multiparty democracy in the political area, particularly the advent of majority rule in South Africa clearly put the stage fostered the environment for greater changes. Prospectively, Africa is on the right direction. However, it remains to see how this will be translated this in the lives of ordinary Africans.

One shares the hopes and high expectations that the African Court of Justice and Human Rights will help African turn a new leaf, as far as the promotion and protection of human rights is concerned, one should be mindful of the fact that the Court is not and cannot be the sole solution to the African human rights challenges. The hopes should not be raised too high that the African Court of Justice and Human Rights will perform miracles. The new Court will faces particular challenges related to the temporary co-existence with the African Court of Human and Peoples' Rights, coverage and accessibility.

¹⁴⁹² As quoted in Maboreke M. 'The Pan-African Parliament Gender and Development – The Promise' in Open Society for Southern Africa (ed.) *Opening Societies Through Advocacy* (Johannesburg: Open Society Initiative for Southern African, 2005) 39, 45.

On the other hand, it will remain challenges to the use of judicial mechanisms in the protection and promotion of human rights. It is not clear how the African Court of Justice and Human Rights will deal with these challenges.

3. Questions for further research and final recommendations

3.1. Questions for further research

The challenges raised above pose enormous problems to African political leaders and researchers alike. It is no use having human rights mechanisms without enforceable powers. In his address to the First Conference of African Intellectuals and Diaspora, President Mbeki recalled the observation by Karl Marx that ‘intellectuals have tended to explain the world; the point, however, is to change it’.¹⁴⁹³ He challenged intellectuals to be more constructively engaged with the issues confronting Africa in a solution-oriented way, and to move beyond philosophising in order to give governments practical solutions to real problems.¹⁴⁹⁴

Underlining the need for African scholars to develop a juristic thought which is adaptable, not only to the African terrain, but also to the peculiar economic, social and political conditions of the continent, Ojwang¹⁴⁹⁵ appropriately argued:

It is essential that the received governmental machinery and its organising legal system be effectively domesticated, so as to serve the social purposes of African in an authentic fashion. This task entails scholastic endeavours to understand the character of the operative legal regimes against the background of the continent’s realities with a view to providing intellectual guidance for the legal process.

The role of African intellectuals in the evolution of human rights as a norm of international law is instructive in this regard. They should propagate, navigate, promote and justify human rights norms and their protection through innovative and scholarly reasoning. Among other things, this will entail the development of new mechanisms and strategies.

¹⁴⁹³ Address by President Mbeki T. to the First Conference of African Intellectuals and the Diaspora, Dakar, Senegal, 6-9 October 2004.

¹⁴⁹⁴ Id.

¹⁴⁹⁵ Ojwang J.B. *Laying A Basic for Rights : Towards A Jurisprudence of Development* ((Harlow: Pearson Education,1992) 21.

Such an input will mark a further contribution to the voices that call for human rights protection in Africa. A research work will never answer all questions. There will definitely remain unanswered questions on the African human rights systems, the African Charter or its enforcement mechanisms. The unanswered questions which require further research include the points mentioned below.

(i) Co-existence of universalism and cultural relativism on human rights

One of the most pertinent issues of the past sixty years has been the debate on the universalism and cultural relativism on human rights. This situation sharpens a long-standing dilemma. How can universalism and cultural relativism on human rights co-exist in a culturally diverse world? As the international community becomes increasingly integrated, how can cultural relativism be respected? Is a global culture inevitable? If so, is the world ready for it? How could a global culture emerge based on and guided by respect of human rights and tolerance? These are some of the issues, concerns and questions underlying the debate over universalism and cultural relativism and there is a need address these issues.

