THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AS A MECHANISM FOR THE PROTECTION OF HUMAN RIGHTS IN AFRICA

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DEDICATION

THIS DISSERTATION IS HUMBLY DEDICATED

TO MY AUNT, DR. STELLA E. ANYANGWE, WHO

INTRODUCED ME TO HUMAN RIGHTS STUDIES.

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The responsibility for this work lies entirely in my hands, however, several individuals have, in one way or the other, played an important part in its completion.

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List of Treaties and Declarations

1. The Magna Carta of 1215.
2. The English Bill of Rights of 1686.
3. The American Declaration of Independence of 1776.
4. The French Declaration of the Rights of Man and of the Citizen of 1793.
5. The Covenant of the League of Nations of 1919.
6. The Treaties of Versailles and St German of 1919.
7. The Germano-Polish Convention on Upper-Sellesi of 1922.
8. The Slavery Convention of 1926.
9. The United Nations Charter of 1945.
10. United Nations Convention on Privileges and Immunities of 1946.
11. The Charter of the Organisation of American States (OAS) of 1948.
12. The American Declaration of the Rights and Duties of Man of 1948.
13. The Universal Declaration of Human Rights of 1948.
14. The Genocide Convention of 1949.
15. The Statute of the Council of Europe of 1949.
16. The European Convention on Human Rights and Fundamental Freedoms of 1950.
17. Declaration on the Granting of Independence to Colonised Peoples of 1960.
18. The Charter of the Organisation of African Unity (OAU) of 1963.
19. The Organisation of African Unity Protocol on Privileges and Immunities of 1964.
20. The Vienna Convention on the Law of Treaties of 1964.
21. The International Covenant on Economic, Social and Cultural Rights of 1966.
22. The International Covenant on Civil and Political Rights of 1966.
23. The First Optional Protocol of the International Covenant on Civil and Political Rights of 1966.
24. The Teheran Proclamation (Final Act) of 1968.
25. The American Convention on Human Rights of 1969.
26. The African Charter on Human and Peoples' Rights of 1981.
27. The European Social Charter of 1981.
28. The Treaty Establishing the African Economic Community (the Abuja Treaty) of 1991.
29. Protocol 11 to the European Convention on Human Rights and Fundamental Freedoms of 1996.
30. Protocol to the African Charter on Human and Peoples Rights relating to the Establishment of an African Court on Human and Peoples' Rights of 1998.

List of cases

1. *South West Africa (Namibia) v Republic of South Africa* second phase ICJ Report (1966) at 284-316.
2. *Mavromattis Palestine Concession case*, PCIJ Serie A no 2 (1924) p 12.
3. *Steiner and Gross v The Polish State* Upper Sellesi Arbitral Tribunal (1927-1928) Annual Digest.
4. *Exchange of Greek and Turkish Population case* Advisory Opinion no 10 PCIJ (1925) Series B.
5. *Reciprocal Emigration case* PCIJ Series B no 17 32.
6. *Aoko v Fagbemi and DPP* (1961) All Nigerian Law Reports 1 Lagos at 400.
7. *Re Southern Rhodesia* (1921) AC 211.
8. *Temple of Preah Vihar case* ICJ Reports (1962).

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SOME KEY TERMS IN THE DISSERTATION

African Charter on Human and Peoples' Rights

A regional human rights instrument created by the OAU to promote and protect human and peoples rights in Africa. Adopted in June 1981, it is now binding on 52 of the 53 member states of the OAU.

African Commission on Human and Peoples' Rights

An organ created by the African Charter on Human and Peoples, Rights and established within the Organisation of African Unity (OAU), mandated to promote and ensure the protection of human and peoples' rights in Africa.

Assembly of Heads of State and Government

A political organ created within the OAU and charged with the responsibility of making decisions for the African continent, and solving continental crises. The body is composed of Heads of State and Government of the Organisation of African Unity, and meets once a year. It is the supreme political organ of the OAU and the only organ empowered by the African Charter to take action on the Commission's recommendations.

Exhaustion of local remedies

One of the conditions imposed by the Charter which has to be fulfilled before a communication submitted to the Commission can be considered. It requires that the complainant ensure that all the legal remedies available at the national level been utilised in order to resolve the dispute to be brought before the Commission. Thus the Commission is regarded here as the last resort.

Organisation of African Unity (OAU)

A regional organisation made up of independent African states. Created in May 1963, the Organisation's main aims were to foster African unity, and to combat colonialism and apartheid.

Other communications

Communications submitted to the African Commission emanating from sources other than states. Article 55 of the Charter permits individuals, groups of individuals and NGOs to file communications against states they believe have violated any of the rights enshrined in the Charter.

Promotional Functions

A function conferred on the African Commission under article 45(1) of the Charter enabling it to sensitise people on their rights, freedoms and responsibilities. This usually involves the organisation of workshops, seminars, symposia, colloquia and conferences.

Protective Functions

A function conferred on the Commission under article 45(2) of the African Charter, which enables the latter to supervise and monitor human rights abuses within state parties. This usually involves receiving and considering complaints from individuals, NGOs or groups of individuals, and even from state parties themselves.

States' Periodic Reports

Reports that states parties to the African Charter are required under article 62 thereof to submit to the Commission after every two years from the date on which the Charter came into force for the state. Through these reports, the states are required to indicate the legislative and other measures taken to give effect to the provisions of the Charter.

Sub-regional Commission on Human Rights

Commissions to be established within each of the five political sub-regions recognised by the OAU; that is, North, South, East, West and Central Africa.

SECTION ONE

1:0 General Introduction

The African Charter on Human and Peoples' Rights[1], (the African Charter), which was adopted in Nairobi, Kenya on 28 June 1981 by the 18th ordinary session of the Organisation of African Unity (OUA) Assembly of Heads of State and Government and came into force on 21 October 1986, is the youngest regional (continental) human rights instrument in the world. The Charter was adopted after much international activity and with support from governmental and non-governmental human rights organisations faced with the lamentable state of human rights on the African continent. Mr. Nnamdi Azikiwe, former President of the Federal Republic of Nigeria, is credited with first suggesting an African Human Rights Convention. According to Maurice Glélé, Azikiwe, in his memorandum to the "Atlantic Charter and British West Africa" advocated the adoption of an African Convention on Human Rights.[2] This call was later echoed during the conference on the Rule of Law (the Lagos Conference) organised in 1961 by the International Commission of Jurists (ICJ).[3] The conference resolutions provided in clause 4 that:

> "in order to give full effect to the Universal Declaration of Human Rights of 1948, the 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".

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[1] Registered with the United Nations on 10/09/91 No 26363.

[2] Maurice Glélé "Introduction à la Charte Africaine des Droits de l'Homme et des Peuples" in *Droits et Libertés à la fin de XXe siècle* (1984) at 313.

[3] Ke'ba Mbaye, Keynote address, "Introduction to the African Charter on Human and Peoples' Rights" Report on a Conference held from 2-4 December 1985 convened by ICJ in Geneva (1986) at 19-20.

From 1961 when this pronouncement was made, to 1981 (two decades) when the Charter was adopted, several other conferences were held in Africa aimed at creating a human rights body.[4] This culminated in the formulation and subsequent adoption of the African Charter in 1981.

Like its counterparts, the European Convention on Human Rights and Fundamental Freedoms (the European Convention) and the American Convention on Human Rights (the American Convention), the African Charter provides for the establishment of a Commission to oversee the implementation of the rights, freedoms and duties it guarantees. Unlike the other two regional human rights instruments, however, the African Charter does not provide for a human rights court.

It is a settled fact that of the three major regional human rights instruments, the African Charter is not only the youngest but is also, in almost all respects, the weakest. Structural shortcomings and a lack of a political will strongly suggest that the promise of both the Charter and the organ it creates - the Commission - cannot be fulfilled without substantial revision and reconstruction. Given the abysmal performance of the African system so far, there is no doubt that a major overhaul is urgently required. The adoption and entry into force of the African Charter and the subsequent establishment of the African Commission on Human and Peoples' Rights (the African Commission), on 2 November 1987, have generated concern among non-governmental organisations (NGOs), practising lawyers, international lawyers and all those concerned in the promotion and protection of human rights. The Charter is seen as a human rights instrument specifically designed to respond to "African concerns, African traditions and African conditions".[5]

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[4] Seminar on Human Rights in Developing Countries, Dakar, Senegal, February 1966; Seminar on the Establishment of Regional Commissions on Human Rights with Specific Reference to Africa, Cairo, Egypt, September 1969; Seminar on the Study of New Special Ways and Means for promoting Human Rights with Special Attention to the Problems and Needs of Africa, Dar -Es -Salaam, Tanzania, 1973; OAU summit meeting which passed a resolution sponsored by Senegal and the Gambia for the drafting of an African Charter on Human Rights, Monrovia, Liberia, 1979; Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Monrovia, Liberia, 1979, Conference of Ministers of Justice to consider the draft African Charter on Human and Peoples' Rights, Banjul, The Gambia, January 1981.

[5] Evelyn A Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedure.* (1996) at 16.

It has features of other regional human rights instruments which set out internationally recognised individual rights, but also proclaims unique concepts, such as peoples' rights and duties, that have been a source of concern for many human rights advocates.

Major concerns raised about the African human rights system include, *inter alia*, the structure of the Charter itself; the practicality of its unique concept of "peoples' rights and duties"; and the effectiveness of the organ it creates - the Commission - in promoting and protecting human rights on a continent that has one of the worst records of human rights abuses.

The Commission, which is established under article 30 of the Charter, is empowered under articles 48, 49 and 55 to receive and consider, subject to certain limitations, communications alleging violations of the Charter from member states, NGOs and individuals. Upon consideration of such communications, however, the Commission is restricted to submitting a factual report of its findings and recommendations to the Assembly of Heads of State and Government of the Organisation of African Unity. It has no power to impose sanctions or award damages. The Charter gives the Commission no express authority to hold States accountable for human rights violations. These restrictions notwithstanding, the Commission's own Rules of Procedure, coupled with the reluctance of the commissioners to give a broader interpretation to some of the ambiguous clauses in the Charter, have rendered the Charter a mere "paper tiger" or a "sleeping beauty" and the Commission a "talk shop".

In addition to the procedural issues, the Charter is characterised by incoherence, clawback clauses and unjustified limitations of certain fundamental rights and freedoms. The system has further been clouded by the impracticalities of concepts such as peoples' rights and duties as enforceable under the Charter. This presents a dilemma the Commissioners must overcome.

One is therefore tempted to conclude that the drafters of the Charter, and the African leaders in particular, never envisaged a supranational organ that would interfere with their national sovereignty in "violation" of article III(2) of the OAU Charter of 1963. One reason for this may be that until very recently (the 1990s), the OAU has lacked a leader with sufficient moral force to channel the aspirations of the continent.

> "Since the leaders all had smeared hands, none dared cast the first stone, and so the complicity of silence continued"[6].

The African Charter as it currently stands, cannot be used as a vehicle for the protection of human rights, even allowing for ingenious interpretation by the African Commission. The institutional structures provided in the Charter are in need of major restructuring. In addition to revising the Charter's substantive provisions, the Commission's powers should be clarified and broadened. The Commission should be given precise, identifiable and express powers to carry out its mandate; to undertake investigative human rights missions in members states; and be mandated to prepare publicly available reports and recommendations, including the exercise of all the promotional functions outlined in article 45(1)(a) and (c) of the African Charter.

The Charter must be reformed and/or interpreted in the light of the democratic imperatives that have found a new voice in recent times. Clauses in the Charter that qualify the rights it guarantees and subordinate them to local legislation need to be removed or reconsidered.

A new system of investigation and enforcement is necessary to give strength and efficacy to the aspirations of human rights' safeguards in Africa. Until we can set up a viable system that has the unfettered power to find member states guilty of human rights violations and make those findings stick, we cannot claim to have a genuine human rights mechanism on the African continent.

Today, with more African nations becoming democratic and more liberal leaders rising to positions of authority in a number of African countries, there is some cause for optimism that Africa can begin to move in this direction. Africa, being the latest

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[6] *Cameroon Post* 8 July 1996 at 2.

continent to establish a regional human rights mechanism, has a great potential to correct the shortcomings of the Inter-American and European systems and to come up with a novel human rights protection mechanism.

This dissertation seeks to render a critical analysis of the African Charter *vis-à-vis* the protection of human rights on the African continent. The study also makes a comparative analysis of the African Charter and the European and American Conventions. It discusses the African human rights protection system on the basis both of the practice and procedure of the African Commission, and in the light of the practice and experiences of other regional human rights bodies. Focus has been placed on the activities of the Commission: how it interprets and attempts to ensure implementation of the Charter, the constraints it faces, and why . The last part of the work will offer practical recommendations on how to perfect the African human rights regime.

The analysis is preceded by a general overview of the concept of human rights and the notion of human rights in Africa.

•1:1 The Concept of Human Rights

Human rights were originally perceived as the natural rights of every individual, and as such, those rights had a distinct anthropological quality;[7] that is to say, they were determined by their author's perception of the nature and essential characteristics of the human person. The particular rights and freedoms that were thus thought to be natural concomitants of being human were identified by contemplating the condition of an individual in a stateless society. By eliminating all considerations that might be conditioned by a person's station in life as a member of the body politic, philosophers attempted to penetrate the true essence of the human condition and sought to translate that vital modality of being human into rights talk.[8]

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[7] *From Human Wrongs to Human Rights* Part IV Centre for Human Rights Pretoria (1995) at 50.
[8] *Ibid.*

Human rights were considered something which man is said to posses in his natural state, devoid of the intervention or support of society. He brings them with him into society which is created to protect these rights by enacting laws.[9] The early theoretical design of the idea of human rights emerged from the political philosophy of John Locke (1632-1704).[10] Locke sought to identify the basic rights of the individual by postulating the existence of the human person in a stateless situation, which he depicted as the idyllic coexistence of individuals in "peace, goodwill, mutual assistance and preservation".[11]

However, according to Locke, the state of nature suffered from certain drawbacks resulting from the absence of a superior power to regulate the conflicting interests of the individuals living in that state. The individuals consequently concluded a social compact whereby they joined forces to form a civil society (the *pactum unionis*); and by means of a second social compact (the *pactum subiectionis*) instituted a government with political power to protect their respective natural rights. The civil government derives justification for its existence and continuous exercise of political power from the contractual duty to protect the natural rights of its subjects. Failure by the government to safeguard the interests of its subjects effectively, will automatically dissolve the social compact and leave the subjects free to conclude a new contract with another sovereign.

Governments can recognise these rights and ensure their protection by law. The principle that law should protect the basic human rights of the individual against the abuses of governments can at least be traced back to John Locke's *Two Treatises of Government*, published in 1690. Locke believed that human beings, not governments, came first in the general order of things. He stated that:

> nan in the State of Nature be so free, as has been said; If he be absolute Lord of his own on and Possession, equal to the greatest and subject to nobody, why will he part with his dom? Why will he give up this Empire, and subject himself to the Dominion and *Control* nother power? To which 'tis obvious to Answer, that though in the State of Nature he *hath* a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of rs. For all being Kings as much as he is, every Man his Equal, and the greater part no strict erver of Equity and Justice, the enjoyment of the property he has in this state is very unsafe,

[9] Finnis John *Natural Law and Natural Rights* (1980).

[10] *Id* note 7 at 48.

[11] WS Carpenter (ed) *Two Treatises of Civil Government (1690)* (1924) 2.3.19.

> very unsecured. This makes him willing to quit a condition, which however free, is full of fears and continual dangers: And 'tis not without reason, that he seeks out, and is willing to join in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates".[12]

Locke's prose was re-iterated in 1776 in the American Declaration of Independence in which the thirteen United States of America proclaimed:

> "We hold these truth 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...".

Over the years, it has been recognised that human rights are not just pious declarations. They must be enforceable. They must be practically implemented. This places the burden of their protection and implementation squarely on the international and national agencies charged with the responsibility of enforcing and interpreting human rights instruments. This recognition of the practicality and enforceability of human rights has meant that governments have to put in place limits both on the exercise of these rights by individuals, as well as on the powers of their agents.

For instance, human rights have to be enjoyed with due regard to the rights and freedoms of others. Limitations on the enjoyment of individual human rights have found expression in all human rights instruments, be they national (as in constitutions), regional (as in the African Charter), or international (as in the UN Covenants). In some cases, however, these limitations are so severe as to render the enjoyment of basic human rights a mockery (as, for example, South Africa during the apartheid era, and in most one party regimes).

Today, there are many perceptions of human rights: the classical and the western espoused mostly by the developed countries in Europe and America; the specifists, the Islamic, and the African concepts championed by the Third World or developing countries, etc. etera. The classical theory holds the view that human rights exist in only one form, while specificity theorists argue against the universality of human rights. The classical concept presupposes that human rights are universal to all societies,

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[12] John Locke *Two Treatises of Government* (Laslett rev ed. 1963) at 395.

irrespective of social structure, while the theory of specificity maintains that human rights exist in the context of societal structure, that is to say, members of each society enjoy human rights depending on how that society is structured, be it socially, economically, politically or otherwise. However, the contemporary concept of human rights assumes that human rights have always existed with human beings. They existed independently of, and before the notion of statehood. Thus, as Judge Takana cited:

> "A state or states are not capable of creating human rights by law or convention; they can only confirm their existence and give them protection. Human rights are not a product of a particular judicial system, or the preserve of a particular continent or people, but are the same and must be recognised, respected and protected everywhere mankind is found".[13]

This means that human rights must be protected on both the domestic and international levels because there is only one notion of human rights applicable to all human beings.

Therefore, the observation made by Professor Jack Donnelly that:

> "Most non-western cultural and political traditions lack not only the practice of human rights but the very concept ... as a matter of historical fact, the concept of human rights is an artefact of modern Western civilisation"

is disputable in that it implies that the concepts of human rights espoused in non-western traditional societies are not regarded as "rights" and that there is in fact no practice of "human rights" in these societies.

In terms of both the classical and the modern concepts of human rights, the principle of the protection of human rights derives from the concept of the individual human being and his relationship with the society, which cannot be separated from universal human nature. If a law exists independently of the will of the state and accordingly cannot be abolished or modified by its constitution because it is deeply rooted in the conscience of mankind and of every reasonable man, it may be called natural law in contrast to positive law. Generally, the guarantee of human rights and fundamental freedoms possesses a supra-constitutional significance. It is in a class of *jus cogens* which cannot be changed even by agreement between states or individuals.

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[13] Judge Takana in the ICJ, citing Judge Philip Jesseys *South West Africa (Namibia) Cases Second Phase* ICJ Report (1966) 6 (see especially the dissenting opinion at 284-316).

The great American and French texts of 1776[14], 1789[15] and 1791[16] set forth principles which are instantly recognisable as propositions of modern human rights law.[17] These principles may be summarised as follows:

- The principle of *universal inherence:* every human being has certain rights, capable of being enumerated and defined, which are not conferred on him by any ruler or earned or acquired by purchase, but which inhere in him by virtue of humanity alone.
- The principle of *inalienability:* no human being can be deprived of any of these rights by the act of any ruler or even by his own act; or in a democracy, even by the will of the majority of the people.
- The *rule of law:* where rights conflict with each other, the conflict must be resolved by the consistent, independent and impartial application of just laws in accordance with just procedures.

1:2 Internationalisation of Human Rights

In terms of the traditional doctrine of national sovereignty, a sovereign state has complete freedom of action to deal with its own nationals (personal sovereignty) and with its own territory (territorial sovereignty). It follows from this principle that in all matters falling within the domestic jurisdiction of any state, international law does not permit interference, let alone intervention, by any other state. Such matters do not fall within the concern of international law. Accordingly, so long as personal sovereignty continued to be regarded as exclusively within the domestic jurisdiction of sovereign states, "what a government did to its own citizens was its own affair and beyond the reach of international law or legal interference by others states".[18] This principle was enshrined in the Covenant of the League of Nations, by virtue of article 15 which stipulated that nothing contained in the Covenant shall authorise the League to intervene in matters that "are exclusively within the domestic jurisdiction of states".

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14. The American Declaration of Independence 1776.
15. The American Constitution of 1789.
16. The French Declaration of the Rights of Man and of the Citizens 1791.
17. Paul Seighart *The international law of human rights* (1982) at 8.
18. JP Humphrey *The international law of human rights* (1973) at 12.

The principle has also found concrete expression in article 2(7) of the UN Charter of 1945 which provides specifically that:

> "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Member to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII".[19]

However, matters stood differently in the case of aliens. As part of its national sovereignty, a state was always entitled to demand respect for its own nationals abroad, as any maltreatment of them could constitute a violation of the personal sovereignty of the state to which they belonged.[20] This demand, however, flowed only from the doctrine of national sovereignty itself - so that, if a state fell short of the requirement of protecting another state's nationals, for example, by expropriating their property, the compensation was due to the other state whose personal sovereignty had been violated, and not to the individual whose property had been taken. So in such a case, the state is the sole claimant.[21] Whether that state chose to pass the compensation on to the injured individual was, in international law, entirely its own affair.[22]

For centuries, one proposition remained unchallenged: by reason of the doctrine of national sovereignty, the law of nations could not recognise any rights vested in any individual against any sovereign state - his own or another.[23]

By the nineteenth century, however, international law was developing a doctrine of legitimacy of "humanitarian intervention" in cases where a state committed atrocities against its own nationals which "shocked the conscience of mankind".[24] There was the growing realisation of the inseparable link between individual liberty and international peace and security. The consequences of the activities of the Ottoman troops affected several other states and threatened peace and security in Europe. World leaders had to discuss how to ensure the protection of these liberties, not only within their own

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[19] PR Ghandhi *International human rights documents* (1995) at 15.

[20] See *Mavrommatis Palestine Concession Case* PCIJ Series A No 2 in which the court pointed out that "by taking up the case of one of its subjects, and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, its right to ensure in the person of its subject, respect for international law...".

[21] MN Shaw *International Law* (1986) at 421.

[22] Sieghart note 17 above at 12.

[23] *Ibid.*.

territories but throughout the world. Thus, when the British Liberal politician, Gladstone, invoked the doctrine of humanitarian intervention to support the freedom of the people of Bulgaria from Ottoman troops, he faced very little opposition.[25] This humanitarian intervention doctrine was invoked largely against the Ottoman Empire in 1827 on behalf of the Greek people; by France in Syria in 1860-1861; and again in 1876 when around 12000 Christians were massacred by irregular Ottoman troops in what is today Bulgaria.[26]

This process continued, albeit slowly. After the First World War, minority treaties were concluded with the League of Nations as a guarantee which sought to protect the rights of linguistic and ethnic minorities within the new state territories created by the treaties of Versailles and St. Germain. For instance, article 4 of the Germano-Polish Convention on Upper Silesia of 1922 broke new ground in guaranteeing the rights of individuals - including the rights to life, liberty and the free exercise of religion, and equal treatment before the law, even against a state's own nationals. A Pole and a Czech were the first private individuals in the history of international law to establish personal rights against a state as a result of this treaty.[27] The same period saw international collaboration in the abolition of both the national and international slave trade. The first true international human rights treaty - the Slavery Convention - was adopted in 1926.[28]

The turning point and the subsequent downfall of the doctrine of national sovereignty, at least as far as it relates to human rights, came in the late 1930s and early 1940s, when unprecedented atrocities were perpetrated by the regimes of Italy, Russia, Germany and other dictatorial regimes in Europe and Asia (which were all lawfully in power), against millions of their own citizens. Many of these atrocities were carried out with complete legality under the respective national legislation: the domestic laws authorised the pernicious injustice of the acts.[29] Moreover, these laws had been enacted by legislatures lawfully installed under the constitutions of these sovereign states. Under the strict

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24. *Id* at 13.
25. *Ibid.*
26. *Ibid.*
27. *Ibid.* See also the case of *Steiner and Gross v The Polish State, Upper Selesian Arbitral Tribunal cases* 188 and 287 1927-28 *Annual Digest.*
28. Ghandhi note 19 above at 2.
29. Sieghart note 17 above at 14.

doctrine of national sovereignty, any foreign criticism of those laws was illegitimate and an interference in domestic affairs.[30]

When the Second World War ended, shocked by the barbaric atrocities committed and sufferings caused by some states against their nationals, the victorious Allied Powers were determined to introduce into international law new concepts designed to outlaw such events in the future, or to make their recurrence at least less likely.[31] The means adopted was the establishment of new inter-governmental organisations, such as the United Nations, and the development of a new branch of international law, specifically concerned with relations between governments and their own subjects.

Since then, several international human rights instruments have been adopted by the UN which now impose obligations on many governments as to what they may or may not do to individuals over whom they exercise state power. To the extent of those obligations, the strict doctrine of national sovereignty has been restricted in at least two crucial respects. First, how a state treats its own subjects is now the legitimate concern of other states, in other words, an issue falling under international law. Secondly, there is now a superior international standard, established by common consent, which may be used for judging the domestic laws and actual conduct of sovereign states within their own territories and in the exercise of their internal jurisdictions, and may therefore be regarded as ranking in the hierarchy of laws even above national constitutions.

During and after the Second World War, the Allied Powers came to the conclusion that it was the gradual infringement of individual liberty with impunity within member states that had led to the war. They then pledged to ensure that protection of individual rights internationally would have to become their major priority if there were to be international peace and security. To make sure that their pledges became a reality, the

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30. *Ibid.*

31. The landmarks in these movements were the Atlantic Charter of 14 August 1941, with its call for "freedom from fear and want", the declaration of 1 January 1942 by the twenty-six United Nations then fighting the Axis Powers, to the effect "that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands"; the Dunbarton Oaks proposals of 1944 for the establishment of the United Nations Organisation which would, among other things, "promote respect for human rights and fundamental freedoms", the phrase to which the San Francisco Conference of 1945 added the words "for

victorious Allied Powers adopted legally binding treaties that exposed the treatment of individuals by their governments to international scrutiny. Despite the proclamation in article 2(7) of the UN Charter that: "[n]othing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State...", Chapter VII of the same Charter permits the UN to intervene in situations where a government's treatment of its citizens threatens international peace and security, for example, the Rwanda genocide of 1994. These legally binding human rights instruments signed by governments rank higher in international law than domestic laws, and prevail when there is conflict between the two. This principle is aimed at ensuring an effective inter-state relationship, thus preventing states from abrogating their international responsibilities by invoking domestic legislation. As far back as 1925, when the Permanent Court of International Justice (PCIJ) gave an advisory opinion in the *Exchange of Greek and Turkish Population case*,[32] the court pointed out that

> "...a principle which is self-evident, according to which a state has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken".[33]

Also in 1930, with regard to the Interpretation of the Convention between Greece and Bulgaria respecting *Reciprocal Emigration*,[34] the PCIJ stated that

> "...it is a generally accepted principle of international law that in relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty".[35]

And in stressing the Universal Declaration's universal character by which human rights issues transcend the domestic jurisdiction of states, Dr HV Evatt of Australia, the President of the UN General Assembly in 1948, stated (after the Declaration had been adopted) that:

> "It is the first occasion on which the organised community of nations has made a declaration of human rights and fundamental freedoms, and it has the authority of the body of opinion of the UN as a whole, and millions of men, women and children all over the world, many miles from Paris and New York, will turn for help, guidance and inspiration to this document".[36]

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all, without distinction as to race, sex, language and religion".

32. Andrew Drzemczewski *European Human Rights Convention in Domestic Law: A Comparative Study* (1983) at. 20-21.

33. Advisory Opinion No 10 PCIJ (1925) Ser B.

34. PCIJ Ser B No 17 32.

35. Drzemczewski note 32 above at 21.

36. Quoted in *UN Department of Social Affairs* " The impact of the Universal Declaration of Human Rights" (1953) Doc ST/SOA/5/Rev 1 at 7.

However, it undoubtedly remains the case that some nations, especially those in the Southern Hemisphere, have not yet accepted, do not yet conform, or conform only inadequately, to the new obligations under international human rights law.

Another argument which is sometimes heard is that "human rights" are an exclusively Western concept, whose "imposition" on the rest of the world, constitutes a form of intellectual, political, or legal neo-colonialism or neo-imperialism.[37] But this argument is gradually losing ground as it becomes evident that concepts of legitimacy, the justice of laws, the integrity and dignity of the individual, safeguards against arbitrary rule and freedom from oppression and persecution, are to be found in very similar form in every civilisation throughout the world and throughout history. People in Africa, Latin America and Asia are as human and deserve as much respect for their dignity as do people in Europe and America.

In spite of these differences in the approach to human rights, since the end of the Second World War there has been a progressive development towards the international protection of human rights on both international and regional levels. The post World War Two international instruments for the protection of human rights commenced with the adoption of the UN Charter on 26 October 1945. Although the Charter (the constitution of the UN) is a legally binding document, the absence of any definition of human rights in the document has greatly weakened the legal authority of its clauses. An attempt was therefore made to supplement them in 1948 by the adoption of the Universal Declaration of Human Rights (UDHR).[38] This document, which defines fundamental rights such as, the right to life and liberty of the person, to a fair trial in criminal proceedings, and fundamental freedoms such as freedom of expression, religion and association, is a declaration adopted by resolution of the UN General Assembly and not a legally binding document.[39] It was not intended to be a legal

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[37] This argument is commonly heard from Third World leaders, especially African leaders who want to use this as a means to continue suppressing their citizens. They believe that by invoking the vices of colonialism and imperialism, they can move their citizens to rebel against any form of Western criticism of their human rights records. Unfortunately for them, this hasn't been the case, for the citizens have become more and more aware of the universality of human rights and each day they pressurise these regimes for reforms.

[38] *The International Bill of Rights* UN Fact Sheet No 2 Rev (1996).

[39] Leah Levin *Human Rights: Questions and Answers* UNESCO (1981) at 17.

instrument binding on members.

Nevertheless, it has gained considerable authority as a general guide to the content of fundamental human rights and freedoms as understood by members of the UN. It also provides an important link between different concepts of human rights in different parts of the world. The declaration has been described as "a common standard of achievement for all peoples and all nations".[40] In terms of its preamble, the declaration is intended to provide a common understanding of the human rights and freedoms in the Charter.

Despite its non-binding nature, the declaration has been affirmed by numerous resolutions of the United Nations' bodies and related agencies; invoked and re-invoked by a broad range of decision makers, national and transnational, judicial and others; and incorporated in many international agreements and national constitutions. The result is that the Universal Declaration is now widely acclaimed as a Magna Carta of humankind, to be complied with by all actors in the world arena. What began therefore as mere common aspiration is now hailed as an authoritative interpretation of the human rights provisions of the UN Charter and established customary law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights. Through repeated practices of states, it is now generally held to have crystallised into a binding instrument.[41] At the First UN Conference on Human Rights held in Teheran, Iran, in 1968, the Final Act, the Proclamation of Teheran states in article 2 that

> " the UDHR states a common understanding of the peoples' of the world concerning the inalienable and inviolable rights of all members of the human family and constitute an obligation for the members of the international community".

The UN General Assembly accepted this view of the declaration when by Resolution 2442 (XXIII) of 19 December 1968, it endorsed the Teheran Proclamation. The UN General Assembly has on several occasions used the declaration as a basis for appeals to urge governments to take measures to promote respect for and observance of human

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40. *Id* at 15.
41. J Humphrey *No Distant Millennium: The international law of human rights* (1989) at 154-166; see also articles 31 and 32 of the 1964 Vienna Convention on the Law of Treaties.

rights. The UN adopted several resolutions against the apartheid regime of South Africa, including the following: UN General Assembly Resolution (UN GA Res.) 2145 (XXI), whereby it decided that the mandate of South Africa in Namibia was terminated; UN Security Council Resolution (UN Sec Council Res) 276 (1970) declaring the continued presence of South Africa in Namibia illegal, (all these because South Africa's treatment of the people of Namibia was considered by the UN to be against the principles enshrined in the Declaration). The UN General Assembly in Resolutions 2372 (XXII), 2403 (XXIII), 2498 (XXIV) and 2517 (XXIV) and Security Council Res 269 (1969) recognised the legitimacy of the Namibian national struggle. The UN Security Council in Resolution 282 (1970) ordering an embargo on the shipment of arms to South Africa, recognised

> "...the legitimacy of the struggle of the oppressed people of South Africa in pursuance of their human rights and political rights as set forth in the Charter of the UN and [in] the UDHR".

Subsequent efforts after the adoption of the 1948 Declaration have been focused on arriving at covenants aimed at further defining the rights and freedoms and providing machinery for dealing with complaints of violations of the Covenants. While the UDHR was drafted with remarkable speed (it was passed on to the Economic and Social Council - ECOSOC - a year after the drafting work started and proclaimed by the UN General Assembly on 10 December 1948); the "no power" doctrine prevailed for almost twenty years. These years of concentrated efforts at standard-setting culminated in December 1966 with the adoption by the UN General Assembly of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), and the Protocol to the latter. Together, these instruments are commonly known as the international bill of rights.

From standard setting, the UN moved to reinforcement of its monitoring mechanisms. A few months after the adoption of the 1966 Covenants, ECOSOC authorised the Human Rights Commission, for the first time, to place on its annual agenda, an item relating to violation of human rights, including authority to examine communications.[42]

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[42] ECOSOC Res 1235 (XLII) of 6 June 1967.

