THE UNIVERSITY OF HULL

THE ORGANISATION OF AFRICAN UNITY AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN AFRICA

being a Thesis submitted for the Degree of

Doctor of Philosophy

by

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October, 1988.

The Organisation of African Unity and the Protection of Human Rights in Africa.

Synopsis:

The adoption of the African Charter on Human and Peoples Rights (AFCHPR) on 17 June 1981 by the O.A.U. Assembly of Heads of States and Government is, singly, the most significant act in the field of Human Rights protection in Africa. The Charter entered into force on 21 October 1986. These developments have inspired the Commission of this thesis.

The aim of this thesis is to examine the promotion and protection of human rights in Africa in three main areas, namely, historical/cultural perspectives, national and regional legal regimes for the promotion and protection of human rights in Africa.

The thesis is divided into eight chapters. The first Chapter explores the historical and cultural background of human rights in Africa. The examination of the socio-legal issues raised in this area serves as a useful backdrop in appreciating the difference between the African notion and western notion of human rights. The impact of the traditional African concept of human rights on the AFCHPR is also explored.

The second Chapter examines the evolution of the OAU with particular emphasis on the relevance of human rights considerations in the resume of events proceeding its formation. An analysis of the Charter of the OAU and the functions of its principal organs is also undertaken with a view to establishing their relevance to the promotion and protection of human rights.

Chapter three examines the concept of self-determination in Africa as pursued by both the UN and the OAU, including an analysis of the strategies of both organisations towards the notion of socio-economic self-determination.

Chapter four explores the issues of ethnicity, racism and apartheid as obstacles to the protection of human rights on the continent. An evaluation of the solutions to these problems is undertaken, with specific regard to economic and diplomatic sanctions against racist regimes and legality of military and financial assistance to liberation movements.

The protection of human rights in the constitutions of African States is examined in Chapter five. The compatibility of the human rights provisions in national constitutions vis-a-vis the AFCHPR is also considered.

In Chapter Six, we undertake an examination of the evolution of the regional machinery for the promotion and protection of human rights in Africa. The relevance and impact of existing international and regional human rights procedures to African States is also examined.

A legal analysis of the AFCHPR as well as its socio-political implications is undertaken in Chapter Seven.

The concluding Chapter is an appraisal of the state of human rights in Africa today. It also profers solutions to problems raised during the course of this research.

The effectiveness of the emerging African legal regime for the promotion and protection of human and peoples rights will ultimately depend upon the cohesion of national, regional and international human rights measures. This thesis thus attempts to chart a course through the labyrinth of national, regional and international legal instruments for the protection of human rights with particular reference to Africa.

ACKNOWLEDGEMENTS

I wish to record my sincere gratitude and thanks to my supervisor, Mr. J. Scott-Davidson, Lecturer in Law of the University of Hull, under whom I was fortunate enough to undertake this study and from whose experience as a teacher of International Law of Human Rights, I derived enormous benefit. Mr. Scott-Davidson's critique and illuminating guidance of this thesis, as well as his invigorating enthusiasm and interest in my research have contributed immensely to the completion of this work.

My special thanks go to Professor Osita Eze of the School of Legal Studies, Imo State University, Aba, Nigeria, for his encouragement and from whose immense experience as a pioneer in human rights law in Africa, I derived great benefit.

I am greatly indebted to the Librarian and Members of Staff at the Brynmor Jones Library, University of Hull, who provided excellent services which proved invaluable to my research. I would also like to thank the members of staff of the Libraries of the Institute of Advanced Legal Studies, London, the School of Oriental and African Studies, the Royal Institute of International Affairs, the United Nations Information Office, London and the Nigerian High Commission, London.

During the course of this work, I was opportuned to undertake research at the OAU Secretariat and at the Economic Commission for Africa (ECA), Addis Ababa. My special thanks go to Ambassador Brownson Dede, OAU Assistant Secretary (Political Affairs) for discussions he willingly agreed to have with me about aspects of my work and for responding to questions on the OAU. Likewise, I should also like to thank a few individuals whose assistance during my sojourn at Addis Ababa lightened my task. These include, Mrs. Adua Coleman-Tommy, Mr. Ali Farah, Mr. Raymond Fell, Mr. Joe Felli and Madame Tchouta Moussa. To the members of the staff of the libraries of the OAU and ECA, I acknowledge the inestimable debt which I owe them.