(ii) Special Procedures under the African human rights system

Special procedures failed to be at the core of the African human rights system. They failed to provide valuable conceptual analysis on key human rights themes under their mandates. Key questions for further studies include: what is the central role and function of the special procedures within the African system? Are they able to perform their mandate sufficiently or should they be extended to cover other key rights, issues, and groups? If yes, what are the other rights, issues and groups that should be covered? Is there an optimum number of mandates? If so, what is the number and how should it be identified? How should the concerns about overlaps between the special procedures (Special Rapporteurs and Working Groups), and the issue of limited financial and human resources be addressed? What should be the criteria for the creation of new mandates? What other steps could be take at a political level to ensure that the special procedures?

(iii) Responsibility of Non-State actors in human rights violations

The need to address the issue non-State responsibility in human rights violations has been raised in the *SERAC* case. In a globalised world, Transnational corporations (TNCs) have increasing power both with their own countries and, across many countries through their increased operations and economic growth. There are significant questions about the positive and negative elements of the relationship between TNCs and human rights. Positively, TNCs can promote the enjoyment of human rights especially economic, social and cultural rights. However, issues of concern range from range from corporate involvement in severe human rights violations to ensure compliance with rights standards. In some situations these concerns are worsened by the reduced capacity of the State to regulate large TNCs. Studies are also needed in the topic.

(iv) The Relationship between the African Commission and the new court

It has been noted in the study, while the mandate of the African Commission is set out in Article 45 of the African Charter, detailing promotional, protective and other functions, the Protocol on the Statute of the African Court of Justice and Human Rights, states in its preamble that:

The establishment of an African Court of Justice and Human Rights shall assist in the achievement of the goals pursued by the African Union and that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of a judicial organ to supplement and strengthen the mission of the African Commission on Human and Peoples' Rights as well as the African Committee of Experts on the Rights and Welfare on the Child.¹⁴⁹⁶

It appears that both the new court and the African Commission will share the protective mandate on the understanding that the court would supplement and strengthen.¹⁴⁹⁷ In so far both the African Commission and the new court will exercise protective functions, it is essential that a mechanism be worked out on how they should collaboratively perform their protective functions.

¹⁴⁹⁶ Protocol on the Statute of the African Court of Justice and Human Rights, Preamble, para 5.

¹⁴⁹⁷ Analysing the Protocol on the African Court, Pityana argued that by complement must surely be understood that it will reinforce and make it more complete. That suggests that both the Court and the Commission will coexist as independent bodies but within a mutually reinforcing relationship. Pityana N.B. 'Hurdles and Pitfalls in International Human Rights Law: The Ratification Process of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights' (2003) 28 *South African Yearbook of International Law* 110, 110-111.

This would avoid unnecessary competition or duplication of functions between the two organs. The studies may address the questions such as: Should the African Commission be maintained or suppressed as it is the case under the current European system of human rights? Should the protective mandate of the African Commission be limited primarily to promotional activities, and the African Court of Justice and Human Rights exclusively given the protective function? In this regard, the modelling of the Rules of Procedure of the new court will be vital its success as they will regulate the relationship between the two bodies.

(v) The role of other AU organs such as the PAP, ECOSOCC, PSC in promoting and protecting human rights and making the African system more effective

As discussed in the study, one of the objectives of the PAP is ‘to promote the principles of human rights and democracy in Africa’ (Articles 3 and 11 of the PAP Protocol). The PSC is also empowered to ‘promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts’. Moreover, one of the guiding principles is ‘respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law’. (Articles 3(f) and 4 (c) of the PSC Protocol). Among the functions of the ECOSOCC, as an advisory organ, it ‘shall contribute to the promotion of human rights, the rule of law, good governance, democratic principles, gender equality and child rights’ (Article 7 of the ECOSOCC Statute). Since these organs can deal with human rights issues, there is a need to study what role they can play in promoting and protecting human rights by making the African system more effective.