[42] UN ~~GA Res~~ 260 (III) 78 UNTS 277.

Apart from the abovementioned international human rights instruments, the UN has adopted over seventy other human rights instruments including the Genocide Convention of 1949[43] and the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960.[44] All these are aimed at entrenching the universal protection of human rights.

Despite the universally acknowledged concept of the protection of human rights, their implementation and enforcement depend largely on the various conceptions held by the different peoples of the world. Peoples from different parts of the globe recognise the need to protect human rights but adopt methods that suit their particular needs.

43. UN GA Res 1514 (XV) 1960.

44. Claude E Welch Jr. "Human rights as a problem in contemporary Africa" in Claude E Welch & Ronald Meltzer (eds) *Human rights and Development in Africa* (1984) at 11.

1:3 The African Notion of Human Rights

Africa presents a paradoxical picture in the study of contemporary international human rights. The reality that one witnesses in contemporary Africa differs greatly from that envisaged by the departing colonial masters. The colonial powers expected that constitutional provisions and a Western-trained judiciary would protect human rights as defined, determined and delineated in the constitutions left behind at independence. Either through *coup d'etat,* or by proclamation of states of emergency or siege, however, constitutional safeguards, and often whole constitutions, have been abrogated, annulled, or amended, so subverting the human rights that had been declared sacrosanct in the constitutions of various African nations.

Recognition and protection of human rights certainly existed in the pre-colonial period.[45] However, African definitions of human rights differed in key respects from those propounded by the West. The conception of human rights in traditional African society is not sanctioned by a normative system deriving its validity from a constitutional base or *Grandnorm,* but is rather premised on social values positively confirmed by African beliefs in the past and transmitted to posterity through oral history and manifested through positive traditional practices. The durability of these values is guaranteed by the fact that they symbolise some of the basic elements which hold society together. The context of family, clan and ethnic solidarity provide the frameworks within which individuals exercise their political and social liberties and duties.[46]

The African traditional systems of human rights are underpinned by social forces peculiar to each society and are not the creation of a modern constitution.[47] The abrogation of a constitution, therefore, will have no effect on the traditional concepts of human rights.[48]

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[45] Claude E Welch Jr "Human rights as a problem in contemporary Africa" in Claude E Welch & Ronald Meltzer (eds) *Human rights and Development in Africa* (1984) at 11.

[46] *Ibid.*

[47] Michelo K Hansungule, *The African theory of human rights* (1995) at 1.

[48] *Ibid.*

There is, however, another point of difference that one might detect between African traditional conceptions of human rights and the conceptions of human rights fostered in modern societies. In the latter, the rights are considered universal and individualistic in nature, and apply on the same footing to every human being irrespective of geographic location.[49] In the former, human rights exist within the context of a particular group or community.[50] In general, African law is a law of the group, not only because it applies to micro-societies (lineage, tribe, ethnic group, clan or family), but also because the role of the individual is largely insignificant.

In traditional African society, the importance of the society, administered by traditional norms, was emphasised, and individual rights were viewed within the context of the group. It was within the group that the individual found security to enjoy his or her rights. The individual was subjugated by the archetype of the totem; of the common ancestor or protecting spirit. As Professor Collumb aptly states:

> "Living in Africa means giving up an individualistic, competitive, egoistic, aggressive and dominant way of life, so as to live along with the living and the dead, with the natural environment and the spirits which people it or endow it with life".

The whole concept of human rights revolved around the African "communitarian ideal". Decisions within each society were made by consensus rather than by competition, and economic surpluses were generated and disposed of on a distributive rather than a profit-oriented basis.[51] Thus, as Issa G Shivji, a Tanzanian writer, puts it:

> "African traditional society is based on collectively (community) rather than on an individual and therefore, the notion of individual is foreign to African ethno-philosophy".

But the seeming absence of the individual conception in the traditional society hardly implies the absence of individual rights. These are there, but individual rights and interests are defined in groups or communities through which the individual finds expression. It would also be wrong to assume that the authoritarianism or absence of Western styled democracy in most African states, reflects the nature of human rights of the traditional African political systems. This seems to be the central thesis of those

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49. Welch Jr note 45 above at 7.

50. Lakshaman Marasinghe "Traditional Conception of Human Rights in Africa", in Welch & Meltzer note 45 above at 33.

51. Rhoda Howard "Is there an African Concept of Human Rights?" in Vincent RJ (ed) *Foreign policies and human rights: issues and responses* (1986) 13.

who deny the existence of the concept of, and even the practice of, human rights and democracy in non-Western systems. Rather, when one speaks of human rights violations in Africa, one refers mainly to the violation of human rights as guaranteed by externalised constitutions: texts adopted outside the norms of traditional African beliefs and values, texts that advocate adversarial ideals rather than the home-grown African culture of dialogue and reconciliation. Externalised texts took little or no account of what the traditional African societies regard as human rights. While the modern concept of human rights protection relies on the courts and other agencies for the enforcement of human rights, traditional African societies relied on communal solidarity and the moral up-bringing of its people. It is believed that if individuals are properly brought up to respect one another, respect their elders and live in solidarity with one another, there will be no room for human rights violations, and consequently no cause for the establishment of courts for their protection.

Studies conducted into the African concepts of human rights as recognised by traditional societies, illustrate enormous satisfaction as to the basically democratic way in which the society protects its own human values: the choosing of leaders, the settlement of conflicts, the provision of social amenities, the rendering of assistance and support, etc etera. The rights guaranteed in modern constitutions are fully guaranteed and enjoyed in traditional societies, although not embodied in texts negotiated by a certain portion of the population. Basic rights such as the right to life, the right to shelter, the right to food, the right to association, assembly, expression etc etera. are recognised and guaranteed, and even the head of a particular community cannot, without the consent of the subjects, and by due customary process, deprive an individual of any of these rights.

The right to life, for example, is sacred. At every libation, at festivals and on other occasions, prayers are offered for the protection and preservation of individual life and life in general respectively[52].

[52.] Victor Dankwa "The African Charter on Human and Peoples' Rights: Hopes and Fears" in *The African Charter on Human and Peoples' Rights: Development, Context and Significance* African Law Association (1991) at 3.

Witness the following prayer at the beginning of a farming season in Ghana:

> "The year has begun, we shall be going to cut the bush, And if (as) we ...go to cut, we pray for our lives, Let our cutlass cut bush and creepers, But do not let it cut (a) Human leg"[53].

The following Akan proverb also exemplifies the importance that traditional societies attach to the right to life:

> "It is man that counts. I call upon gold, it does not answer. I call upon my drapery, there is no answer. It is man that counts"[54].

In my village, Oshie, in the North-western Province of Cameroon, for example, not only is it forbidden to take some other person's life, it is also forbidden to take one's own life. A man who for any reason kills another person is severely punished. Depending on the circumstances that led to the killing, the killer can either be expelled from the village for life, or for a certain period of time, or be asked to pay, after consultation with the family of the deceased, compensation in the form of "blood money". The death penalty imposed by some modern societies is not practised because it is forbidden to take life. In Western societies, the right to life includes even the right to affect one's own life, for example, suicide, euthanasia (and even to affect the lives of others through legalised abortion). The African communitarial ideal sees it as a duty upon society to protect the life of everyone, and to ensure that not even an individual takes his or her own life. If a man takes his own life, his funeral shall be blocked, that is to say, nobody will be allowed to shed tears or even to feel sorry for him. Nobody is allowed to visit the funeral house until it is announced that the deceased's family has paid something to enable the ban to be lifted. Anyone found crying at the scene of the funeral shall be heavily fined. The community believes that since he or she didn't value his or her life, he or she should be buried like an animal. This in our village, is a great humiliation to the relatives of the deceased, and serves as a deterrent to would-be suicides for they would not want to "disgrace their family". A woman who attempts an abortion and dies in the process is treated in the same manner. Such is the value attached to life that the whole community comes to mourn if one of their number dies. The importance that the people in this community attach to life demonstrates their desire to inculcate into the younger generation the inviolability of this God-given right.

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[53] Anne Klingelhofer "Agriculture" in David Brokenscha (ed) *Akwapim Handbook* (1972) at 137.
[54] KA Busia *The position of the Chief in the Modern Political System of Ashanti* (1951) at 35.

It is believed that if all the members of the community are brought up to respect their lives and those of others, it will be very unlikely for these persons to take life for granted, theirs or others.

The importance attached to the right to life could also be noticed with other basic rights. Non-centralised or amorphous societies such as the Ibos of Nigeria, Nuer of Sudan, Tonga of Zambia, and the Ashanti in Ghana are said, during the pre-colonial era, to have had very strong egalitarian and democratic traditions.[55] In most indigenous African political traditions, it was not unusual to find that decisions affecting the community as a whole could not be made until they had been publicly debated. For example, in some tribes in the Bamangwato of Botswana, (considered to be one of Africa's most democratic societies)[56], important decisions of governance were made with the participation of all adult members of the community. The Ashantis of Ghana and the Yurobas of Nigeria, operated systems which checked and carefully balanced and sanctioned the abuse and disregard of tribal powers. The Bugandas of Uganda are known to have gone even further and killed most of their Kabukas (Kings) in defence of their rights and freedoms,[57] and in the famous break-up of the Shaka Zulu empire, several of his best soldiers and loyal citizens rebelled against him in an uncharacteristic fashion due to his alleged gross human rights violations.[58]

Once in a group or community, the African is entitled to various other rights due to members of that group. These rights: association, assembly, speech, movement, property, did exist and were enjoyed by traditional African societies.

The African has been known for being associational or communitarian in attitude. It is therefore unfair to deny the existence of this right within the society.[59] In traditional Yoruba society, for example, the right to family membership (association) is considered as a distinct legal right. Family membership endows the members with a number of

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55. "Human Rights and African Development" in *Encyclopaedia of Public International Law* (North Holland)(1985) at 285-290.

56 Hansungule note 47 above at 11.

57. *Busia note 54 above at 35.*

58Hansungule note 47 above at 10.

rights including, the right of succession to family property which is held in common; the right to be supported in times of scarcity; and the right to claim societal and psychological help at moments of need. In modern societies, the problems associated with old age, infirmity, widowhood, and being orphaned, generally all fall within the sphere of social welfare underwritten by the state. In the context of a traditional society, these problems are generally the concern of the members of the extended family.[60] Membership of an extended family is regarded as a fundamental right, and any attempt to exclude a person from such membership unlawfully is considered, in Yoruba for example, as a violation of human rights. This right is so deeply rooted among the tribes of Nigeria that it has found expression in the constitution of the country. One leading case in this area that came before the Nigerian courts is *Aoko v Fagbemi and DPP*.[61] The applicant was found to have committed adultery which was a criminal offence under native law and custom. The family council decided to expel her from her extended family. She applied to the Nigerian courts for an injunction. The court allowed the injunction on the ground that adultery was not an offence under the Nigerian Criminal Code, and therefore her expulsion constituted a violation of her fundamental rights under section 22(10) of the Federal Constitution of Nigeria.[62]

With the right to freedom of association follows other rights. In the past, Africans would associate with each other based not only on kin, but also on sex. Boys of mature age were usually assembled to be taught the basic ethics of manhood, including how to run a family, the village set-up, the politics in the village, and succession to the throne. Some are even trained to be adjudicators to settle village disputes among their piers. Throughout the session, the African principles of generosity, hospitality, tolerance and duty of the children to look after and respect their parents, and the duty of the parents to look after their children are emphasised. Girls too assemble to learn about their roles in society. Persons of different age groups could assemble freely to discuss issues affecting their lives.[63] But today, in most African countries, demonstrations and assemblies require the prior procurement of a permit from state authorities. Today, a

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[59] *Ibid.*

[60] Marasighne note 50 above at 47.

[61] 1961 1 All Nigerian Law Reports at 400.

[62] SNC Obi *Modern family law in Nigeria* (1966) at 38.

single police officer can disperse a crowd of thousands of people who have assembled to enjoy their rights of expression, association and assembly, just because they do not have a permit to assemble. It was unheard of in traditional society that people needed permits to assemble.

Freedom of movement in traditional society, particularly among the tribes in the Southern Province of Zambia has always been exercised without government intervention. These tribes have been drifting to other parts of the country in search of more fertile land for their farming needs.[64] In the past few years they have moved right up to the north of the country. The most striking thing about their movement is that the migrations are taking place without government interference. And as they move, they are exercising their freedoms of movement and residence.

Among the Yorubas, freedom of speech has always been regarded as a common, or communal right.[65] It is subject, however, to a very real limitation, namely, the principle of respect.[66] This principle involves respect for both oneself and others. The respect for others raises a notion of stratification along a hierarchy of respect determined within each social unit. The hierarchy of respect for parents, for elders closely related by blood, for elders belonging to the same extended family, and for the head of the whole family, provides a classic paradigm.

> "The defamation of a person higher in status [or an elder], such as a chief, is a very serious offence which often calls for heavy compensatory payment [but not incarceration as in some modern societies]".[67]

The limitation introduced by the principle of respect and the need to leave most slander and libel to mediation and conciliation through family councils as matters affecting family status, must be viewed as indicative of the fundamental belief that all freedoms are limited by the need to preserve social harmony.

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[63] Hansungule note 47 above at 11.

[64] *Ibid.*

[65] Marasighne note 50 at 36.

[66] *Ibid.*

[67] Francis M Deng *Tradition and Modernisation: a challenge for law among the Dinka of Sudan* (1971) 226.

Viewed in this way, the limitation placed upon the freedom of speech in a modern society is largely controlled by a normative system which could be manipulated by a ruling elite which control the legislative machinery. In a traditional society, manipulation is very unlikely because the freedom is internalised and therefore becomes part of the common weal of the society.

Apart from the political rights and freedoms, the existence of which have often been denied by Western scholars, economic rights, such as the right to own property was completely ruled out. In the celebrated English case of *Re Southern Rhodesia* (1921) AC 211, the Privy Council in London held that the concept of property was foreign to the natives. This case involved the sale of a large piece of land by an African chief to the British South African Company for mining and for the other English settlers. Seeing that most of their tribal land had changed hands as a result of this agreement, the tribal people decided to challenge the agreement. It was in the course of this proceedings that the Privy Council, then the highest court of the former Rhodesia, now Zimbabwe, held that:

> "Africans did not entertain the concept of property in their ideals and therefore it would be improper to hold the so-called contract valid when the mind of the two contractors could not have been said to have agreed as to the contract".

In this way, the Westerners denied the existence of the principle of property (such as land) and therefore the human right to property in the jurisprudence of traditional African society, and so began to dismantle the African ideas in order to replace them with the English idea.

The protection against any unlawful incursions into the right to hold movable property under native law and custom is an absolute one.[68] Problems, however, arise particularly with immovable property, primarily land. Under the traditional system in Yoruba, for example, family land is not subject to private ownership.[69] Although the community as a whole owned the land in question, individual members in each community would be entitled to parcels of land on the basis of the formula in the respective community.

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68. Marasighne note 50 above at 40.
69. *Ibid.*

Once an individual is a member of a community, that individual has a right to land. No one, not even the head, can deprive him or her of this right. Land in the West and most modern African societies, can be owned by individuals who can exclude others and who have the right to alienate it as they wish. In traditional African society, this is not possible as individuals can own only (absolute) rights to use of the land but not the land itself. This is owned by the community as a whole for the respective members.

The fact that family property, such as land, is considered communal property is basic to property rights as conceived by most traditional societies in Africa. Any act of alienation of such property requires the consent of all members of the extended family. The limitation upon the freedom to own immovable property is a recognised principle among most traditional societies in Africa, justified principally on the ground that land and the extended family are inseparable and therefore any parcelling of the family's land (to individuals) which may eventually lead to the incursion of other extended families into the domain of the first, could begin the process of social decay and societal disintegration. An extended family without family land has been likened to " a building without pillars or walls".[70] In 1912, a Nigerian Chief, in a submission to the West African Land Commission said: " I conceive that land belongs to a vast family of which many are dead, few are living and countless yet unborn".[71]

In the Nyakyusa, a Bantu community south of Tanzania, land is not owned in any absolute sense either by the man and his household who live on and cultivate it, or by the village group, or by the chief, but by all of them jointly.[72] The holding of land is both "communal" and "individual". It is communal in the sense that the individual's rights are dependent upon his social relationships, upon his membership of some group with a definite cultural idiom and social organisation of its own.[73] The holding of land is individual in the sense that at any moment, particular people have definite rights to

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70. *Ibid.*
71. TO Elias *The nature of African Customary law* (1970) at 162.
72. Geoffrey Wilson *The land rights of individuals among the Nyakyusa* (1968) at 29.
73. *Ibid.*
74. *Ibid.*

participate in the use and to share the produce of particular pieces of ground.[74]

Indeed, the experience on the ground clearly shows considerable satisfaction on the land allocation rules in traditional system than is the case in the modern system. Whereas there are lists of applicants awaiting allocation of "state land", at the Ministry of Lands under modern state systems, there are no equivalent lists at traditional institutions.

From the foregoing, one can firmly assert that the notion of respect for human dignity, the freedom of expression, and other basic rights were firmly entrenched in the daily administration of traditional African societies.

In terms of contemporary notions of human rights, colonialism produced some beneficial effects in ameliorating some of the limitations arising from certain traditional practices. For instance, the abolition of vicarious liability in criminal cases can be said to have made punishment in such cases humane and fair.[75]

However, it must not be forgotten that colonialism accounts, partly, for the dismal state of human rights in Africa today. Of all the major continents of the world, Africa endured the most recent and most widespread colonialism.[76] Indigenous peoples were brutalised, tortured and even killed by the colonial masters; valuable resources were extracted from the continent for use in Western counties. Most of the anti-human rights laws that characterise most of the statute books in Africa today were imposed by the colonialists. An authoritarian framework for local administration was installed, reducing most indigenous rulers to relatively minor cogs in the administrative machinery. Initial constitutional arrangements were drawn overwhelmingly from patterns familiar to the departing colonial powers, hence reflecting the assumptions far

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75. Dankwa note 52 above at 5.

76. Welch & Meltzer note 45 above at 11.

77 *Ibid.*

78 *Id* at 15.

more common in the metropole than in particular African societies. As they were externally imposed, these constitutions lacked popular support and legitimacy.[77] In the social sphere, the imposition of colonial rule brought new complexities and changes in existing indigenous practices. When collective and individual expression came into conflict, the values of the colonising power were presumed to be superior to those indigenous to African societies. The European rulers thus had both the will and the power to impose new procedures and values.[78] For example, several matrilineal African societies had practices of inheritance by which property passed from father to nephew, aimed at ensuring the stability and continuity of the extended family, rather than from father to son. Colonial legal codes, based on different assumptions, assaulted this belief by stressing inheritance through direct descent.

From the foregoing, it is clear that colonial administration undermined traditional norms and expectations of political, social and economic rights. The frameworks brought by colonialism reflected Western liberal assumptions; traditional expectations, such as those about the responsibilities of chiefs or the nature of judicial settlement were jeopardised. The overall effect was one of weakening the effectiveness of indigenous standards and traditional institutions without firmly implanting new ideas.

"The concept of human rights in Africa", according to Chris Mojekwa, "was fundamentally based on ascribed status...",[80] or, to cite Latif Adegbite,

> "...the indigene in traditional Africa enjoyed greater freedom than his modern counterpart. Admittedly, these rights were not guaranteed by the state so that he could, at his own instance, enforce them against the whole world...".[81]

Unlike the Western concept of human rights which emphasises individual rights, the African concept shares significant similarity with the Islamic concept in that both emphasise rights based on community. Because of the differences in conceptualisation, the means of enforcement of these rights also differ from one region to the other. And

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[79]Mojekwa "The African perspective" in Jack L Nelson & Vera M Green *International Human Rights: contemporary issues* (1980) at 91.

[80]Latif O Adegbite "African Attitudes to International Protection of Human Rights" in Asbjorn Eide & August Scheu (eds) *International Protection of Human Rights* (1968) at 69.

[81] Ghandhi note 19 above at 125-134.

because it is very difficult to negotiate an enforcement mechanism suited to all the peoples in all the regions, some regions have opted to establish human rights institutions that will deal with the problems of human rights in that particular region.

1:4 Regional protection of human rights

International protection of human rights in general, and the regional protection of human rights in particular, are recent developments in international human rights law. Since the adoption of the 1948 Universal Declaration, the world has witnessed the establishment of three regional human rights instruments; namely, the European Convention on Human Rights and Fundamental Freedoms of 1950,[81] for the continent of Europe; the American Convention on Human Rights of 1969,[82] for the Americas; and the African Charter on Human and Peoples' Rights of 1981[83], for the continent of Africa.

The existence of these three systems for the protection of human rights, and the possibility of a fourth regional system in the Arab World[84] lead to the question whether regional arrangements are compatible with the universal concept espoused by the UN and the West, or whether they are likely to diminish the value of the human rights work of the UN and perhaps even undermine its effectiveness.

There is a good deal to be said on both sides of the question. On the one hand, experience has shown that despite the universally acknowledged nature of human rights, their protection and promotion rely heavily on regional systems and the political will of member states. In Europe, for example, it was possible, albeit amidst some scepticism, to conclude a convention containing binding obligations and setting up new international machinery at the time when this was not feasible in the world at large. The history of the two UN Covenants adopted in 1966 exemplifies the difficulties in negotiating detailed human rights provisions that will be acceptable to the governments of states of widely varying cultures, traditions, ideologies and stages of economic development. Agreement on such matters is easier to achieve between governments within the same geographical region, sharing a common history and cultural tradition -

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[82] *Id* at 147-164.

[83] *Id* at 175-185.

[84] AH Robertson & JG Merrils *Human rights in the World* : An Introduction to the Study of International Protection of Human Rights (1989) at 222.

a process which the UN has been encouraging and promoting.

Though the UN Covenants have now been widely ratified, the number of states which have accepted their optional provisions is still limited.[85] Regional systems can improve the effectiveness of the international protection of human rights; they can be of significant relevance where there is insufficient protection at national level or where universal instruments are not respected. If a regional instrument can be justified in this way in one part of the world, logic requires the same view as regards regional systems elsewhere.

On the other hand, it can be argued that human rights belong to human beings by virtue of their humanity and should thus be guaranteed to everyone on an equal basis without distinction wherever they live. The Arabs and the Asians should enjoy the same human rights as the Europeans, Americans or Africans.

Human rights should indeed be the same for all persons everywhere, at all times. In other words, the normative contents of all international human rights instruments should in principle be the same. There may, of course, be variations in formulation, due to differences in drafting or legal traditions, but the basic rights and fundamental freedoms should be the same for all. The touch-stone here should be the UDHR which sets out "a common standard for all peoples and all nations".

It is therefore reasonable, on practical grounds, to set up regional arrangements for the protection of human rights which may differ from each other, provided that the rights to be protected are essentially the same and are substantially those established in the Universal Declaration. This reasoning can be supported by at least two arguments. Firstly, given the diversity of the modern state system, it is natural that regional systems of enforcement should be more readily accepted than universal arrangements. A state cannot be forced to submit itself to a system of international control and will do so only if it has confidence in the system. It is much more likely to have such confidence if the

[85] As of 30 June 1995, 132 and 131 countries had ratified the ICESCR and the ICCPR respectively, while 84 and 28 had ratified the First and Second Protocols to the latter respectively.

international machinery has been set up by a group of like-minded countries which may already be partners in a regional organisation, than if this is not the case. Moreover, a state will be willing to give more power to a regional organ with restricted membership, in which the other members are its friends and neighbours, than to a world-wide organ in which it and its associates play a relatively small part.

Secondly, on a more practical level, it is obviously easier and more convenient for a case to be heard within the region than somewhere else. To take Africa as an example, it would be more convenient, and probably less expensive for all concerned, when a complaint by one state against another, and *a fortiori* an individual application against a state, can be heard in Banjul, rather than in New York or Geneva.

Regional systems for the protection and promotion of human rights are also consistent with the world-wide system of the UN. Articles 33 and 55 of the UN Charter expressly recognise the principle of regional settlement of disputes threatening international peace and security. The same principle is expressly reiterated in article 44 of the ICCPR and can be properly extended to disputes over the violations of human rights.

As mentioned earlier, when it comes to the drafting, contents and measures of implementation of the regional human rights instruments, the position is different. While it is desirable that the most effective system possible should be established everywhere, it is a fact that the same system is not at present acceptable in all parts of the world.[86]

At this juncture, it would be appropriate to examine the three major human rights instruments in the world, with particular emphasis on their origin and history, control machinery, procedure and modifications.

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[86] Robertson & Merrils note 84 above at 223.

1:4:1 Origin and History

1:4:1:1 Europe

After the Second World War, the Congress of Europe was held at The Hague in May 1948 and brought together prominent politicians from sixteen different countries.[87] In its message to Europeans, adopted at the final session, the Congress proclaimed:

> "We desire a Charter of human rights, guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition; we desire a Court of Justice with adequate sanctions for the implementation of this Charter...".[88]

On 5 May 1949, the act creating the Council of Europe was signed in London by ten states.

The European Convention was discussed and adopted by a generation of Europeans scared by the atrocities perpetrated by the Axis powers,[89] and faced with a growing ideological conflict between the East and the West.[90] The events of the war made European countries especially conscious of the value of democracy and the protection of human rights. By the end of the war the communist threat had become a reality. Between 1948 and 1949, Europe witnessed the communist seizure of Czechoslovakia, civil war in Greece, and the Berlin Blockade.[91] European leaders feared any encroachment on individual liberty, believing that dictatorships and the gradual suppression of individual rights were the root causes of war.

Historically, the Europeans were familiar with bills of rights but were unfamiliar with judicial enforcement of the rights they embodied. European states were culturally identifiable units with the cause of individual human rights firmly rooted in their past:

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[87] See note 6 above at 71.

[88] *Ibid.* See also Mark W Janis & Richard S Kay *European human rights law* (1990) at 22.

[89] Carol M Tucker "Regional human rights models for Europe and Africa: A comparison" *Syracuse. Journal of International and Comparative Law* vol 10:135 (1983) at 140.

[90] *Ibid.*

The Magna Carta (1215), the English Bill of Rights (1689) and the French Declaration of the Rights of Man and of the Citizen (1793), all emphasised a liberal attitude toward individual rights. Consequently, when faced with a growing communist threat, post war European states, bound by their common ideology, democracy and individual liberty, were ready to surrender some of their sovereign powers to protect these ideologies.[92]

This willingness to transfer power was the key to a workable inter-governmental arrangement in Europe, and is the cornerstone of any workable international arrangement. To this end, references to human rights in the final text of the Council of Europe were not mere affirmations of faith, but were made conditions of membership. The Council of Europe stipulated the protection and promotion of human rights as one of its principal goals from inception in 1949. Article 1(b) of the Statute states

> "... this aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in ... the maintenance and further realisation of human rights and fundamental freedoms".

Article 3 of the Statute prescribes observance of human rights as an obligation of membership. It states: "Every Member of the Council 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 ...", and article 8 sets out sanctions that could be imposed as a result of violation of article 3:

> "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may decide".[93]

Such were the feelings, that Council members resolved to be bound by such fundamental principles of democracy as free elections, universal suffrage and secret ballot, and to allow for the first time in international law, private individuals and associations to bring any alleged breach of these principles before a European Commission on Human Rights. Thus, when the Convention was signed in Rome in

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[91] AH Robertson *Human Rights in Europe* (1963) at 1-14

[92] *Id* at 141.

[93] The Statute of the Council of Europe 1949.

1950, the world watched closely to see if European states would be willing to empower an international commission and a court to safeguard individual rights as guaranteed in the Convention.

Moreover, European citizens have a long-standing culture of individual liberty. They are aware of their rights and responsibilities, and know the limits of state action. Institutions such as the police, the army, the judiciary etc etera, which are the main institutions for the protection of human rights, all understand their respective roles and are well equipped for the task. In short, the European human rights system has advanced to a stage where it now focuses more on protection than on promotion.

The commitment of the Council of Europe to the protection of human rights was put to a severe test when the Greek military overthrew the civilian regime in 1967, suppressed representative institutions, and imprisoned political opponents.[94] Greek membership of the Council was about to be suspended in conformity with the organisation's adherence to the observance of human rights when the military withdrew and renounced the European Convention.[95] Greece returned to the Council in 1974 after the restoration of democratic civilian government.[96]

1:4:1:2 America

Like the Council of Europe, the Organisation of American States (OAS) also exhibited an early concern for the protection of human rights within member states. The preamble to the OAS Charter drawn in 1948 states, *inter alia*, that the signatories are

> "confident that the true significance of American solidarity and good neighbourliness can only mean the consolidation on this continent, within the frameworks of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man".[97]

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[94] Edward Kannyo "The OAU and Human Rights" in Yassin El-Ayouty & I William Zartman (eds) *The OAU After Twenty Years* (1984) at 161.

[95] *Ibid.*

[96] *Ibid.*

[97] *Ibid.*

The Inter-American Commission of Human Rights (IACHR) was set up in 1959 and was integrated into the 0AS framework in 1967.[98] The American Convention on Human Rights was signed in 1969 and came into force in 1978.

The IACHR was created under Resolution VI of the 5th meeting of Consultation of Ministers of Foreign Affairs of the OAS, in Santiago, Chile, in 1959. Part two of the resolution provided that the Commission was to be composed of seven members selected, in their personal capacity from slates presented by the governments. The purpose of the Commission would be to "promote respect for human rights".[99]

The then Council of the organisation approved the Statute of the Commission on 25 May 1960. Under article 2 of the Statute, the Commission was established as an autonomous entity of the OAS. Human rights were understood to be those spelled out in the Bogota 1948, American Declaration of the Rights and Duties of Man (ADRDM).[100] The Second Special Inter-American Conference (Rio de Janeiro), in 1965 amended the Commission's statute. The amendments were in the form of additions and changes intended to make the statute stronger and as effective as possible in assisting the Commission to perform its functions. The 1960 statute was amended as follows:

- .it authorised the Commission to pay "particular attention to the observance of the human rights referred to in articles 1, 2, 3, 4, 17, 25, and 26 of the American Declaration of 1948;
- .it authorised the Commission to examine communications sent to it and any other information available to address the government of any member state "for information deemed pertinent, and to make recommendations to it, in order to bring about more effective observance of fundamental human rights".[101]

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[98] *Ibid.*

[99] *Annual Report of the Inter-American Commission on Human Rights* (1990-1991) OAE/SER L/11 79 rev 1 Doc 12 at 6.

[100] *Ibid.*

[101] *Ibid.*

Later, at the Third Special Inter-American Conference (Buenos Aires) 1967, the Protocol of Amendment to the Charter of the OAS was signed. The protocol added important provisions to the Charter that concerned the Commission in particular and human rights in general, thereby establishing a quasi-conventional structure on the subject matter. On the one hand, the Commission became one of the organs through which the organisation accomplishes its purpose (article 51.e of the Charter); on the other hand, the Commission was instructed to continue to monitor the observance of human rights until the American Convention on Human Rights adopted in 1969 entered into force (article 150, transitory).[102] On 22 November, 1969, the Inter-American Specialised Conference on Human Rights convoked by the Council of the OAS (San Jose, Costa Rica), approved the American Convention on Human Rights, which entered into force on 18 July 1978, when Grenada deposited the eleventh instrument of ratification. [103]

At its ninth regular session (La Paz, Bolivia) 1979, the General Assembly of the OAS approved the Commission's new statute. Articles 6 and 8 were later amended at the tenth regular session of the Commission as "an organ of the OAS, created to promote the observance and defence of human rights and to serve as consultative organ of the organisation in this matter".[104] Human rights were defined as the rights set forth in the American Convention on Human Rights, for the states parties thereto, and as the rights set forth in the American Declaration, for the other members states.[105] As with the previous statute, membership of the Commission, defined in article 2, continued to be seven. The Commission's functions and powers with respect to all members states of the OAS are spelled out in article 18 of the Statute; those it has with respect to the states parties to the American Convention are enumerated in article 19. Its powers in relation to member states that are not yet parties to the Convention are set forth in article 20.

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[102] *Id* at 7.

[103] *Ibid.*

[104] *Ibid.*

[105] *Ibid.*

1:4:1:3 Africa

The origin of the African Charter can be traced back to 1961 when African NGOs and practising lawyers meeting at a conference in Lagos, Nigeria, recommended the establishment of the rule of law in African countries.[106] A consciousness founding campaign followed, which involved the heads of state of the OAU. As a result of effective lobbying by NGOs, more conferences were organised.

At the OAU Assembly of Heads of State and Government meeting in Monrovia, Liberia, during July, 1979, President Leopold Senghor of Senegal moved a motion supported by The Gambia, that a group of highly qualified experts should be called upon to prepare a preliminary draft of an African Charter on Human and Peoples' Rights.[107] The motion is commonly referred to as "Resolution 115 (XVI) of the Assembly of Heads of State and Government at its 16th Ordinary Session held in Monrovia, Liberia, from 17-20 July 1979 on the preparation of a preliminary draft of an African Charter on Human and Peoples' Rights providing, inter alia, for the establishment of bodies to promote and protect human and peoples' rights".[108]

The drafters of the African Charter faced some ideological challenges. Even though there is a reference to the Charter of the OAU, the latter does not consecrate the rights of Africans as individuals. Instead, the integrity of the state and the inviolability of its frontiers are strongly reaffirmed. The priority of African politicians was to strengthen the new-born states, not to emphasise the rights of the individual. Their most important challenge was to convince the international community to accept that a specific African concept of human rights exists, without questioning the principle of universalism.

