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## New Trends in African Human Rights Law: Prospects of an African Court of Human Rights

Yemi Akinseye-George\*

### Introduction

African Human rights law refers to the various national, regional and international legal instruments concerning the liberties of the people of Africa.<sup>1</sup> These include the human rights provisions in the constitutions of African countries,<sup>2</sup> the growing body of case law<sup>3</sup> emerging from the courts and international human rights instruments that are of application

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1 See OSITA EZE, *HUMAN RIGHTS IN AFRICA*, 141 (Lagos: Nig. Inst. of Int'l Affairs and Macmillan, 1984); T.O. Elias, *Human Rights and the Developing Countries* 1-29 (1977); HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, 689-705 (Clarendon Press, 1996); Asmarom Legesse, *Human Rights in African Political Culture* 123 (Kenneth Thompson ed. 1980); Olusola Ojo Ahmadu Sessay, *The OAU and Human Rights: Prospects for the 1980s and Beyond*, 8 HUM. RTS. Q. 89 (1994).

2 Most African constitutions contained, either in their preambles and/or substantive provisions, measures for the promotion and protection of human rights. See ALG. CONST. ch. IV (1976); La Loi Fondamentale, Benin, Aug. 26, 1977, *Afrique Contemporaine*, 93 Sept.-Oct. at 23 (1977), *et seq.*, preamble and ch. VIII; ETH. CONST. ch. III, (revised 1955); GHANA CONST. pmb. and ch.4 (1969); GUINEA CONST. pmb. & pt. X (1958); KENYA CONST. ch. V (1969); MAURITIUS CONST. ch. II (1968); MOROCCO CONST. pmb. & art.8-12 (dealing with the political rights of the citizen) & art. 13-18 (dealing with the economic and social rights of the citizen) (1962); NIG. CONST. ch. III (1963); NIG. CONST. ch. IV (1979 & 1999); SEN. CONST. pmb. & pt. II (1963); TANZ. CONST. (Interim) pmb. (July 1965); ZAMBIA CONST. pt. III (1973); CONGO CONST. (1969); see also CONGO CONST. pt. II, (1973); Georges Lavroff, *La Constitution De La Republique Populaire du Congo du 12 Juillet 1973*, 1 REVUE JURIDIQUE ET POLITIQUE, 3-4 (1974) (for the text of the Constitution of 1973 see 1 REVUE JURIDIQUE ET POLITIQUE, 15-26, (1974)); ZAIRE CONST. pmb. & title II (amended July 1976); see also GHANA CONST. ch.6 (1979); ZIMB. CONST. ORDER ch. III (1979).

3 Gino J. Naldi, *Supreme Court of Zimbabwe declares Judicial Corporal Punishment on Juveniles unconstitutional*, 2 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ (RADIC) 488-492 (1990); Chidi Anselm Odinkalu, *The Judiciary and the Legal Protection of Human Rights in Common Law Africa: Allocating Responsibility for the failure of Post-Independence Bills of Rights*, 8 PROCEEDINGS OF THE AM. SOC'Y OF INT'L L., (ASIL Proc.) 124-137 (1996); J.K Minkah-Premo, *The Role of Judicial Enforcement of ECOSOC Rights in National Development: The Case of Ghana*, 11 PROCEEDINGS OF THE AM. SOC'Y OF INT'L L., (ASIL Proc.) 52-89 (1999).

to African countries.<sup>4</sup> For the present purpose, this article will focus on the African Charter of Human and Peoples' Rights,<sup>5</sup> which is the main human rights instrument that is applicable to all of Africa.

First, some preliminary issues need to be addressed. Africa has never been short of human rights laws. Since the early independence days in the 1960s, the constitutions of virtually all African countries displayed elaborate human rights provisions generally referred to as bill of rights. Credit for this goes to the erstwhile colonial masters. Although they had given little or no regard to the human rights of Africans under colonial rule,<sup>6</sup> they often left behind elaborate human rights laws and administrative institutions. Unfortunately, however, soon after the foreign overlords departed, their African successors began to jettison the inherited structures. In places such as Nigeria, where the human rights laws were retained in the postcolonial constitutions, these laws were of little effect in improving the welfare of the great majority of the people. The great majority of Africa's postcolonial leaders, under the guise of searching for an indigenous system of political organization, opted for heavy-handed rule paying little or no attention to human rights. In order to shield their misrule from international observers, the leaders claimed unfettered sovereignty over matters of human rights, which they regarded as domestic affairs. Regimes such as those of Jean-Bedel Bokassa in Central Africa, Idi Amin in Uganda, and Fernando Macias Nguema in the Republic of Equatorial Guinea demonstrated the depths of state brutality. In most African countries, human rights were replaced with human suffering as the rulers, one after another, imposed one-party rule, suppressed political dissent and personalized the resources of the state. The continent became a breeding ground for despots like Mobutu Sese Seko, Mengistu, and others. The idea of human rights never gained popularity with these despots. Their palpable misrule gave rise to brutal civil wars and humanitarian catastrophes in Sudan, Ethiopia, Nigeria (1967-1970), Liberia, Sierra Leone, Angola and Democratic Republic of Congo (formerly Zaire).