(vi) The contribution of NEPAD and APRM to reinforcing the African human rights system

According to the NEPAD Framework Document of October 2001, the objective of NEPAD is ‘to consolidate democracy and sound economic management’. The NEPAD Framework Document contains several references to human rights. Under paragraph 49, African leaders will, among other things, take joint responsibility for ‘promoting democracy and human rights in their respective countries and regions by developing clear standards of accountability, transparency and participatory governance at the national and sub-national levels’.

Paragraph 71 states that African leaders have learned from experience that, among other things, human rights are conditions for sustainable development and are pledging to work to promote human rights. The NEPAD Framework Document sets out a number of initiatives, including the Democracy and Political Governance Initiative.

As part of this initiative, 'Africa undertakes to respect the global standards for democracy, the core components of which include political pluralism, allowing for the existence of several political parties and workers' unions, and fair, open and democratic elections periodically organised to enable people to choose their leaders freely' (paragraph 79).¹⁴⁹⁸

The purpose of the initiative is to 'contribute to strengthening the political and administrative framework of participating countries, in line with the principles of democracy, transparency, integrity, respect for human rights and promotion of the rule of law' (paragraph 80). To achieve this, the participating countries undertake commitments to meet basic standards within governance and democratic behaviour and to support and build the relevant institutions. At the same time, there is a mechanism put in place to monitor progress made by States to honour such commitments.

A main component of NEPAD is the APRM. Member States of AU can voluntarily subject themselves to review. The purpose of the review is to ensure that the policies and practices of the Member State being reviewed conform to the agreed values within democracy and political governance, economic governance, corporate governance, and socio-economic development. Within the thematic area of democracy and political governance are nine key objectives, No. 3 being 'promotion and protection of economic, social, cultural, civil and political rights as enshrined in all African and international human rights instruments'.

¹⁴⁹⁸ This contrasts with what Mandy wrote: 'the founding documents of NEPAD failed to integrate human rights into its programme of development the absence of a rights-based approach is discernible in the lack of human rights language in its documents. NEPAD makes no explicit commitment to the enforcement of human rights, no mention of many important rights issues such as gender and ethnicity, and failed to take into consideration human rights when outlining its core economic objectives'. See Manby B. 'The African Union, NEPAD and Human Rights: The Missing Agenda' (2004) 26 *Human Rights Quarterly* 983, 984, 1021. See also Baimu, who argued that: the NEPAD human rights approach was Eurocentric by placing the human rights issues under the democracy and political initiative, and it lays emphasis on civil and political rights, while failing to mention socio-economic rights. Baimu E. 'Human Rights in NEPAD and Its Implications for the African Human Rights System' (2002) 2 (2) *African Human Rights Law Journal* 301.

Nos. 7-8 specially mention the rights of women, children and other vulnerable groups, including displaced persons and refugees; and No.2 mentions, among other things, democracy, the rule of law, and a Bill of Rights. Since human rights are included in the prerequisites for development in the NEPAD Framework Document and are among the matters to be investigated as part of the APRM, it would be logical if some researches are conducted to analyse how they can contribute to reinforcing the African human rights system. In addressing the issues raised above, further research may address the following questions: what is the role and mandate of the APRM in human rights?

Does the existence of the APRM enhance efforts towards effective protection and promotion of human rights in Africa? How can Africa ensure the complementarity of the work of the African Commission and the APRM in order to enhance their efficiency in human rights monitoring? Are there areas of overlap or duplication in the work of these mechanisms? What is the value-added by the APRM in the promotion of human rights in Africa?

(vii) The role of Non Governmental Organisation in complementing AU organs in the protection of human rights in Africa and the enforcement of the African Charter, including other relevant human rights instruments

NGOs have been active participants in all aspects of the work of the African Commission. The African Commission's practices evolved over time to allow NGOs greater rights of participation than any other AU body. NGOs also had a great amount of informal interaction with government delegations whom they could approach in the main session room or meet outside the sessions. NGO participation at the African Commission has been essential to its work. NGOs are able to use their expertise on thematic areas and countries to further the work of the African Commission.