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[106] Ke'ba Mbaye note 3 above at 11.

[107] OAU Doc Decision 115 (XVI) REV 1 AHG/115 (XVI) 1979.

[108] OAU Doc CAB/LEG/67/5.

The initiative of the OAU to create the African Charter effectively broke almost twenty years of embarrassing silence on, first, the disgraceful abuses of human rights on the continent, and secondly, the pressing need to match words with action in the creation of an institution to promote and protect human rights in Africa. It also to a certain extent, emasculated the principle of non-interference in the internal affairs of member states enshrined in article III(2) of the OAU Charter. By adopting the Charter, the OAU member states had "acknowledged the need for comprehensive institutionalised machinery to give effect to the firm attachment to the promotion of respect for, and protection of [internationally recognised norms of] human rights".[109]

The contrast between the prominent role that was given to the goal of the protection and promotion of human rights in western Europe, and to a lesser extent, the Inter-American political system, (i.e. the Council of Europe and the OAS respectively), at their very inception; and its almost complete neglect in the case of the OAU, is very illustrative of the different circumstances in which the human rights systems were formed and the effects of those circumstances on their performances in the protection of human rights.

The formation of the Council of Europe was a major step in the long quest for European unity that had been pursued at least since the nineteenth century. In the wake of World War Two and its Nazi and Fascist atrocities, and the rise of Soviet style regimes in eastern Europe, western European leaders felt that greater regional unity and regional protection and promotion of individual liberty were interconnected means of protecting their liberal-democratic societies.

The main impetus for the creation of the OAS was the dominant political, economic and ideological role of the United States and its decision to shield the hemisphere from ideological and political influence that it considered inimical. US political hegemony must be considered an important factor in the place of human rights in the Inter-American system although, ironically, the US has not ratified the American Convention.

Like the Council of Europe, the OAU was created in an attempt to promote greater regional integration. However, within this broad goal of continental unity, the most important element was the co-ordination of efforts to bring about complete decolonisation of the continent and to combat apartheid in South Africa. The protection of individual rights was never a priority for the OAU. Thus, it was not until the sixteenth year of its existence that the OAU formally addressed itself to the subject of human rights protection within member states. Unlike the Council of Europe, the OAU's scope is limited by "strict adherence" to the concept of non-interference in the internal affairs of member states. The OAU can neither compel member states to adhere to its decisions, which are mere recommendations, nor impose any sanctions against errant members, such as suspension or expulsion.

1:4:2 Control machinery

Comparative studies of norms and mechanisms for the protection of human rights is a recently developed subject in international law. Studies carried out in this area include universal as well as regional systems. Concerning the latter, examination concentrates particularly on the three systems functioning to date, which were established respectively by the European Convention of 1950 (for Europe), the American Convention of 1969 (for America), and the African Charter of 1981 (for Africa).

Each of the three regional systems has a Commission. However, unlike the other two, the African system does not have a court.[110] It is also important to mention the restructuring of the European institutional system following the adoption of Protocol No 11 of 1994.[111]

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[109] EG Bello *The African Charter on Human and Peoples' Rights: A legal analysis* vol 4 (1985) 9 27.

[110] The OAU Assembly of Heads of State and Government in a resolution AHG/230/Res (XXX) of 1994 requested the Secretary-General to convene a meeting of government experts to draft a Protocol to the African Charter relating to the Establishment of an African Court on Human and Peoples' Rights. The Protocol was adopted unanimously by the OUA on 9 June 1998 in Ouagadougou, Burkina Faso, and has been signed by thirty states.

[111] The protocol will have to be ratified by all the state parties to the Convention for it to come into force.

1:4:2:1 The Commissions

The Commissions shall be examined under the headings Organisation, Competence and Procedure.

1:4:2:2 Organisation

The three Commissions are composed of independent experts, whose numbers and functions vary in each case. While the European Commission has a number of commissioners equal to the state parties,[112] the Inter-American Commission has seven,[113] and the African Commission eleven.[114] In the composition of each of the Commissions, no state party can have more than one national as member of any of the Commissions.[115] However, while the European and American Conventions authorise that a member can be elected from a non state-party to their respective conventions, the African Charter provides in Article 31 that the members of the Commission shall be composed of "African personalities of the highest reputation, morality...", and Article 33 provides that they "shall be elected by secret ballot by the Assembly of Heads of State and Government of the OAU from a list of persons nominated by the States parties to the Charter".[116] Article 34 emphasises that "the candidates must have the nationality of one of the States Parties to the present Charter".

Members of the European Commission are elected by the Parliamentary Assembly of the Council of Europe for a period of six years and are eligible for re-election indefinitely. Those of the Inter-American Commission, like their African counterparts, are elected by the General Assembly of the Organisation of American States and the Organisation of African Unity, respectively, but unlike their African colleagues who are elected for a period of six years and can be re-elected indefinitely, their term is for

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[112] Ankuma note 5 above at 15.

[113] *Ibid.*

[114] *Ibid.*

[115] Articles 37(2) and 32 of the American Convention and the African Charter respectively.

four years renewable only once.[117]

1:4:2:3 Competence

The competences of the Commissions differ in their various functions of promotion of, advice on and protection of human rights.

The promotional function is provided in the American Convention and the African Charter, but not in the European Convention. Article 41 of the American Convention provides that "the principal function of the Commission shall be to promote respect for and defence of human rights" notably through studies, developing human rights awareness and requesting governments of members state to supply it with information on the measures adopted by them in matters of human rights. The African Charter for its part, provides that the Commission should collect documents, undertake studies and research, and assist in the formulation of principles and rules aimed at solving legal problems relating to human and peoples' rights upon which African governments may base their legislation. These functions can be performed in co-operation with other African and international institutions concerned with the promotion and protection of human and peoples' rights.[118]

With regard to the advisory or interpretative function, the European Commission again lacks this function. The American Commission, provides in its article 41 paragraph (e) that Member States of the Organisation of American States can request advice from the Commission through the General Secretariat of the OAS "on matters related to human rights" and, the Commission will respond "...within the limits of its possibilities to provide those states with the advisory services they request". The African Charter provides in its article 45 paragraph 3 that the Commission shall, among other functions, "...interpret all the provisions of the present Charter at the request of a state party, an

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[116] Article 31 of the African Charter.

[117] Article 37(1) of the American Convention.

[118] Article 45(1) of the African Charter.

institution of the OAU or an African Organisation recognised by the OAU".[119] Evidently, the advisory services envisaged in the Inter-American and African systems have an indisputably political and moral weight but lack legal force.

Finally, all three Commissions perform protective functions. They are competent to receive communications from states as well as from individuals.

In the European system, a communication addressed by a state party against another state party is automatically (*ipso jure*) received by the Commission.[120] All that is required is that the two states must have ratified the Convention. This procedure is similar to that of the African system, but unlike the European system, the African Charter gives the states two options: (a) to settle the matter between or amongst themselves (as the case may be) without referring it to the Commission, and to refer it to the Commission only when they cannot reach an amicable settlement, or (b), to refer the matter directly to the Commission. [121]

Unlike the European and African systems, in the Inter American system, the submission of a communication to the Commission by a state is subject to the prior acceptance by the state party filing the complaint, of the competence of the Commission to receive communications against it. [122]

The right of an individual whose rights have been violated to seek recourse from the Commission is guaranteed in the European and American Conventions. In the African Charter, this right ensues from a dynamic or teleological interpretation of article 56 of the Charter concerning the admissibility of "other communications". The African Commission is competent to receive and consider communications from individuals

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[119] *Id* article 45(3).

[120] Article 25 of the Convention; the communication is first sent to the Secretary General of the Council of Europe before being forwarded to the Commission. The Convention does not state why it is necessary for the Secretary-General of the Council of Europe to be seized of the communication.

[121] Articles 47-49 of the African Charter.

from states party to the Charter, without their prior acceptance of the competence of the Commission.

On the other hand, the European Convention requires that a declaration be made by states party to the convention recognising the competence of the Commission to receive individual communications.[123] It is worth mentioning, however, that this condition will disappear with the entry into force of Protocol 11 which institutes the obligatory jurisdiction of the European Court (thus there will be no Commission) for all communications - interstate as well as individual. However, this will come into force only after all the members of the Council of Europe have ratified the Protocol.

As to who can submit a communication before each of the Commissions, the American Convention provides in its article 44 that all persons or group of persons, NGOs entities legally recognised in one or many member states of the OAS can submit a communication to the Commission.[124] The African Charter is more generous by introducing an *actio popularis* approach to give the right of submission to the "whole world". This contrasts sharply with the European system where only the victim is entitled to approach the Commission (article 25 of the Convention) or the court (article 34 of Protocol 11).

1:4:2:4 The Procedure

In all the systems, for a communication to be declared admissible, it must satisfy certain conditions, notably: the applicant must have exhausted all local remedies in settling the matter (that is, if they exist and are effective and not unduly prolonged);[125] the communication must be submitted within a certain period after the exhaustion of local remedies (6 months in the European and American systems, while the African Charter

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[122] Article 45 of the American Convention.

[123] Article 25 of the European Convention.

[124] Article 44 of the American Convention.

[125] Articles 26, 46(a) and 56(5) of the European Convention, The American Convention and the African Charter respectively.

talks of a reasonable time);[126] the matter must not have been settled by another international human rights body (article 27,1b (Europe), 47d (America) and 56(7) (Africa); the communication must not be manifestly ill-founded or abusive or incompatible with the Convention, (article 27,2, (Europe), 47c (America) and 56 (3) (Africa)).

The European system provides for a preliminary examination of a communication by the Commission. In this way, when the conditions described above have not been met, the communication is declared inadmissible. In principle, the procedure of the Inter-American Commission is similar to that of the European Commission, except that unlike the European Commission, the former, in practice, proceeds with examination on admissibility and on the merits simultaneously, save in cases where it is called upon to render protective measures. It is by declining to decide on admissibility that the Commission can extend its powers to the examination of individual communications. The African Charter for its part does not expressly provide for any preliminary examination of communications, but this power ensues implicitly from article 55(1), by virtue of which the Secretary of the Commission prepares

> " ...before each session....a list of the communications other than those of States Parties ... and transmit them to the Members of the Commission, who shall indicate which communications should be considered by the Commission".[127]

Where a communication is declared admissible, the European Commission places itself at the disposal of the parties with a view to securing an amicable settlement.

If this is achieved, the Commission prepares a report indicating briefly the facts and the solutions, and transmits it to the Committee of Ministers and the Secretary to the Council of Europe for publication.[128] The Inter-American Convention provides for a similar procedure. Its article 48(f) provides that:

> " The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognised in the Convention".

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[126] Articles 26, 46(b) and 56(6) of the European Convention, The American Convention and the African Charter respectively.

[127] African Charter article 55(1).

[128] Article 28(2) of the European Convention.

In case of a friendly settlement, it then prepares a report on the facts and the solution obtained which it transmits to the Secretary General of the OAS for publication; a copy is also sent to the complainant and to the state party(s) concerned, and the states party to the Convention.[129]

The requirement of a friendly settlement is also provided for in the African Charter, but unlike the other two treaties, the Charter reserves this procedure to interstate communications. Thus, article 52 of the African Charter stipulates that:

> "After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, ... a report to the States concerned and communicated to the Assembly of Heads of State and Government".

It is noteworthy here that in practice, the Commission has extended the possibility of securing a friendly settlement even with regard to "other communications".[130]

When a communication has been declared admissible, to proceed with examination on the merits (substantive issues), the European Commission receives comments and arguments from representatives of the parties, so as to establish the facts.[131] Unlike the European Commission, the Inter-American Commission has very broad powers with regard individual communications. This power however varies, depending on the nature of the violation.[132] Thus, in cases of massive human rights violations, the Commission does not limit itself to the examination of individual communications, it also examines all the situations that reveal massive human rights violations perpetrated in the country (geographic approach), or in a specific domain (thematic approach). Moreover, the Commission can also be seized *proprio motu* or *ex-officio* in such situations. It has done this on many occasions, notably, during the massive human rights violations under the regime of Salvador Allende in Chile, or during the confiscation of

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[129] Article 49 of the American Convention.

[130] See Communications 11/88, 16/88, 17/88, 18/88, 44/90, 62/91, 67/91 and 138/94.

[131] Article 28(1) of the European Convention.

[132] J Kokott "The protection of fundamental rights under German and International law" (1996) *Revue Africaine de Droit Internationale et Comparé* at 390-394.

newspapers in Peru under the reign of Velasco Alvarez.[133] The Inter-American Commission also has the power to undertake on-site missions to member states.[134] These powers, especially the latter, make it very different from the other two in terms of competence.

The approach of the African Commission is similar to that of the Inter-American Commission. In principle, the African Commission can examine a communication only when it reveals the existence of a series of serious or massive violations of human and peoples' rights.[135] In such a case, the Commission can bring this to the attention of the Assembly of Heads of State of the OAU, which may, in its turn, request the Commission to undertake an in-depth study of the situation, and submit a report on the facts and make recommendations.[136] In practice, however, the Commission examines communications even if they reveal the violation of a single provision of the Charter. If a communication satisfies the conditions laid down under article 56, it need not reveal serious or massive violations as required by article 58(1). Thus as Professor Oji Umozirike explains: "The wrongful detention of citizen A cannot be regarded as massive and serious in the strict language of the Charter but offends modern notions of human rights".[137] The African Commission also undertakes on-site missions to member states and has adopted resolutions in the areas of human rights protection and promotion, powers not expressly conferred on it by the Charter.

At the end of the examination, the European Commission prepares a report describing the facts and giving its opinion on whether there has been a violation of the Convention

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[133] M Mubiala " Mécanisme régionaux de protection des droits de l'homme" in (1996) *Journal of African Society of International and Comparative law* at 47.

[134] See P Nikken, *Le système interamericaine des droits de l'homme* (1990) at 104-105 for visits undertaken to the Dominican Republic (1965 and 1966), Chile (1974), Argentine (1979), and more recently, Haiti (1994 and 1995).

[135] Article 58 of the African Charter

[136] Article 53 of the African Charter.

[137] Oji Omozurike "The African Charter on Human and Peoples' Rights: An Introduction" (1991) *1 Review of the African Commission on Human and Peoples' Rights* at 11.

by the state. The report is transmitted to the Committee of Ministers. If in three months following the transmission of the report, the European Court of Human Rights is not seized, the Committee of Ministers will confirm or reject the Commission's recommendations. This is then communicated to the state concerned, which, in case of condemnation, must indicate measures taken or to be taken to remedy the situation. The Inter-American Commission has greater powers in this regard, for, in terms of its article 50(3), it can decide on the publication of the report by a majority vote of its members; it can also make recommendations to the State party directly, prescribing a time limit within which it must take steps to remedy the situation.[138]

The powers of the African Commission in this regard are very limited. In terms of article 59, the Commission is barred from publishing its reports *suo moto*. Article 59(1) stipulates that:

> "All measures taken within the provision of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide".

And as Commissioner Atsu Kofi Amega points out,

> "The question that has always preoccupied the Commission is that of knowing the fate of these reports, questions left to the competence and conscience of the Heads of State and Government". [139]

1:4:3 Recent developments in the European and African systems

The European mechanism for human rights protection has been restructured by the adoption in 1994 of Protocol No 11, African states have also adopted a Protocol to the African Charter relating to the establishment of an African Court on Human and Peoples' Rights.

1:4:3:1 The Reform introduced by Protocol No 11

Protocol No 11 to the European Convention establishes a permanent European Court of Human Rights. As under the present system, the new article 34 of the protocol

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[138] See note 86 above at 105-113.

[139] African Centre for Democracy and Human Rights Studies, "The preliminary draft of the African Human Rights Court" (1997) 7:1 Jan-March *African Human Rights Newsletter* at 1.

stipulates that both states and individuals will be able to lodge applications with the court. The new court will assume the role played by the present Commission and Court. This is aimed at accelerating the procedure. The court becomes the sole organ to receive, sieve, examine and pass judgement on all applications, be they interstate or individual.

In the case of individual applications, the registrar of the single court will liaise with the applicants in an attempt to eliminate the more doubtful applications at an early stage. Regarding its organisation, the new court will continue with as many judges as there are states party to the Convention. With the disappearance of the Commission the Court is seized directly by the states (article. 33) and individuals (article. 34). To fulfil its task, the court will be subdivided into:

- a committee of three judges;
- chambers of seven judges (there will be about five chambers); and
- a Grand Chamber of seventeen judges (article 27).

The protocol has also made some significant innovations to the European human rights protection system. Unlike in the present system, the new system allows the court to include more than one judge from the same state, elected by the Parliamentary Assembly of the Council. The members of the court will be elected for a period of six years instead of nine as under the present system, they will also be required to retire at the age of seventy.

When a communication is submitted to the court, it will be examined by a committee of three judges, one of whom will be the judge rapporteur, with due regard to the conditions laid down under the new article 35. The committee will then decide on the admissibility or otherwise of the communication.

Its decision is final. If unanimity cannot be achieved, or where the judge rapporteur feels that the application cannot be declared inadmissible, the application will be transmitted to a chamber.

Chambers composed of seven judges will determine both the admissibility and merits of the applications and there will be a hearing before the chambers. The chamber may at any stage in the proceedings, put itself at the disposal of the parties in order to facilitate an amicable settlement. Where a matter raises a serious question on the interpretation of the Convention, or where the Chamber's decision on the matter would contradict an earlier decision taken by the court, the chamber can surrender its jurisdiction on the matter in favour of the Grand Chamber of seventeen judges (article 30).

Within three months of the delivery of the judgment by the Chamber, the parties to a case can request that the case be referred to the Grand Chamber. In case of such an appeal, a panel of five judges of the Grand Chambers shall evaluate the requests and accept them only if the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance (article 43). If the panel accepts the appeal, the Grand Chamber will decide the case by means of a judgment. When considering such appeals, "no judge from the chamber which rendered the judgement shall sit in the Grand Chamber", except the President of that Chamber in which the original hearing took place and the national judge who sat in respect of the party(s) concerned. This means that fifteen of the seventeen judges of the Grand Camber will not be familiar with the facts of the case and it would be likely that a completely new hearing (including oral presentations) would be necessary (article 27).

1:4:3:2 The establishment of an African Court on Human and Peoples' Rights

The major difference between the African Charter and its two counterparts, the European Convention and the American Convention, is that, the former does not provide for a human rights court. When it is in dispute concerning the violation of human and peoples' rights under either articles 48, 49 or 55 of the Charter, the African Commission prepares in either case a report which is transmitted to the Assembly of Heads of State and Government. The question which arises over the fate of the reports clearly raises the issue of the effectiveness of the African Commission.

This question has been there since the establishment of the Commission, until finally, Resolution AHG Res 230 (XXX), adopted during the OAU Assembly summit in Tunisia in June 1994, mandated the Secretary General of the OAU to convene a meeting of government experts to brainstorm, in consultation with the African Commission, ways and means of enhancing the effectiveness of the Commission, especially with regard to the creation of the African Court of Human and Peoples' Rights. The establishment of a court comes against the backdrop of criticisms about the "non-acceptability" of the Commission's recommendations, and the lack of mandate of the Commission which does not have the powers of a human rights court under the Charter.

In terms of the article 5(1) of the Protocol, the court can only take up matters from the following: parties: the plaintiff state, the respondent state, a state whose citizen is a victim and the Commission itself. When a state party has an interest, it may submit a request to the court to be permitted to join (article 5.2). In terms of article 5(3), the court may permit NGOs, with observer status before the Commission and individuals to institute cases directly before it, in accordance with article 34(6) of the Protocol which provides that

> "At the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state which has not make such a declaration"

The court's authority covers all disputes relating to the interpretation and application of the Charter, the protocol, and all human rights instruments ratified by the state (article 3(1). Although the persons cited in paragraph 5(1) of the protocol are empowered to refer cases to the court, they can only do so after a report or decision by the Commission on the case. Matters brought before the court are "appeals" for the reversal of the decision or report of the Commission. What is therefore submitted to the court is not the case itself as heard by the Commission, but rather, the decision or report of the Commission on the case.

Even with the introduction of a court, the Commission still remains the preliminary body for the settlement of disputes between states, and between individuals and a state. In a nutshell, the Commission serves as an organ of investigation to assist in the court's judgment on the case.

The Protocol empowers the court to grant compensation or reparation (article 27.1). The members of the Commission have always been divided on this issue due to the fact that it is not provided for in the Charter. In the matter of Louis Mekongo against Cameroon, Communication 59/91, for instance, the Commission having acknowledged the rights of the complainant to be indemnified could not itself make a pronouncement on the principle of indemnities or their amount; it therefore referred the petition to the Assembly of Heads of State and Government so that this body could request the state of Cameroon to take up the matter with the competent national court of law.

The Protocol will come into force thirty days after fifteen instruments of ratification or accession have been deposited.

In a world where globalisation, democracy and human rights have become the watchwords, the creation of a human rights court in Africa is very desirable. Apart from the reasons given on the ineffectiveness of the Commission and the over-cautiousness of the OAU Assembly, the existence of a court in Africa would go a long way in striking a balance in the area of human rights with its counterparts in Europe and America. It will, moreover, significantly signal the integration of the continent into the contemporary democratic era. It must, however be cautioned that the establishment of a human rights court will not in itself solve the serious human rights problems in Africa. Numerous obstacles, including finance, independence, political will, and above all else implementation of the court's decisions, still block the way to any effective realisation of human rights on the African continent.

SECTION TWO

2:0 The Organisation of African Unity (OAU) and the protection of human rights in Africa

2:1 Introduction

The Organisation of African Unity (OAU) is a comprehensive inter-governmental organisation embracing all aspects of inter-state relations.[1] It is made up of fifty-three independent African states[2] and stands out as the largest regional (continental) organisation. The primary task of the organisation is to furnish the mechanism for resolving African problems by Africans in an African forum free from outside influence and pressure.[3] With more than three decades having passed since most African countries achieved independence, and with the OAU itself reaching its 35th anniversary,[4] it is an appropriate time to assess the background to, and contributions of the OAU to the promotion and protection of human rights and fundamental freedoms in Africa.

2:2 Formation of the OAU

The OAU is the logical outcome of the search for a Pan-African organisation that spanned sixty-three years and involved at least five Pan-African Conferences between 1900 and 1963. In 1897, Dr WE Du Bois opined that "if the Negroes were to be a factor in the world's history, it would be through a Pan-Negro movement".[5] The creation of this Pan-Negro movement in Africa, the OAU, was initially delayed by the emergence of two camps of African nationalists: the radicals and the conservatives popularly christened the Casablanca and the Monrovia groups.[6]

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[1] B Andemicael *The OAU and the UN* (1976) at 11.

[2] Morocco suspended its membership of the OAU in 1984 when the Sahawari Arab Democratic Republic was recognised by the OAU.

[3] AW Chanda "The Organisation of African Unity: an appraisal" (1989-92) 21-24 *Zambia Law Journal* at 1.

[4] The OAU celebrated its 35th anniversary on 25 May 1998.

[5] VJ Ngoh "The OAU Charter: On the eve of the third millennium" 1996 *African Star* at 13.

In spite of the ideological differences between the two groups, the quest for African unity overcame all odds and on 25 May 1963, the Organisation of African Unity was born in Addis Ababa, Ethiopia, with Emperor Haile Selaisse as the first chairman, and Addis Ababa as its headquarters.[7] The founding fathers of the OAU at the time opted for a diluted internationalism in preference to a Pan-African super-state. The formation of the OAU represented a giant step in Africa's quest for unity, and accelerated the struggle against colonialism and apartheid.

However, complete unity in the sense of economic and political integration of African countries (as envisaged by Dr Kwame Nkruma)[8] has not proved feasible even after thirty-five years.[9] Enormous obstacles stand in the way of "complete" African unity.

Firstly, the size of the African continent (about 11000000 square miles) is an impediment to unity considering the fact that Africa has very poor transport and communication facilities. Secondly, Africa is a continent of great diversity *vis-à-vis* languages, religion and traditions. These factors act as a barrier to any meaningful co-operation. The Anglophone-Francophohe divide is a glaring example, where each camp competes rather than co-operates with the other in all aspects of inter-state relations. Third, the African colonial heritage serves as a major barrier to unity. It is a fact that European powers divided Africa into arbitrary and artificial political entities which largely ignored tribal and religious boundaries. No doubt, therefore, there are Tutsis in the Democratic Republic of Congo (formerly Zaire),[10] Rwanda, Burundi, Uganda; and Housas in Northern Cameroon and Nigeria. These artificial boundaries have resulted in some tribes or religious groups becoming a 'minority' in some countries and a target for discrimination and marginalisation by the majority or the central government. In most

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[6] *Ibid.*

[7] *Ibid.*

[8] The first President of independent Ghana, who had advocated a "United States of Africa" similar to the United States of America.

[9] Chanda note 3 above at 16.

[10] The name was changed to Democratic Republic of Congo when the rebels, led by Laurent Desiré Kabila, overthrew Mobutu's government. It is also worth mentioning that the original name of the country

cases, these minority and marginalised groups rise against the central government, usually through civil war or terrorist attacks. The Banyamulenge (Tutsi minority) in Eastern Zaire who took up arms in 1996, and toppled the Mobutu regime in 1997 serve as a recent example. The European powers also implanted into Africa, their different political and government traditions and systems and established different economic ties and trade investment patterns which today, for example, link the former French colonies with the French economy and the Franc zone. Finally, African states are potential economic rivals. In their desire to industrialise, they impose tariffs and other non-tariff barriers on goods from other African countries so as to encourage and protect their infant industries and also raise revenue.[11]

In view of these obstacles, the prospects of a political and economic association along the lines of the European Union (EU) will remain a dream for a long time to come. Even though the 3 June 1991 OAU summit conference in Abuja-Nigeria adopted the treaty establishing the African Economic Community (AEC), it is not envisaged that the AEC will become operational in the near future. In terms of article 6 of the treaty, the Community shall be established in six gradual stages of varying duration over a period of thirty-four years.[12] Thus, it is quite clearly an institution for the future. For the moment, in spite of the incessant bickering among themselves, African countries accept the need for a loose alliance in the form of the OAU.

Founded amidst the wave of de-colonisation sweeping across Africa, the OAU members were concerned above all with "safeguarding their own sovereignty and territorial integrity and opposing the remaining relics of colonisation on the African continent".[13] The protection of human rights was secondary, as they contended that it was only when the people are free from colonial bondage that they can fully enjoy their rights. But as shall be seen later, the violations of human rights in some regimes after

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under colonial rule was Congo and in 1975 this was changed to Zaire by President Mobutu.

[11] Chanda note 3 above at 2.

[12] Chris M Peter "The proposed African Court of Justice" 1993 *East African Journal of Peace and Human Rights* 117 at 132

[13] Clement Nwankwo "The OAU and Human Rights" (1993) 4/3 *Journal of Democracy* at 50 .

independence were so serious as "to shock the conscience of mankind".[14] As the principles and purposes set forth in the OAU Charter clearly show, co-operation for the sake of African independence was the dominant theme. Not surprising, therefore,

> "the OAU has succeeded only in those areas in which there has been a broad consensus among its members, such as, the liberation of the African continent from colonialism and the dismantling of apartheid".[15]

2:3 Purposes and institutional structure of the OAU

2:3:1 Introduction

Article II(1) of the OAU Charter mandates the organisation to seek

> "...to promote the unity and solidarity of the African states; to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa; to eradicate all forms of colonialism from Africa; and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights".[16]

Based on the principles of "sovereign equality of all Member States",:[17] ..[and] "non-interference in the internal affairs of States",[18] it is clear that the OAU falls far short of the organic federal union for which Nkrumah had argued. It is a loose organisation for cooperation with no supranational element. The intended scope of activity is very wide, embracing political and diplomatic cooperation; economic cooperation, including transport and communications; health, sanitation and nutritional cooperation; and scientific and technical co-operation for defence and security.

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[14] See Bello Emmanuel for the atrocities perpetrated by the regimes of Obote and Amin in Uganda, Marcias Nguema in Equatorial Guinea, Jean-Bedel Bokassa in Central Africa Republic.

[15] Chanda note 3 above at 1.

[16] OAU Charter article II.

[17] *Id* article III(1).

[18] *Id* article III(2).

To meet these goals, the OAU has institutional structures, namely: the Assembly of Heads of State and Government, the Council of Ministers, the General Secretariat and the Commission of Mediation, Conciliation and Arbitration.[19] Article XX of the Charter also empowers the Assembly to establish such specialised commissions as it may deem necessary, including *inter alia*; an Economic and Social Commission; Educational, Scientific, Cultural and Health Commission; and the Defence Commission.

To fully appreciate how the OAU has performed since its creation in 1963 in the area of human rights protection, it would be appropriate to examine the role assigned by the (OAU) Charter of 1963 to each of the above organs, and how each was structured to deal with the problem of human rights on the continent.

2:3:2 The Assembly of Heads of State and Government

This body is the supreme political organ in the OAU structure. It is charged with discussing matters of common concern to Africa with a view to co-ordinating and harmonising the general policies of the organisation. It may, in addition, review the structure, functions and acts of all the organs and specialised agencies which may be created in accordance with the Charter. It has the power to choose the Administrative Secretary General, and his or her assistants and staff; to establish specialised commissions; to approve amendments to the Charter; and to decide questions which may arise concerning the interpretation of the Charter.[20]

It is a plenary body on which each state has one vote and which meets annually. Extraordinary sessions may be called with the approval of two-thirds of the members of the organisation. Its resolutions are adopted by a two-third majority, except on questions of procedure which require a simple majority. Apart from resolutions or decisions having an internal effect, such as the adoption of the budget or the appointment of committees, the Assembly's decisions are in effect no more than

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[19] *Id* article VII.

recommendations to member states. This is exemplified by the emphasis placed by the Charter on the sovereignty of members states and the fact that the Charter does not establish an organ vested with disciplinary powers to enforce compliance with the OAU resolutions. Moreover, the Charter does not provide for suspension and/or expulsion of members who do not comply with its resolutions and decisions, as is the case with the Statute of the Council of Europe.[21]

With this weakness, coupled with the fact that the Charter places no emphasis on the issue of human rights as do its European and American counterparts, the member states of the OAU were left unchecked. There was no legal base generated from the Charter from which the Assembly could condemn or sanction any member state. As will be illustrated below, there was absolute adherence to the principle of non-interference.[22]

2:3:3 The Council of Ministers

This organ comprises foreign ministers or such other ministers as are designated by the governments of members states. It meets twice a year or in extraordinary session.[23] It usually meets immediately before the Assembly summit and is entrusted with the responsibility of preparing conferences of the Assembly.[24] It also implements the decisions of the Assembly and has a general responsibility for co-ordinating inter-African co-operation. It considers and approves the regulations of specialised commissions and the budget of the organisation. The rules of procedure of the Council adopted in August 1963, provide that meetings are held in private but also allow for the Council to decide by simple majority on public meetings. Unlike the Committee of Ministers of the Council of Europe, the Council of Ministers of the OAU has very

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[20] *Id* article VIII.

[21] Statute of the Council of Europe article 8.

[22] The indifference manifested by the OAU in the face of gross human rights violations perpetrated by its members, such as Uganda under Amin, Equatorial Guinea under Nguema, etc. is a glaring example.

[23] OAU Charter article XII(2).

[24] *Id* article VIII.

limited powers. While the former can approve and supervise the execution of decisions from the European Commission and Court of Human Rights, the latter bears little or no relation with the African Commission.

2:3:4 The General Secretariat

This body is headed by an Administrative Secretary-General appointed by the Assembly.[25] It is a central and permanent organ of the organisation charged with the duty of carrying out the functions assigned to it by the OAU Charter, other treaties and agreements and by regulations made pursuant to the Charter. The Secretary-General is assisted by one or more Assistant Secretary-Generals. The Charter of the OAU provides in article XVIII(1) that in the performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any government or other authority external to the organisation. In addition, each member state undertakes to respect the exclusive character of the responsibility of the Secretary-General and staff and not to seek to influence them in the discharge of their duties.[26]

Article XVIII of the OAU Charter is virtually identical to article 100 of the UN Charter and attempts to ensure the complete independence of the staff. The OAU Protocol on Privileges and Immunities adopted in 1964 also closely follows the 1946 Convention on Privileges and Immunities of the United Nations.

Unlike the Secretary-General of the UN, the OAU Secretary-General does not enjoy independent political powers. This is also evident from the fact that he has no express right of participation in meetings of the Assembly, the Council or the specialised commissions, unless their own rules of procedure so provide. It is worth noting that the African Charter on Human and Peoples' Rights expressly gives the Secretary-General of the OAU the power to attend the Commission's meetings.[27]

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[25] *Id* article XVI.