The cold war did not help matters. As is often said, (in Africa) "when two elephants fight, the grass suffers." This saying depicts the effect of the East-West power struggle of the cold war era on African societies. Turned into a major geopolitical battleground for the two super powers, the continent became a dumping ground for deadly arms and ammunitions. Several years after the cold war, the arms have continued

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4 For a table showing the state of ratification of international human rights treaties by African countries, see Frans Vijoer, *The Six Major United Nations Human Rights Treaties and Monitoring Mechanisms: Their Relevance For Africa*, 11 PROCEEDINGS OF THE AM. SOC'Y OF INT'L L., (ASIL Proc.) 132-133 (1999).

5 A full text is available in 21 I.L.M. 59.

6 CLAUDE AKE, *DEMOCRACY AND DEVELOPMENT IN AFRICA*, 3 (The Brookings Inst. 1996).

to be used with tragic consequences. Starting with Congo in 1960, the super powers tried to influence the ideological orientation of African governments. One of the rewards given to friendly governments was that the superpowers would turn a blind eye toward their human rights violations, no matter how serious. Another reward was that they would stabilize and subsidize governmental authority even if it was corrupt and oppressive.<sup>7</sup>

Then came the tragic wave of military intervention in government, which ravaged the continent, like bush fire in the harmattan. Within the first twenty years of independence, virtually all African countries had experienced some form of military insurrection. Needless to say that these had devastating effects on human rights and the rule of law.<sup>8</sup>

Amidst all these problems the Organization of African Unity was powerless to alleviate the suffering of the Africans. Formed in 1963, at a time when the newly independent states of the continent feared clashes over their arbitrary, colonially defined borders and neocolonialist meddling from their recently estranged colonial overlords, the organization adopted a conservative outlook aimed at preserving the existing order while defending the colonial borders. Consequently, it could not mediate effectively in African conflicts nor could it provide any meaningful protection for the human rights of Africans.<sup>9</sup>

## **I. The African Charter on Human and Peoples' Rights**

Although it has been castigated as a "meaningless document"<sup>10</sup> the African Charter on Human and Peoples' Rights remains the first major attempt by African leaders to establish a regional machinery for the implementation of the rights of Africans.<sup>11</sup> Adopted on June 17, 1981 by the eighteenth Assembly of Heads of State and Government, the Charter reaffirms the support of African leaders for international protection of human rights and freedom, as declared in the Universal Declaration of Human Rights. Having thus given consent to the

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7 Nana K.A. Busia, *The New World Order and Its Implications for Human Rights and Democracy in Africa- A Cortical Appraisal*, 11 PROCEEDINGS OF THE AM. SOC'Y OF INT'L L., (ASIL Proc.) 133-152 (1993).

8 GEORGE AYITTEH, *AFRICA IN CHAOS* (1998).

9 Christopher Mulei, *The Role of the OAU in the Democratization Process- A Case of Lack of Clear-Cut Policies and Political will Towards an Open Society*, 6 PROCEEDINGS OF THE AM. SOC'Y OF INT'L L., (ASIL Proc.) 56-72 (1994).

10 Makay Wa Mutawa, *The African Human Rights System in a Comparative Perspective*, 3 REVUE AFRICAINE DES DROITS DE L'HOMME 6 (1993).

11 For a balanced assessment of the Charter, see R. M. D'sa, *Human and Peoples' Rights: Distinctive Features of the African Charter*, 1 J. AFR. L. 29, 74 (1985).

internationalization of human rights, the African leaders could no longer plead that human rights were matters reserved exclusively for the domestic jurisdiction. Therefore, the façade of 'national sovereignty' would no longer provide a cover up for grave breaches of human rights. Although many critics of the African Charter often underestimate the significance of this development, it is one of the most important achievements of the adoption of the Charter. While it is ironic that a group of despotic rulers would establish such machinery for the implementation of human rights, the historical and political significance of their action must not be underestimated.