NGOs interventions highlighted violations of human rights and issues of implementation; their lobbying and advocacy work has resulted in important resolutions, studies, and the creation of various special procedure mandates. NGOs participate in Working Groups established by the African Commission to develop international human rights standards or discuss particular thematic issues. NGOs have played a prominent role in the development of international human rights standards by highlighting the need for such standards, providing international standards by highlighting the need for such standards.

NGOs across the world have provided evidence of human rights violations to the African Commission and supported its work on country and thematic issues. Analysts may reflect on how NGOs' engagement with other AU organs can be made more strategic. They may also have to identify aspects of NGOs interaction with these organs that they wish to change if they hope to change the institutional culture of the AU and the behaviour of States. Key questions include: What are the different ways in which NGOs could interact with the AU's organs? How can NGO engagement with these organs be more strategic? How could the AU's organs develop a range of interventions that NGOs could make in addition to oral statements? If so, what kinds of intervention should NGOs be able to make? How could NGOs be involved in decision-making processes?

(viii) The role of National Human Rights Institutions in complementing AU organs in the protection of human rights in Africa and the enforcement of the African Charter, including other relevant human rights instruments

NHRIs have often been treated as NGOs or as part of governments whereas in reality they are neither and have a unique status as independent expert organisations that are focused on national implementation of human rights. There is need for reflection on the role that NHRIs could play in complementing AU organs in the protection of human rights and the enforcement of the African Charter and the contributions that they could make given their unique status and expertise. It has been highlighted that NHRIs could play an indispensable role in relation to documenting national human rights situations; providing expertise on national protection systems, including key national institutions; advocating and advising the State on the scope and implementation of its human rights obligations; and assisting in follow-up to recommendations of international human rights bodies.

NHRIs could provide information to the human rights mechanisms on the human rights situation in a country under regional period review, and in other instances where a particular country is considered or discussed. NHRIs also play an important role in following up on the recommendations/decisions of the human rights mechanisms both in terms of promoting this information nationally and in terms of monitoring and reporting back on implementation and follow-up. In addition, NHRIs could make contributions to discussions on thematic human rights issues.

However, NHRIs could also, in some circumstances, come under attack from the State on the positions that they adopt or information that they submit.¹⁴⁹⁹ The nature of their relationship with the State may make them vulnerable to political regime changes, changes in legislation or appointment processes, or threats of a financial or physical nature. It may be important therefore to reflect on possible constraints on NHRIs participation in certain circumstances and how these could be overcome.

(ix) The role of national courts in complementing AU organs in the protection of human rights in Africa and the enforcement of the African Charter, including other relevant human rights instruments

The limitations of the domestic system is partly a result of the lack of knowledge by national judges and lawyers of international law and the various human rights instruments that had been adopted and ratified by their respective States. Where countries had even ratified human rights treaties, few of them had legislated these instruments into local law; therefore, few judges are interested in using the norms of international law to determine their local cases, some of which are in the ambit of the international instruments.

Since most domestic courts had the opportunity of expounding on these regional instruments to induce policy reforms, local judges should be encouraged to enrich themselves as well as take advantage of the provisions of international instruments in the interpretation and determination of local cases.

No matter the strength and effectiveness of the international protection mechanisms, the first port of call would always be the national courts and if the national courts are not effectively equipped or the judges better schooled and exposed to the provisions of international instruments to which their citizens are entitled to have access to, national courts could not be an effective bridge when citizens attempt to exhaust local remedies before approaching regional or international courts.

¹⁴⁹⁹ See Kjaerum M. *National Human Rights Institutions Implementing Human Rights* (Copenhagen: Danish Institute for Human Rights, 2003) 18.

There is a need to conduct studies on how to use the *amicus curiae* system where NGOs and lawyers, more knowledgeable in the application of regional and international instruments, will assist the court and educate parties to a case as what options were available under the various instruments. International mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories. The two systems are largely complementary and reinforce each other; it this regard the decisions of African human rights mechanisms will have a significant bearing on the development of human rights jurisprudence on the continent, if invoked at domestic level.