It is universally acknowledged that International Non-Government Organisations (NGO's) are at the vanguard of human rights promotion and protection. This work could not have been completed without the valuable data and information supplied by some NGO's, I thus wish to particularly acknowledge the invaluable assistance rendered by Mr. Chris Avery of Amnesty International, Mr. Adama

Dieng of the International Commission of Jurists and Ms. Julia Hauserman of "Rights and Humanity".

I should also like to commend the work of writers and commentators etc., on human rights and African Law, politics and sociology, whose invaluable contribution to these fields have likewise, enriched my work.

I am greatly indebted to Mrs. Christine Dove for her typing of this thesis and for the interest she developed in my work.

Finally, this work would not have been brought to fruition without the financial assistance of my father, Alhaji A.G.F. Razaq LL.B.; MA(TCD), the Bursary Award of the University of Hull and the indispensable support of my family and friends, to them I extend my profound appreciation.

Much as the assistance rendered by the above mentioned aides and well-wishers has influenced the evolution of this work, they are in no way responsible for any of its shortcomings, this responsibility I alone must bear.

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Chapter One

Theoretical, Ideological and Cultural Perspectives of Human Rights

(a) Introduction

In examining theoretical perspectives of human rights we should take heed of the caveat of Javolenus that "Omnis definitio periculosa est" which is as relevant to the definition of human rights as any other legal concept whether as a purely legal phenomenon or a social phenomenon. This caveat is underlined by Lloyd who maintains that "it must be remembered that choices will be influenced by personal ideologies and attitudes of the chooser, whether for instance he favours capitalism or socialism, or whether for instance, his general outlook is religious or positive. Thus linguistic recommendations may be activated consciously or subconsciously, by such underlying premises. It must be born in mind that even behind the most apparently technical of rules there may be lurking deeply held social or political philosophies" [1].

Thus it will become evident in our examination of theoretical, ideological and indeed cultural perspectives of human rights that different meanings are given to human rights, in different ideological and cultural systems. This lack of universal concurrence as to the meaning of human rights, human dignity and freedom is due, no doubt to the diverse economic, political, social and cultural experience of the various regions of the world. However, the apparent universal subscription to the concept of human rights and fundamental freedoms as prescribed by the Universal Declaration of Human Rights has not foreclosed the agitation for the reappraisal of the conceptions of human rights.

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[1] D. Lloyd, Introduction to Jurisprudence, 2nd ed. (London Stevens & Sons) 1965, p.32

An examination of the Universal Declaration of Human Rights reveals that its provisions are founded upon the western concept of political liberty and democracy, inclusive of property rights in contradistinction to socio-economic rights and egalitarianism[2]. The Universal Declaration has been regarded as a document based on the assumption that western values are paramount and should be extended to the non-western world[3]. Despite these criticisms, the significance and influence of the Universal Declaration has not waned. The Charter of the OAU as well as the constitutions of many African States expressly subscribe to the principles of the Universal Declaration[4]. In order to appreciate the universal acknowledgement of the principles of the Universal Declaration a brief spectral summary of the human rights activity in historical perspective is necessary.

Evidence of such activity long before the advent of the Universal Declaration, can be found in the Babylonian Laws (in the reigns of Urukagina of Logash, 3260 BC, Sargan of Akkad, 2300 BC, and Hammurabi of Babylon, 1792-1750 BC)[5] as well as in the Assyrian Laws (those inscribed on the nine day tablets in the reign of Tiglath-Pileser I, 111-1077 BC)[6] and in the Hittite Laws (especially those ascribed to the reign of King Telepinus, 1516-1486 BC)[7]. The

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[2] A. Pollis & Peter Schwab, "Human Rights: A Western Construct with Limited Applicability" in A. Pollis & P. Schwab (eds) Human Rights: Cultural and Ideological Perspectives. (Preager. New York) 1979 p.8

[3] Ibid

[4] See Chapter Five on the Relevance of National Constitutions in the Protection of Human Rights in Africa at p.72.