Just like its predecessors, (The European Convention on Human Rights and the Inter American Convention on Human Rights), the African Charter provides for a number of civil and political rights traditionally referred to as "first generation rights."<sup>12</sup> These include, the right to freedom from discrimination (art. 2), equality before the law, equal protection of the law (art. 3), inviolability of the human person and respect for human life, integrity and legal status including prohibition of slavery, slave trade, torture, cruel and inhuman or degrading treatment (art. 4 & 5), right to fair hearing including an effective appeal to competent national organs, presumption of innocence, right to counsel of one's choice and trial within a reasonable time and prohibition of retroactive laws (art. 6 & 7). The Charter further guarantees the freedom of conscience and religion (art. 8), right to receive information, express and disseminate opinions (art. 9), freedom of association and the right to assemble freely with others (art. 10 & 11), right of entry and residence of aliens (art. 12), right of participation in government (art. 13) and the right to property (art. 14). These rights are however subject to "clawback" clauses or restrictions of law and order, national security, the safety, health, ethics and the rights and freedoms of others.<sup>13</sup> The Charter avoids the use of general derogation clauses.<sup>14</sup> Yet it permits the imposition by domestic law of a wide range of limitations. However, in view of the obligations of member states under the Charter and general international law, including the Universal Declaration of Human Rights, the Charter limits the liberty of any state to enact laws imposing restrictions on its guaranteed rights.

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<sup>12</sup> Traced to the natural rights philosophy of the late 18th Century, these rights have traditionally been given priority by western states. See D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW, 601 (Sweet & Maxwell, 4th ed. 1979).

<sup>13</sup> See *supra* note 11.

<sup>14</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, art.4, 14668 U.N.T.S. 171.; European Convention on Human Rights, Nov. 4, 1950, art.15, 213 U.N.TS. 221, E.T.S. 5.; American Convention on Human Rights, July 18, 1978, art.27, 1144 U.N.T.S. 123. The general derogation clauses in these three instruments are similar.

The second broad category of rights guaranteed by the African Charter consists of economic, social and cultural rights now widely referred to as “second generation rights.” These rights attained recognition in the twentieth century with the advent of socialism. Although there is jurisprudential debate and skepticism on the part of some western states as to the human rights character of “second generation” human rights, the Universal Declaration of Human Rights catalogues rights within both generations as human rights. Furthermore, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights impose legal obligations in respect of each. Moreover, the premise underlying all United Nations human rights texts is that civil and political, as well as economic, social and cultural rights are of equal priority, revealing that the two groups of rights are interdependent. This approach has been adopted by the African Charter on Human and Peoples’ rights, which makes provisions for both categories of rights without giving priority to either group.

The African Charter provides that every person shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work. (art. 15) The view has been correctly expressed that if the right to work is intended as imposing a legal duty on states to provide employment, then it is difficult to see how this can be translated into a concrete right capable of enforcement in Africa.<sup>15</sup> The stark reality in Africa today appears to be the direct opposite of what the Charter seeks to guarantee. The right to work is virtually non-existent and the majority of the people who seem to be enjoying this right are working under harsh conditions almost akin to servitude. Workers retrenchment, non-payment of salaries, job insecurity and the like are common features of African labor markets.

Other rights provided include the rights to enjoy the best attainable state of physical and mental health (art. 16(1)). This imposes an obligation on the state parties to take necessary measures to protect the health of the people and to ensure that they receive medical attention when they are sick (art. 16(2)). There is also the right to education, and the right of every person to take part in the cultural life of his country, while a duty is imposed on the state to promote and protect the morals and traditional values recognized by a community (art. 17(3)).

The Charter recognizes the family as the natural unit and basis of society, which shall be protected and assisted by the state. The state is

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15 EZE, *supra* note 1, at 226. *But see* AMECHI UCHEGBU, ECONOMIC RIGHTS, THE AFRICAN CHARTER ON HUMAN RIGHTS, 161-187 (J.A. Omotola and A.A. Adeogun eds., University Press 1987) (Professor Amechi Uchegbu, maintains that where a neo-colonial state sheds its responsibility towards its citizens by collaborating with the rich minority to deny the people the right to work and to earn decent wages, the government ceases to be legitimate.)

obligated to ensure the elimination of every form of discrimination against women and also to ensure the protection of the rights of women and children as stipulated in international instruments and conventions. Special measures are to be taken for the protection of the aged and the disabled in keeping with their moral and physical condition (art. 18).

The guarantee of these rights by the African Charter and other human rights instruments do not automatically make them available to the majority of the African peoples because the facilities required for their enjoyment are largely non-existent in the continent. Also, the political economy is under the grip of a minority elite who are out to preserve their privileged position, which in fact conditions the manner in which available resources are allocated and utilized. Many African leaders spend huge sums of money on white elephant projects such as construction of their official or personal mansions, churches and mosques while maintaining that they lack resources for implementing basic educational and health programs required to improve the living standards of the overwhelming majority of their people. The majority is invariably deprived of the basic necessities of life, while the ruling elite and their friends swim in oceans of opulence. Subsistence living becomes the order of the day, the right to property is rendered illusory as most people have no property worthy of protection, and the right to work is nothing but a mere theoretical guarantee hardly worth the paper on which it is written.