(x) Sexual orientation and gender identity

Across the continent, people continue to face widespread and severe forms of discrimination based on their sexual orientation and/or gender identity. These range from violations of the right to life, including executions and hate-induced violence, to being tortured, ill-treated, and detained solely on the basis of feeling and acting contrary to social norms and expectations. A number of African countries still criminalise sexual relations between persons of the same sex. Lesbian, gay, bisexual, and transgender people also face discrimination in the areas of housing, employment, education, right to freedom of association, right to family life, and other key civil and political rights, as well as economic, social and cultural rights. Repressive and discriminatory national laws, policies and practices have led to homophobia, hate crimes and prejudice, and a climate of impunity for human rights violations based on sexual orientation and gender identity.

It is up to the researchers to undertake study on this neglect and important area of human rights violations and seek for a comprehensive approach addressing all aspects of human rights in relation to sexual orientation and gender identity, including mainstreaming these issues through more systematic promoting equality and values consistent with human rights norms and standards in the African human rights mechanisms.

3.2. Final recommendations

The challenges facing the system can best be addressed through its reform. The solution does not lie in merely adding mechanisms to the equation. The structure and functions of the existing mechanisms should also be clarified. In doing so, much could be learnt from the changes in the other regional human rights systems. Even if any major changes to the present African human rights system may encounter considerable scepticism and resistance among the African States, and the AU, it cannot be avoided in the long run. African human rights system must be reformed. Effective measures and relevant human rights monitoring bodies should be instituted to deal with abuses and violations of human rights. Governmental support and enhancement of these mechanisms and their performance standards are inevitable. National efforts in the field of human rights should be complemented by the international community especially in the light of the economic difficulties encountered by Africa as well as the conflict situation which exist in the continent.

A national protection system is one in which international human rights norms are reflected in the national constitution; are incorporated in national legislation; where the local courts can resort to international human rights norms; where there are specialised human rights institutions to promote and protect human rights; where there is national monitoring of the situation of vulnerable parts of the population; and where human rights are taught in schools and other institutions of learning. National protection systems are meant to help strengthen the implementation of international human rights at home.

Nationally, every African State should ensure legal, political and development infrastructures conducive to full respect for human rights. Such infrastructures cannot exist and flourish in absence of democracy. Democracy in turn, has to be rooted in the social fabric of the society. A good practical framework that is being put to use at the UN is the concept of the national protection system.¹⁵⁰⁰

¹⁵⁰⁰ Ramchan B. 'For Effective National Protection Systems', Speech at the International Launch of Article 2, available at www.article2.org/mainfile.php/0102/22 (visited on 29 July 2008).

Six key aspects of such a system are: integration of international human rights norms in the constitution of a country; incorporation of international human rights norms in national legislation; recourse to international human rights norms by local courts, human rights education; the existence of national human rights institutions; and monitoring of the situation of vulnerable parts of the population. In these ways, a country must strive to develop in the image of the Universal Declaration.¹⁵⁰¹

Three general principles have proven of great value in human rights and related work: the principles of respect, confidence-building, and protection. We should strive to demonstrate respect for a people even while maintaining a dialogue with its leaders. We should endeavour to build up confidence in one's methods of work; and one must remember always that the goal is to protect people at risk. There must be credibility in the protective role. Prevention is crucial. We must strive to prevent gross violations of human rights before they occur; one must strive to prevent humanitarian or man-made disasters. The best form of protection is prevention. The Conflict Prevention Mechanism of the AU has pioneered this path in African and there is much in its experience to build on. Every country should strive for prevention. National, sub-regional, regional and international institutions should do likewise. Prevention would commend itself to the peer review process.