[26] *Id* article XVII.

[27] African Charter article 42(5)

2:3:5 Commission of Mediation, Conciliation and Arbitration[28]

The creation of a separate principal institution for the peaceful settlement of disputes is indicative of the desire to treat inter-African disputes as exclusively African and to exclude, as far as possible, the overriding authority of the Security Council of the UN. Article XIX of the OAU Charter envisages a separate treaty establishing the Commission, and it was not until 1964 that the separate protocol on Mediation, Conciliation and Arbitration was approved by the Assembly as an integral part of the Charter.[29] The Commission is essentially a panel of twenty-one members elected by the Assembly, of whom only three members,[30] the President and two Vice-Presidents, are full-time, and constitute the bureau of the Commission. Members, who must have recognised professional qualification,[31] serve for a term of five years, and are eligible for re-election.[32] They enjoy security of tenure and can only be removed from office by the decision of two-thirds of the Assembly on grounds of inability to perform or of proven misconduct.[33]

The duty of the Commission is to facilitate the peaceful settlement of disputes among member states. The jurisdiction of the Commission is restricted to disputes between states for example, territorial claims, wars, expulsions etc etera. and the bureau has the responsibility of consulting the parties as regards the appropriate mode of settling the disputes. Disputes may be referred to the Commission jointly by the parties concerned, by the party to the dispute, by the Council of Ministers or by the Assembly.[34] If one of

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[28] The creation of the Mechanism for Prevention, Resolution and Management of Conflicts will go a long way to supplement the efforts of this Commission.

[29] See L Sohn, *Basic Documents of African Regional Organisations* 2 (1971) at 12 for the entire Protocol of the Commission of Mediation, Conciliation and Arbitration.

[30] Protocol of the Commission of Mediation, Conciliation and Arbitration article. II

[31] *Id* article II(3).

[32] *Id* article III.

[33] *Id* article IV.

[34] *Id* article XII.

the parties refuses to submit to the jurisdiction of the Commission, the bureau must refer the matter to the Council of Ministers for consideration.[35] Parties to a conflict may choose any of three ways of settling their disputes: mediation, conciliation and arbitration.[36]

2:3:5:1 Mediation

When a dispute between members states is referred to the Commission for mediation, the President, with the consent of the parties, appoints one or more members of the Commission to mediate the dispute.[37] The role of the mediator(s) is confined to reconciling the claims of the parties.

2:3:5:2 Conciliation

Where a request for the settlement of a dispute by conciliation is made, the President, with the consent of the parties, establishes a Board of Conciliators of whom three must by appointed by him from among members of the Commission, and one each by the parties.[38] The function of the Board is to clarify the issues in dispute and to endeavour to bring about an agreement between the parties upon mutually accepted norms.
The Board may undertake any inquiry or hear any person capable of giving relevant information concerning the dispute.

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[35] *Id* article XIII(2).

[36] *Id* article XIX.

[37] *Id* article XX.

[38] *Id* article XXIII.

2:3:5:3 Arbitration

Where arbitration is resorted to by the parties, an arbitral tribunal consisting of five members is established.[39] Under article XXIX, a *compromis* has to be concluded by the parties, specifying an undertaking by them to go to arbitration and accepting the decision of the tribunal as legally binding. The *compromis* may also specify the law to be applied by the tribunal and the power, if the parties so agree, to adjudicate *ex aequo et bono.* The Commission appears to have been little used and arbitration not at all. "The member states have shown a marked preference for political settlement as opposed to the more formal, expert and quasi-judicial techniques available in the Commission".[40] It could also be that member states lack confidence in the Commission. Thus, the Somalia-Kenya and Somalia-Ethiopia disputes, the Algeria-Morocco dispute, the Ivory Coast-Guinea dispute, the Cameroon-Nigeria disputes have been dealt with outside of the Commission.[41]

2:4 Specialised Commissions

Article XX of the OAU Charter authorises the Assembly of the organisation to establish a number of specialised commissions. In this regard, the following commissions have been established: Economic and Social Commission; Scientific, Technical and Research Commission; Health, Sanitation and Nutrition Commission. To these, the Assembly in 1964 added the Commission of Jurists and the Commission for Transport and Communications. In 1966, the Assembly reduced the number of commissions to three because of duplication of competence and activities both between the specialised commissions themselves and the UN bodies active in Africa. However, ad hoc commissions can be established, and in 1965, a Commission on Refugees was

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[39] *Id* article XXVII.

[40] This Commission is hardly used by the OAU as neither the adversaries nor the OAU have been inclined to use it. Instead they prefer more flexible ad hoc bodies and statesmen. Also see Chanda note 3 above at 15.

[41] *Ibid.*

established.[42]

The above-named organs are entrusted with the responsibility of ensuring a better life for the African peoples. One can argue that the reference to the UN Charter and the UDHR in the preamble of the OAU Charter of 1963, the establishment of Commissions, and the struggle for the liberation of Africa demonstrate the commitment of African leaders to human rights. It has always been argued that the people of Africa cannot enjoy their human rights while still under colonial bondage, thus the reason for giving priority to the liberation of the continent from colonialism.

When compared to the founding documents of other regional formations like the Council of Europe or the OAS, the OAU Charter makes very little reference to human rights and no mention is made of democracy. Despite the endorsement of the principles enshrined in the Universal Declaration in the preamble to the Charter, the focus of the organisation remained decidedly elsewhere throughout the first sixteen years of its existence.[43] The institutional arrangement of the OAU did not provide for any body specifically designed to deal with the question of human rights within member states. In the words of Mr. William Hhara,

> "...what we are looking at [today] is the world of civil and sometimes ethnic conflicts in which there is massive human sufferings, enormous movement of people, and very often, terrible violations of human rights. These are multi-dimensional human situations within the boundaries of states which the OAU was not quite specifically set up to deal with".[44]

The principle of non-interference in the domestic affairs of member states provided in article III(2) is largely responsible for the woes that many African countries faced and some are still experiencing.[45]

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[42] In February 1964, the OAU Council of Ministers meeting in Lagos set up a ten member Commission to deal with the problem of refugees in Africa.

[43] Clement Nwankwo note 13 above at 50.

[44] "Peace Keeping in Africa" *Report on the Pretoria Seminar - South Africa* 1995, ACCORD at 18.

[45] VJ Njoh note 5 above at 13.

As has been pointed out, in spite of the invocation of the Charter of the UN and the UDHR, and the importance of freedom, equality, justice and dignity of the African peoples, the promotion and protection of human rights was not set as one of the goals of the OAU and no organ was created for that purpose. The main aims of the OAU Charter as envisaged by its founders, were to complete the process of decolonisation; combat apartheid in South Africa; prevent extra-regional foreign interference - particularly by the major powers - and promote stability and greater co-operation among African states.

Admittedly, the eradication of colonialism and the attainment of self-rule is a condition *sine qua non* for the full realisation and/or enjoyment of human rights. Colonial domination inherently denies the claims of equality, human dignity and self-determination of all peoples. Insofar as the OAU has worked for the complete de-colonisation of Africa and led the international campaign against apartheid in South Africa, it has played an important role in the promotion of human rights in Africa.

However, as the post-colonial history of Africa, and of other regions has shown, the problem of human rights is not resolved by the mere acquisition of political independence. In many independent African states, constitutional governments have been overthrown, opponents imprisoned or banished and in some extreme cases, physically eliminated.[46] It is significant to note that the overwhelming majority of refugees in Africa have fled independent states for political reasons. In the socio-economic realm, extreme inequalities with regard to access to material and other resources remain a fundamental problem and are the sources of a good deal of the political instability that currently afflicts the continent.

A development which might have been used to create a human rights protection mechanism within the OAU was the addition at the summit conference in Cairo in 1964 of the Commission of African Jurists to the Specialised Commission.[47] In terms of

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[46] The elimination of political opponents extra-judicially was very common in the regimes of Bokassa and Amin.

[47] Edward Kannyo "The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background" in Claude E Welch Jr. & Ronald Meltzer (eds) *Human rights and Development in Africa*

article 1 of the Commission's Statute, its purposes were, *inter alia*;

- to promote and develop understanding among African jurists;
- to consider legal problems of common interest and those which may be referred to it by any member of the OAU;
- to encourage the study of African law, especially African customary law; and
- to consider and study international law in its relation to the problems of the African states.

This Commission did not last long, for when the organisation approved the reorganisation and reduction of the Specialised Commissions in 1968, the Commission of Jurists was dropped as an OAU organ.[48]

Until 1981 therefore, the OAU had neither any Charter provision or any organ to deal with human rights within member states. This shortcoming was exacerbated by the strict observance of the principle of non-interference in the internal affairs of states, a principle which was, and is still, constantly being used and abused by African dictators to prevent the OAU from dealing with charges of human rights violations in member states.

2:5 The Principle of non-interference and the protection of human rights within the OAU

The traditional principle of domestic jurisdiction, as discussed earlier, allows a state to deal with anything within its territory in the way it sees fit. This principle prevents states from interfering with what is seen as falling essentially within the domestic jurisdiction of another state. This is a basic principle in inter-state relations, which aims to replace might with right. Inter-governmental organisations such as the League of Nations and the United Nations enshrine this principle in the basic documents that bind the countries (in this case, the Covenant and the Charter respectively). However, in spite of the inclusion of this principle in most treaties governing inter-state relations, applications vary from absolute to relative adherence, depending on the states involved.

1984 at 131.

The Organisation of African Unity, unlike the UN, incorporated this principle in its 1963 Charter without reservation. While the UN Charter provides that "...this principle shall not prejudice the application of enforcement measures under Chapter VII",[49] the OAU Charter states categorically in its article III(2) that the member states solemnly affirm and declare their adherence to the "...non-interference in the internal affairs of states". This, coupled with the fact that the OAU did not provide any organ to oversee the activities of its members with regard to the treatment of their nationals, gave lee-way for varied interpretations of this principle. In most of the cases, a strict interpretation has been adopted. The following examples will illustrate how the OAU and its member states adopted the principle of non-interference to the letter, and how they have gradually moved from strict adherence to the principle to partial acceptance of international norms.

Soon after the formation of the OAU, in December 1963, Burundi protested to the organisation about the widespread killing of the Tutsi ethnic minority in neighbouring Rwanda.[50] Nearly ten years later, in 1972, it was the turn of the Rwandese leaders to protest the massacre of Hutus in Burundi following the abortive uprising in May 1972 in which up to 80 000 Hutus were killed by government forces.[51] At the OAU Council of Ministers meeting held in Rabat, Morocco in June, Rwanda raised the issue of the massacre but the OAU failed to take action.[52] In October 1972, Rwanda decided to raise the Burundi massacre again, this time outside the OAU, using the UN General Assembly. In his address to the Assembly, the Rwandese Foreign Minister, Augustin Munyaniza, said of his country's policy that

> "... just as it condemns apartheid...[it] has equally no fear in denouncing racism wherever it is practised, even if it is exercised by blacks over other blacks, as is being done in that country of Black Africa where an ethnic minority is in the process of exterminating, in the name of racism, another ethnic group which is nonetheless in the majority".[53]

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[48] *Ibid.*

[49] UN Charter article 2(7).

[50] Kannyo note 47 above at 132.

[51] *Ibid.*

[52] *Ibid.*

He caustically suggested that it would be desirable if international jurists could succeed in defining what were the domestic affairs of another country so as not to encourage indifference by some parties to

> " situations that violated the right to life of all human beings. The case of Burundi where more than 200,000 innocent victims have just been massacred, and the cases of the Middle East and South Africa would serve as examples to be used in such a study".

This address was followed by a sharp response from the Burundi delegation. The Burundi Minister of Foreign Affairs chided Rwanda for not having confined its raising of the matter to the African arena and for interference in Burundi's internal affairs.[54] During the course of the 1973 OAU Summit Conference in Addis Ababa, Milton Obote, then in exile in Tanzania, circulated a letter to all African leaders in which he accused Idi Amin of committing atrocities in Uganda. The OAU ignored the letter and failed to act. [55]

The successful invasion of Uganda by Tanzanian troops and a substantial number of armed Ugandan exiles in 1979 was the turning point in inter-African relations, at least, as far as human rights within member states are concerned. At the beginning of 1979, President Nyerere openly hosted a meeting of Ugandan political exiles in Tanzania. This move was unprecedented in the history of inter-African relations. Here was a member state of the OAU hosting a meeting of a group plotting the overthrow of the government of another member state - a direct violation of article III(2) of the Charter. During the course of the Tanzania-Uganda war, Presidents Numeiry of Sudan, chairman of the OAU, General Olusegun Obasango[56] of Nigeria, and William Tolbert of Liberia tried, without success, to mediate in bringing the war to an end.[57] President Nyerere insisted that the OAU had to condemn Amin for aggression before he could consider any peace proposals, a demand which the organisation refused to meet, as President Numeiry, the then chairman, pointed out that the OAU was not in the business of

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[53] UN Doc A/PV 2054/ 1973.

[54] UN Doc A/PV 2055/1973.

[55] Kannyo note 47 above at 144.

[56] Former President of the Federal Republic of Nigeria.

condemning fellow member states.[58] The overthrow of the Amin regime with the help of Tanzanian troops gave rise to a heated debate at the July 1979 OAU Summit Conference held in Monrovia, with the heads of state who attempted to mediate being especially critical. President Numeiry accused President Nyerere of having violated the principle of non-interference and the respect for territorial integrity of other member states. President Obassango, on his part, condemned the precedent that would be set by the Tanzanian action, and President Sekou Touré of Guinea pointed out that "the OAU was not a tribunal which would sit in judgement on any member state's internal affairs."[59]

In October 1991, the Secretary-General of the OAU dispatched a five-member team to observe the presidential and legislative elections in Zambia. Upon arrival, the team met with resident African diplomats to explain the purpose of its mission. Several of the diplomats responded antagonistically doubting the propriety of sending an observer mission to a "sovereign African state" and "worrying that the Zambia precedent would require similar monitoring in all future Africa elections."[60] The team answered by noting that it had been invited by Zambia's President, Dr Kenneth Kaunda, a founding father of the OAU. In November 1995, when the Nigerian government executed nine minority human rights activists, including the playwright Kenule Beeso Saro-Wiwa (Ken Saro-Wiwa), South African President, Nelson Mandela, took a tough stance against Nigeria. Even after Nigeria had been suspended from the Commonwealth for its action, he continued calling for economic sanctions against the country. The South African Ambassador to Nigeria was briefly recalled, and Nigeria decided to withdraw from the South African-sponsored Four Nation Football tournament that took place in South Africa in December 1995. Relations between the two countries became strained to the extent that Nigeria decided to pull out of the prestigious African Nations Cup competition hosted by South Africa in 1996. Nigeria accused Nelson Mandela and

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[57] Kannyo note 47 above at 145.

[58] *Ibid.* (emphasis added).

[59] *Ibid.*

[60] Larry Garba "The OAU and Elections" (1993) 4:3 *Journal of Democracy* 55.

South Africa of interference in its internal affairs. Regrettably, very few African states were bold enough to condemn Nigeria, while the OAU failed to issue any statement on the matter.

The principle of non-interference and its unwarranted use by member states notwithstanding, the OAU and some of its members did either directly or indirectly, interfere in the "internal affairs" of other member states. There has always been occasional attempts within the OAU forums to challenge the legitimacy of governments which came to power through violence.

The issue was first raised in connection with the assassination of President Sylvanus Olympio of Togo by mutinous troops in January 1963. The Ghanaian government was blamed for the assassination by a number of African leaders who were opposed to President Nkrumah's policies.[61] As a result of their opposition, Togo was not represented at the founding conference of the OAU in May 1963. Such was the strength of feeling generated by the Olympio assassination that the "unreserved condemnation in all its forms, of potential assassination as well as subversive activities on the part of neighbouring states or another state"[62] was inserted in the OAU Charter as one of the principles of the organisation.

The overthrow of President Nkrumah by the Ghanaian military in 1966 led to determined attempts to deny the successor regime legitimacy within the OAU. At the sixth meeting of the Council of Ministers held in March 1966 in Addis Ababa, so many delegations withdrew in protest of the presence of the delegation representing the new military regime, that the meeting came to a hasty end.[63] A similar situation arose following the overthrow of the government of President Milton Obote of Uganda in January 1971. The Council of Ministers' meeting that took place in February of the same year was forced into a difficult situation when the deposed President sent a

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[61] Kannyo note 47 above at 134

[62] OAU Charter article III(5)

[63] Kannyo note 47 above at 134.

delegation to challenge that of the military government. Rather than choosing between the two delegations, the meeting decided to avoid the issue and adjourned *sine die.*[64]

The decision by the OAU to hold its 1975 summit conference in Kampala, Uganda, gave rise to strong protest from Tanzania, Mozambique, Zambia and Botswana which pointed to the atrocities which had been and were still being committed by the Amin regime. The thrust of their argument was that it was wrong for African leaders to condemn human rights violations in southern Africa and yet remain silent about abuses within member states of the OAU.[65] In response to the OAU's decision to go ahead with the Kampala conference, Tanzania, Zambia and Botswana boycotted the meeting, while Mozambique's delegation was led by low-ranking officials rather than President Samora Machel.

Following the 1978 overthrow of the Comoros President, Ali Sollih, by a force of fifty mercenaries led by Gilbert Bourgeaud (usually known by his alias, Bob Denard), the Comorian delegation representing the successor regime was expelled from the OAU Council of Ministers meeting in Khartoum, Sudan.[66] The role played by the mercenaries in the overthrow, and the presence of Denard, a notorious mercenary and veteran of several African conflicts, as part of the delegation, was considered the ultimate insult to Africans leaders. In April 1980, President William Tolbert of Liberia was assassinated in a *coup d'etat.* Ten days later, thirteen former ministers and high ranking officials in the deposed regime were publicly executed by firing squad.[67] This action prompted the OAU Council of Ministers which was meeting in Lagos, Nigeria to appeal to the new Liberian leader, Samuel Doe, to restrain such excesses. The message by the ministers affirmed "...the right of any member state to change its government in any way it sees fit". However, the ministers called for an exercise of restraint "...on purely

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[64] *Ibid.*

[65] Collin Legun (ed) *African Contemporary Records* 1975-1976 at C22-C24.

[66] Kannyo note 47 above at 134.

[67] *Id* at 135.

humanitarian grounds and [in] respect for the principles of human rights".[68]

The OAU has also been involved in domestic conflicts and matters of an humanitarian nature. The most notable attempts to settle what were essentially domestic conflicts include: the Congo (Zaire) crisis in 1964-1965; (and the 1996-1997 crisis that threatened to destabilise the Great Lakes Region and the whole of Central Africa); the Nigerian civil war (1967-1970); the Angolan civil war (1975-1976); the Chad conflict; the Burundi crisis (1995-1996) and the Congo-Brazzaville civil war of 1997, to name but a few. The record of the organisation in this regard has, however, not been outstanding. Almost all the internal conflicts were terminated with the military victory of one of the protagonists; while in other cases, success has been achieved only by informal ad hoc committees and individual heads of state acting as intermediaries. On the humanitarian front, attempts have been made by the OAU from time to time to become involved in domestic conflicts even in the face of a limited threat of extra-regional intervention and regional instability.

Political analysts have, however, contended that the crisis in the OAU following the overthrow of Nkrumah and Obote was essentially due to partisan political factors. Opposition to successor regimes came from governments which had been very friendly with the deposed leaders or which disliked the ideological leanings of the successor regimes, and no issues of human rights or humanitarian concern were involved.

African leaders have long now taken refuge behind article III(2) to violate the rights of their citizens; but as the world approaches the new millennium where respect for human rights and fundamental freedoms, and the ideals of democracy will capture the centre stage of the comity of nations, the OAU will find it more and more difficult to maintain this article if it intends to have any credibility in the twenty-first century world. Respect for [states'] fundamental sovereignty and integrity is crucial to any inter-governmental progress. However, the time for absolute and exclusive sovereignty has passed; its theory was never matched by reality. It is the task of leaders today to understand this and to find a balance between the needs of internal good governance,

[human rights] and the requirements of an even more interdependent world.[69]

States which deride what they deem to be unwarranted intervention or interference in their internal affairs, generally do so by invoking the concept of state sovereignty by which they claim to have the right independently to administer affairs which fall essentially within their jurisdiction. When governments argue that human rights issues are matters falling essentially within their state jurisdiction, they all too often quote article 2(7) of the UN Charter in support. However, it is apparent that in so doing, they conveniently close their eyes to the article's proviso which circumscribes the prohibition on the United Nations from intervention in domestic jurisdiction of states.[70]

For article 2(7) provides in part that "...but this principle shall not prejudice the application of enforcement measures under Chapter VII"; and Chapter VII deals with "Action with respect to threats to the peace, breaches of the peace and acts of aggression". These measures are applied to maintain or restore international peace and security and may or may not involve the use of armed force, e.g., the complete or partial interruption of economic relations and means of communication (as was the case with apartheid South Africa) or, if these prove to be inadequate, the taking of action by air, sea or land forces, as is the case of Iraq. It is argued that violations of human rights in any state can, potentially, endanger international peace and security and can, justifiably, be the basis of international action, as evidenced recently in Haiti, Bosnia, Sierra Leone, the concept of domestic jurisdiction of states notwithstanding.

From the above analysis, the following conclusions can be drawn: human rights issues cannot be deemed to be matters which fall "essentially within the domestic jurisdiction of any state", and international action in respect of such matters cannot justifiably be seen as an affront to state sovereignty or independence. Of significance is the fact that even states which are not members of the UN, *ipso facto,* pre-empt such international

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[68] *African Research Bulletin* (1980) at 5649A.

[69] Report of the Secretary of UN para 17 1992 UNDP 1 Pub 1247.

[70] KA Acheampong "Our Common Morality Under Siege: The Rwanda Genocide and the Concept of the Universality of Human Rights" *Review of the African Commission on Human and Peoples' Rights*

action as the UN has vested itself with the power to ensure compliance, by all states, with the UN Charter's principles for purposes of maintaining international peace and security. Article 2(6) of the UN Charter states that: " The organisation shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security". The international viewpoint as to the non-absoluteness of sovereignty and the universality of human rights has provided the justification for the intervention or interference, by the United Nations, in the affairs of individual states. Such interventions have on the basis of article 41 of the UN Charter and a host of UN resolutions largely employed measures not involving the use of armed force with the aim of ensuring peaceful settlement of international disputes.[71]

As discussed above, all matters of human rights are of international concern and no nation, group of nations, or a continental organisation such as the OAU can, therefore, be seen or heard to claim that such matters fall solely within its, or their domestic jurisdiction. Thus the concept of universality of human rights which can be invoked by all human beings in defence of their own human rights or those of other human beings has become deeply rooted. By such an invocation, the international community is called upon to take all necessary action, including, where necessary, armed force as provided for by article 42 of the United Nations Charter, to help restore the enjoyment of such human rights to those who have been deprived of them and so save them from the indignity and denial of human worth occasioned by these human rights violations. The taking of action, armed force included, to either maintain or restore international peace and security which we contend, is always threatened by violations of human rights, is warranted if potential violators of human rights are to perceive the United Nations as having any resolve to halt or pre-empt human rights abuses.

(1994) at 29.

[71] Some of these are the following: the 1975 Resolution on Peaceful and Neighbourly Relations Among States; the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the UN Charter; the 1982 Manila Declaration on the Peaceful Settlement of International Disputes.

The OAU and its members resolved in the preamble of the OAU Charter of 1963 to adhere to the principles of the United Nations Charter. This means that its principles must conform to those of the latter, and where these appear to be in conflict, the principles of the UN should prevail. It is common knowledge that article III(2) of the OAU Charter was a deliberate attempt by its member states to

> "maintain an indifferent attitude to the suppression of human rights in the independent African states, by duly emphasising the principle of non-interference in the internal affairs of member states at the expense of certain principles, particularly the customary principles of respect for human rights".[72]

But as the United Nations continues to emphasise the interrelationship between universal human rights and international peace and security, the principle of non-interference firmly defended by African states will become redundant, at least as far as human rights are concerned. And as the world inches into the twenty-first century, African states cannot but follow the internationally recognised standards.

Apart from the requirements contained in article 2(7) of the UN Charter, the rigid position held by most African states with regard the principle of non-interference is gradually giving way, considering the fact that since 1963 when the OAU Charter was signed, many African states have entered bilateral and multilateral treaties that require them either individually or collectively to surrender part of their sovereignty to international scrutiny. Some of these treaties are between African states themselves, such as the Southern African Development Community (SADC), while others are between African States and countries from other regions, such as the UN Covenant on Civil and Political Rights, and usually provide for the promotion and protection of human rights among the state parties. By signing these treaties, these states are precluded by two important principles, namely; the principles of estoppel and *pacta sunt servanda,* from invoking their domestic jurisdiction or legislation in the treatment of their citizens.

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[72] Oji Omuzurike "The Domestic Jurisdiction Clause in the OAU Charter" 1978 *African Affairs* 78 at 903.

Professor Schwarzenberger defines the principle of estoppel as a " doctrine according to which a subject of international law is precluded from denying the truth of a statement made earlier by a duly authorised representative or the existence of a fact in which such representative has by word or conduct led others to believe".[73] Professor Ian Brownlie says that the principle of *estoppel* "undoubtedly has a place in international law and it has played a significant role in territorial disputes which have come before international tribunal".[74] In the *Temple of Preah Vihar case,*[75] the ICJ came to the conclusion that the attitude of Thailand showed that she had acquiesced or recognised the disputed frontier line between her and Cambodia in the area of the Temple; "that marked on the map drawn up by the Mixed Delimitation Commission set up by the treaty of 1904".[76] Lord McNair advances the view in the case of *Eastern Greenland* that bilateral and multilateral treaties are binding agreements when accepted (with ratification through the proper channels) and that in that particular case, "Norway reaffirmed that she recognised the whole of Greenland as Danish; and thereby she has debarred herself... in consequence from proceeding to occupy any part of it".[77]

This discussion would support the presumption and the rule of evidence that "a person [or state] cannot deny the existence of a particular state of affairs which he has himself brought about, and on the basis of which another person has acted".

As far as the maxim *pacta sunt servanda* is concerned, it may also be invoked against the actions of African states party to the African Charter or any other international human rights instrument, if such actions are judged by other states parties, to be

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[73] G Schwazenberger, *A manual of International Law* (1960) at 683.

[74] See "The Validity of Treaties" *Collected Courses*, Academy of International Law 1971, vol III P 348.

[75] See ICJ Reports 1962 at 6.

[76] Ian Brownlie *Principles of Public International Law* (1973) at 164. But TO Elias says that the International Law Commission "noted that in municipal systems of law this principle had its own particular manifestations reflecting technical features of the principle in municipal law might not necessarily be appropriate for the application of the principle in international law. For this reason, it preferred to avoid the use of such municipal terms as estoppel".

[77] *Id* at 165.

inconsistent with the obligations assumed under these instruments, especially those directly related to the provisions of human rights that impose external constraints on internal affairs of the state involved.

Apart from the principle of non-interference, article III(3) of the OAU Charter serves as a further hindrance to the full promotion, protection and enjoyment of human rights in Africa and is a source of numerous inter-state conflicts. This article provides for the "...respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence". The casual and haphazard delimitation of African boundaries following the Berlin Conference of 1884-1885 lies at the root of almost all the conflicts in Africa. Although the Charter does not expressly spell out the inviolability of colonial boundaries inherited at independence, a subsequent decision of the OAU laid down that the borders inherited at independence should be maintained and respected.[78] This facilitated the proliferation of new states and lessened the chance of a united Africa. Following a proposal from Tanzania at the 1964 OAU conference in Cairo, the Assembly adopted a resolution which, *inter alia*, provided that the Heads of State and Government "solemnly declare that all members states pledge themselves to respect the borders existing on their achievement of national independence".[80] By confirming colonial boundaries therefore, the OAU, *ipso facto*, adopted and confirmed undemarcated and disputed borders which are sources of conflicts, genocide and human rights violations in Africa today.

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[78] OAU Doc AHG/Res 16(1) 1964. Also see Chris M Peter note 12 above at 125.

[79] Morocco and Somalia entered reservations to this resolution because of their respective claims in the former Spanish Sahara and the Ogaden region of Ethiopia.

SECTION THREE

3:0 The African Charter and Commission on Human and Peoples' Rights

3:1 Introduction

The decision of the Eighteenth Ordinary Assembly of Heads of State and Government of the Organisation of African Unity (OAU) which met in Nairobi, Kenya from 24 to 28 June 1981 to adopt an African Charter on Human and Peoples' Rights[1] is an historic development that created conditions for a regional mechanism to promote and protect the fundamental rights and freedoms of over 500 million people in Africa. The Charter, also referred to as the Banjul Charter,[2] is the third regional human rights instrument in the world, alongside the European and American Conventions.

The decision of the OAU to create a human rights system is particularly significant because it indicates that African leaders for the first time recognised that human rights violations in African states are a matter of concern for the international community. Until 1981, the principle of non-interference in the internal affairs of member states which is set out in article III(2) of the OAU Charter, had been constantly used, expressly or implicitly, to prevent the organisation from dealing with situations within members states which threatened or actually involved grave violations of human rights.[3] Moreover, jealous defence of national sovereignty had not only until then hindered OAU efforts to protect human rights, but had also obstructed the process of greater African regional integration.[4]

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[1] The African Charter on Human and Peoples' Rights entered into force on 21 October 1986. To date, 52 of the 53 OAU member states have ratified the Charter, the exception being Eritrea.

[2] The Headquarters of the African Commission is in Banjul and the final draft of the Charter was done in Banjul, The Gambia.

[3] Oji Umozurike " The Domestic Jurisdiction Clause in the OAU Charter" 1978 *African Affairs* 78 at 197.

[4] Edward Kannyo "The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background" in Claude E Welch JR. And Ronald Meltzer (eds) *Human Rights and Development in Africa* 1984 at 128.

The question one may wish to ask is: after eighteen years of existence, why did the OAU decide to include the protection of human rights within member states as one of its goals?

3:2 The African Charter on Human and Peoples' Rights

3:2:1 Factors leading to the adoption of the Charter

The conceptualisation and eventual adoption of the African Charter was neither an accident of history nor an act of sudden enlightenment on the part of African states. Rather, its conception was made imperative by a confluence of domestic and international geopolitical realities. In the course of the eighteen years that had elapsed between the formation of the OAU and the 1981 summit conference in Kenya, the organisation had on various occasions been confronted with political problems, some of them amounting to crises.[5] Many of these problems had direct or indirect human rights or humanitarian implications. With each crisis, the OAU was looked to both within and outside of Africa to demonstrate its credibility. In some of these crises, the organisation recorded success but in others it failed.

For instance, in November 1966 at its third ordinary session, the Assembly of Heads of State and Government of the OAU meeting in Addis Ababa, Ethiopia, Liberia, Egypt and the host country, Ethiopia were mandated to solve the Guinea hostage crisis. These three countries succeeded in securing the release of the hostages. At the same summit, Zaire was mandated to reconcile Rwanda and Burundi. President Mubuto of Zaire succeeded in reconciling the two countries.[6] At almost all the meetings of the Council of Ministers and the Assembly of Heads of State and Government of the OAU, topical issues affecting the continent and within members states were on the agenda. For example, at the 1966 Heads of State Summit in Ethiopia, issues discussed included, *inter alia*, Rhodesia, the Rwanda and Burundi conflict and an Inter-African Force;[7] and

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[5] The Biafran Civil War; the Congo (Zaire) crisis; the Rhodesia crisis and refugee problems.

[6] . Edward Kannyo " The OAU and Human Rights" in Yassin El Ayouty (ed) *The OAU After Twenty Years* (1982) at 366.

at its second extraordinary session held in Lagos, Nigeria, from 28 to 29 April 1980, the Heads of State discussed amongst other issues; economic co-operation, Liberia and Chad.[8] It was therefore natural that when African leaders felt the need to create a regional mechanism for the promotion and protection of human rights, the OAU was regarded as the appropriate organ.

Political developments in Africa cannot, however, be examined in isolation from international politics. The adoption of the Charter was a combination of factors arising from intra-African and international developments.

3:2:1:1 Intra-African developments

An analysis of events leading to the creation of the African Charter will reveal that the Charter has had a lengthy and difficult period of gestation. The idea was first mooted in Lagos, Nigeria in 1961 but found no concrete expression for almost twenty years. Within this period, several developments occurred in Africa necessitating the establishment of a regional human rights system for the continent.

The principal intra-African factors leading to the adoption of the African Charter in 1981 include:

- the gradual acceptance of the OAU by African leaders as the proper forum for the resolution of African conflicts;
- the embarrassment caused for the OAU and African leaders in general by the atrocities of the Amin, Bokassa and Nguema regimes in Uganda, the former Central African Empire and Equatorial Guinea respectively; and
- The invasion of Uganda by Tanzanian troops.

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[7] *Id* at 370.

[8] *Id* at 375.