One of the unique features of the African Charter is its recognition and enunciation of group rights described as "people's rights and freedoms." Traditionally referred to as third generation rights, these rights began to take a distinctive form as recently as the 1970s and their chief proponents are the developing states.<sup>16</sup> The inclusion of the rights of peoples in the Charter reflects the importance of the group or community under African customary law.<sup>17</sup>

The Charter guarantees non-domination of people (by another) as all peoples shall be equal and shall enjoy the same respects and rights (art. 19). The right of all peoples to existence and self-determination guaranteed by the Charter encompasses the freedom of people to determine their political status and to ensure their economic and social development according to the policy they have freely chosen (art. 20(1)). Colonized and oppressed peoples shall not only have the right to free themselves by resorting to any means recognized by the international community, but they shall also have the right to the assistance of the state

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<sup>16</sup> See Harris, *supra* note 12 at 601

<sup>17</sup> Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 6 REVUE AFRICAINE DES DROITS DE L'HOMME 16 (1996-7); 35 VA. J. INT'L L. 339 (1995).

parties in liberation struggle against foreign domination, be it political, economic or cultural (art. 2 (2) and (3)).

Moreover, the principle of sovereignty over natural resources is recognized. All peoples shall freely dispose of their wealth and natural resources in a manner, which is in their exclusive interest, and in no case shall a people be deprived of it. In case of expropriation, the dispossessed people shall have the right to the lawful recovery of property as well as to adequate compensation. However, the free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting an international economic co-operation on the basis of mutual respect, equitable exchange and the principle of international law.

The right to development is guaranteed. Thus, all peoples shall have the right to their economic, social and cultural development in strict respect of their freedom and identity and in the equal enjoyment of the common heritage of mankind (art. 22(1)). Recognizing that development is not possible in the absence of peace, the Charter further provides for the right of all peoples to national and international peace and security, while reaffirming the principles of solidarity and friendly relations between states contained in the Charter of the United Nations and the Organization of African Unity. Finally, the right of the peoples to a general satisfactory environment favorable to their development is guaranteed.

In addition to these rights, the Charter contains corresponding duties which state parties to the convention are expected to perform towards the attainment of the objectives of the Charter. Thus, state parties shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity (art. 21(4)). They shall also eliminate all forms of economic exploitation, particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources (art. 2(5)). Third, states shall also have the duty, separately or in co-operation with others, to ensure the exercise of the right to development. Finally, states shall not allow their territories to be used as bases for subversive or terrorist activities against the people of any other state party to the Charter.

## **II. The African Commission**

The sole organ for the implementation of the African Charter is the African Commission on Human and Peoples' Rights. Established in 1987, the Commission consists of eleven members known as Commissioners who are elected by the OAU through secret ballot for a six-year term and serve in their personal capacities.<sup>18</sup> The members are

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<sup>18</sup> African Charter on Human and Peoples' Rights, *supra* note 15, at art. 31, art. 33, art. 36, art. 42.



elected by the Assembly of Heads of State and Government of the OAU; the members in turn elect the Chairman and Vice Chairman. The Secretary-General of the OAU appoints the Secretary of the Commission.

The members are independent in the exercise of their functions as Commissioners. They must be Africans of the highest reputation known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights, particular consideration is given to persons having legal experience. The headquarters of the Commission is located in Banjul, Gambia, pursuant to a decision of the twenty-fourth session of the Assembly of Heads of State and Government of the OAU. The Commission conducts two regular sessions annually, each lasting a maximum of 15 days. Isaac Nguema, a former Chairman of the Commission, considers these annual sessions insufficient in light of the functions the Commission has to perform.<sup>19</sup>

The principal function of the African Commission is to ensure the promotion and protection of human and peoples' rights. The promotional mission is discharged through such programs as study, research, information, sensitization, consciousness-raising, education and leadership training in the field of human rights. The promotion function of the Commission extends to cooperation with both governmental and non-governmental organizations in the field of human rights. Further, the Commission's protection functions include the examining of complaints of human rights violations alleged either by the State parties or by private persons.<sup>20</sup> It also performs quasi-legislative functions such as interpretation of the Charter and elaboration of drafts of legislative or regulatory texts to be proposed to States in the area of human rights (art. 45). Under Articles 60 and 61 of the Charter, the Commission is authorized to make use of international and comparative human rights law and other principles of law in the interpretation and implementation of Charter provisions.

There are some who would condemn the African Commission for failing to take serious actions when dealing with grave human rights violations across Africa. However, in a number of cases, the Commission

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19 Isaac Nguema, Africa, *Human Rights and Development*, REVUE AFRICAINE DES DROITS DE L'HOMME 91, 112 (1998).