Constitutional governance and the evolving African constitutionalism should be key to national endeavours. The doctrine of democratic legitimacy should be a fundamental starting point in these endeavours. African States need to nurture and protect an African constitutionalism grounded in universal and regional human rights norms. The international community is of Africa what Africa is of the international community. As a result, the international community cannot absolve itself from its responsibility of solidarity with Africa. We accept the notion of the universalism of human rights, such universalism should apply to setting the norms as well ensuring their application. The international community cannot only concern itself with human rights in Africa in terms of declarations or political attitudes, but it must support materially and economically Africa's drive to promote and ensure respect for human rights.

¹⁵⁰¹ Ramchan B. 'For Effective National Protection Systems', Speech at the International Launch of Article 2.

The international community cannot absolve itself from its responsibility of solidarity with Africa. If we accept the notion of the universalism of human rights, such concept should apply to setting the norms as well ensuring their application. The international community cannot only concern itself with human rights in Africa in terms of declarations or political attitudes, but it has to support materially and economically Africa's drive to promote and ensure respect for human rights. Equally beneficial are the findings and recommendations of UN human rights mechanisms. These may be of constructive inspiration.

Another way to deal with human rights challenges under the African system is that Africa's development partners should play a critical role in facilitating States' compliance with recommendations from the human rights mechanisms. This can be done through the mutual consultation to be conducted between Africa and the development partners. The outcome of the African human rights mechanisms will be discussed and this will give an opportunity to development partners to make relevant input where necessary. Africa's development partners have a particular interest in the full realisation of human rights as one of the major keys of ensuing Africa's development. Thus the consultations present an opportunity for Africa to account to its partners on human rights issues.

At the regional level, AU has prioritised the promotion and protection of human and peoples' rights as enshrined in its Constitutive Act. The AU cannot, and will not, guarantee or ensure the protection of human rights unless individual African States do so themselves. Simple references to international human rights instruments and their inscriptions in national constitutions and laws will not ensure their implementation.

One concurs with Nmehielle¹⁵⁰² rightly pointed out that:

The future of the African system should entail a consolidation in the areas where its development has been positively steady, while it strives to improve the areas where it had failed. One can say that there is now an African human rights system that is in a positive to advance human rights protection in Africa. The emergence of the AU as an attempt to reposition African in international and inter-African relations speaks volumes in terms of a new desire to lift human rights beyond the lip service of the OAU era.

¹⁵⁰² Nmehielle V.O. 'The Mandate of the African Commission' (January-March 2004) *Africa Legal Aid* 11, 14.

Nmehielle went on and suggested that:

It is, however, clear that progressive objectives in regional normative instruments would serve little purpose if a proactive stance is not taken to make those objectives a reality. The progressive future development of the African system will largely depend on the willingness of the AU as a regional entity and individual African countries to live up to their obligations. The provision of adequate financial and human resources for the African system is a sine quo non for the effective functioning of the African Commission in all its mandates, the soon to be established African Human Rights Court, and other supervisory mechanisms that implement other normative instruments.¹⁵⁰³

Nmehielle further maintained that if this determination is followed through, it is likely that there would be more gains in the positive development of the African human rights system. Member States of AU must also start to see the various human rights bodies as partners in the promotion and protection of human rights rather than as opponents.¹⁵⁰⁴ States must be made to take seriously their obligation under the African Charter or other human rights instruments to submit periodic reports on national implementation of human rights treaties.¹⁵⁰⁵ In the same way, the AU would have to take a proactive stance by exerting itself in encouraging a positive state of human rights practice by Member States in their domestic settings.¹⁵⁰⁶ The effective functioning of the African Commission in its mandates as well as the development of a robust jurisprudence of the African human rights system largely depends on all these factors.¹⁵⁰⁷

The political impetus, especially the trend towards multi-party democracy and the liberalisation and democratisation of the political system has blown winds of hope for the enhanced promotion and protection of human rights in Africa. However, the improvement of the African human rights system calls also for the targeting of human rights education at all sectors of the society. In this regard, NGOs should also be enabled to perform their duties across the board.