3:2:1:2 The gradual acceptance of the OAU by African leaders

Since its creation, the OAU has on occasion intervened in crisis involving its members. These crises range from liberation,[9] humanitarian[10] to border disputes.[11] There have also been attempts within the OAU to challenge the legitimacy of governments which came to power through violence.[12]

When the OAU was formed in 1963, there were only thirty-two independent African states. The organisation immediately established a nine-member Liberation Committee[13] to accelerate the liberation of the rest of Africa from colonial rule. The Liberation Committee played an important role in co-ordinating the efforts of the various nationalist movements in their struggle for independence. In the words of President Robert Mugabe of Zimbabwe:

> "The OAU created a liberation committee in 1963 to assist those countries which were still under colonial rule to become free. The OAU did not look askance at the armed revolutionary struggle. The liberation committee based in Dar-Es-Salaam was charged with the task of organising help of all kinds including arms and financial support and channelling it to the guerrilla movements".[14]

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[9] The OAU was actively involved in the liberation struggle of those countries that were still under colonial rule or white minority rule, for example, Rhodesia, Angola, Namibia and South Africa.

[10] Member states of the OAU adopted an "open door policy" to refugees and granted refuge to those fighting the colonialists.

[11] The OAU succeeded in solving the border disputes between: Guinea and Senegal (1972); Mali and Upper Volta (1975); Tunisia and Libya (1980); and Ethiopia and Sudan (1977).

[12] Uganda in 1971 was refused participation at the Council of Ministers meeting and the Assembly of Heads of State and Government meeting in Addis Ababa, Ethiopia, following Amin's overthrow of Obote; while in 1978, the Council of Ministers' meeting in Tripoli, Libya, expelled the Comoros delegation from the meeting in reaction to the *coup* that had taken place in that country.

[13] This Committee was dissolved by the OAU Heads of State and Government Summit (1993) in Tunis, Tunisia, during its Thirtieth Ordinary Session by resolution AHG\ Resolution 228 (XXX).

[14] (1984) September-October *African Report* September at 83.

A special fund managed by the committee and contributed to by the OAU members greatly assisted the liberation movements. The OAU also contributed to the liberation struggle by soliciting non-African support. Because Africa was able to present a united front on the need for decolonisation and the eradication of apartheid in South Africa, the world community was sympathetic and offered concrete support. Through the United Nations, the OAU mobilised the world community to impose mandatory economic and military sanctions against the "rebel regime" of Ian Smith's unilateral declaration of independence (UDI), in the former Southern Rhodesia. In the case of South Africa, the OAU's diplomatic efforts were highly successful. Before the reforms introduced by President FW De Klerk in 1989/1990, the OAU had managed to have South Africa suspended or expelled from numerous international bodies such as the UN General Assembly, UNESCO, ILO, FIFA and the International Olympics Movement. The OAU was also partially successful in lobbying for the imposition of economic sanctions against South Africa. Until the early 1990s, these efforts left South Africa virtually isolated from the world community.

Since 1963, the OAU has been faced with several conflicts involving its members. These disputes fall into two major categories: those between states, and domestic disputes. The OAU's role in resolving problems arising from purely internal conflicts has been largely constrained by the reluctance of governments facing internal rebellion to permit international intervention. However, since most African countries have boundaries that cut across ethnic lines and as any major internal conflict is bound to cause an outflow of refugees and political exiles, a domestic conflict inevitably creates tension between neighbouring states. The most serious internal conflicts the OAU has faced are those in Burundi, Congo (Zaire), Ethiopia, Nigeria, Rwanda, Somalia and Sudan.[15] The effectiveness of the OAU in dealing with intra-African disputes can be assessed by distinguishing between two types of settlement: normalisation of relations; and complete settlement of dispute.

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[15] AW Chanda "The Organisation of African Unity: An Appraisal" (1989-1992) 21-24 *Zambia Law Journal* at 14.

The organisation's main success has been in relation to the former, where it has been able to act as an effective instrument for reducing inter-state tension without necessarily resolving the problems that caused the tension. Such was the case in the Ogaden Region border dispute between Somalia and Ethiopia in 1964. As the tension was only reduced, it flared up again in 1976.[16]

The OAU has also used other methods for resolving conflicts such as: establishment or reinforcement of norms for inter-state relations[17] *vis-à-vis* specific problems; appeals to adversaries for a cease-fire and to seek negotiations, bilateral or with the aid of a mediator; and the establishment of the Commission on Mediation, Conciliation and Arbitration,[18] or the designation of an individual or *ad hoc* mediator. The organisation has relied heavily on flexible, *ad hoc* bodies of varying sizes, levels of national representation and scope of responsibilities. The most successful have been those made up of heads of state : for example, the *ad hoc* Committee on the Congo (Zaire) Mercenary Problem, which comprised ten heads of state. The inclusion of heads of state in the mediating bodies created to resolve the underlying cause of crises has tended to enhance the prospects of success. The designation of an individual head of state by the OAU as the sole intermediary in a dispute has been one of the most successful methods of conflict resolution. For example, former Zambian President, Kenneth Kaunda, was instrumental in solving the crisis between Somalia and Kenya in 1967; the ending of the Algeria-Morocco war was as a result of mediation by the late Emperor Haile Selaisie of Ethiopia; and the late President William Tolbert of Liberia was instrumental in reconciling Guinea and Ivory Coast on the one hand and Senegal on the other in 1971.[19]

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[16] *From Human Wrongs to Human Rights* Part IV Centre for Human Rights Pretoria (1995) at 382.

[17] See Declaration on the Code of Conduct for Inter-African Relations No AHG/Decl 2 (XXX) of 1994.

[18] The Commission has never been used as neither the adversaries nor the OAU deliberative organs has been inclined to use it

[19] See note 16 above at 380.

The success achieved by individual statesmen may be credited to the general African tradition of respecting the wisdom of the elders and men of distinction.

> "The inclination to appoint an individual statesman to mediate in a dispute emanates from the character of inter-African disputes which have always been considered as being primarily political and, therefore needing political rather than legal solutions". [20]

Although not entirely absent from concern for regional stability, humanitarian considerations have been more clearly apparent in the attitude of the OAU with regard to the position of refugees than in its attitude towards any other African problem. The problem of refugees has confronted the organisation since its creation. In the early 1960s, thousands of Tutsis fleeing the sporadic warfare that followed the revolution in Rwanda, entered the neighbouring states of Burundi, Tanzania, Uganda and Zaire. They created problems of security, relief and provision of shelter in these states. So, soon after the formation of the OAU, the host states asked the organisation to address the problem.[21]

In February 1964, the OAU Council of Ministers meeting in Lagos set up a ten-nation *ad hoc* commission to deal with the problem of refugees.[22] The commission was mandated to examine the problem of refugees in Africa and make appropriate recommendations for solutions; and to find ways and means of maintaining refugees in the countries of asylum. The commission later drew up a draft on all aspects of the problem of refugees in Africa and a decision was also made to set up a refugee bureau in the OAU Secretariat.

The UNHCR, the Dag Hammersjold Foundation, and the OAU convened an international conference on the legal, economic and social aspects of African refugees in Addis Ababa, Ethiopia in October 1967.[23] In 1968, the OAU set up a bureau for the placement and education of refugees which was integrated into the General Secretariat in June 1974. The efforts of the OAU to deal with the refugee problem took an

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[20] *Chanda* note 15 above at 16.

[21] Edward Kannyo note 4 above at 137.

[22] *Ibid.*

[23] *Ibid.*

important step forward when the OAU Convention Governing the Specific Aspects of Refugees in Africa was signed on 6 September 1969 as a supplement to and regional adaptation of the UN Convention Relating to the Status of Refugees (1951).[24]

Despite all these measures, the number of refugees in the continent has continued to grow, and it is estimated that Africa harbours half of the world's refugees. In response to the growing number of refugees, the UNHCR and other UN agencies in collaboration with the OAU, organised the International Conference on the Assistance to Refugees in Africa (ICARA) in Geneva in April 1981.[25] The ninety countries which participated in the conference pledged a total of $560 million[26] to support refugee programmes in Africa.

> "The work of the OAU in the sphere of refugee relief is significant because it involves an expansion of the role of the organisation into an area that impinges on domestic jurisdiction. It is also an area that is directly related to the protection of human rights".[27]

With the above-mentioned achievements and commitment by the OAU, African leaders had, by the end of the 1970s, come to accept the organisation as the natural agency to deal with political, humanitarian and other issues on the continent. Consequently, when the time came for the African Charter on Human and Peoples' Rights to be adopted, the OAU was seen as the appropriate organ to which to turn .

3:2:1:3 Embarrassment caused to the OAU and African leaders by Amin, Bokassa and Nguema

Large-scale killings of political opponents, suspected opponents and others by the regimes of Idi Amin in Uganda (1971-1979), Marcias Nguema in Equatorial Guinea (1968 - 1979), and Jean-Bedel Bokassa in Central Africa Republic (1966 - 1979), were almost certainly the most important factors in the final decision of the OAU to move

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[24] *Ibid.*

[25] Kannyo note 4 above at 138.

[26] *Ibid.*

[27] *Ibid.*

toward creating a human rights protection mechanism for Africa. The transgressions of these three regimes in particular and of other dictatorial regimes in Africa, caused revulsion both in and outside of Africa, and threatened to damage the image and reputation of the OAU. For instance, the organisation was put in an embarrassing position when Idi Amin became chairman in 1975. "He combined brutal methods of government in Uganda with a flamboyant and provocative style in international affairs".[28] His violent attack on Zionism and Israel during his address to the UN General Assembly in 1975 prompted the US Chief Delegate, Daniel Patrick Moynihan, to lambaste him and the OAU, claiming "...it is no accident, I fear, that this racist murderer... is the Head of the Organisation of African Unity...".[29]

At the 1977 annual Commonwealth Conference in London, which Uganda did not attend, Uganda's human rights violations were discussed. In the final communiqué, the conference declared:

> "Cognisant of the accumulated evidence of sustained disregard for the sanctity of human life and of massive violation of basic human rights in Uganda, it was the overwhelming view of the Commonwealth leaders that these excesses were so gross as to warrant the world's concern and to evoke condemnation by Heads of Government in strong and unequivocal terms. Mindful that the people of Uganda were within the fraternity of Commonwealth fellowship, Heads of Government looked to the day when the people of Uganda would once more fully enjoy their basic human rights which now were being so cruelly denied".[30]

In Central African Republic, self -styled Emperor Bokassa combined harsh repression of political opposition with bizarre megalomaniacal extravagance; while in Equatorial Guinea, throughout his eleven years in power, Marcias Nguema presided over one of the most brutal regimes that Africa has seen. Large numbers of people were either killed or driven into exile.

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[28] *Id* at 142.

[29] *Facts of File* 1975 739 D1 - D3.

[30] Kannyo note 4 above at 143..

These regimes created problems for the OAU and African leaders in general by exposing them to the charge of using a "double standard" in their condemnation of apartheid in South Africa while remaining silent about atrocities by other African regimes.[31]

3:2:1:4 The impact of the Tanzanian invasion of Uganda (1978-1979)

In spite of the international outcry, the OAU had not until 1979 formally taken up the problem of human rights violations in Central African (Empire) Republic, Equatorial Guinea or Uganda. However, the successful invasion of Uganda by Tanzanian troops and armed Ugandan exiles which led to the downfall of Amin was to ensure discussion of the subject at the 1979 OAU summit conference in Monrovia, Liberia.

Even though Tanzania was strenuously condemned by some African leaders for violating article III(2) and (3) of the OAU Charter, President Nyerere drew considerable sympathy from several African leaders and the international community who were appalled by Amin's human rights record and OAU indifference. Newly installed President of Uganda, Godfrey Binaisa, vigorously defended Nyerere and going against OAU practice, also launched a strong attack on the regimes of Bokassa and Nguema for their human rights violations.[32]

It was against this background the President of Senegal, Leopold Senghor, decided to introduce a draft resolution that had been handed to him by a group of African jurists, calling for the establishment of an African Human Rights Convention. The Assembly decided to include the phrase "peoples rights"[33] to the draft and adopted a resolution

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[31] Laurie S. Wiseberg, 'Human Rights in Africa: Toward the Definition of the Problem of Double Standards' (1976) 6:4 *Issues*,; also see *African Contemporary Record* 1975 - 1976
C22 for Tanzania's response to the holding of the1975 OAU Heads of State summit in Kampala, Uganda. The Tanzanian government warned in a statement released in dar - es- salam just before the conference that Africa was 'in danger of becoming unique in its refusal to protest about the crimes committed against Africans, provided such acts are done by African leaders and Governments'.

[32] .Kannyo note 4 above at 146.

[33] Kebe Mb'aye Keynote address, "Introduction to the African Charter on Human and Peoples' Rights" Report on a Conference held from 2-4 December 1985 convened by ICJ in Geneva (1986) at 19-20.

calling upon the Secretary-General to organise

> "as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft on an African Charter on Human and Peoples' Rights, providing among other things for the establishment of organs to promote and protect human rights".[34]

To a large extent, the resolution can be seen as a means to end the controversy provoked by the violent changes in Uganda in 1979; but it could also be seen as an attempt to forestall similar controversies in the future and at the same time redeem the image of the OAU by showing that it was not after all indifferent to human rights violations within member states.

Between 1979 and 1981, the OAU organised three meetings to draft the proposed Human Rights Charter. The first was in Dakar, Senegal, from 25 November - 2 December 1979 for African Legal Experts to draft the African Charter on Human and Peoples' Rights; it was followed by the Conference of Ministers of Justice and Legal Experts to consider the draft Charter, which was held in Banjul, The Gambia, in June 1980, and culminated in the Second Conference of Ministers of Justice to finish the consideration of the draft African Charter on Human and Peoples' Rights, which was held in Banjul, The Gambia, in January 1981.[35] After the second consideration of the draft, the Charter was termed the Banjul Charter.

3:2:2 International developments

There are basically two extra-African influences that contributed to the creation of an African human rights mechanism: the role the UN played in encouraging the formation of regional human rights bodies, and the central role that US President, Jimmy Carter, gave to the subject of human rights in his foreign policy. Since the mid-1960s, the UN has encouraged the creation of regional human rights commissions in those areas where they did not exist.[36] These efforts resulted in the organisation of human rights

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[34] OAU Doc AHG\ Dec 115 (XXI), reproduced in UN Doc A\34\552.

[35] Victor Dankwa "The African Charter on Human and Peoples' Rights: Hopes and Fears" in *The African Charter on Human and Peoples' Rights: Development, Context and Significance* African Law Association (1991) at 8.

conferences in Africa and have kept the subject of human rights alive in the minds of the leaders, intellectuals, legal practitioners and other people of Africa.

Even though the OAU was not directly involved in the efforts of the United Nations to create a regional human rights body in Africa, some of its members were. During the twenty-third session of the UN Commission on Human Rights in March 1967, Nigeria, a prominent member of the OAU, introduced a resolution, co-sponsored by the Congo (Zaire), Senegal and Tanzania, asking the UN to consider establishing regional human rights commissions for regions lacking them.[37]

Following the adoption of this proposal, the UN Commission set up an *ad hoc* study group[38] of eleven members to look into the possibilities. In its report, the group expressed general agreement that the initiative for setting up regional human rights commissions should be taken by states in these regions. [39]

At the twenty-fourth session of the commission, a Nigerian resolution (cosponsored by Austria) was adopted, requesting the UN Secretary-General to transmit the report to member states and regional inter-governmental organisations; and also to consider the possibility of arranging suitable regional seminars in the field of human rights. The first UN seminar on human rights in Africa was held in Cairo, Egypt, in September 1969.[40] Among the conclusions of the meeting, the participants called on the member states of

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[36] .Kannyo note 4 above at 164.

[37] UN Doc E\CN\L940 Draft Recommendation II Report of the Twenty-third session of the UN Commission on Human Rights (E\4322) 109-25.

[38] AH Robertson & JG Merrils *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights* (1989) at 202.

[39] UN Doc E\CN4\966 Report of the UN ad hoc study group established under Resolution 6 (XXIII) of the Commission on Human Rights.

[40] *Ibid.* Also see UN Doc ST\TAO\HR 38 1969; (1969) II *Human Rights Law Journal*,.692 - 702 for a report on the proceedings of the Seminar.

the OAU to consider appropriate steps, including the convening of a preparatory committee, with a view to establishing a regional commission on human rights for Africa.

In the ten year period following the Cairo Seminar, a number of other meetings were held in various African states under the aegis of the UN.[41] At many of these conferences, the desirability of establishing an African Human Rights Commission or some similar body was expressed. The second UN sponsored seminar devoted to the question of establishing an African Regional Human Rights Commission was convened in Monrovia, Liberia in September 1979. The seminar took place after the OAU had passed a resolution in July 1979 authorising its Secretary-General to facilitate the establishment of an African human rights body. The UN seminar therefore took advantage of the momentum generated by the OAU resolution to help in the search for a structure for the proposed mechanism. One of the conclusions of the UN seminar was that it would be desirable to establish an African Commission on Human Rights as soon as possible.

Between the 1961 Lagos Conference and the 1979 Monrovia Conferences, increased international attention to the subject of human rights violations had been reflected in international political developments, the media and academic circles. Beyond the human rights related activities of states in international institutions, many states have chosen to make human rights a concern in their bilateral and multilateral foreign policy.

Much of the surge of interest in human rights in the last decades can be traced to the catalysing effect of President Carter's 1977-1981 efforts to make international human rights an objective of US foreign policy. In the mid-1970s, a combination of domestic and international factors gave impetus to new thinking within the US foreign policy establishment. Following the debacle of the Vietnam War, increased debate over US support for the creation of a physical apparatus for repression in Latin America, and the

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41 After the 1969 Cairo Seminar, other conferences focused on the establishment of a human rights body in Africa. They included *inter alia*: the Conference of African Jurists on the African Legal Process and the Individual held in Addis Ababa in April 1971; the Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa; and the Seminar on the Establishment of Regional Commissions of Human Rights with specific reference to Africa held in September 1979...

domestic crises that led to the collapse of the Nixon presidency, it became necessary to rethink US foreign policy. These developments, in conjunction with the cold war, led Congress and the Carter administration to give unprecedented prominence to human rights rhetoric within US foreign policy. To give effect to the rhetoric, administration policy-makers would, through relevant legislation, ostensibly link aid to a recipient's human rights record. In these conditions, it became politically expedient for African countries to adopt the rhetoric.

But the duplicity and politicisation of the rhetoric was manifest in US policy toward friends and foes. While the administration vilified Soviet bloc countries for human rights violations, it closed its eyes to abuses elsewhere and continued to provide military and economic assistance to the Shar's Iran and Mobutu's Zaire, among many other strategically or economically prized clients.

In the late seventies, the United States "lost" Nicaragua and Iran as a result of its support for repressive rulers who alienated virtually their entire population and provoked popular revolutions. A few years earlier, Angola was "lost" because of the colonial policy and human rights abuses of the US-backed Portuguese regime. The US, has also lost other strategically located countries, such as the Philippines, largely as a result of a misguided subordination of human rights concerns in preference for geographic spheres of influence. The fear of losing even more territories led the US to reconsider its foreign policy with regard to the protection of human rights. Difficult decisions had to be made about the weight to be given to human rights as well as other foreign policy goals, and at least rough rules for trade-offs and loans needed to be formulated to regulate US foreign policy. This reformulation of bilateral and multi-lateral relations marked a turning point in US foreign policy with regard to human rights protection. It also sent a signal to African dictators that friendly relations with the US, and the acquisition of financial aid would henceforth be based on a sound human rights record.

Further, the Carter administration's serious attention to economic and social rights, even if it was ultimately subordinate to a concern for civil and political rights, greatly contributed to the international perception of its policy as genuinely concerned with human rights, and not just a rhetoric for cold war or neo-colonialism.[42] Such an international perception was almost the necessary condition - although by no means a sufficient condition - for an effective international human rights policy. It, to some extent, won the confidence and co-operation of socialist countries, African countries, human rights advocates and other categories of human rights personalities and institutions.

Politicians, journalists, academics and others in various parts of the world paid greater attention to the problem of human rights violations, especially in Africa. The activities of Amnesty International, the International Commission of Jurists and other international non-governmental organisations influenced the global human rights climate in the late 1970s.

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42 It should be noted that previous regimes had concentrated on recognising only civil and political rights, and considered economic and social rights not being truly human rights. This must have cast doubts on t the US notion of the universality of human rights, especially from socialist and Third World countries, which give preference to the latter rights.

3:3 Analysis of the Charter

3:3:1 The Preamble

To draft a human rights instrument for atheists, animists, Christians, Hindus, Jews, Muslims; a continent of over fifty countries and islands; with capitalists, socialists, Marxist-Leninists, military, one-party and democratic regimes was not an enviable task. The difficulties that faced the draftsmen were exacerbated when they had to take into account both international human rights standards and "the virtues of African historical tradition and the values of African civilisation".[43] The stated objective of the drafters was to prepare an African Charter on Human Rights that was based on African legal philosophy and was responsive to African needs. The Charter was to reflect the history, values, traditions and economic development of the continent.[44] This approach is not unique to Africa. Western conceptions of human rights are a result of European historical experience. This point of continental peculiarity was emphasised by President Leopold Senghor of Senegal when he informed the experts meeting in Dakar to draft the Charter that:

> "Europe and America have construed their system of rights and liberties with reference to a common civilisation to respective peoples and to some specific aspirations. It is not for us Africans to copy them or to seek originality for originality's sake. It is for us to manifest both imagination and skill. Those of our traditions that are beautiful and positive may inspire us. You should therefore constantly keep in mind our values and the real needs of Africa".[45]

The President also cautioned the experts not to produce a Charter on the "African man"; "humankind is one and indivisible and the basic needs of [human beings] are similar everywhere".[46]

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[43] Preamble of the African Charter on Human and Peoples' Rights paragraph 4.

[44] Evelyn A Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedure.* (1996) at 6.

[45] *Ibid.*

[46] *Ibid.*

The desire for originality and to produce a charter to cater for "African needs" justified the drafters' departure from the models created by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) and the American Convention on Human Rights (the American Convention). In addition, the draftsmen rejected the Charter format proposed at the UN sponsored Monrovia Seminar on the Establishment of Regional Commissions on Human Rights with Specific Reference to Africa held in September 1979.[47] The UN seminar had set out its proposed standards in two articles: articles 2 and 3.

Article 2 provides:

> "The Commission shall be guided by the international law of human rights, including the provisions of specific African instruments on human rights which may be concluded, such as a declaration, a charter or a convention, the provisions of the UN Charter, the Charter of the OAU, and the Universal Declaration of Human Rights...".[48]

while article 3 states that:

> "The Commission shall also have regard to other international conventions, whether general or particular establishing rules expressly recognised by the state members of the OAU; to African practices consistent with international human rights standards evidencing customs generally accepted as law; and to the general principles of law recognized by African nations, judicial decisions and the teachings of authoritative authors as subsidiary means for the determination for the rules of law".[49]

The proposal of the UN Monrovia seminar simply set out applicable standards as embodied in other international covenants and declarations and was seen as a "means"-oriented document, that is, it focused on form rather than substance. The Banjul Charter (Dakar Draft) on the other hand, catalogues specific rights to be protected and is seen as an "ends"-oriented document, focusing on substance rather that form. The Monrovia experts had decided not to prepare a distinct set of rights for Africa.[50] Most of their efforts were devoted to suggesting operating procedures for a proposed African regional

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[47] GG Ramcharan 'Travaux Preparatoires of the African Commission on Human Rights', (1992) 3:7 *Human Rights Law Journal.* Also see 310 - 312 for the fifteen Articles drawn by the Monrovia experts, assembled under UN auspices.

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.*

commission on human rights modelled in some measure on the Inter-American Commission on Human Rights. The draftsmen recommended that existing international documents serve as standards for promoting and protecting human rights in Africa.[51] But the experts at Dakar, assembled under OAU auspices, opted for a type of document differing dramatically from that of the Monrovia experts, assembled under UN auspices.

The preamble of the African Charter on Human and Peoples' Rights is very different from the preambles of other regional conventions for the protection of human rights. It indicates that the Charter draws its inspiration from the OAU Charter, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples".[52] The preamble also recognises

> "that fundamental human rights stem from the attributes of human beings which justifies their protection ..., that the reality and respect of peoples' rights should necessarily guarantee human rights ..." and that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone".[53]

One respect in which the Banjul Charter differs from its American and European counterparts is its reliance on principles primarily African in nature. The concept of duty embodied in the Charter is different from that contained in the American and European Conventions. In the latter regional human rights instruments, the "concept of duties" refers only to the obligation of a state toward its citizens or toward citizens of another state within its jurisdiction. Occasionally, obscure references are made to the individual's responsibility to the community. The American Convention does mention in article 32, the individual's responsibility to his or her family, community and mankind, while the Universal Declaration[54] also provides in article 29(1) that "everyone has duties to the community in which alone the free and full development of his or her personality is possible". However, neither the European Convention, the American Convention, nor the Universal Declaration mentions such an obligation by

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[51] *Ibid.*

[52] Preamble of OAU Charter paragraph 3.

[53] *Id* note 43 paragraph 6.

[54] UN GA Res 217 (III) A 1948.

the individual to the state.

The African Charter imposes an obligation upon the individual not only toward other individuals, but also towards the state of which he is a citizen. In addition, the preamble stresses the importance of economic, social and cultural rights as a pre-requisite to the full enjoyment of human rights.

> "It is henceforth essential to pay 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".[55]

In summation, the preamble to the African Charter could be seen as a guide for the significant themes that run throughout the Charter. First, the Charter relies heavily on African documents and traditions rather than United Nations declarations or conventions. Second, while individuals enjoy certain rights under the Charter, they are obliged to fulfil certain duties toward other individuals and toward the state of their citizenship. Third, economic, social and cultural development is a top priority. Finally, the Charter incorporates in one document the three generations of human rights, namely, civil and political rights (first generation), economic, social and cultural rights (second generation), and solidarity or group rights (third generation). And as the Assistant Secretary-General of the OAU puts it,

> "...the cultural character of Africa and the African Charter revolve around the Charter of the OAU.... A significant triptique which expresses our will to ensure the liberation of our continent, the development of man and all his faculties, as well as the establishment of a society that takes into account our cultural values and traditions". [56]

3:3:2 Content of the Charter

The African Charter is divided into three parts, comprising its substantive and procedural aspects as well as the general provisions. Part one sets out the substantive aspects of rights and duties in two chapters. Chapter one sets out the rights to be protected under the Charter, while chapter two sets out the duties of the individual towards "his family and society, the state and other legally recognised communities and

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[55] Preamble to African Charter paragraph 8.

[56] Wolfgang Benedek & Wolfgang Heinz (eds) "The place of human rights in the regional political systems" in *Regional systems of human rights in Africa, America and Europe* (1992) at 23.

the international community". [57]

Part two covers the procedural aspects, including the establishment and organisation of the African Commission on Human and Peoples' Rights. Chapter one calls for the establishment of the African Commission and lays down the structure of the Commission in detail. Chapter two details the functions of the Commission, while chapter three deals with the procedure of the Commission. Chapter four of part two indicates the applicable principles by which the Commission will secure the protection of human rights in Africa. Finally, part three of the Charter consists of general principles especially as regards commencement, ratification, special protocols and amendments.

A significant feature which emerges from article 1 of the Charter is that it permits its members only to recognise the rights, freedoms and duties contained in the Charter and to undertake to make them effective by law. A distinctive feature of that clause is the failure to include the words *"guarantee"* and *"ensure"*. The earlier Dakar draft required that states: "shall recognise and shall guarantee the rights and freedoms stated in the present Convention (sic) and shall undertake to adopt in accordance with their constitutional provisions, legislative and other measures to ensure their protection".[58] The elimination of the vital words *"guarantee"* and *"ensure"* from the final text deprives the Charter of its force and has prompted some human rights commentators to argue that the Charter was intended to be non-binding on member states. It has also been argued that these words were dropped in order to make the Charter more acceptable to those governments concerned about the effects of a human rights covenant on national sovereignty.[59]

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[57] African Charter article 27 (1).

[58] Dakar Draft of the African Charter article 1; see also OAU Doc CAB/ LEG/ 67/3/ Rev 1 (1979).

[59] Richard Gittleman; "The Banjul Charter on Human and Peoples' Rights: A Legal Analysis" in CE Welch Jr and RI Mertzer *Human Rights and Development in Africa* (1984) at 156.

The Charter incorporates a mixture of qualified and unqualified civil and political rights in articles 2 to 13. The unqualified rights include , *inter alia*; the inviolability of the human person (article 4), the right to human dignity (article 5), the right to a fair trial and equality before the law (article 7). The libertarian essence of other rights is substantially diluted by the presence of claw-back clauses. Those affected include: the right to personal liberty (article 6), freedom of expression (article 9), the right to free association (article 10), freedom of conscience and religion (article 8), freedom of assembly and movement (articles 11 and 12), and the right to participate in the government of one's country (article 13).

The effect of the claw-back clauses is to subject the enjoyment of the affected basic rights to national law without specifying the circumstances which would legitimate national restrictions. Thus, as Professor Umozurike[60] has explained:

> "These latter rights may be derogated from...by law or be exercised in accordance with the law of the land. The standard for such law is unfortunately not stated, there is no requirement that the law must be reasonably justifiable in a democratic society. These civil and political rights require that governments interfere as little as possible with the freedom and liberty of individuals".[61]

The Charter contains no specific provision entitling a state to derogate from its obligation as is the case with the American and European Conventions. Derogation clauses limit a state's conduct in at least two important ways. Firstly, they limit the circumstances in which derogation may occur. For example, under the European Convention, derogation may occur only "in time of war or other public emergency threatening the life of the nation".[62] Second, derogation clauses define rights that are non-derogable and must be respected even when derogation is permitted.[63] The effect of derogation clauses, therefore, is to define carefully the limits of a state's behaviour toward its nationals during times of national emergency - a time when states are

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[60] Chairman of the African Commission from 1989 to 1991.

[61] Oji Omuzurike; " The African Charter on Human and Peoples' Rights: An Introduction" in (1991) 1 *Review of the African Commission on Human and Peoples' Rights* (1991) at 5. See also Communications 147/95 and 149/96.

[62] European Convention on Human Rights and Fundamental Freedoms article 15(1).

presumed to be more prone to violate human rights.

While derogation clauses permit the suspension of previously granted rights, claw-back clauses restrict rights *ab initio*. As a result, claw-back clauses tend to be less precise than derogation clauses in that the restrictions they permit are almost totally discretionary. The granted right(s) may be restricted by local law or the existence of a national emergency, two very vague and broad standards. By virtue of these standards, claw-back clauses do not provide the control over state behaviour that derogation clauses provide. For instance, under article 6 of the African Charter, "every individual shall have the right to liberty and to the security of his person". Furthermore, "no one may be arbitrarily arrested or detained". Yet the Charter qualifies these guarantees with a claw-back clause: "No one may be deprived of his freedom except for reasons and conditions previously laid down by law".[64] The Charter, however, contains no definition of these "reasons and conditions".

The American Convention which is closely paralleled by the African Charter, lays out additional procedural safeguards to ensure that the right to liberty is not a mere "paper" right. For instance, the Convention provides that a detained person be brought promptly before a judge;[65] that he be entitled to a fair trial within a reasonable time or be released.[66] The European Convention goes even further by providing for comprehensive protection of individual liberty in that no one shall be deprived of his liberty except in certain situations. The Convention also sets out procedural safeguards by requiring the accused to be promptly informed of the reason for his arrest in a language he understands;[67] and also allows the victims of any violations of its provisions the right to compensation.[68] Thus, by providing comprehensive procedural safeguards regarding the

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[63] *Id* articles 2, 3, 4(1) and 7.

[64] African Charter Article 6.

[65] American Convention on Human Rights Article 7(5).

[66] *Ibid.*

[67] European Convention article 6 (3) (a).

right to liberty, both the American and the European Conventions seek to provide external restraint upon government power. In the light of these safeguards, the African Charter is woefully deficient with regard to the right to liberty.

Articles 14 to 17 of the African Charter incorporate economic, social and cultural rights - the second generation rights. The Charter sets out the rights to property and to work under equitable and satisfactory conditions, including equal pay for equal work, in articles 14 and 15 respectively. The right to well-being both physical and mental, and the right to enlightenment, that is, education, cultural life, moral and traditional values, are covered in articles 16 and 17.

This is a notable deviation from the European and the Inter-American systems. As regards second-generation rights, the fundamental difference between the African Charter on the one hand, and the International Covenant on Economic, Social and Cultural Rights and the European Convention on the other, is that while these rights may be progressively achieved[69] under the Covenant and are included in a separate European instrument, the European Social Charter,[70] the African Charter provides for their immediate implementation alongside first-generation rights. Though the second generation rights are indivisible, interdependent and interrelated, and make the first more meaningful, their effective and consequential implementation requires positive action on the part of the government.

A comparison between the provisions of the African Charter and those of the International Covenant on Economic, Social and Cultural Rights however indicates that the latter deals more extensively with these rights and they are better defined and elaborated than in the former. The right to education, for example, which appears in

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[68] Id Article 5(5).

[69] International Covenant on Economic, Social and Cultural Rights (1966) article 2(1).