20 In its second session, Dakar, 8-14 Feb. 1988, the Commission adopted its internal regulations governing the procedure for the examination of complaints. With respect to duties, it has been suggested that the Commission should clarify which of the duties in the Charter are moral or legal obligations and what the scope of their application ought to be. Makau wa Mutua, *supra* note 16, at 45. See Onje Gye-Wado, *A Comparative analysis of the Institutional Framework for the Enforcement of Human Rights in Africa and Western Europe*, 2 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ (RADIC) 187 (1990).

has intervened to protect human and peoples' rights. The case of Nigeria under military dictatorship provides an illustration of the proactive role of the African Commission in dealing with serious human right violations. At first, the Commission adopted a diplomatic approach and merely criticized the military regime through Resolutions passed at its ordinary sessions. For instance, in the resolution on Nigeria adopted on November 3, 1994 at the 16<sup>th</sup> Ordinary Session of the Commission held from October 25 through November 3, 1994 in Banjul, Gambia. The resolution among other things regretted the annulment of the June 12, 1993 Presidential election in Nigeria, though it had been adjudged free and fair by national and international observers. The commission condemned the gross violation of human rights in Nigeria as evidenced by:

The exclusion of the African Charter on Human and Peoples' Rights from the operation of decrees adopted by the military regime;

The detention of pro-democracy activists and members of the press;

The exclusion of the jurisdiction of the courts over decrees;

The discarding of court judgments;

The promulgation of laws without proper procedure or penal laws with retroactive effect; and

The closure of newspaper houses.

The resolution further called upon the Nigerian Government to respect the right of free participation in government and the right to self-determination and hand over power to the duly elected representatives of the people without unnecessary delay.

The Commission, during its 2<sup>nd</sup> Extraordinary Session in Kampala, Uganda, from December 18-19, 1995, condemned the human rights abuses of the Nigerian Military regime of General Abacha, and requested that the government prevent harm to the Ogoni detainees. The Commission resolved to send a delegation to Nigeria to discuss the situation with Nigerian Government officials.<sup>21</sup> Unfortunately, notwithstanding the efforts of the Commission and other human rights bodies, the military government went ahead with the trial and execution of the Ogoni leaders including Ken Saro Wiwa.

The grave situation in Burundi and Rwanda was also addressed by the Commission at its 2<sup>nd</sup> Extraordinary Session. It decried the use of armed bandits to cause insecurity, assassinations and massive displacement of civilian populations. Yet it was powerless to stop the 1994 genocide in Rwanda and to prevent blood-letting in Burundi.<sup>22</sup>

21 Final Communiqué of the 2nd Extraordinary Session of the African Commission on Human and Peoples' Rights, Dec. 18-19, 1995, Kampala, Uganda.

22 Abdelsalam A. Radwan Mohammed, *Article 58 of the African Charter on Human and Peoples' Rights*, 8 PROCEEDINGS OF THE AM. SOC'Y OF INT'L L., (ASIL Proc.) 290, 303-305 (1996).

The weakness of the Commission concerns its lack of freedom of action under Charter provisions. For instance after duly noticing a case of emergency or a situation of "serious or massive" violations of human or peoples' rights, it shall notify the chairman of the Assembly of Heads of State and Government "who may request an in-depth study." Poor funding, understaffing and reliance on the OAU for implementation of its sessions are additional problems limiting the effectiveness of the African Commission. However, there is optimism that the establishment of an African Court under the regime of a dynamic African Union would bring about greater effectiveness of the African human rights system.

### **III. The Impact of the African Charter on the Domestic Laws of African Countries**

Notwithstanding its defects (and they are many), the African Charter and the African Commission have had some important beneficial effects on the domestic law and practice relating to human and peoples' rights in several African countries.

First, the Charter has positively impacted (albeit indirectly) the development of constitutional law with particular reference to human rights. The last decade has witnessed the adoption of new constitutions that incorporate bill of rights in a manner similar to those contained in the African Charter. The South African Bill of Rights, for instance, guarantees socio-economic rights such as the right to education. Similarly, Malawi and Namibia have adopted new constitutional pacts which show a commitment to the recognition and protection of human rights as enunciated in the African Charter and other international human rights instruments. These new bills of human rights differ from those of the immediate post colonial era in that, not only are they justiciable, but they also reflect changed political realities and on-going democratic struggles. As Maluwa observed, "The common theme running through all these changes has been the attempt to institute political pluralism and democratic rule in place of single-party dictatorships and autocratic oligarchies that had become the political order of the day in all but a handful of African states, and to build a political culture founded on a conception of human rights now taken for granted in the more established democracies."<sup>23</sup>

Also, some African countries have incorporated the Charter into domestic law, thus facilitating its enforcement by domestic courts. In Nigeria for instance, the Charter was incorporated through the African Charter (Ratification and Enforcement) Act cap 10, Laws of the Federation of Nigeria, 1990. Consequently, Nigerian lawyers frequently cite the provisions of the Charter to support human rights actions in