[5] For a collection of these laws, see G. Driver and J. Miles, The Babylonian Laws (Oxford 1968)

[6] See G. Driver and J. Miles, The Assyrian Laws (Oxford 1935)

[7] For a collection of these laws, see E. Neafield, The Hittite Laws (Oxford, 1951)

Dharma of ancient India (Vedic Period: 1500-500 BC)[8] and the jurisprudence of Lao-Tse (b.604 BC)[9], and Confucius (circa 550-478 BC) in ancient China prescribed laws for the protection of human rights. The citizens of the city-state of ancient Greece enjoyed many rights including freedom of speech (isogoria), equality before the law (isonomia), the right to vote (jus suffragii) and the right of access to justice (jus actionis). Similar rights were prescribed by Roman Law under "jus civile".

An examination of the history of the evolution of human rights reveals that most of the significant revisions in the nature and scope of human rights have generally resulted from socio-political upheavals.

The important revisions including the Great Charter of the Liberties of England or the Magna Carta (1219)[10], Statutem det allagio non cocendendo (1217)[11], the Petition of Rights[12], the Instrument of Government[13], the Habeus Corpus Act (1679)[14], the Bill of Rights

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[8] A. Basham, The Wonder that was India, 3rd rev. ed. (Oxford University Press 1968)

[9] A. Waley, The Way and Its Power, The Study of the Tao Tse Te Ching (Oxford, 1934)

[10] After being defeated the King of France in 1214, King John had this Charter imposed on him by the prelates, earls and barons of his realms on the meadows of Runnymeade near Staines (Surrey)

[11] Edward I gave this Statute to the English people, he also convinced representatives of farms and counties to the Parliament

[12] Parliament presented this petition to Charles I, who sanctioned it on 7 June 1628. The King was subsequently tried and beheaded.

[13] This instrument gave supreme authority to Oliver Cromwell as Lord Protector of the Commonwealth of England, Scotland and Ireland.

[14] Enacted by Charles II on 26 May 1679, this was officially titled An Act for the Better Securing the Liberty of the Subject and the Prevention of Imprisonment beyond the Seas.

(1689)[15], the Constitution of the United States (17 September 1787), and the Declaration des Droits de l'Homme et du Citoyen" (26 August 1789)[16].

Human rights provisions have since this "Declaration" been included in the constitutions of most countries of the world, irrespective of ideological barriers. Western nations[17] as well as Eastern bloc countries[18] including the Soviet Union[19] have subscribed to notions of human rights in their respective constitutions. Similarly, the newly independent States of Africa and Asia[20] have included provisions regarding human rights in their respective constitutions.

In recent times, the quest for an adequate theory of human rights has been beleaguered by the ideological war that has persisted between the Socialist and Capitalist camps. In describing the polarity of the two arguments Schnieder states that:

> "If, for some, the system of economic exploitation hiding, according to them, behind the facade of Liberal Democracy is in total contradiction to human rights, for others, the so called liberation of the proletariat and the development towards real humanity in the Communist sense are really a

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[15] Officially titled "An Act for Declaring the Rights and Liberties of the Subject and the Settling of Succession of the Crown", enacted on 16 December 1689.

[16] La Fayette, who supported the cause of the Americal colonies for independence, introduced this declaration in the French "Assemblee Constituante" in July 1789.

[17] For instance the Belgian Constitution of 1831, the French Constitution of 1946, and the Constitution of the Federal Republic of Germany 1949 in J. Verzjil. Human Rights in Historical Perspective 6 (1955) p.59-71

[18] For instance, see the Constitution of the Czechoslovak Socialist Republic of 1960 and the Constitution of the Socialist Republic of Yugoslavia.

[19] Peselj "Recent Codifications of Human Rights in Socialist Constitutions in Howard Law Journal Vol 11 (1965) p.342, See also, Bermann "Human Rights in the Soviet Union, Howard Law Journal, Vol.33 (1965) p.333.

[20] George "Human Rights in India" in Howard Law Journal, Vol.11 (1965) p.291

> pretext leading to slavery and to the establishment of totalitarian power of party and state to which the rights of the individual are exposed without protection[21].

While the above statement reflects the ultra-capitalist view of communism and vice versa, in reality the historical experience of each camp has moulded the human rights concept unique to them. Therefore arguments representative of many African scholars advocating a preference for "a socialist society - where the transfer of real power to the majority creates a much more solid foundation for greater democracy and human rights"[22] in our opinion, avoids the concrete realities of the societies of Africa.