[70] Signed in Turin 18 October 1961; entered into force in February 1965. It is also worth noting that the European concern about economic and social development expressed itself in the creation of the European Communities: i.e., the European Coal and Steel Community in 1951, European Atomic Energy Community in 1957 and the European Economic Community in 1957, rather than in a concept of economic rights as human rights to be secured under the European Convention. Also see article 26 of the

article 17(1) of the Charter simply states "Every individual shall have the right to education". Article 13 of the Covenant covers this right in more than three hundred and fifty words. Some commentators have argued that the reason for not elaborating on these rights is that "the intention of the framers was simply to emphasise the importance of economic and social rights, especially their close relationship with civil and political rights".[71] Since many African states were already parties to the Covenant on Economic and Social Rights, an exhaustive treatment of these rights at regional level was not considered necessary.[72]

The African Charter is the first regional human rights instrument to incorporate the controversial third-generation rights which are not vested in individuals but in groups. These rights include: equality of all persons (article 19), the right to self-determination (article 20), sovereignty over group wealth and natural resources - including the right to dispose of the same (article 21), the right to development (article 22), the right to national and international peace and security (article 23), and the right to a generally satisfactory environment favourable to development (article 24).

Articles 25 and 26 impose duties on the states to promote and ensure through "teaching, education and publication ... the rights and freedoms ..." and also to "guarantee the independence of the courts ...".[73] The state also has the duty under article 18(2) to assist the family which is the "custodian of morals and traditional values recognised by the community".[74]

American Convention, and article 1 of the Additional Protocol to the American Convention.

[71] AH Robertson & JG Merrils *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights* (1989) at 211.

[72] *Ibid.*

[73] African Charter articles 25 and 26.

[74] *Id* article 18.

The list of duties contained in articles 27 to 29 has given rise to the question of whether they impose legally binding obligations upon the individual and to what extent these duties are enforceable. Answers to some of these questions can be very illuminating: for example, can an individual be prosecuted because he or she has not placed his or her physical and intellectual abilities at the service of his or her community as required by article 19(2)? Given that an individual cannot be arraigned before the Commission, and many states have not incorporated the Charter into domestic law, how does the Commission seek to enforce such duties?

Some duties nonetheless appear to be enforceable and an individual who fails in his or her duty would be answerable under municipal law. Enforceable duties would appear to be: the duty under article 28 to respect other individuals without discrimination; the duty under article 29(1) to maintain one's parents in case of need; the duty under article 29(3) not to compromise the security of the state; the duty to contribute to the defence of one's country; and the duty to pay taxes under article 29 (5 and 6). Other duties such as those involving the harmonious development of the family; preservation and strengthening of positive African values; and promotion and achievement of African unity, place a moral rather than a legal obligation upon the individual. It may well be that the concept of duty in the African Charter as a whole serves as a "code of conduct for good citizenship" for the African peoples.

In its attempt to incorporate all three generations of human rights in a single document, the African Charter omitted some of the basic rights and paid lip-service to others. There is no right to privacy, no express right to form trade unions, the right to participate in government is silent on the question of regular and free periodic elections by secret ballot, there is no freedom from forced labour, no specific requirement that there should be full consent between the spouses during marriage and its dissolution. The rights to rest, leisure and social welfare, home and to correspondence are also omitted.

The foregoing reveals that the African Charter did not result from a free floating, jurisprudential exercise and exchange between jurists. At the end of the day it was the outcome of hard diplomatic bargaining, bringing together people from a distinctly Franco-legal tradition and an Anglo-American one, each with very different African customary traditions; and a very significant Moslem bloc within those to be affected by the Charter.

Unlike in the other regional systems where discussion was focused on human rights *per se,* the drafters of the African Charter were preoccupied with several issues:, colonialism, sovereignty. non-alignment, neo-colonialism, Zionism, solidarity, etc etera. This was exacerbated by the divergent views held by the different ideological, religious and political leanings of the legal experts. For instance, countries like Mozambique, Zambia and other socialist states insisted on the inclusion of economic and social rights in the Charter; the Muslim bloc relied heavily on the Koran for the protection of civil liberties. The civil law and common law had to be blended with the practice of Shari'a to produce a document that would be acceptable to all. Inevitably, the final text of the Charter had to accommodate the concerns of all. It had to leave the clauses sufficiently open-ended to allow for a domestic application which would cater for the diversity of the member states. As the father of the African Charter, Justice Keba M'baye[75] recalled, "it was the best that could be achieved at the time".[76]

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[75] Legal Resources Foundation, Zimbabwe *Bill of Rights Conference Report* (1994) at 26.

[76] *Ibid.*

3:4 The African Commission on Human and Peoples' Rights

3:4:1 Introduction

The implementation of the rights and freedoms enshrined in the African Charter on Human and Peoples' Rights is entrusted to the African Commission which by virtue of article 30 of the Charter is established within the OAU and mandated to "promote human and peoples' rights and ensure their protection in Africa". [77]

This chapter endeavours to discuss the African mechanism for the protection of human rights - the African Commission - on the basis both of its practice and procedures, in the light of the practice and experiences of other regional human rights bodies, and the "concept of human rights" in Africa. The chapter also highlights some of the constraints faced by the Commission, their causes and how they affect the activities of the Commission, especially in the implementation of the rights enshrined in the Charter.

3:4:2 Composition of the Commission

Article 31 of the Charter provides that the Commission is made up of eleven Africans known for their "high morality, impartiality and competence in matters of human rights; particular consideration being given to persons having legal training".[78] The requirement of legal experience seems desirable in view of the fact the Commission's mandate also requires it to interpret legal treaties. To date,[79] all those who have been appointed to the Commission have been persons from a legal background, although some of the Commissioners come with political[80] and diplomatic[81] backgrounds as well.

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[77] African Charter article 30.

[78] *Id* Article 31.

[79] At the last OAU Heads of State Summit held in Harare, Zimbabwe, in June 1997, a South African clergyman (but also a lawyer) Dr Rev Nyameko Barney Pityana, was elected member of the Commission.

[80] Ministers and Attorney-Generals.

[81] Ambassadors.

The size of the Commission is relatively small in comparison with the size of the OAU (53 member states) and in view of its very broad mandate.

The European Commission on Human Rights has a number of Commissioners equal to the number of High Contracting Parties to the European Convention;[82] similarly, the UN Human Rights Committee has a larger complement of eighteen members.[83] Like the African Commission, the Inter-American Commission is small having only seven members.[84] However, unlike the African Commission, the European Commission, the Inter-American Commission and the Human Rights Committee can and do entrust the bulk of their work to their Secretariats.[85] The Human Rights Committee, for instance, has a Working Group on Communications, Rapporteurs on Communications and Rapporteurs to follow up on its views. The Working Group and Rapporteurs on communications study the communications and make recommendations to the Committee, which in almost all cases, adopts them.[86]

One other important issue regarding the composition of the African Commission is the question of geographical representation. Even though the Charter is silent on the matter, international practice requires that appointment to international and/or regional organisations would give consideration to this concept. The stipulation in article 32 of the Charter[87] that the Commission shall not include more than one national of a single state shows a desire to achieve an equitable geographical balance.

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[82] Ankumah note 44 above at 16.

[83] *Ibid.*

[84] *Ibid.*

[85] *Ibid.*

[86] Tom Zwart *The Admissibility of Human Rights Petitions: The Case Law of the European Commission on Human Rights and the Human Rights Committee* (1994) at 10.

[87] " The Commission shall not include more that one national of the same State", Article 32, African Charter.

A comparative analysis of the three commissions therefore will reveal that they all comprise independent experts. In their composition, no state party can have more than one national as a member of any of the Commissions. However, while the European and American Conventions allow the appointment of a member to the commission from a non party state, the African Charter provides in its article 31 that the members of the Commission "shall be composed of African personalities of the highest reputation, morality...", and article 33 provides that they shall be elected by secret ballot by the Assembly of Heads of State from a list of persons nominated by the states party to the Charter. Article 34 further states that "...the candidates must have the nationality of one of the States Parties to the present Charter".

Members of the European Commission are elected by the Committee of Ministers for a period of six years and are eligible for re-election indefinitely; those of the Inter-American Commission, like their African counterparts, are elected by the General Assembly of the Organisation of American States, but unlike their African colleagues who are elected for a period of six years and can be re-elected indefinitely, their term is four years, renewable only once.

Balancing the Commission with members from the different political regions of Africa has been a major concern. This balance should not, however, be limited to geographical location. In a continent with different traditions, cultures, legal systems and different colonial legacies, the question of balancing the Commission cannot be over-emphasised. Therefore, equitable balance should also reflect equitable representation of commissioners from Anglophone, Francophone, Lusophone and Arabic countries. Serious consideration should also be given to the different legal systems.

The initial composition of the Commission[88] reflected the importance which the OAU attaches to the question of equitable balance. However, with the replacement of commissioners, this balance has been distorted.[89]

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[88] The initial composition was as follows:

1. Professor Isaac Nguema, Chairman, (Gabon), a University law lecturer;
2. Mr. C.L.C. Mubanga Chipoya, (Zambia), Civil Servant;
3. Dr. Ibrahim Badawi El Sheikh,Vice-Chairman, (Egypt's Ambassador to Zimbabwe);
4. Mr. Justice Kisanga, (Tanzania), Judge of the Supreme Court of Tanzania;
5. Mr. M.D. Mokama, (Botswana), Attorney-General;
6. Mr. Y Ndiaye, (Senegal), Judge of the Supreme Court;
7. Mr. Alioum B Beye, (Mali), secretary-general, African Development Bank;
8. Mr. A. M. Behedra, (Libya), private legal practitioner;
9. Mr. S. Janneh, (The Gambia), private legal practitioner;
10. Mr. Alexis Gabou, (Congo), Minister of Interior;
11. Mr. Grace Ibingira (Uganda), Businessman

[89] The present composition of the Commission is as follows:

1. Professor Issac Nguema, (Gabon), university law professor;
2. Professor E.V.O.Dankwa, (Ghana), university law professor;
3. Dr. Nyameko Pityana, (South Africa), Reverend & President of the National Human Rights Commission
4. Ambassador Ibrahim EL Sheikh Badawi, (Egypt), Ambassador to the Netherlands
5. Mr. Youssoupha Ndaiye, Chairman (Senegal), President of the Constitutional Council of Senegal
6. Mr. Atsu Koffi Amega, (Togo); President of the Constitutional Council of Togo.
7. Mr. Mohammed Hatem Ben Salem, (Tunisia), his country's Ambassador to Senegal;
8. Mr. Alioune Blondin Beye, (Mali), UN Special Envoy to Angola;
9. Mr. Kamel Rezzag-Bara,(Algeria), President of Observatoire Algérien des Droits de l'Homme.
10. Dr. Vera Duarte Martins, Vice-Chairperson (Cape Verde Island), Judge of the Supreme Court.
11. Madam Julienne Ondzeil-Gnelenga, (Congo), Barrister.

Record of Election of Members of the Commission since 1987:

July 1989 Elections

The term of office of members elected in July 1987 for 2 years had expired in July 1989. The following members were re-elected:

Amb. Ibrahim B. EL-Sheikh , Mr. Alioune Blondin Beye, Prof. Isaac Nguema and Mr. SB Semega Janneh for a six year term

Mr. Grace Stuart Ibingira of Uganda who had been elected in 1987 for four years resigned in 1989 and Prof. UO Umozurike from Nigeria was elected in July 1989 to replace him for the remainder of his term.

The term of office of three Members of the Commission elected in July 1987 for four years terminated in July 1991. In June 1991, the following members were re-elected:

Justice Habesh Kisanga, Mr. Mubanga Chipoya, and Prof. UO Umozurike for a period of six years.

Mr. Mubanga Chipoya of Zambia died in December 1991 and in the election held in July 1992, Ambassador Hatem Ben Salem of Tunisia was elected for the remaining term of five years.

The term of office of four members elected in 1987 for six years, namely, Mr. Ali Mahmoud Buhedma, Mr. Alexis Gabou, Mr. MD Mokama and Mr. Youssoupha Ndiaye, expired in June 1993. In the election of June 1993 to fill the four vacant posts the following were elected members for six years:

- Mr. Youssoupha Ndiaye

- Mr. Atsu Koffi Amega

The issue of equitable representation had been noted even in the Draft Monrovia Proposal for the Setting-up of an African Commission on Human Rights produced by the UN Experts to the 1979 Monrovia seminar. Article 7(2) provides that, "In the election of the Commissioners, consideration shall be given to equitable geographical distribution of membership and to the representation of the different legal systems in Africa".[90]

Like many international institutions, the representation of women on the African Commission is largely disproportionate. Established in 1987, the first female commissioner was elected only six years later[91] and the second in 1995,[92] and this was due to pressure from NGOs and other women's groups. For instance, at the tenth ordinary session of the Commission held in October 1991, Professor SBO Gutto of the International Commission of Jurists lamented that:

> "Since the establishment of the African Commission and up to the present, there has been no direct involvement of women in the work of the Commission. The present membership of the Commission has no woman. It is apparent that the Commission's work in areas of promotion, investigation and protection is minimised by this glaring exclusion of those who constitute more than 50% of the African population".[93]

Critics of the Commission and other human rights advocates have also challenged the composition of the Commission on the compatibility of the professions of some commissioners *vis-à-vis* their commissionership. Since its establishment in 1987, the

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- Prof. EVO Dankwa

- Dr. Vera Valentino Duarte M.

The term of office of four members elected in 1989 expired in June 1995. In June 1995, the following members were elected

- Mr. Alioune Blondin Beye

- Prof. Isaac Nguema
- Mrs. Julienne Ondziel
- Mr. Kamel Rezzag-Bara

The term of office of three members expired in June 1997, and in the last election, the following members were elected. Ambassador Ben Salem (re-elected), Dr. Badawi and Dr. Pityana from Tunisia, Egypt and South Africa respectively.

[90] Ramcharan note 47 at 311.

[91] Cape Verde's Vera Duarte Martins.

[92] Congo's Julienne Ondzeil- Gnelenga.

[93] Ankumah note 44 above at 16.

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 the independence and credibility of the Commission. The government function and the function of the Commission could be a source of conflict of interest in the ability of the commissioners to function as independent experts.

It is not entirely true, however, to think that a commissioner who holds a government position would not take a decision against his or her government. The point, however, is that it is very doubtful in an Africa where leaders have die-hard associates, whether the public would be confident that individual commissioners are able to render decisions which would be adverse to their states. The Commission should therefore not only assert itself as being independent but should also be perceived by the public as an independent body. Or in other words, justice should not only be done but it should be seen to be done. It is worth noting that as a mark of the independent nature of the Commission, its headquarters are in The Gambia, rather than Ethiopia, the seat of the OAU. [94]

Concerns regarding the independence of the Commission with regard to the profession of commissioners were also discussed at the UN Monrovia seminar, and article 5(2) of the Draft Monrovia Proposal states that; "Membership of the Commission shall be incompatible with membership of a government or of the Diplomatic Corps".[95]

It should be noted that the proposals contained in the Monrovia draft were to be presented by the OAU Chairman, the late William Tolbert, to the next summit of the OAU Heads of State and Government, but this could not be done as he and his Minister of Justice who was the Chairman of the Seminar, were killed after the 1980 *coup d'etat*

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[94] It is also believed that the other reason why The Gambia was chosen as the Commission's headquarters was because the country enjoyed a reputation for having a 'democratic ' and tolerant government. In July 1994, a *coup* in the country interrupted almost 30 years of civilian rule. The African Commission expressed great concern about the political changes and considered moving its headquarters from The Gambia. The Commission decided that it would not hold its sessions in The Gambia while the country continues to be ruled by a military government.

in Liberia. As such it was never thoroughly considered by the OAU experts. This may partly explain why most of the provisions were not incorporated into the final text of the Banjul Charter.

3:4:3 Mandate of the Commission

The African Commission's four-fold functions can be summarised as: promotion, protection, interpretation and any other task entrusted to it by the OAU Heads of State and Government.

3:4:3:1 Promotional activities

The promotion of human rights is a condition *sine qua non* for the respect, recognition and protection of these rights. "If people are not aware of their rights, they cannot ensure their protection".[96] The promotional function is provided in the American Convention and the African Charter, but is lacking in the European Convention.

Article 41 of the American Convention provides that "the principal function of the Commission shall be to promote respect for and defence of human rights" notably through studies, developing human rights awareness and by requesting governments of member states to supply it with information on the measures adopted by them in matters of human rights. The African Charter for its part, provides that the Commission should collect documents, undertake studies and research, and assist in the formulation of principles and rules aimed at solving legal problems relating to human and peoples' rights upon which African governments may base their legislation. These functions can be performed in co-operation with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

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[95] Ramcharan note 47 above at 309.

[96] Ankumah note 44 above at 21.

Article 45(1) of the Charter mandates the Commission to set up a documentation centre and undertake studies and research in the field of human and peoples' rights, organise seminars and conferences, disseminate information, and encourage national and local institutions concerned with human and peoples' rights. At its third ordinary session in April 1988, the Commission drew up a comprehensive Programme of Action. This programme focused on the following:

i) Actions in the area of information, sensitisation and reflection ;[97] including:

- introduction of periodic radio and television programmes on human and peoples' rights;
- teachings on human and peoples' rights;
- publication of the African Charter in local vernaculars.[98]

ii) Actions in the field of training and research on human and peoples' rights including the formation of recommendations on the establishment of national or sub-regional committees on human and peoples' rights.[99]

iii) Quasi-legislative action aimed at the introduction of the African Charter or some provisions thereof into the legal systems of states party to the Charter: all with a view to ensuring some degree of harmonisation of the concept and application of human rights throughout the continent.[100]

The Commission has also granted observer status to more than two hundred African and foreign NGOs involved in the promotion and protection of human rights in Africa. These NGOs participate in the public sessions of the Commission and are permitted to suggest agenda items for any session. This also enables the NGOs to obtain informed

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[97] *African Commission on Human and Peoples' Rights: Documentation No1 First - Second - Third Activity Reports* (1987-1999) at 27.

[98] *Ibid.*

[99] *Ibid.*

[100] *Ibid.*

knowledge about the Commission and its activities so that they can disseminate factual information. To ensure that these organisations are actually promoting human rights, they are required to submit a detailed activity report in the area of human rights after every two years after having obtained observer status.[101]

The eleven commissioners of the Commission have also been allocated states falling within the geographic region of which they are nationals or in which they reside for promotional activities.[102] The commissioners are required to carry out promotional activities between sessions in countries allocated to them. During each session, they are expected to present a report on their inter-session promotional activities. Commissioners are expected to visit human rights organisations, universities and other institutions in the countries allocated to them during which they are required to give lectures on the African Charter, African human rights issues, and the work of the African Commission.

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[101] *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights* ACHPR/XI/AN RPT/5/REV 2 (1991-1992) at 7.

[102] The current distribution is as follows:

Mr. Youssoupha Ndiaye	Senegal, Niger, Guinea, The Gambia,
Dr. Vera Valentino Duarte-Martins	Cape Verde, Mozambique, Guinea Bissau and Sao Tome and Principe
Prof. Isaac Nguema	Gabon, Equatorial Guinea, Democratic Republic of Congo, Burkina Faso, Congo-Brazzaville
Prof. E.V.O. Dankwa	Ghana, Sierra Leone, Kenya, Uganda,
Mr. Atsu-Kofi Amega	Togo, Central African Republic, Benin, Cameroon
Mr. Kamel Rezzag-Bara	Algeria, Comoros, Saharawi Arab Democratic Republic, Mauritania, Chad
Dr. Ibrahim Ali Badawi	Egypt, Tanzania, Ethiopia, Eritrea, Sudan
Dr. Mohamed Hatem Ben Salem	Tunisia, Libya, Djibouti, Mali, Liberia
Mr. Alioune Blondin Beye	Côte d'Ivoire, Angola
Mrs. Julienne Ondziel Gnelenga	Burundi, Rwanda, Mauritius, Seychelles, Madagascar
Dr. Nyameko Barney Pityana	South Africa, Zimbabwe, Zambia, Malawi, Botswana, Namibia, Lesotho, Swaziland, Nigeria.

The main purpose of promotional activities is sensitisation of the public to human rights issues in an effort to enhance respect and recognition for the rights set forth in the Charter.

3:4:3:2 Protective activities

Whereas a broad mandate is conferred upon the Commission in relation to its promotional functions, its protective mandate is somewhat restricted. Article 45(2) of the Charter simply mandates the Commission to: "ensure the protection of human and peoples' rights under conditions laid down by the present Charter".[103] These "conditions" could be taken to be the procedure of the Commission contained in articles 46 to 62, including of course, the Commission's Rules of Procedure.[104] Thus, to fulfil the task entrusted to it under article 45(2) of the Charter, the Commission has been empowered (a) to consider interstate communications or complaints, (b) to receive other communications from individuals or NGOs, and c) to examine state reports submitted in conformity with article 62[105] of the Charter.

It should be mentioned here that this latter task is not expressly conferred on the Commission by the Charter, so in 1988, at its third ordinary session, the Commission requested the Assembly of Heads of State and Government of the OAU, to confer this task on it. In a recommendation at its third ordinary session in 1988, the Commission noted that

> "considering that the Charter does not stipulate to which authority or body the periodic report should be directed, ... Considering that the Charter has not specifically entrusted to the Commission the responsibility to consider the periodic reports on human rights, ... Considering further that it is difficult to see which other organ of the OAU could accomplish this task, ... recommends that the Heads of State and Government mandate the General Secretariat to receive[106] the said reports and communicate them to the Commission without delay ...

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[103] African Charter article 45(2).

[104] The first Rules of Procedure were adopted in February 1988 and were revised in October 1995.

[105] This article imposes an obligation on all state parties to the Charter to "report on the legislative or other measures taken with a view to given effect to the rights and freedoms recognised in the Charter..." every two years from the date at which the Charter came into force.

[106] It should be noted that in practice, these reports are sent directly to the Secretariat of the Commission and not the OAU.

> Specifically entrust it with the task of examining the periodic reports submitted by the States Parties pursuant to Article 62 ...".[107]

One of the major similarities in the three major regional human rights instruments in the world can be found in the competence of the Commissions in their protective functions. The three organs are competent to receive communications from states as well as from individuals, NGOs and groups. In spite these similarities, the African system displays some unique features which merit attention at this juncture.

3:4:3:2:1 Inter-state communications under the African Charter

This procedure is provided for in articles 47 through 54 of the Charter. Under the procedure, two options are available to state parties: a state party which has reasonable ground to believe that another state party to the Charter has breached any of the provisions in the Charter, may write to the respondent state regarding the matter and a copy of the allegation is sent to the Secretary-General of the OAU and another to the Chairman of the Commission.[108] The respondent state has up to three months to respond to the allegations.[109] If the matter is not satisfactorily resolved between the two states, either state can submit the matter to the Commission.[110] Alternatively, any state party to the Charter which has good reason to believe that another state party has violated any provision(s) in the Charter can ignore the first option and complain directly to the Chairman of the Commission.[111]

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[107] Ankumah not 44 above at 28.

[108] African Charter article 47.

[109] *Ibid.*

[110] Id article 48.

[111] *Id* article 49.

The Commission can use the wide powers vested in it under article 46 "to resort to any appropriate method of investigation ; it may hear from the Secretary General of the OAU or any other person capable of enlightening it".[112] In both circumstances, the ultimate goal of the Commission should be to reach an amicable solution.

Regarding the admissibility of a communication from one state party against another, article 50 requires that the Commission shall "only deal with a matter submitted to it after making sure that all local remedies...have been exhausted, unless it is obvious... that the procedure... would be unduly prolonged".[113]

After having tried all appropriate means to reach an amicable solution without success, the Commission is obliged under article 52 to prepare a report of its findings for the states concerned and communicate it to the Assembly of Heads of State and Government. The report may be accompanied by recommendations. [114]

To date, the Commission has not receive any complaint from any state party alleging that another state party has violated any provision in the Charter.[115] This is hardly strange, inter-state complaint procedures are seldom used (just as in the European and Inter-American systems) as a mechanism for human rights protection.

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[112] *Id* article 46.

[113] *Id* article 50.

[114] *Id* article 53.

[115] In 1997, Sudan brought an action against Ethiopia, claiming that the latter's invasion of Kurmuk and Gissan (border towns in Sudan- near Ethiopia), violated not only the OAU Charter but was characterised by killings and torture of civilians. The Commission took no action claiming Ethiopia is not a party to the Charter. It is however unclear whether the Commission would have done anything even if Ethiopia had been a party to the Charter, because the Charter seems to be referring to violations committed within one's territory and not violations committed during an act of war.

3:4:3:2:2 Other Communications

Articles 55 to 58 of the Charter deal with "other communications" providing for the submission of complaints to the Commission by individuals, groups and NGOs, both local and international. Such communications are to be considered by the Commission if a simple majority of its members so decide.[116] Article 56 of the Charter stipulates the admissibility criteria to be applied to individual and similar communications as follows:

- the communication should indicate the author(s) even if the latter requests anonymity;[117]
- the communication should be compatible with the Charter of the OAU or with the present Charter;[118]
- the communication is not written in disparaging or insulting language directed against the state concerned and its institutions[119] or to the OAU;
- the communication is not based exclusively on news disseminated through the mass media;[120]
- the communication is sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;[121]

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[116] African Charter article 55(2).

[117] On all but one of the communications submitted to the Commission so far, none of the complainants have requested anonymity.

[118] See Communications 57/91 and 1/88, where failure to prove a prima facie violation renders the communication inadmissible; an allegation in a general manner is not enough, Communication 63/92.

[119] See Communication 65/92 where the communication was declared inadmissible for using words such as "regime of torturers" and "a government of barbarism".

[120] In Communication 149/96, the government of the Republic of the Gambia alleged that the communication should be declared inadmissible because it is based exclusively on news disseminated through the mass media. The Commission however ignored this argument and declared the communication admissible.

[121] See Communications 43/90 and 45/90 where non-exhaustion of local remedies renders communication inadmissible; but see Communication 59/91 where the communication was declared admissible where appeal had been pending before the courts for twelve years. This was considered to be unduly prolonged. Communications can also be declared admissible without the exhaustion of local remedy if the remedies is at the discretion of the executive or if the jurisdiction of the ordinary courts have been ousted by a decree or through the establishment of a special tribunal, see Communications 60/91, 64/92, 68/92 and 78/92.

- the communication should be submitted to the Commission within a reasonable period from the time local remedies have been exhausted or from the date the Commission is seized of the matter; and
- the communication does not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the UN[122] or the Charter of the OAU or the provisions of the present Charter.

In most respects, these conditions follow the usual pattern in other regional and global human rights instruments.[123] An unusual condition however is that contained in article 56(4) that communications should not be based exclusively on news disseminated through the mass media. It is particularly odd that a communication can be disqualified on this ground in view of the fact that the media is often the sole and main source of information regarding human rights abuses. This proviso seems to have been designed to limit the opportunities for an *actio popularis* suggested by article 55, a condition which if other evidence is hard to find, may be regrettable.[124]

Unlike in other regional bodies where the complainant must be, or be related to, the victim, in the African Charter, there is no requirement restricting who may file a communication. Thus, a communication may be submitted on behalf of a victim by some person or organisation who does not even know[125] or has never seen or met the victim.[126] It is also worth noting that unlike the European Commission where

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[122] See Communication 15/88 where the UN Human Rights Committee had decided the case in favour of the victim and he submitted the same communication to the Commission. It was declared inadmissible. However, the submission of a complaint to an NGO or an Inter - Governmental Organisation such as the EEC does not render a communication inadmissible, Communication-59/91; but a communication already being examined under Rule 1503 of the UN does, Communication 69/92. 'The purpose is to avoid usurpation of the jurisdiction of the bodies who may provide a solution or relevant information'.

[123] See article 5(2) of the First Optional Protocol of the International Covenant on Civil and Political Rights; article 46(1) of the Inter-American Convention, and article 27(1) of the European Convention.

[124] The Commission seems to have ignored this condition in its consideration of admissibility of Communication 149/96, but adopted it in Communication 162/97 when it declared the latter communication inadmissible.

[125] See Communications 99/93, 100/93 and 39/90.

[126] See Communications 27/89, 48/91and 56/91.

acceptance of the right to individual petition is optional,[127] the competence of the African Commission with regard to "other communications" is mandatory, as soon as a state ratifies the Charter.

Prior to the Commission's consideration of a communication, article 57 requires that the communication be brought to the attention of the state concerned by the Chairman of the Commission. This is logical to give the state the opportunity to respond to the allegations, and to seek ways of settling the matter amicably. This provision has constantly been abused by state parties, and the Commission also has given it a narrow interpretation.[128] Consideration of cases was deffered to wait for the reaction of states to complaints lodged against them. Most of these reactions never came. Most of the states usually claim that they never received letters from the Commission or that they were received late.[129]

At its 12th Ordinary session, however, the Commission decided that it would proceed with the consideration of a complaint if after five months the state had not responded.

Although provision is made for individual complaint to be considered by the Commission, the Charter does not empower the Commission to take any action on individual cases, except on special cases which "reveal the existence of a series of serious or massive violations".[130] In such cases, the attention of the Assembly of Heads of State and Government may be drawn to the violations. The Assembly may then

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[127] See article 25 of the European Convention. One of the most important innovations in Protocol 11 to the European Convention, is the abolition of the optional character of the present right to individual petition. Under the protocol, the right of individual petition and the competence of the court will automatically apply to all participating states.

[128] The Commission used to postpone cases indefinitely to wait for governments' responses, which in most cases never came. See Communications 25/89, 47/90 and 100/93 where the government of former Zaire "deliberately" ignored the letters from the Commission but the latter kept on writing.

[129] See Communication 25/89 where after four notifications from the Secretariat of the Commission to Zaire since 1989, the Ministry of Justice replied and claimed, in 1993, that none of the letters had been received. Subsequent letters also elicited no response and in 1996 the Commission resolved to go ahead and consider the case on the merit without a response. The Commission had also wanted to send a Fact Finding Mission to Zaire, but the government failed to respond to the request.

[130] African Charter article 58(1).

request an in-depth study of the situation.[131] The victims of the violations have to await the outcome of the study, if and when it is ordered. The African situation contrasts sharply with the American Convention which in terms article 41(f) mandates the latter to take action in petitions and other communications pursuant to its authority.[132]

3:4:3:2:3 State Reports

Article 62 of the Charter imposes an obligation upon each state party "to submit every two years... a report on the legislative or other measures taken with the view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter".[133] The reporting procedure of the Charter closely follows that of the UN Covenant on Civil and Political Rights.[134]

It seeks to establish dialogue with state parties and help them to completely fulfil their obligations. The examinations have always been a forum for wide-reaching discussions that give valuable indications of how the Commission interprets certain provisions of the Charter. Subjects such as peoples' rights, traditional cultural practices and the implementation of economic, social and cultural rights have been taken up.

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[131] *Id* article 58(2).

[132] *Human Rights in International Law* Council of Europe Press (1992) at 311.

[133] African Charter article 62.

[134] The examination begins with the state representative delivering an overview of the report. One Commissioner, the Special Rapporteur, is assigned to study the report in depth and prepare questions which are then put to the representative to open the discussion. In practice, these questions are prepared by the Secretariat and sent to the rapporteur six weeks in advance so that he can study them and make additions if need be. After the questions of the rapporteur, the floor is opened for questions from all the Commissioners. The representative answers as many of these questions as possible and where he fails to give convincing answers, the Commission requests that he send them to its Secretariat in writing. The rapporteur then summarises and concludes.

Since the Charter entered into force in October 1986, the first reports were due in 1988,[135] but of the 51 states that had ratified the Charter by December 1997, only 19[136] have submitted their reports. The reports submitted vary in quality as well as degree of comprehensiveness.

The examination of these reports is itself questionable: copies of the reports are usually not made available to the commissioners, let alone, to NGOs and the general public in advance for comments and preparations. The few available copies are usually not translated into the working languages[137] of the Commission thus restricting debate only to those commissioners who understand the language in which the report is written.[138] Apart from the quality of the reports, the review procedure adopted by the Commission is inadequate. Unlike the UN Human Rights Committee which spends at least 1.5 to 2 days on the examination of a single report,[139] the African Commission spends less that two hours on a report. [140]

The value and objectives of the reporting system are determined by the quality of the oral questioning which takes place. "What is required are penetrating, detailed and probing questions".[141] The quality of state reports could also be significantly improved by the availability of reporting guidelines.

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[135] Article 62 of the Charter requires that state parties submit reports every two years, from the date the Charter came into force.

[136] *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights* (1996/1997) 22-26.

[137] The working languages of the Commission are the same as those of the OAU, that is, English, French, and any other African language, if possible (article, XXIX of the OAU Charter).

[138] See comments made by Commissioner A B Beye during the examination of the First Periodic Report of The Gambia at the Commission's 12th Session, in 1992 in the Transcript produced by the Danish Centre for Human Rights, '*Examination of State Reports: 12th Session, October 1992. Gambia, Zimbabwe and Senegal'* vol 3 1995, at 30

[139] *Examination of State Reports: 12th Session, October 1992. Gambia, Zimbabwe and Senegal'* at 9.