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23 Tiyanjana Maluwa, *Discourses on Democracy and Human Rights in Africa*, 9 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ (RADIC) 55, 57 (1997).

domestic courts. In the case of *Abacha v. Fawehinmi*,<sup>24</sup> the Nigerian Supreme Court upheld a decision of the Court of Appeals on the superiority of the African Charter to domestic legislation. The Court, however, rejected an argument that the Charter was superior to the national constitution of the country.<sup>25</sup>

The African Charter has also had some positive political impact in African countries. Nigeria has a good record of compliance with decisions of the African Commission. The few cases of non-compliance are exceptional. In fact, African countries often respond with less enthusiasm toward United Nations human rights mechanisms. They regard the African human rights system as “our own” while often viewing the United Nations system as foreign. It is believed that the Nigerian military government might have executed some *Zango Kataf* activists who were sentenced to death by a tribunal, but for the intervention of the African Commission. The Chairman of the Commission had written to the Nigerian Government urging it to postpone the planned execution of the activists pending the determination of their petition by the Commission. The government seems to have complied.

Again in *Katangese Peoples' Congress v. Zaire*,<sup>26</sup> although the Commission did not accept the claim of the people of Katanga to ‘self-determination in a manner that would have recognized their claim to secede from Zaire, the government was held to be under an obligation to recognize the peoples’ right to their indigenous culture and language.

Perhaps the most profound impact of the African human rights system on domestic law has been in the area of civil society empowerment. Before the establishment of the African Commission, African human rights NGOs used to work only with NGOs based in Europe and America. There was little interaction among African NGOs. However, the Charter, in its establishment of the Commission, has created a platform for NGOs to meet twice every year to exchange ideas. African NGOs with observer status at the African Commission are allowed to make submissions at the sessions of the Commission. During the military era, Nigerian NGOs learned a lot from South African NGOs through this platform. The African NGOs now have what is called the Civil Society Forum at the Summit of the Heads of State of OAU (now African Union). It is the work of the NGOs (African and non-African) that gave impetus to the emergence of the additional protocols of the African Charter including that of the African Court. The NGOs forum constituted a powerful lobbying group in convincing African leaders

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24 *Abacha v. Fawehinmi*, Part 4 F.W.L.R. 533 (2000).

25 *Ogugu v. State*, 4 N.W.L.R. 1 (1994).

26 Eighth Annual Activity Report of the African Commission of Human and Peoples’ Rights, June 26-28, 1995, Parts 1 & 2, at 187-188.

about the need, not only for an African Court but also for an African Union. The following section considers these new features of the African human rights system.

#### IV. The African Court

In 1998, the OAU Assembly of Heads of State finally adopted the Protocol establishing an African Court on Human and Peoples' Rights (hereinafter the 'African Court'). The Court is designed to complement the protective mandate of the African Commission.<sup>27</sup> Its jurisdiction extends to all cases and disputes concerning the interpretation and application of the Charter, the Protocol, and any relevant Human Rights instrument ratified by the states concerned.<sup>28</sup>

At the request of a member state of the OAU, any of its organs or any African Organization recognized by the OAU, the Court is entitled to give advisory opinions on any legal matter relating to the Charter on any other relevant human rights instruments.<sup>29</sup> Direct access to the Court is granted to the African Commission, state parties and African inter-governmental organizations.<sup>30</sup> Others, such as NGOs with observer status and individuals, are also entitled to institute cases directly before the Court in urgent matters or serious, systematic or massive violations of human rights provided that the Court shall not accept any

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27 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 2, 9 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ (RADIC) 432-439 (1997). See also E.K. Quashigah, *The African Court of Human Rights: Prospects, in Comparison with the European Court and the Inter-American Court of Human Rights*, 10 PROCEEDINGS OF THE AM. SOC'Y OF INT'L L., (ASIL Proc.) 59-60 (1998). Gino J. Naldi and Konstantinos Magliveras, *The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison*, 8 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ (RADIC) 944, 944-969 (1996).

28 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 3(1). Further, the Protocol, in Article 7, identifies the "sources of law" as "the provisions of the charter and any other relevant human rights instruments ratified by the states concerned."

For a history of the African Court, See Ben Kioko, *The Road to the African Court on Human and Peoples' Rights*, PROCEEDINGS OF THE AM. SOC'Y OF INT'L L., (ASIL Proc.) 70-85 (1998). The 34th Ordinary Session of the Assembly held in Ouagadougou, Burkina Faso from June 8-10, 1998 endorsed the recommendation of the Council of Ministers approving the Protocol on the establishment of the African Court.

29 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at Art. 4(1).