The efficacy of a human rights theory depends upon the extent to which it reflects a given societies cultural, economic and ideological experience. The wholemeal application of foreign theories to the unique contents should be reassessed. The aim of this chapter is to examine the jurisprudence of human rights with a view to understanding the struggle of man for human rights.

Other methodology shall involve the dialectical approach which will focus on the interconnectedness and interdependence between the various facets of social existence[23]. The dialectical method proceeds by theories anti-theories and synthesis and is suitable to our appraisal of the

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[21] Peter Schneider "Social Rights and the Concept of Human Rights" in D.D. Raphael (ed) Political Theory and the Rights of Men (Bloomington, Indian University Press) 1967 p.81

[22] Osita Eze, Human Rights in Africa: Some Selected Problems (Macmillan, Lagos, Nigeria, 1984), p.3. See Claude Ake "The Congruence of Political Economies and Ideologies in Africa" in P.C.W. Gurkind and I. Wallerstein (eds) The Political Economy of Contemporary Africa (Beverley Hills, Sage Publications) 1976 p.198.

[23] T.F. McCarty, J.B. Maine, S.P. Marks and L. Sivois (under the supervision of Karel Vasak) Human Rights Studies in Universities (Paris, Unesco) 1973 p.82.

evolution of human rights. This method should explain the confusion inherent in the naturalist, positivistic and normativistic conceptions of human rights that still exist today in various formulations. It should also explain the lacuna in the sociological school which still retains elements of the positivistic theory of Anglo-American jurisprudence.

In identifying a theory of human rights which reflects the material conditions of a given society we reject the techno-juristic conception of law and order which is purely restricted to the legal aspects of a social phenomenon.

We shall thus adopt the dialectical method which will emphasise the relevance of the material being conditions of men, their cultural relativity and the establishment of an equitable and just social order. Since the realisation of human rights cannot be considered outside historical and structural contexts we shall also examine the concept of human rights in the pre-colonial traditional Africa. An analysis of the human rights in Colonial Africa will also be undertaken as a vital backdrop to the analysis of the struggle for self-determination of the continent.

(b) Jurisprudence of Human Rights

One of the most significant of the numerous conditions affecting the international community's future in securing the protection of human rights may be described as that of simple intellectual confusion[24]. The source of this confusion must be the lack of consensus among the proponents of jurisprudential theories of human rights. The schools of jurisprudential thought include the theological, natural law, positivist, historical utilitarian, social science, realists and variants thereof.

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[24] M. McDougal, H. Laswell and L. Chen. Human Rights and World Public Order (New Haven Conn. Yale University Press) (1980) p.63

The common denominator of all these theories is the compelling need to provide a justification for human rights. Human rights represent demands or claims which individuals or groups make on society, some of which are protected by law and have become 'lex lata' and while others remain aspirations to be achieved in the future. Consequently, the juridicalization of human rights is necessary because in its absence, individuals would merely be appealing to moral doctrines and public opinion when their rights are encroached upon by the State, rather than invoking established laws designed to protect them from such excesses.

(i) Natural Law

Western conceptions of human rights were derived from Greco-Roman and Judaeo-Christian traditions which asserted both rights and duties as expounded in the "natural law" arguments.

The classical conceptions of natural law were predicated on elementary principles of justice which were right reason. Cicero believed that true law is right reason in agreement with nature which is valid for all nations and all times and from whose obligations we cannot be freed by senate or people, God being the author, propagator and enforcer of this law[25]. The theory of Natural Law as law of land which conferred certain immutable rights upon individuals was emphasised by Thomas Aquinas[26]; Natural Law, according to him, is part of divine law which is discernable by reason. However, Aquinas concept of good tolerated slavery as just,

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25 Marcus Tullius Cicero, De Republica. De Legibus De Republica, Book II, IV, 379-85, V 383-87 (C. Keyes trans. 1952)

26 Heale, A Catholic View of Human Rights: A Theoristic Reflection, in A. Rosenbaum ed. The Philosophy of Human Rights (Westport Conn. Greenwood Press) 1980 p.87-97

although unlike Aristotle[27], he denied that any man was by nature a slave since Gods grace is distributed uniformly.