¹⁵⁰³ Nmehielle (January-March 2004) 14.

¹⁵⁰⁴ *Id.*

¹⁵⁰⁵ *Ibid.*

¹⁵⁰⁶ *Ibid.*

¹⁵⁰⁷ *Ibid.*

African governments should tolerate criticism of methods, processes and procedures that run counter to human rights, especially if it is constructive and offered good faith. Odinkalu observed that through history, the protection of human rights has been won by struggle, and struggle requires mobilisation.¹⁵⁰⁸ Mobilizing citizens for public participation is a matter of civic education; education in democracy and human rights is needed at all levels to create awareness. Africa needs a new generation of citizens to accompany the innovations that are taking place in the continent. According to Hermet, the classic citizenships where individuals exercise their citizenship by paying taxes and voting should be replaced by new citizenships where people take responsibilities and have a say in the decisions affecting their lives.¹⁵⁰⁹

There is a need to establish a clear relationship between African human rights mechanisms and human rights initiatives or programmes under the AU. To maximise its limited resources, the AU must avoid excess bureaucracy where possible, eliminating any institutional overlap. Lloyd and Murray argued that, the African Commission should offer itself to coordinate a response to the AU and initiate debate. As a result, in the process of doing so it could begin to put itself at the head of a number of units and institutions and instruments with the remit for human rights.¹⁵¹⁰

In this regard, the African Commission should invite representatives from the above named organs to attend its sessions and *vice versa*, in order to reinforce a mutual cooperation. This is necessary in line with the necessity of rational utilisation of the resources for the promotion and protection in Africa. The African Commission should hold regular consultations with AU such, the African Court of Human Rights (and latter the African Court of Justice and Human Rights), the African Committee of Experts on the African Charter on the Rights and the Welfare of the Child, the African Court of Human and People' Rights, African Court of Justice and Human Rights. NEPAD vision of human rights embodied in the APRM should be implemented in close partnership with the existing mechanisms. The most beneficial action should be that these mechanisms operate in close relationship applying the principle of complementarity.

¹⁵⁰⁸ Odinkalu C.A. 'Why More Africans Don't Human Rights Language', as cited by Heyns C. and Steffens (eds.) *Human Rights: Peace and Justice in African A Reader* (2006) 186.

¹⁵⁰⁹ Hermet G. *Le passage à la démocratie* (Paris : La Bibliothèque du Citoyen, Presses de Sciences Politiques, 1996) 123.

¹⁵¹⁰ Lloyd A. and Murray R. 'Institutions with Responsibility for Human Rights Protection under the African Union' (2004) 48 *Journal of African Law* 165, 185.

The challenges under the African human rights system lie not so much in the human rights instruments or enforcement mechanisms *per se*, in the inclusion of human rights in African constitutions, in democratisation or multi-partyism *per se*, or indeed in increasing the transparency of the monitoring bodies, but in instituting the mechanisms and political commitment which will effectively implement provisions at the national level. The national and international road to the promotion and protection of human rights in Africa is long, tortuous, erratic and rough, but it must be traversed. The challenges and prospects will be most difficult to elucidate and fulfil, but this must be done and taken into account for viable African human rights system.

Since its creation, the African human rights system has been a symbol of hope for victims of human rights violations. Every day, victims call on its mechanisms to address their concerns. The credibility of the human rights message and the AU action in the field is tested by the system's ability to respond in a meaningful way to these concerns. An effective African human rights systems could be expected to go beyond responding to appeals for help, not only could it serve as an early-warning mechanism but could also help to prevent patters of human rights violations, rather than reacting to them after they occur. From this, it may be expected that human rights will flower, even though it may only be in the long run. The struggle for human rights is a continuing one, for at no time can it be expected that perfection will be reached.

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