30 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 5(1).

petition from NGOs or individuals involving a state party that has not made a declaration accepting the competence of the Court under Article 6(3) and (5). The need to grant direct access to NGOs and individuals was informed by the reluctance of African States to file complaints against each other. Since the inauguration in 1987 of the African Commission, no member state had ever filed a complaint against another.<sup>31</sup> The Court shall rule on admissibility of cases instituted by NGOs and individuals in accordance with the provisions of Article 56 of the Charter.<sup>32</sup> In accordance with the philosophy of the African Charter, the Court may reach an amicable settlement in a case pending before it.<sup>33</sup>

The Eleven judges of the Court shall be nationals of Member States of the OAU and there shall be adequate gender representation in the nomination process.<sup>34</sup> The quorum shall be at least seven judges.<sup>35</sup> The Assembly of Heads of State and Government shall elect the Judges by secret ballot. The Assembly shall ensure that there is representation of the main regions of Africa and their principal legal traditions.<sup>36</sup> This is an improvement to the African Charter, which contains no provision for geographical or gender representation.

Judges of the court are to be elected for a term of six (6) years and may be re-elected only once. The judges, except the President shall perform their functions on a part-time basis. The court shall elect its President and one Vice-President for a period of two years. They may be re-elected only once.<sup>37</sup> Provisions are made to guarantee the independence and immunity of the judges in accordance with international law. The position of judge is declared by Article 18 to be incompatible with any activity that might interfere with the independence or impartiality of such judge or the demands of the office.

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31 Ben Kioko, *supra* note 28, at 82.

32 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 6(2).

33 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 9.

34 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 11 & 12.

35 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 23.

36 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 14.

37 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 21.

The Court shall make its decisions on the basis of written or oral evidence including expert testimony.<sup>38</sup> It may make appropriate orders including payment of fair compensation or reparation. It shall adopt such provisional measures as may be necessary in cases of extreme gravity and urgency in order to avoid irreparable harm to persons.<sup>39</sup>

The Court shall render its opinion within ninety (90) days of completing its deliberations. A decision is not subject to appeal.<sup>40</sup> Unlike the African Commission, the African Court is endowed with power to give final and binding judgments.<sup>41</sup> This capability, coupled with the right of access to the court granted NGOs and individual will greatly enhance the effectiveness of the African human rights mechanism.<sup>42</sup> As a judicial body, the Court does its work openly. It is therefore more likely to attract media attention and generate more interest, while also raising the level of awareness about the African human rights system. This is preferable to the position of the African Commission, which could hold only private sessions.

The protection that would be available through the Court would place Africans, individuals and NGOs alike, in a better position to defend democratic rule in their countries. In this way the Court possesses the potential to strengthen the rule of law and help consolidate African democracies.<sup>43</sup>

Moreover, the Court shall notify the parties of its judgment and transmit copies thereof to the Member States of the OAU, the Council of Ministers and the Commission. It is the responsibility of the Council of Ministers to monitor the execution of the judgment of the Court on behalf of the Assembly.<sup>44</sup> States parties undertake to comply with the judgment in any case to which they are parties within the time stipulated

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38 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 26.

39 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 27.

40 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 28.

41 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art 28 (2). Since the African Commission is not a judicial body, lawyers could not argue before it. It is thus deprived of the assistance, which lawyers appearing before it could render in dealing with the numerous cases before it.

42 Franz Viljoen, *Arguments in Favor Of and Against an African Court on Human Rights*, 22 PROCEEDINGS OF THE AM. SOC'Y OF INT'L L., (ASIL Proc.) 10 (1998).

43 *Id.*

44 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art.29.

by the Court and also undertake to guarantee a judgment's execution.<sup>45</sup> The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The contents of the report shall include cases of non-compliance with the court's judgment by any state. Though the budget of the Court shall be funded by the OAU,<sup>46</sup> the Court shall draw up its own rules and determine its own procedures.<sup>47</sup>

The Protocol of the African Court supplies the missing link in the African human rights mechanism. By so doing, it complies with the standard already set by other regional mechanisms, namely the European Convention and the Inter-American System, which provide effective judicial forum for enforcing human rights. It is hoped that the African Court, in developing authentic human rights jurisprudence, would follow the proactive approach of the European and Inter-American Human Rights Courts. However, the view has been expressed that the Inter-American System is of much more relevance to the African situation.<sup>48</sup>

## V. The African Union and Human Rights

At the conclusion of the two-day (March 1-2, 2001) extraordinary meeting of the Organization of African Unity held in Sirte, Libya, all member states of the Organization of African Unity unanimously decided to establish a pan-African organization as a way of creating closer relations among the different countries. Modeled on the European Union, the Organization, named the African Union is aimed at restoring dignity and economic strength after decades of economic backwardness and political instability. It replaced the Organization of African Unity, which had proved to be incapable of delivering the promise of a genuine African integration, common currency, foreign policy, defense structure and common economic programs as initially envisaged by the Pan African Movement of the 1950s.