The link between natural rights theory and modern human rights was established by John Locke who believed in a state of nature where men and women were at freedom to determine their actions and at freedom to set up political autonomy which upheld natural rights of life, liberty and property[28]. Natural rights theory has made significant contributions to the development of human rights in that it emphasises freedom and equality as a fountain from which other human rights naturally flow. However reservations have been expressed about the suitability of natural law as a criteria of determining norms of human conduct. Firstly, the theory is based upon either the absolute belief in God or the belief in the innate being of man. However such convictions, though desirable, are not universally upheld[29]. Secondly, that the natural rights theory is founded upon the universability and immutability of basic postulates which neglect cultures and social diversity of human beings. Thirdly, that a normative principle for human rights cannot be

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[27] Aristotle, The Politics Book IV Chapter 14. Aristotle explained the need for authority and restrained freedom. In emphasising the idea of justice he believed that slaves were excluded from its applications because they are not equal to free men, slavery was a natural institution since some people are by nature slaves thus being less discerning and capable

[28] Raymond Polin "The Rights of Man in Hobbes and Locke" in D.D. Raphael (ed) Political Theory and Rights of Man (MacMillan. London) 1967, p.20-21

[29] During the conference that was held in review the drafting of the Universal Declaratin of Human Rights, the proposal to edify human rights by bringing it under the protection of Divinity or by reference to the Divine origin of man was rejected. The USSR observed that the attempt was tantamount to imposing one nations faith on others, and that the Declaration must not contain theological affirmations given the separations of Church and State in numerous countries and furthermore that the Declaration must not include questions meant to be reached by each individual for himself which indeed is one of the rights protected by the Declaration in the form of the freedom of thought, conscience and religion (Article 18). See the Proceedings of the Third Committee 90-126 UN Doc A/C 3/SR 95-100 (1948).

based on a postulate that human rights are owed to man because of the very fact that he is man. Thus, the postulate wrongly presumes the universality of human nature and conduct. The potential for such an end may exist but it cannot be assumed. Fourthly, that the multiplicity of norms set as a basis for natural rights are as many as the natural rights theorists[30].

The main difficulty therefore with the naturalist logic relates to the vagueness of the names and ambiguity of the mandate. These difficulties left numerous legal philosophers disenchanted with the natural rights theory[31]. However, in recent times there has been a re-emergement of natural rights theory. The renaissance of the naturalists rights logic has led to considerable agreement among the theorists to formulate the concept of a minimum definition of what it means to be human in society[32].

The influence of the renaissance of rights theory on international law is reflected in the preamble to the Universal Declaration of Human Rights which states that: "Whereas recognition of the inherent dignity and of the equal and inallienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...". Similarly,

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30 For instance, for natural law as morals: Dabin (b.1889); as deontology: d'Entreves (b.1902); as related to sociology: Se Iznick (b.1919); as ethical jurisprudence: Cohen (1880-1947); as relativity of rights and restraints: Chroust (b.1907); as sence of injustice: Cahn (1906-1964). For natural law theories generally see Leo Straus, Natural Rights and History, (the University of Chicago Press, Chicago) 1971.

31 This disaffection is reflected in the oft-quoted criticism of natural rights, by Jeremy Bentham: "Right is a child of law; from real laws come real rights, but from imaginary law, from "laws of nature" come imaginary rights... natural rights is simple nonsense: natural and impresciptible rights, rhetorical nonsence, - nonsense upon stilts". For a study of J. Bentham's critique of natural rights theory see Hart "Utilitarianism and Natural Rights" Tulsa Law Review Vol 53 1979 663

32 Oldfrom, "Essence and Concept in Natural Law Theory", in Law and Philosophy 1964, p.239

article 1 of the Declaration states that: "All human beings are born free and equal in dignity. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood".