[140] Peter Takirambudde "Six Years of the African Charter on Human and Peoples Rights: An Assessment" (1`991) 7:2 *Lesotho Law Journal* at 58.

[141] *Ibid.*

The Commission has produced a set of guidelines, but in the words of Felice Gear:

> "The Commission has developed reporting guidelines amounting to some 25 pages-extensive and exceedingly detailed. They lack specificity about rights outlined in the Charter. They lack specificity about the civil and political rights. They can be more confusing than helpful".[142]

Another problem faced by the Commission with its reporting procedure is that some states fail to send representatives to present their reports. Even though the Charter does not expressly require states to send representatives for the examination of their reports, and the Commission's own Rules of Procedure do not make this mandatory, the Commission has adopted the practice of the UN Committee whereby, if the state representative does not appear, the report will not be considered[143] because the importance of an exchange of views with the government representative outweighs the necessity of going ahead and considering the report.[144] The Commission has thus opted not to examine the reports of states whose representatives are not present to discuss the reports with the Commission. This has resulted in several reports being deferred, some indefinitely.[145]

3:4:4 Other functions

Apart from the mandates of promotion and protection of human and peoples' rights entrusted to the Commission under article 45 (1 and 2) of the Charter, article 45 (3) empowers the Commission to interpret the provisions of the Charter at the request of any state party, an institution of the OAU, or an African organisation recognised by the

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[142] *Ibid.* It should be noted here that the Secretariat has prepared another five-page simplified guideline which will be submitted for adoption by the Commission.

[143] However, in the light of repeated failures by certain governments to sent representatives to explain their reports, the Committee has adopted a practice that after three failures by a representative to show up, it will go ahead with the consideration. The Commission too has taken this stand. At its 23rd ordinary session, the Commission decided that if after two sessions a state does not send a representative to present its report, it will go ahead and consider the report.

[144] *Examination of State Reports, 13th Session April 1993: Nigeria-Togo* vol 4 (1995) at 12.

[145] On numerous occasions, the Commission has deferred the consideration of reports to subsequent sessions because the states did not send their representatives. For instance, the report of Togo was deferred to the 13th session because there was no representative to discuss it at the 12th session ; the report of Benin, Cape Verde and Ghana which were scheduled for examination during the 13th session were deferred to the 14th session; the report of Cape Verde, Benin and Mozambique scheduled for the 14th session were postponed to the 15th session and during the 15th session, the report of Mozambique was deferred to the 16th all because there were no representatives. The report of Seychelles submitted in 1993

OAU. To this effect, the Commission has considered and adopted with minor modifications a number of resolutions submitted to it by NGOs including, Resolutions on human rights education;[146] the military;[147] and contemporary forms of slavery. The African Commission has also taken the initiative in interpreting some of the provisions of the Charter to suit internationally recognised standards.[148] Through the adoption of resolutions, the Commission has redefined some of the provisions in the Charter.[149]

To date, neither the OAU nor any state party has requested the Commission to exercise this function, possibly a sign that they fully understand the provisions in the Charter.

Article 45 (4) of the Charter also suggests that the Commission should be available to perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government. The Assembly as a body has not entrusted any specific task to the Commission. However, some organs of the OAU have sought co-operation with the Commission in their activities.

There is little doubt that the promotional activities of the Commission have been noteworthy and commendable. In collaboration with NGOs and other institutions concerned with the promotion of human rights, the Commission has organised seminars, workshops, conferences and symposia at which relevant information has been

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has not yet been considered for the same reason.

[146] *African Commission on Human and Peoples' Rights, 7th Annual Activity Report* vol 4 (1994) Resolution on Human Rights Education, See also, Review of the African Commission on Human and Peoples' Rights 206

[147] *African Commission on Human and Peoples' Rights 8th Activity Report* (1994) Resolution on the Military, ACHPR/RPT/8TH Annex VII Rev 1 .

[148] See Communication 101/93 where with regard to Freedom of association the Commission made a landmark decision stating that " ...competent authorities should not enact laws which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and International Human Rights standards". With these words, the Commission stated a fundamental principle which applies not only to the freedom of association but to all rights.

[149] See Resolution on the Right to Recourse Procedure and Fair Trial, Annex VI; and Resolution on the Right to Freedom of Association, Annex VII.

disseminated.[150]

In relation to the Commission's protective mandate, serious problems continue to exist as evidenced by the carnage in Rwanda, Burundi, Somalia, Nigeria, Liberia, the former Zaire and many other parts of Africa. These tragic events have been possible in part because of the ineffectiveness of the African system of human rights protection. A decade after its establishment, the impact of the African Commission on Human and Peoples' Rights in Africa is still very limited.

As the Commission celebrates its Tenth Anniversary in November 1997, it is still faced with a lot of constraints, which have to a large extent, retarded its progress and the protection of human rights in Africa. At this juncture, it is appropriate to consider some of these constraints that have hindered and continue to hinder the effectiveness of the African Commission in particular, and the African human rights regime in general.

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[150] In October 1992, the Commission organised, in collaboration with the Raoul Wallenburg Institute in Sweden, a seminar on the National Implementation of the African Charter in the Internal Legal Systems in Africa; The Commission organised in co-operation with the Union of African Journalists, The Tunisian Association of Journalists and others, a seminar on the Role of the African Media in the Promotion and Protection of Human Rights, held in Tunis, in October 1992.

SECTION FOUR

4:0 Constraints facing the African Commission

The weakness or strength of any human rights regime revolves around its normative and procedural scope, its implementation machinery and the state practice of the relevant actors. The major constraints on the African Human Rights Commission stem mainly from the following factors:

- The incoherence and ambiguity of the African Charter itself;
- Lack of publicity and accessibility;
- Lack of co-operation and political will;
- Financial constraints.

4:1 The African Charter itself

A thorough analysis of the African Charter on Human and Peoples' Rights reveals that "it is the epitome of a legal instrument which prescribes norms but whose framers deliberately guarantee that it is a law without teeth".[1] The Charter is often incoherent, ambiguous and leaves room for varied interpretations. The Charter has been described as a model of "*lex imperfecta and simulata*".[2] *Lex imperfecta* (imperfect law) is often a conscious design by politicians in response to an aggravated crisis of confidence in a way which seeks to reinforce belief in the lego-political system but with a built-in planned inefficiency. This is usually manifested in one of two ways

> "... it may take the form of a law which is backed by an inadequate enforcement system that is staffed with exquisite incompetents. Though the law would have prescribed norms of behaviour, it would have carefully insulated certain activities from the reach of an enforcement mechanism....[3] [Or]
>
> "... it may be a subtle modality for restoring confidence in certain disgraced institutions or practices." .[4]

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[1] Peter Takirambudde " Six years after the African Charter on Human and Peoples' Rights: An assessment" (1991) 7:2 *Lesotho Law Journal* at 39.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

The ineffectiveness of the Commission, therefore, has not been entirely accidental. Given the origin, record and history of the OAU response in general, and its response to matters of human rights violations (on the continent) in particular, the ineffectiveness and inefficiency of the Charter and Commission respectively, "had been conscious, deliberate and planned".[5]

The OAU has always been very wary in matters regarding sovereignty and power, so what it therefore intended to achieve with the Charter was the generation of an *innocuous* instrument which would do no more than provide public catharsis. It was simply responding to the unprecedented moral demands of the late 1970s that something ought to be done about human rights in Africa. The goal of the Charter was not enforceability but rather to "steal the opposition's thunder". [6]

The Banjul Charter offers only general guidance as to what the African Commission could do and how it should conduct its business. The Commission's own Rules of Procedures that could have helped matters are rather vague and have not been exploited. The Charter gives the Commission a very broad mandate under article 45 and permits the latter under article 60, to "draw inspiration from international law on human and peoples' rights...".[7] However, article 59(1) curtails this extensive power given in article 60 by requiring that "all measures taken within the provisions of this Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide".[8]

The OAU Heads of State were reluctant to grant the African Commission any significant role in the protection of human rights; and made sure that its activities were primarily promotional. The Charter, for instance, mandates the Commission to receive

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[5] *Ibid.*

[6] *Id* at 40.

[7] African Charter article 60.

[8] African Charter article 59(1).

and consider communications from individuals[9] but leaves obscured what it should do after the consideration, leaving the determination of what should be done with its findings to the Assembly of Heads of State.

Thus, although provision is made for individual complaints that human rights violations be considered by the Commission, article 45 does not oblige the Commission to take any action, such as awarding damages in individual cases. Unlike the African Charter, the Inter-American Commission and the European Commission not only make recommendations, they also award damages and compensation to victims.

An opportunity, as well as a severe constraint was thus laid upon the Commission from its very inception. The African Commission does, to be sure, enjoy a significant freedom to manoeuvre in exercising its function of promotion of human rights in Africa, but is far more limited in its function of protecting these rights.

The claw-back clauses and the absence of a derogation clause in the Charter also present serious limitations on the performance of the Commission. The Charter permits states to apply national or domestic laws, but does not specify whether such laws must be compatible with its provisions, international standards or be necessary in a democratic society. The absence of a derogation clause does not in any way check the excesses of states. Thus, the African Commission's ability to provide some external restraint in situations where governmental activity contravenes international norms is highly questionable. Without precise legal guidelines, the Commission will be severely handicapped in dealing with such situations. Most states would always justify their actions not in terms of the provisions of the Charter or other international treaties, but in terms of their domestic law.

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[9] African Charter article 55(1)

For example, in response to a complaint by a complainant - Sir Dawda K Jawara[10] - to the Commission alleging torture, arbitrary arrest and detention by the Gambian military government after the July 1994 *coup*, the government responded thus:

> "How do we reconcile Decrees 57 and 59 with adherence to the African Charter as it relates to the liberty of the individual and due process of law ? On the face , these Decrees may be found to be objectionable, vis-à-vis the African Charter, but their essence need to be studied and placed in the context of the changed circumstances in The Gambia. In fact, article 6 of the Charter states 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law...'. I place emphasis on the underlined words".[11]

Similar references have been made by Nigeria and other states, justifying their actions.[12] The African Charter is the first human rights instrument to incorporate the three generations of human rights into one single document and give them the same importance in terms of recognition, promotion and protection, and the African Commission is therefore obliged to follow suit in their implementation. Considering the fragility of African economies, one wonders whether the incorporation of economic and social rights in the Charter is actually meant to be enforced by the Commission. This aspect in itself exposes the hypocrisy of the African leaders *vis-à-vis* their commitment to human rights protection on the continent.

Developed countries in Western Europe and the Americas recognise the indivisibility, interdependence and inter-relatedness of human rights, but cautious of the difficulties involved in the realisation of economic, social and cultural rights, they have opted to include the latter rights in separate documents,[13] with a desire to "progressively and in pursuance to their internal legislation, and to the extent allowed by their available resources and taking into account the degree of their development..." to ensure the

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[10] Former Head of State of the Republic of The Gambia, overthrown on 22 July 1994 by the Military.

[11] See Communications 147/95 and 149/96

[12] In response to the Commission's decision on Communication 101/93, in which the Commission decided that "the Decree should therefore be annulled", the Nigerian Government argued that such a decision was an assault on its sovereignty and claimed that the Commission lacked the judicial capacity to do what it did. (See African Commission on Human and Peoples' Rights, 2nd Extraordinary Session, 18-19 December 1995 Doc II/ES/ACHPR/4.)

[13] See Additional Protocol to the American Convention on Human Rights in the Area of Economics, Social and Cultural Rights; The European Social Charter.

enjoyment of the rights recognised in the protocol.[14] This pattern has also been followed by the drafters of the UN Covenant on Economic, Social and Cultural Rights, article 2 of which provides that ".....with a view to achieving progressively the full realisation of the rights recognised in the present Covenant...".[15]

It is hard to believe that Africa whose economies depend largely on aid from the West would be able to guarantee these rights by law. Of the over 200[16] communications addressed to the Commission under article 55, only two are related to the question of these latter rights (Communication 157/96 and Communication 155/96). Very few African states have incorporated aspects of economic and social rights into their constitutions or other domestic legislation.[17]

The imposition of duties upon the individual and the introduction of collective rights into the Charter unduly extend the scope of the African human rights regime and the enforcement capacities of the Commission. In terms of article 29, the individual shall also have the duty, *inter alia,*

> " 2, to serve his national community by placing his physical and intellectual abilities at its service...;
> 6, to work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society...;
> 8, to contribute to the best of his abilities, and at all levels, to the promotion and achievement of African unity...".[18]

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[14] Article 1 of the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights.

[15] *Human Rights in International Law* Council of Europe Press (1992) at 18.

[16] African Commission on Human and Peoples' Rights, *Register of Communications submitted under Article 55.*

[17] See the Constitution of the Federal Democratic Republic of Ethiopia (1995) No 1. Articles 41 and 42. Note that South Africa and Namibia have also incorporated some social rights into their Constitutions, e.g. the right to education.

[18] African Charter article 29.

It has been observed that these duties are a reminder that the African concept of rights carries corresponding obligations.[19] While the concept of duties in itself is not in dispute, the problem arises when it is incorporated into a human rights instrument and required to be enforced by law. To what extent are the duties in the African Charter enforceable? Aside from the issue of tax evasion which is a crime in itself, can an individual be prosecuted because he or she has not placed his or her physical and intellectual abilities at the service of the national community? Considering the fact that the rights and freedoms guaranteed are not absolute, are there limitations on duties?; Can a state derogate from its obligation because an individual failed to perform his or her duties recognised in the Charter ? Society itself places some moral restraint on the enjoyment of human rights, for instance, the duty to respect elders or one's parents, and the duty to take care of one's children. These are moral rather than legal obligations.

The effect of the Charter provisions on the effectiveness of the Commission is further exacerbated by the existence of collective rights. While no incoherence arises directly from the coexistence of first and second generation rights, the incorporation of collective rights into the Charter lies beyond the available span of attention and enforcement capacity of the Commission.

> "The effect is not to strengthen the African human rights regime but rather to undermine the impact of the Charter and stretch the extremely scarce resources available for human rights [protection] in Africa".[20]

4:2. Lack of awareness and publicity

In order for the millions of Africans whose rights are embodied in the African Charter to concretise them, they must be aware of the rights, of how they can seek redress if the rights are violated, of the role of the African Commission in this regard, and of their obligations. The Charter itself recognises the need for public awareness and mandates the Commission *inter alia*, to, "...promote human and peoples' rights and in particular... organise seminars, symposia and conferences; disseminate information,

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[19] Philip Amoah "The African Charter on Human and Peoples' Rights - An Effective Weapon for Human Rights?" (1992) 4 *Journal of the African Society of International and Comparative Law* at 227.

[20] *Id* at 52.

encourage national and local institutions concerned with human and peoples' rights...".[21] To this end, the Commission has organised several workshops and conferences in collaboration with other institutions. At its third ordinary session held in Libreville, Gabon, in April 1988, it started granting observer status to NGOs involved in the promotion of human rights. Articles 75[22] and 76[23] of its Rules of Procedure deal with co-operation with NGOs.

These organisations can propose agenda items to be discussed at the Commission's session, they can be consulted and they can take part in deliberations at the public sessions of the Commission.

However, given the widespread ignorance, illiteracy and the uncritical acceptance of authority in Africa, the efforts of the Commission and NGOs to create this awareness have been largely insignificant. Very few states, if any, have undertaken to educate their citizens on the rights and duties enshrined in the Charter as required under article 25.[24] The efforts of some NGOs have at times been thwarted by overzealous politicians who benefit from the ignorance of the citizens.

The problem of publicity has further been compounded by the Commission's narrow interpretation of article 59 of the Charter. Article 59(1) provides that all measures taken within the provisions of the present Charter (on the procedure of the Commission) shall remain confidential until such time as the Assembly of Heads of State shall otherwise decide. Article 59(2) states that 'However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly...". From the

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[21] African Charter article 45(1) (a).

[22] Rule 75 - Non-governmental organisations, granted observer status by the Commission, may appoint authorised observers to participate in the public sessions of the Commission and of its subsidiary bodies.

[23] Rule 76 - Consultation The Commission may consult the non-governmental organisations 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.

[24] Article 25 of the Charter provides that "state parties ... shall have the duty to promote and ensure

foregoing, it would seem that it is the prerogative of the Assembly of Heads of State and Government to decide on or authorise the publication or otherwise of the Commission's reports.

The Commission has in some instances interpreted "measures taken" to mean that it cannot disclose the names of states against whom complaints have been filed, it cannot describe the nature of the cases before it,[25] and it cannot mention the status of the cases pending before it. This restrictive interpretation of the confidentiality clause has been problematic as publicity and its resultant public shame have a major deterrent effect in preventing future human rights abuses.

As a result of the restrictive interpretation of this clause, some of the commendable efforts of the Commission have gone unnoticed. And as Philip Amoah observes:

> "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 the 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 (rather than individuals) but exposure of the Commission to charges of ineffectiveness and lack of certainty, (vision initiative and vigour)[26] about the end result of its work. Both situations undermine the confidence of the general public regarding the Commission's effectiveness and relevance".[27]

In the words of Ellen Sirleaf, the Commission,

> "is generally unknown and invisible, it is regarded with suspicion by those who do know it, as seen from the eyes of a casual observer, it is not performing. I do not know of any cases that you (the Commission) have resolved relating to any of the major human rights problems recently affecting our continent". [28]

The lack of publicity, perhaps more than anything else, has led to the impression among potential petitioners that the African Commission is not worth approaching. Therefore, in spite of the massive human rights violations that characterise the continent, only a

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through teaching, education and publication the respect of the rights and freedoms ....".

[25] Amoah note 19 above at 38.

[26] Takirambudde note 1 above at 54.

[27] Amoah note 19 above at 227.

[28] Ellen Sirleaf "African Human Rights NGOs and the African Commission"; in *Report on the Conference on the African Commission on Human and Peoples' Rights* Fund for Peace (1991) at 27.

few communications are addressed to the Commission.

It should however be noted that the Commission has over the years gradually expanded its interpretation of the confidentiality clause. The Commission releases documents to the public concerning its activities. These include, *inter alia*; its Final Communiqué at the end of each ordinary session, press releases, and its Annual Activity Reports after adoption by the OAU Assembly. Until 1994, the Commission published a journal entitled *Review of the African Commission on Human and Peoples' Rights*,[29] which contained articles and information about Commission activities. The information contained in these documents however, does not sufficiently publicise the work of the Commission especially as regards its deliberations and decisions. The Commission also issues a report at the end of each session (Secretary Report), which contains the deliberations and decisions of the session, however, this report does not resolve the publicity issue as it is a confidential document.[30]

Since 1994, some significant improvements have taken place regarding the Commission's treatment of confidentiality. The seventh Annual Activity Report of the Commission disclosed the status of cases submitted to the Commission, and in the Final Communiqué of the sixteenth session held in 1994, the Commission also published the status of communications, and with regard to the submission of periodic reports, the Final Communiqué called by name upon individual states who had not submitted to do so.[31]

The major drawback of the restrictive interpretation of the confidentiality clause is that it deprives the Charter of much of its meaning. Firstly, "experience has shown in other human rights systems that publicity and its resultant shame have a major deterrent

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[29] The latest edition of this publication is vol. 5 which was published in early 1995.

[30] Evelyn A Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedure.* (1996) at 39.

[31] *Review of the African Commission on Human and Peoples' Rights* (1994) vol 4.

effect in preventing future human rights abuses".[32] Secondly, the Commission could develop an African human rights jurisprudence by publicising the manner in which it reaches its decisions on admissibility and the substantive rights in the Charter. In the absence of such vital information, potential litigants of the African Charter cannot use the Commission's decisions as precedents.

Closely linked to the problem of awareness and publicity is the problem of communication with the Commission. Prior to the establishment of its formal headquarters, the African Commission met peripatetically in the national capitals of OAU member states: in Addis Ababa, 2 November 1987 (ceremonial opening); Dakar, 8 to 13 February 1988; Libreville 18 to 28 April 1988; Cairo 7 to 26 October 1988, and Benghazi 3 to 14 April 1989. The Secretariat of the Commission was established at its present location in Banjul, The Gambia, two years after the establishment of the Commission itself.

The location of the headquarters of the Commission in Banjul has been identified as one of the most serious problems affecting it. In an Africa where communication is a problem, and in a Gambia where these facilities are hard to come by, communication with the Commission is virtually impossible. Valuable time and scarce resources are spent on communications which would have been avoided had the headquarters been situated elsewhere. The most reliable and quickest method to communicate with the Commission is by fax or telex, at the same time, these seem to be the most expensive not only for the limping Commission, but also for those who wish to communicate with it. The Secretariat has restricted its fax services to those cases it terms "very urgent", while all other correspondence is sent by post.

Postal services in Africa as a whole and The Gambia in particular, are very unreliable. Most letters posted to the Commission within Africa take on average of one month to be received. In most cases, especially on matters relating to individual or NGO communications, the Commission usually requests more information (in some cases three or four times) from the complainants in order to consider their communications. If

the complainant is to rely on the postal service, which is usually the case, about six months can be spent on exchange of correspondence alone. In such circumstances, before the Commission is seized of a matter, the damage, would most likely already have been done.

In like manner, when the Commission responds to institutions, NGOs and individuals seeking information, or when the Commission sends out information, for instance, invitations, state reports etc etera. by post, they more often than not fail to reach their destination on time. Some NGOs have complained seriously about the non or late reception of invitations, and this has prompted one NGO leader to lament that "...When one writes to the Banjul Office, one rarely gets a response and NGOs do not receive materials or notices of meetings sufficiently in advance".[33]

Due to the heavy expenses involved in sending information to the Commission, many already cash-strapped African NGOs, are reluctant to take up cases of human rights violations to the Commission.

The Commission is located in a country in which less than 20 of the 54 African countries have Embassies or High Commissions. This means that for other states access to information or follow-ups on the Commission's decisions are difficult and expensive. For states that have diplomatic missions in The Gambia, the Commission simply addresses all inquires concerning them to their Missions or Embassies for onward transmission to the appropriate authorities. This arrangement facilitates the work of the Commission and is less expensive.

Most Africans are unaware of the Commission not only because of its limited impact, but also because of its location. The Gambia is a small "snake-like" country, almost surrounded by Senegal, with just over one million inhabitants. It has one of the poorest economies on the continent that attempts to survive on tourism and groundnuts. Until July 1994 when the military seized power, the country was almost unknown. Most

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[32] Ankumah note 30 above at 77.

[33] EG Bello *The African Charter on Human and Peoples' Rights: A legal analysis* vol 4 (1985) 9 24.

Africans do not know the address of the Commission, let alone how to address themselves to it.

Another disadvantage of this location is that The Gambia has no university or other facilities for human rights research. The documentation centre of the Commission is poorly equipped as regards both materials and information. These conditions do not attract the most competitive and competent Africans who otherwise might seek employment with the African Commission.

It should be mentioned here that at its 22nd ordinary session held in Banjul, the Gambia, the Commission decided that if by the next session, the host country had not taken positive steps to build a modern structure for the Commission, it will request the OAU to invite other members to bid for the hosting of the Commission. This decision was taken after members expressed dismay at the isolation of the Commission due to lack of information resulting from the location of its headquarters. They complain that the activities of the Commission are not known to the outside world because there are no modern facilities to enable the Commission sell its commodities.

4:3. Financial constraints and secretarial problems

The serious financial problems facing most African states have not only affected the OAU, but have also taken a toll on the African Commission. Despite repeated appeals to the Secretary-General of the OAU and to the OAU Assembly itself for more funds, the Commission seems to have achieved very little.[34] The Assembly has authorised the Commission to accept donations, gifts and other contributions from other sources to enable it to discharge its functions.[35] The European Community, the UN Centre for Human Rights and other Human Rights NGOs and semi-governmental bodies have provided and continue to provide human, material and financial assistance to keep operations at the Secretariat to the bearest minimum level.

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[34] See *Sixth Annual Activity Report of the African Commission* (1992-1993) at 7 paragraph 23(a), the Commission stated that "In spite of serious administrative and financial shortcomings and the repeated requests of the Commission, no substantial measure has been taken to resolve this situation".

[35] *Ibid.*

Financial assistance from the Raoul Wallenburg Institute in Sweden, for example, has been used for inter-session promotional activities and funding of on-site missions.[36] It should be noted that the OAU does not provide funds for promotional activities.[37] The Raoul Wallenberg Institute continues to finance the promotional activities of the Commission, including missions undertaken by Commissioners and the publication of the Commission's Review.[38]

The first extraordinary session of the Commission held in 1989 was to discuss the poor financial state of the body.[39] In spite of the concerns raised by the commissioners, and the continuous requests made to the OAU Secretary-General for additional funds, drastic cuts are still being made to the operational budget of the Commission with a total reduction of about 25% for the year 1993/1994 alone.[40] As the table below shows, subvention from the OAU has been falling, leaving the Commission with no alternative but to look elsewhere - donor aid.

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[36] *Tenth Annual Activity Report of the African Commission on Human and Peoples Rights* (1996/1997) at 8.

[37] See note 34 above at 7 paragraph 20.

[38] *Ibid.*

[39] See Recommendation of the Commission AHG/165 (XXV) Annex XV.

[40] Note 34 above at 7.

The budget allocated by the OAU to the Commission for the 1991 to 1994 financial years stood as follows:

Code	Description	Appropriations 1992-1993	Actual Expenditure 1991-1992	Appropriations 1993-1994	Increased (Decreased
100	Est. Post	85,614.00	69,336.00	101,771.00	32,435.00
101	Post Adjust	23,942.00	12,397.00	21,182.00	8,785.00
102	Temp. ASST.	1,000.00	1023.00	1,500.00	477.00
103	OT Pay	250.00	276.00	250.00	-26.00
104	Comm. Honorarium	55,000.00	34000.00	33,000.00	-1,000.00
204-212	Common Staff Costs	117,375.00	43,777.00	79,098.00	35,321.00
300	Official Mission	20,000.00	18,599.00	20,000.00	1,401.00
401-406	Maint. Costs	19,000.00	13,700.00	16,500.00	2,800.00
501-504	Communication Costs	7,000.00	6,465.00	6,500.00	35.00
600-610	Supplies and Services	12,700.00	44,596.00	16.000.00	-28,596.00
800	Meetings	160.000.00	188,438.00	135,000.00	-53,438.00
	TOTAL	501,881.00	432,607.00	430,801.00	-1,806.00

Source: Seventh Annual Activity Report of the ACHPR,1994; see also Review of the African Commission on Human and Peoples' Rights vol 4 1994 at .156.

As can be seen from the table above, the basic needs of the Commission, such as recruitment of professional staff, establishment of a documentation centre, promotional activities etc etera. were not catered for. The Commission had to source elsewhere to carry out its activities, while continuing its plea to the OAU Secretariat.[41] The budget for the period 1996/1997 and 1997/1998 is no different. As the table below indicates, in spite of the increase in the items required by the Commission, there has not been a corresponding increase in financial allocations.

Accounts no.	Titles	Approbation U.S.$ 1996-1997	Approbation U.S.$ 1997-1998
	SECTION I SALARIES AND WAGES		
100	Establish posts	108,000.00	109,500.00
101	Post Adjustment Allowance	27,000.00	28.000,00
102	Temporary Assistance	10,400.00	10.400,00
103	Overtime Payment	400.00	400.00
104	Commissioner's Honorarium	33,000.00	33,000.00
	TOTAL SECTION I	178,800.00	181,300.00
	SECTION II COMMON STAFF COST		

[41] Since the establishment of the Commission, all its Activity Reports to the OAU Assembly have carried this plea, but there has still been no success. "Due to financial problems, facing the OAU, several projects of the Commission had to be suspended. This only made the situation of the Commission worse. The Commission is appealing to the OAU Secretariat to provide the Commission's Secretariat with the equipment it needs to carry out its functions.." Tenth Annual Activity Report, (1996) at 7-8.

201	Travel on Home Leave	41,210.00	14,598.00
202	Travel on Transfer		
203	Installation Allowance		
204	Dependency Allowance	6,400.00	6,800.00
205	Housing Allowance	36,480.00	36,480.00
206	O.A.U. Pension Fund	15,120.00	15,330.00
207	O.A.U. Insurance Scheme		
208	O.A.U. Medical Scheme	5,000.00	5,000.00
212	Education Allowance	31,250.00	31,250.00
218	Acting Allowance	1,000.00	1,000.00
	TOTAL SECTION II	136,480.00	110,458.00
300	Official mission	15,000.00	15,000.00
	TOTAL SECTION III	15,000.00	15,000.00
	SECTION IV RENTAL AND MAINTENANCE		
401 (i)	Maintenance of vehicles	4,000.00	4,000.00
401 (ii)	Fuel Costs	5,000.00	5,000.00
402	Maintenance of Equipment	2,000.00	2,000.00
403	Maintenance of Premises	1,500.00	1,500.00
404	Utilities (Electricity and Water)	5,000.00	5,000.00
405	Alteration of Premises		
406	Insurance of Vehicles, Equipment, etc.	3,000.00	3,000.00
	TOTAL SECTION IV	20.500,00	20,500.00
	SECTION V COMMUNICATION		
500	Cables	1,500.00	1,500.00
501	Telephone Services	3,800.00	3,800.00
502	Postage	1,000.00	1,000.00
503	Pouches		
504	Freight		
	TOTAL SECTION V	6,300.00	6,300.00
	SECTION VI SUPPLIES AND SERVICES MISCELLANEOUS		
600	Stationary and Office Supplies	5,000.00	5,000.00
601	Bank Charges and Revenue Stamps	1,000.00	1,000.00
603	Ordinary Hospitality	1,000.00	1,000.00
604	Staff Welfare		
605	Library Books and Service	500.00	500.00

606	Subscription to Newspapers	500.00	500.00
607	Other Supplies and Services	500.00	600.00
608	Printing of Documents	5,000.00	5,000.00
	TOTAL SECTION VI	13,500.00	13,600.00
	SECTION VII CAPITAL ASSETS		
700	Land and Building		
701	Improvement to Premises		
702	Furniture and Fixtures		
703	Office Equipment	3,000.00	
704	Internal Reproduction Equipment		
705	Telecommunications Equipment		
707	Purchase of Vehicles	18,000.00	
708	Interpretation Equipment		
709	Other Equipment		
	TOTAL SECTION VII	21,000	
	SECTION VIII CONFERENCE AND MEETINGS		
800	ACHPR Meetings	180,000.00	180,000.00
900	Joint Projects	17,000.00	15,000.00
	TOTAL SECTION VIII	197.000,00	195,000.00
	GRAND TOTAL	588,000.00	542,158.00

Source: Report of the Secretary to the African Commission on Human and Peoples' Rights, submitted at the Commission's 21st Ordinary session held from April 15 to 24 1997.

Though in existence for ten years now, the Commission still lacks an efficient, effective and functioning Secretariat. "Since the entry into force of the African Charter, and the establishment of the Commission, the latter has suffered from a chronic lack of staff, resources and services necessary for the effective discharge of its functions".[42] Until November 1996, the Secretariat had only one professional staff member, the Secretary to the Commission, and a few supporting staff.[43]

In spite of the broad promotional mandate of the Commission, no documentation centre has been established to assist in this regard. The Secretariat also faces the lack of translation and related services. In the absence of such services, the Commission is prevented from conducting a thorough examination of states' reports submitted under article 62 of the Charter, and other vital documents.

Operating with inadequate staff and devoid of equipment and financial resources, it is hardly surprising that several lapses appear to have occurred with regard to communications and interaction with NGOs; dissemination of documents; translation of documents; responses to requests for information; etc etera.

Some human rights commentators have, however, retorted to the assertion that the root cause of the budgetary problem of the Commission is " the serious financial problems of the parent OAU". Makau disagrees and claims that

> "... the Commission's troubles are not due to the lack of resources in Africa but to the misuse of those resources [and the lack of interest by states in the work of the Commission]. One is struck in Africa ... by the number of government dignitaries driving fancy imported cars and enjoying other luxuries; [the number of trips made abroad and the number of persons in each delegation]. If every government [in Africa] were to give up one Mercedes Benz, the Commission would be fully funded. So it is a matter of priorities...".[44]

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[42] *Ibid.*

[43] These include: an accountant, a bilingual secretary, a receptionist, a filing clerk, two drivers, a cleaner and two watchman. It is worth noting that the Danish Centre has provided funding for the recruitment of two lawyers, an administrator, a documentalist and a bilingual secretary. This, it is hoped will go a long way to strengthen the Secretariat.

[44] The lack of interest on the Commission could also be attributed to the poor showing of the Commission itself on the continent. It's activities are unknown and states rarely hear about the Commission.

It is worth mentioning here that the problems at the Commission's Secretariat might soon become a thing of the past thanks to a donation from the Danish Government through the Danish Centre for Human Rights, DCHR. The government has donated eight computers and two printers to the Secretariat, provided funds for the recruitment of five professional staff; two lawyers, one press officer, one administrative officer and one documentalist. Prior to this gesture, the Centre annually sponsored a lawyer from Denmark to work at the Secretariat. Since 1996, the African Society of International and Comparative Law has sponsored two lawyers to the Secretariat for a period of twelve months; and has provided computers and printers. Prior to this, the Secretariat had only one typewriter, one computer and one printer. It is hoped that in the near future, the Commission will be complaining not about the lack of resources but about the growing workload.