All 53 OAU members have signed the declaration of the Union, but thirty-six ratifications are required for it to take effect.<sup>49</sup> When the Union eventually takes off, it is expected to have an Assembly of Heads of State, an Executive Council of Ministers, a parliament and a court of

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45 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 30.

46 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 32.

47 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, *supra* note 27, at art. 33.

48 Franz Viljoen, *The Relevance of the Inter-American Human Rights System for Africa*, 11 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ (RADIC) 661 (1999).

49 Constitutive Act of the African Union, art. 28, <http://www.dfa.gov.za/for-relations/multilateral/treaties/auact.htm>.



justice. The Secretary-General of the OAU, Dr. Salim Ahmed Salim has opined that the African Union would make a real difference in the lives of ordinary Africans.<sup>50</sup> On his part, Justice Kayode Eso, an eminent Nigerian jurist and Chairman of the Banjul-based African Center for Democracy and Human Rights Studies, says the establishment of the African Union is "a testimony to the commitment of the Heads of State and Government of the OAU to move Africa forward."<sup>51</sup> But many are skeptical that an organization promoted by Colonel Gaddafi, a leader with questionable human rights records, is likely to place human rights high on its agenda.<sup>52</sup> Only time will tell to what extent the African Union will be able to strengthen the African human rights system. If the Union brings about greater economic integration and closer ties among the African States as envisaged, there should be a reduction in political conflicts. This would in turn mean a better life for the war torn areas in the region. Further, a better economic performance that the Union is expected to bring about should mean an improved regime for the implementation of socio-economic rights in the African continent.<sup>53</sup>

## Conclusion

We have attempted to review the existing regime for the protection of human and peoples' rights in Africa. While the African Commission may not have done much to implement the human and peoples' rights in the African Charter, it has initiated some important moves in the direction of fulfilling its mandate. These include the creation of greater awareness about the African Charter and the establishing of a platform for co-operation and networking among African human rights NGOs. By its inability to enforce the provisions of the Charter, the Commission has underscored the necessity for a judicial forum capable of making authoritative and final pronouncements in cases

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50 BBC NEWS, *African Union treaty comes into force* (May 26, 2001), at [http://news.bbc.co.uk/hi/english/world/africa/newsid\\_1352000/1352707.stm](http://news.bbc.co.uk/hi/english/world/africa/newsid_1352000/1352707.stm).

51 Kayode Eso, *The Role of the African Human Rights System and Civil Society in the African Union 3* (Mar. 2001) (unpublished manuscript, on file with the Kayode Eso Library, Ibadan, Nigeria).

52 The objectives of the African Union, as stated in Article 3 of the Constitutive Act, include the following: a. Achieve greater unity and solidarity between the African countries and the peoples of Africa; b. Defend the sovereignty, territorial integrity, and independence of its Member States; c. Accelerate the political and socio-economic integration of the continent; d. Encourage international cooperation taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights; f. Promote and protect human and peoples' rights and other relevant human rights instruments. *Supra* note 49, at art. 3.

53 N.J. Udombana, *Towards the African Court of Human and Peoples' Rights: Better late than never*, 8 REVUE AFRICAINE DES DROITS DE L'HOMME 338-58 (1999).

of human rights violations. It is significant that although an adjudicatory forum has now been added to the African human rights system, the reconciliatory approach has not lost its appeal to the African leaders, who, notwithstanding the provision for a court, still provided for amicable settlement in Article 7 of the African Court's Protocol. It is also significant that access to the Court has been granted to individuals and NGOs in urgent cases or serious, systematic or massive violations of human rights. Fortunately, the Court has the rich experience of the African Commission as well as that of the other regional courts elsewhere to draw from. However, it may have to contend with the problems of inadequate funding<sup>54</sup> and other constraints such as the possibility of hostility from African governments with poor human rights records. The international community and others who are genuinely interested in advancing the cause of human rights in Africa must support the Court with such a level of funding<sup>55</sup> to ensure its financial independence. On its part, the African Union should be expected to create an enabling environment for the Court by tackling the problems of political instability, bad governance, massive poverty, widespread illiteracy and other impediments to the realization of human rights in Africa.

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54 Christof Heyns, *The Regional and Sub-Regional Protection of Human Rights in Africa: In Search of a Realistic Dream*, PROCEEDINGS OF THE AM. SOC'Y OF INT'L L., (ASIL Proc.) 8 (1996).

55 Inger Osterdahl, *The Jurisdiction Ratione Materiae of the African Court of Human and Peoples' Rights: A Comparative Critique*, 7 REVUE AFRICAINE DES DROITS DE L'HOMME 132-150 (1998). The writer opines that the establishment of an African Court of Human and Peoples' Rights is a great success for the Organization of African Unity (OAU). This also marks a great step forward in the struggle for human rights in Africa. All efforts to strengthen human right in Africa must be encouraged.