4:4. The lack of political will and co-operation from states

The experience of the European and American Commissions shows that for several years, they had to deal with antagonistic governments who were very sceptical of the Commissions. Given the shallow foundations of the African Commission, the challenges of human rights that it must confront are enormous. Not only does it struggle with meagre resources, it also faces serious doubts from the leaders that established it about its efficacy and powers. State parties have woefully failed to comply with their obligations under article 62 of the Charter.[45] As pointed out, not only do they fail to submit their periodic reports, those who do, submit poor quality reports and some do not even bother to send representatives to come and present their reports as demanded by the Commission.

Very few states, if any, have incorporated the provisions of the Charter into their domestic legislation in conformity with the OAU Assembly's Resolution No AHG/165/(XXV), Annex XI of 1989; and even fewer have taken steps to "promote and ensure through teaching, education and publication ... of the rights and freedoms

[45] Of the 52 states party to the Charter, only 22 had submitted their reports by October 1998.

contained in the present Charter ...".[46]

Most of the states have deliberately decided to ignore to comply with the recommendations of the Commission.[47] The Commission has no established mechanism to follow up compliance with its recommendations. In communication No 101/93/Nigeria, for instance, the Commission decided that "... the decree should therefore be annulled", but the government of Nigeria instead violated the rights further. When the complainant brought the matter back to the Commission, complaining of non- compliance, the Commission did nothing.

The Commission seems helpless in the face of all these obstacles. Some countries like Nigeria have tried to intimidate the Commission by charging that the Commission is acting *ultra vires* and has no judicial authority to make such recommendations. [48]

African leaders favour and do co-operate more with the UN Committee than with the African Commission. Most of the African states that have not submitted their periodic reports to the Commission have done so to the Human Rights Committee. For example, Togo, Cameroon, the Democratic Republic of Congo, Central African Republic and Gabon have all submitted their initial reports to the Committee.[49] Cameroon for instance, submitted its second periodic report to the Committee in February 1996[50] but has not submitted even its initial report to the African Commission. This demonstrates lack of trust and confidence in the institution.

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[46] Article 25 of the Charter.

[47] Nigeria and the former Republic of Zaire have failed or refused to comply with the Commission's decisions on Communications 101/93 and 25/92 respectively.

[48] In a letter written to the Commission by the government in reaction to the latter's decision on communications against the former, the Nigerian government charged that the Commission has assaulted its sovereignty; that it lacks judicial capacity; that it is adopting unconventional procedures and that the Commission has breached the confidentiality clause in the Charter. It is worth mentioning that the Commission's reaction to this was equally firm.

[49] *Official Records of the Human Rights Committee* vol II (1988-1989) (New York 1995) CCPR/8/Add 1 at 13.

[50] See UN Doc CCPR/C/63/Add1.

In a bid to address this situation, the Secretariat of the Commission drafted a "resolution on states' compliance with the Commission's decisions", for consideration and adoption by the Commission during its 22nd ordinary session. This resolution came against the backdrop of the wanton disregard and disrespect demonstrated by some state parties to the African Charter for the Commission's decisions. Decisions taken on communications are usually ignored, and in some cases, where the Commission has invoked Rule 111 of its Rules of Procedure calling for the implementation of provisional measures, these have not been heeded.

Despite numerous appeals from the Secretariat of the Commission, reminding states of the necessity of complying with its decisions, nothing seems to have changed. There is no doubt that such attitudes have negative effects on the activities of the Commission. Not only does it indicate to the complainant that the Commission is a "toothless bull-dog", it also has telling moral consequences for the commissioners who sit to deliberate on these cases and see nothing coming from "their sweat". Also, such attitudes tend to cripple rather than enhance the work of the Commission and other human rights workers in Africa, and retard the development of a viable human rights regime on the continent.

It would be a grave mistake for states to assume that because the Commission is vested only with recommendatory powers, it is debarred from adopting decisions, and/or resolutions, especially in special cases within the framework of its competence, which make determinations or are intended to be operative.

The Commission is bound by the Charter to consider communications fully, carefully and in good faith. When the Commission concludes that a communication describes a real violation of the Charter's provisions, its duty is to make that clear to the state party and indicate what action the government must take to remedy the situation.

The table below summarises the number of decisions the Commission has taken on the substantive issues of the communications submitted to it since its establishment in 1987. It illustrates the level of co-operation received by the Commission from state

parties in the promotion and protection of human rights on the continent. In all the communications, the Commission has found the states concerned guilty of serious human rights violations, especially the civil and political rights.

	COMMUNICATION	STATE	DATE/SESSION OF DECISION	REMARK
1	16/88, 17/88 & 18/88	Benin	16th session, November 1994	No response
2	25/89, 47/90, 56/91, 100/93	Zaire	19th session, March 1996	No response
3	27/89, 46/91, 49/91, 99/93	Rwanda	20th session, October 1996	No response
4	39/90	Cameroon	21st session, April 1997	recommendation partially implemented
5	59/91	Cameroon	16th session, November 1994	No response
6	60/91	Nigeria	16th session, November 1994	No response
7	64/92, 68/92 & 78/92	Malawi	16th session, November 1994	No response
8	71/92	Zambia	20th session, October 1996	No response
9	74/92	Chad	18th session, October 1995	No response
10	87/93	Nigeria	16th session, Nov. 1994	No response
11	101/93	Nigeria	17th session, March 1995	No response
12	103/93	Ghana	20th session, October 1996	No response
13	129/94	Nigeria	17th session, March 1995	No response
14	159/97	Angola	22nd session, November 1997	No response

From the above table, one may conclude that the ineffectiveness of the African Human Rights system in general, and the African Commission in particular, is not due to a lack of financial or human resources, but rather to the lack of political will and co-operation from those capable of strengthening the system. This lack of interest and co-operation is not only demonstrated with regard to the Commission's decisions, but is also manifested in the submission of periodic reports and valuable information requested by the Commission.

4:5 Incompatibility and competing obligations of commissionership

There is no doubt that the effectiveness of any institution derives for the most part from its credibility and reputation. Nothing discourages the public desire to send communications to the Commission more than rumours and perceptions of ineffectiveness arising from possible conflicts of interest, a situation which tends to render illusory the obligation imposed upon Commissioners "to make a solemn declaration to discharge their duties impartially and faithfully". [51] The functions of the Commission have been further undermined by the competing obligations of the members of the Commission

> "... because [all] the commissioners have full-time obligations and because they sometimes get as little as two weeks notice of the biannual meeting, they are not always able to attend even the two sessions[52] the Commission does hold per year. This is a significant problem not only because it further disrupts the continuity of the Commission's work but also because the

[51] African Charter article 38.

[52] The European Commission holds about eight sessions per year each lasting at least two weeks.

Commission requires a quorum in order to take decisions at its sessions. If no quorum exists, as was the case at the meeting in March 1991, the decision must be postponed until the following session six months later, aggravating delays which are already impeding the progress of the Commission's work". [53]

[53] Isaac Nguema, "Legal and Infrastructural Constraints on the Commission", *Conference on the African Commission on Human and Peoples' Rights* Fund for Peace (1991) at14-15.

SECTION FIVE

5:0 Perfecting the African Human Rights System

5:1 Introduction

While it is not easy to establish a "perfect" working mechanism at first instance, it is not impossible to put in place a credible working system over time. The world changes every day and new developments and ideas on how to improve the lives of its inhabitants come to mind. Framers or drafters of legal instruments or agreements might not have been able to foresee certain changes at the time of drafting; or might have had a particular motive in mind, such that as soon as that is accomplished, the agreement became irrelevant; and the need for revising the agreement or mechanism becomes inevitable. In some instances, treaties are created to achieve a particular goal within a specific period and as soon as that is done, the treaty is dead.

The recognition of the need for a possible amendment of an agreement at some future stage has necessitated drafters of almost all treaties to outline procedures for any such alteration. Amendments have been made to various agreements, ranging from bilateral and multilateral treaties and even regional and global agreements. For instance, the ECOWAS Treaty signed in Lagos in 1975 was revised in 1993; countries in Eastern and Southern Africa decided in 1993 to replace the Preferential Trade Area (PTA) with the Common Market for Eastern and Southern Africa (COMESA); the European Convention established in 1950 has eleven protocols while the Inter American Convention has at least two. The African Charter for its part has two draft protocols. There are also calls for the revision of the structure of the UN.

All these measures are being taken to "perfect" a system that was put in place without certain shortcomings in mind, and as these institutions face future challenges, there shall be need for further amendments.

The African human rights regime in general, and its enforcement mechanism in particular, can be improved through the following measures:

- Revision of the African Charter;
- Establishment of sub-regional Commissions;
- Establishment of a continental court;
- Redefining the role of the OAU Assembly in the protection of human rights.

5:2 Revision of the African Charter

5:2:1 Introduction

The African Charter was adopted only seventeen (17) years ago, and came into force less than twelve (12) years ago. It would seem premature to talk about the revision of the Charter at this stage. However, it should be noted that the effectiveness of the African human rights system revolves around the Charter. The failure or success of the Commission is determined first by the substantive and procedural provisions of the Charter and the powers accorded it therein.

The preamble to the Charter is the first pointer towards such a revision. Like the OAU Charter, the Banjul Charter still recognises the eradication of colonialism, Zionism and apartheid; and adheres to the principles of non-alignment for the promotion and protection of human rights on the continent. While these stands could have been paramount and fundamental at the time of formulation and adoption of the Charter, there is no doubt that if the same drafters were to assemble today, they would eliminate most of these principles. No country in Africa is still under colonial rule, apartheid has been abolished, the cold war is over and there is little or no cause for alignment. The aspirations expressed in the preamble can be seen throughout the provisions of the Charter.

The Charter does not empower the Commission to amend or revise, or even to suggest an amendment *suo moto*. By virtue of article 68, only a state party can make a written request to that effect, to the OAU Secretary-General. From the wording of this article, it would seem that the state party proposing the amendment must have a draft ready. "The

Assembly of Heads of State and Government may only consider the draft after all the states have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring state".

There is no doubt that the drafting pattern of the Charter and the provisions and concepts contained therein are a source of concern for the commissioners. The effectiveness of the Commission depends for the most part on how the Charter is drafted. Much as the Commissioners may wish to demonstrate some dynamism in their interpretation of the Charter, they are constrained by certain provisions. The Commission is very conscious of the difficulties posed by the Charter in its efforts to protect and promote human rights on the continent, and as such has included the Revision of the Charter on the agenda of its past four sessions. Every now and then, when NGOs criticise the commissioners for not doing enough, the latter always refer to the limited powers accorded them in the Charter. But can the commissioners overcome these limitations? And if so, how?

An example may prove helpful in attempting a response to these questions. A careful interpretation of the provisions of the Charter dealing with "other communications" will reveal that if the commission were to limit itself to those provisions, the protection of human rights would be an illusion. The cumbersome and time consuming procedure to be followed renders the whole idea of human rights protection a mockery (see articles 55 -59). The Commission has managed, to some extent, to circumvent this cumbersome procedure by not only adopting international standards, but also by outlining in its rules of procedure how to handle such cases. The Commission has undertaken on-site visits to member states to investigate human rights abuses; it has been able to use Rule 111 of its Rules of Procedure (provisional measures) to prevent irreparable damage being caused to victims. However, even this has not been enough to improve the situation. Commissioners are still very reluctant to "over-stretch" their power; complainants have very little confidence in the system; activities of the Commission are still distanced from the people; and decisions of the Commission are often ignored.

While the Charter served to put human rights on the agenda of African states and lend respectability to those pursuing human rights work in national contexts, it is no longer appropriate as the continental centre-piece of the project to ensure well defined and enforceable human rights throughout Africa. The enforcement mechanism it creates has been prevented from performing effectively by the way in which it is drafted.

The Charter, when viewed from its historical context reveals that it was essentially an instrument of the anti-colonial struggle which at the time of its formulation and adoption, was a central preoccupation of Africa. To a considerable degree therefore, the Charter was a political statement rather than a legal document intended to be a workable domestic Bill of Rights.

It should therefore be revisited and transformed from an anti-colonial tract to the precise and enforceable human rights treaty which could be incorporated and applied by domestic courts, and monitored and ultimately adjudicated upon and enforced by a regional tribunal.

The Commission can therefore revise the Charter and lobby a state party within the OAU to sponsor it. After all, some African leaders have also been calling for the revision of the Charter. Thus it is appropriate, at this stage in the history of Africa, to revise the Charter, and more particularly, the strategy for creating an effective human rights protection system for the people of Africa.

5:2:2 Factors to bear in mind

In drafting a new Human Rights Charter for Africa at this time and age, the drafters should take the following into account:

- Since the late 1980s, there has been a significant change in international politics, especially on the continent of Africa; colonialism has been eradicated, apartheid has been abolished, the cold war has ended, etc etera.

- The end of the cold war and the collapse of the Soviet Union have had a significant impact upon attitudes in and towards Africa. Armed struggles of liberation movements, materially supported by either the East or the West; dictatorships; and collectivists suspicious of human rights limitations upon sovereignty, have been virtually wiped out. Today, pluralism and democracy are increasingly embraced and practised and national bills of rights have set standards with a precision and substance well in advance of the Charter.

- Some of the concepts in the Charter which seem to be unique to Africa, should also be reconsidered in the light of certain contemporary realities. Concepts such as "Peoples' Rights and Duties" should be carefully researched and analysed.

- The role of the different OAU organs must also be critically examined. What is the role of the OAU Assembly, the Council of Ministers, the Secretary-General? How do all these organs affect the work of the Commission, and how do they enhance the promotion and protection of human and peoples' rights on the continent. For instance, some analysts have questioned the rationale of article 42(5) of the Charter, which states that the Secretary General of the OAU "may attend the meetings (whether public or private), of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote....". Why then is he/she expected to attend? Is he an envoy of the Assembly to oversee who says what? Even though in practice he doesn't attend and/or interfere with the deliberations of the Commission (at least from the public eye), this particular provision invites suspicion and speculation.

5:2:3 Content of the "Revised African Charter"

A human rights treaty, be it for Africa, Asia or Europe, must have features of a legally binding instrument, capable of being enforced by a tribunal. The African Charter as it currently stands exhibits very few such features and this partly accounts for the perceived inefficiency of the Commission. A Human Rights Charter for a continent like Africa with its diverse cultures and legal systems would embrace, but not be limited to,

the following:

5:2:4 Civil and Political Rights

The civil and political rights which should be embodied in the Charter include, but not limited to, the following:

- right to life
- right to personal liberty
- freedom from torture and forced labour
- protection from discrimination
- right to participate in government
- freedom of religion and worship
- freedom of expression and the right to information
- freedom of association and assembly
- freedom of movement
- the right to administrative justice
- right to family life and the protection of the family from unwarranted interference
- right to privacy of all kinds
- children's rights
- women's rights

These rights should be made justiciable at both national and regional levels.

5:2:5 Economic Social and Cultural Rights

These rights should include:

- right to work
- adequate standard of living
- health
- education
- shelter
- right to own property

- practice of one's culture
- to form trade unions
- to strike
- to leisure

Unlike the former rights, these rights should be included in the Charter only as directive principles of state policy. This will be a constant reminder to states.

5:2:6 Collective rights

These should include all those in the present Charter, including the right of a people to assistance (collective self-defence or security).

5:2:7 Duties

While appreciating the correlation between individual liberty and responsibility, it is unclear how these duties could be enforced by a human rights body. These duties place a moral rather than a legal obligation on the individual. Traditionally, these duties are owed to other individuals and the community in which the individual lives. If the Charter is to impose a duty on the individual against the state, it should be unambiguous. They should be duties capable of being legally enforced, and not at the expense of the guaranteed rights.

5:2:8 Derogation

All the civil and political rights shall be justiceable. The rights should be stated broadly, with a general limitation clause. The Charter should also state in detail the circumstances under which this derogation can take place and the procedure to be followed, before, during and after the derogation. Above all else, the Charter must stipulate those rights that are non-derogable, under whatever circumstances.

5:2:9 Procedures and applicable principles

The procedure for inter-state communication appears adequate. However, the procedure for individual communication is in need of thorough consideration. Article 58 becomes redundant. The conditions for admissibility are satisfactory save for article 56(4) which appears to present a problem. The requirement that the communication should not be based exclusively on news disseminated by the news media is irrelevant, especially if we take into account that before a complaint is lodged, the complainant must have exhausted local remedies. Also, there is little doubt that NGOs do not go to the government to ask whether they have violated human rights, they rely on the media for information. And NGOs always investigate these press reports before acting on them.

Other controversial articles which seem to be a hindrance to the effective development of human rights in Africa are articles 58 and 59. There is no reason, for instance, for the Commission to draw the attention of the OAU Assembly, let alone its Chairman, before considering a communication. What if the Assembly has just met and is to meet again after 12 months. Should the victims wait for 12 months? What if the matter is against the state of the sitting Chairman? Will he request an in-depth study against his own country? Provisions like article 58, therefore, should have no place in the new Charter.

5:2:10 State Party Obligations

The state parties to the Charter shall undertake to be bound by the following:

- Reporting system every two years.
- Each state party to the Charter shall undertake to make at least seven non-civil and political rights justiceable. Three of these rights shall be compulsory, to be enforced by all state parties. These include:
  - right to primary education;
  - right to basic health care;
  - right to peace.

5:2:11 General Provisions

These include coming into force, headquarters, remuneration and secretariat equipment, number of sessions per year, ratification, adherence, special protocols and amendments.

5:3 The establishment of Sub-Regional Commissions

It may seem strange that, while Europe is "merging" its human rights enforcement mechanisms to create a single European Human Rights Court, I am advocating the creation of sub-regional commissions in Africa.

But as indicated earlier, western European states were culturally identifiable units with the cause of individual human right firmly rooted in their past. Moreover, their citizens had a long-standing culture of individual liberty. They were aware of their rights and responsibilities, and knew the limits of State actions. Institutions such as the police, the army, the judiciary etc. etera. which were usually the main institutions for the protection of human rights, all understood their respective roles and were equipped for the task. In short, the European human rights system has now advanced to a stage where it focuses on protection with little or nothing emphasis on promotion. (The recent merger of the protection system bears testimony to this assertion). The Convention does not confer on the Commission any promotional power.

This is in sharp contrast to the African system, where more than half of the population is unaware of the rights and freedoms guaranteed in the Charter. Institutions for the protection of these rights are still very weak and "controlled" mainly by the executive branch of government. Laws imposed during the colonial and one party era are still in the statutes books of most of the African countries. In such an "arid condition", the protection of human rights cannot grow. People must be aware of their rights and freedoms, institutions have to be equipped and archaic laws repealed to allow for a human rights culture to flourish.

The promotion and protection of human rights could be achieved simultaneously if sub-regional commissions, entrusted with promotional activities are established alongside the creation of a continental court. Apart from their promotional activities, the commissions shall receive communications from complainants within their regions and process them in accordance with the provisions of the "Charter". As far as accessing the court is concerned, the Commissions "could form a kind of barrier - a practical necessity well known to all jurists - which would weed out frivolous or mischievous petitions"[1] The commissions shall represent citizens at the continental court, in case of any appeal from states.

The creation of these commissions shall also bring the human rights subject closer to the people and they shall collaborate effectively with NGOs within their regions. It will create a sense of identity and cohesiveness amongst the few States involved and will also generate a desire to work in a small rather than a large group.

These sub-regional commissions can improve the effectiveness of the present human rights protection system; they can be of significant relevance where there is insufficient protection at national level or where continental or universal instruments are not respected.

It is therefore reasonable, on practical grounds, to set up sub-regional regional arrangements for promotion and protection of human rights which should not differ from each other, in that the rights to be protected should be essentially the same and are substantially those established under the Charter. This reasoning can be supported by at least two arguments. Firstly, given the diversity of the modern state system, it is natural that sub-regional arrangements of enforcement would be more readily accepted than global arrangements. A state cannot be forced to submit itself to a system of international control and will do so only if it has confidence in the system. It is much more likely to have such confidence if the machinery has been set up by a group of like-minded countries which may already be partners in a regional organisation, than if this is not the case. Moreover, a state will be willing to surrender more power to a regional

[1] MW Janis & Richard S Kay European Human Rights Law (1990) at 39.

organ of restricted membership, in which the other members are its friends and neighbours, than to a world - wide organ in which it and its associates play a relatively small part. Secondly, on a more practical level, it is obviously easier and more convenient for a case to be heard within the region than somewhere else. To take SADC as an example, it would be more convenient, and probably less expensive for all concerned, when a complaint by one State against another, and *a fortiori* an individual application against a State, can be heard in say Zimbabwe, rather than in Banjul. Also, it is very easy for States within a sub-region to agree on sanctions against another member than at continental level. The cases of Burundi and sierra Leone are glaring examples, where East African countries and ECOWAS respectively decided to impose economic sanctions on these two countries to force the military regimes to step down. This would probably not have been the case had it been left to the OAU to decide on what to do. The OAU failure in the Congo (Kinshasa) and Congo (Brazaville) conflicts in 1996-1997 is a glaring example.

The establishment of sub-regional commissions will to some extent generate competition amongst the various commissions as each will strive to ensure that it does not lag behind in matters of human rights, or that it is not publicly criticised as a region with the worst human rights record. Each region will take care of the expenses of its commission, and since there will be fewer States, a commissioner can be nominated from each State, or at least from half the States. This will give a greater number of commissioners compared to the current situation.

Therefore, it would be fruitful to identify sub-regional groups (e.g. SADC, ECOWAS, ECCAS) with common convictions on human rights, preferably associated with other functional common interests (history, legal systems, economic, political .) and thus the possibility of formulating more substantive procedures combined with a better enforcement machinery.

The commissions shall strive to settle each communication amicably. Only when this fails, can they resort to "litigation". They shall apply internationally recognised standards, like those pursued by the UN human rights organs, and other regional bodies.

5:4 The Establishment of a Continental Court

One of the major reasons for the success of the European and American human rights systems is the establishment of a court.

> "...[I]t is at least doubtful that a national state would abandon its sodomy laws or reform its welfare procedures [and change its anti-human rights legislation] merely by the directive of some non-judicial board composed almost completely of foreigners. But these same orders, when cast in the form of a judgement of law, have been harder to resist. Resistance would evince not merely a (justifiable) disagreement on matters of policy but a defiance of the commitment to human dignity and the rule of law made by the state when it adhered to the [African] human rights system in the first place".[2]

Therefore, to reinforce the activities of the sub-regional commissions, the establishment of a court at continental level which will have an appellate jurisdiction, and be able to pass legally binding judgements would be required. The advantages of having such a court include, *inter alia*:

- The court will deliver legally binding, authoritative and conclusive decision. According to Rembe, one of the drawbacks of the Commission is its lack of mandate to make final binding decisions.[3]The Commission is little more than a sub-committee of the OAU, entitled to investigate and recommend to the parent body, but without the power to initiate action. This makes enforcement dependent on the institution (governments) against which protection is sought. The Protocol establishing the court provides that the court will give final and binding judgments, and state parties undertake to "comply with the judgment in any case to which they are a party".[4]

- The court can also serve as an institution for the implementation of effective remedies. Findings of a court being binding, can be implemented effectively. This will lead to real sanctions and remedies. The Protocol provides that the court may follow a finding with an appropriate order to remedy that violation.[5]

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[2] *Id* at xliii-xliv

[3] NS Rembe "The syatem of protection of human rights under the African Charter: Problems and prospects" Roma *Institute for Southern African Study* (1991) at 44.

[4] Article 30 of the Protocol.

[5] Article 29(2) of the Protocol.

- If the universality of human rights is taken seriously, not only substantive norms, but also procedures and mechanisms should be universalised. States should not pretend to adhere to universal norms, while at the same time detracting from the model accepted in other international and regional human rights systems.[6]

- The establishment of an African Court of Human Rights will also develop an African human rights jurisprudence. It is true that the African Charter endow the Commission with a mandate to provide guidance to states in respect of the making of laws.[7] The Commission has not been very successful in realising the aim of developing a uniform law for the promotion, interpretation and enforcement of human and peoples rights in Africa. In terms of the Protocol, the court will be required to give reasons for both its advisory and contentious decisions. Dissenting and separate opinions are also allowed in both instances.[8] In terms of article 10 of the Protocol, any party to a case is entitled to be represented by a legal representative. All these provide the system with those prerequisites for the development of a human rights case-law which have been lacking so far.

- The establishment of a continental court will also go a long way to maximise publicity of the African Court and human rights generally. One of the crucial respects in which adjudication differs from mediation, conciliation and arbitration, is in its public nature. Dissemination of information about the Commission's work (and, as a consequence, about the Charter itself) has been stifled by some provisions of the Charter as well as its own interpretation thereof. A court is, by its very nature, a public institution. Its activities are more likely to attract media attention and to capture the public imagination than those of the Commission.

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[6] See M Mubiala "Contribution à l'étude comparative des mécanismes régionaux Africaine, Americaine et Européen de protection des droits de l'homme" (1997) 9 Revue Africaine de Droit Internationale et Comparé at 52: "on ne peut pas prétendre adhérer à un système de valeurs en y soustrayant ce qui apparaît en définitive comme la plus grande conquête en matière des droits de l'homme, à savoir la soumission des Etats à la juridiction internationale".

[7] Article 45(1)(b) of the Charter.

[8] See article 4(2)(advisory jurisdiction) and article 28(7) (contentious jurisdiction of the Protocol.

- Finally, the establishment of an African human rights court will strengthen national courts. Applying human rights provisions in states without a human rights tradition is sometimes risky and requires a courageous judiciary. The decisions provided by an African court may provide domestic courts with precedents which can be applied locally. In this sense, the hands of the domestic judges will be strengthened. They may justify decisions that could embarrass states with reference to cases already decided by an African court. Although such decisions also exist in other jurisdictions, in particular, that of the European Court of Human Rights, the use of non-African case-law could easily be countered by arguments against the "importation of ideologically unsound tenets into African legal system".[9]

The human rights court I recommend is in some respect to that envisaged by the Protocol. While the Protocol requires the court to be composed of eleven judges I suggest it should be composed of 15 judges - three from each of the five regions and elected by the different regional bodies. Its functions shall be to entertain appeals from decisions made by the different sub-regional commissions. Its decisions would be final and legally binding and should be forwarded to the Council of Ministers for implementation.

The judges of the court shall be nominated by the different Bar Associations of the different states party to the Charter within each region. Each association shall elect two judges from among its members and forward their names to the Assembly of Heads of States and government of the different regions which shall finally elect the three to sit on the court. The court shall elect its President and Vice-President who shall be full-time employees.

[9] Frans Viljoen, "Arguments in favour of and against the African Court of Human and Peoples' Rights" paper presented at a conference on the theme "The OAU at 35: achievements and prospects", held in Addis Ababa, Ethiopia, 3-5 August 1998.

5:5 Redefining the Role of the OAU Assembly

The present African control machinery is made up of; the African Commission and its Secretariat, the OAU Secretary-General, and the OAU Assembly of Heads of State and Government.

The Commission carries out its functions as mandated by article 45 of the Charter through its Secretariat, with the Secretary of the Commission as the Chief Executive of the Secretariat. By virtue of article 41 of the Charter, the Secretary-General of the OAU shall appoint the Secretary to the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission.

Of all the organs, the OAU Assembly is the ultimate. Unlike in the European system where the Committee of Ministers takes binding decisions and supervises the implementation of the Commission's decisions, in the African system, the Council of Ministers has no role. Instead, the reports and decisions of the Commission are submitted to the Assembly and the fate of these is not known. As Judge A Koffi Amega observes: "The question that has always preoccupied the Commission is that of knowing the fate of these reports, questions left to the competence and conscience of the Heads of State and Government".

It is high time that the role of any political organ involved , directly or indirectly, in the promotion or protection of human rights be re-examined.

As in the European system where the Committee of Ministers supervises the implementation of the Commission's or Court's decisions, the Council of Ministers in Africa should be given the same role. However, unlike the European system, its role should be limited to supervision of the implementation, with no mandate to review the Commission's decision. The role of the Assembly of Heads of State and Government should be restricted to receiving reports.

As we inch into the new millennium, Africa cannot afford to lag behind in human rights, democracy and good governance. The only way to break free of this cocoon is to empower the people with knowledge, because as Commissioner Nguema said, "... it is the African themselves who will defend their rights". This can only be effectively achieved if the people are made to identify themselves with the different mechanisms - the commissions and the court. The people have to be sensitised and assisted so that they can contribute to the development of the African human rights regime. The effectiveness of a human rights court in Africa can only be guaranteed if the people for whom it is created are aware of not only its existence but also its relevance, otherwise it will be a misplaced priority. There must also be a expressed determination by the leaders to ensure protection of human rights. The assertion by Commissioner Nguema that the court "...will replace the Heads of State and take decisions" is true, but the court will not replace them to implement the decisions. One of the most practical ways of ensuring the effectiveness of the organs established is through public pressure from a vibrant and sensitive civil society. Peoples' power has always prevailed and it is our responsibility to ensure that the power of the African people prevails over political institutions.

Table of communications

Communication No.	Complainant	State concerned	Allegations/ Complaint	Commission's decision
1/88	*Frederick Korvah*	*Liberia*	lack of discipline in the Liberian Security Police, corruption, immorality	Inadmissible, under article 56(2)
11/88,	*Henry Kalenga*	*Zambia*	detention without trial	Amicable resolution
15/88	Mpaka-Nsusu Andre Alphonse	Zaire	detention without trial	Inadmissible, under article 56(7)
16/88,	Comité Culturel pour la Démocratie au Bénin,	Benin	arbitrary arrest and detention, torture and degrading treatment	Inadmissible under article 56(5)
17/88,	Badjogoume Hilaire,	Benin	detention without charge out trial, right to work.	Amicable resolution
18/88,	El Hadj Boubacar Diawara	Benin	arbitrary detention and right to property	Amicable resolution
25/89	World Organisation Against Torture,	Zaire	torture and degrading treatment	Violation found
27/89	Organisation Mondiale Contre la Torture	Rwanda	unlawful expulsion of nationals	Violation found
39/90	Annette Pagnoulle	Cameroon	unfair trial	Violation found
40/90	Bob Ngozi	Egypt	unfair trial	No violation found
43/90	Union des Scolaires Nigeriens - Union Generale des Etudiants Nigeriens au Benin	Niger	freedom of association and assembly, arbitrary arrests and right to life	Inadmissible, under article 56(5)
45/90	Civil Liberties Organisation	Nigeria	right to liberty and integrity of the person, right to health	Inadmissible, under article 56(5)

47/91	Lawyers' Committee for Human Rights,	Zaire	arbitrary arrests & detentions, torture, extra-judicial executions, unfair trials, restrictions on the right to association and peaceful assembly, expression press.	Violation found
56/91	Les Témoins de Jéhovah,	Zaire	freedom of religion, arbitrary arrest and right to property	Violation found
57/91	Tanko Bariga	Nigeria	money owed to the complainant	Inadmissible (under article 56 (2)
59/91	Louis Emgba Mekongo	Cameroon	unlawful arrest and unfair trial	Violation found
60/91	Constitutional Rights Project	Nigeria	unfair trial and judicial independence	violation found
62/91	Committee for the Defence of Human Rights	Nigeria	unlawful arrest	Closed without a decision
63/92	Congress for the Second Republic of Malawi	Malawi	instability in the country	Inadmissible under article 56(2)
64/92	Krishna Achuthan,	Malawi	arbitrary detention	Violation found
67/92	Civil Liberties Organisation	Nigeria	arbitrary arrests and detentions, independence of the judiciary	Amicable resolution
68/92	Amnesty International	Malawi	unfair trial, degrading treatment and punishment	violation found
69/92	Amnesty International	Tunisia	arbitrary arrests	inadmissible under article 56(5)
71/92	Rencontre Aficaine pour le de Défense des Droits de l'Homme	Zambia	illegal expulsion of nationals from West African origin, unfair trial	violation found

78/92	Amnesty International	Malawi	freedom of association and assembly	Violation found
87/93	Constitutional Rights Project	Nigeria	unfair trial, independence of the judiciary	violation found
99/93	Organisation Mondial Contre la Torture	Rwanda	extra-judicial executions and arbitrary arrests	Violation found
100/93	Union Interafricaine des Droits de l'Homme	Zaire	torture, arbitrary executions, arrests & detention, unfair trials, restrictions on freedom of association, movement and the press; right to health and education.	Violation found
101/93	Civil Liberties Organisation	Nigeria	freedom of association	Violation found
103/93	Alhassan Aboubakar	Ghana	unlawful arrest and detention	violation found
129/94	Civil Liberties Organisation	Nigeria	freedom of Association, independence of the judiciary.	violation found
138/94	International PEN	Côte d'Ivoire	freedom of expression.	Inadmissible under article 56(5)
159/97	RADDHO et al.	Angola	expulsion of nationals from West African origin, unfair trial.	violation found

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