The implication of these provisions is that there are some inherent rights of the individual that must be protected in all organized societies. Further practical evidence of modern invocations of the naturalist theory is reflected in Tanzanias justification for its role in overthrowing the Amin regime in Uganda. The barbaric practices of the Amin regime caused such universal outrage that Tanzanians violation of Uganda's sovereign rights were overlooked and Tanzania's actions were justified on naturalist and humanitarian grounds. During the Nuremberg trials of 1945, although the judgements were set in the framework of positive law, they derived their validity from public consensus that the Nazi leaders had acted in defiance of naturalist logic[33]. The influence of the natural law theory is also evident in the American Declaration of Independence and the French Declaration of the Rights of Men and Citizens[34]. Thus, despite its initial demise, the natural law theory has been resuscitated with various attempts to rationalise its basic philosophy. This revival is not unconnected with the inadequacy of positive law, based on technisms, in resolving social problems.

(ii) The Positive School

The emergence of the positive school of law was a reaction against the a priori and metaphysical basis of natural law, which had failed to explain the basis of law in an increasingly complex society. The positive movement secularized the concept of law by withdrawing it from the realm

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33 Richard Falk, Human Rights and State Sovereignty (Holmes and Meier/London) p.44.

34 L. Henkin "Right Here and There" in Columbian Law Review Vol 81, No. 8 (1981) p.1591-1594.

of supernatural[35]. The predominant theory since the peace of Westphalia has been associated with the "will" of the sovereign state. Consequently one of the major influences of current human rights theories is the classical theory of legal positivism. The positivists view assumes that all authority stems from what the state and its officials have prescribed. Thus since the notion of rights evolved within the context of domestic political struggles the source of human rights are contained only in the enactments of a framework of law with the corresponding sanctions of the State. The State can, therefore, enhance the protection of human rights by using its institutions and procedures to the optimum benefit of the individual.

The contribution of positivism to the development of any system of rights in intentional law is reflected in the existence of human rights conventions and treaties. These instruments were created by States to form part of the system of international law and are thus evidence of positive collection of rights. Legal Positivism reduces law to a matter of commands, rules and norms[36].

The major drawbacks in the positivist theory are basically predicated upon the distinctions made between that the law 'Is' and what the law "ought to be". The philosophical division between the legal system and ethical or moral foundations preclude a progressive development of the law[37]. For instance, the morally abhorrent <u>apartheid</u> policies of South Africa are based on positive law. This major defect in positivism affects

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35 D. Lloyd. <u>Introduction to Jurisprudence</u> (Stevens, London) 1972, p.79.

36 H.L.A. Hart, "Positivism and the Separation of Law and Morals" <u>Harvard Law Review</u> 71, (1955) p.593.

37 J.J. Shestack "The Jurisprudence of Human Rights" in T. Meron (ed) <u>Human Rights in International Law: Legal and Policy Issues</u>. (OUP-Oxford) 1984 p.80.

the desirability of the theory as a normative basis for human rights, especially as the State can justify the application of inhuman laws as the basis of legal positivism.

Neo-Positivists like Professor H.L.A. Hart have revised the philosophy to create a criteria, for the invalidation of government laws, based on the standards that have been recognised and accepted by the community[38]. The major standards being the (natural)/equal right of all people to be free[39]. The neo-positivist recognition of concepts of natural rights may lead to the gradual acceptance of aspects of morality as the basis of invalidating laws. However, in the absence of such an acceptance, the gulf between the positivists logic and naturalist logic will remain.

In practical terms, positivism has served the reinforcement of juridical ideas of equality of states and the sanctity of treaties. The sanctity of sovereign states, mutually respective of each others prerogatives necessarily preclude any missionary attempt to intervention for humanitarian purposes[40]. Consequently the positivist or statist theory connotes the realisation of human rights or a substantial part thereof, through the internal dynamics of domestic politics. We therefore, submit that positivism being a self sufficient model of commands, rules or norms cannot serve as an adequate theory for the fundamental rights of man. This summation is underlined by the inability of the concept to look beyond the limited framework of pure law for the solution of societal problems.

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38 H.L.A. Hart op cit p.593.

39 Ibid.

40 Richard Falk op cit p.36.

(iii) The Socialist Concept of Law and Human Rights

The socialist theory of human rights recognizes human rights as those which have become part of a positive legal system. Vyshinskii defines law as "the aggregate of rules of conduct or norms, yet not of norms alone, but also of customs and rules of community living confirmed by the state authority and coercively protected by that authority"[41]. Thus, the State prescribes the rights and duties of citizens and institutions in accordance with the consciousness, interest and will of the dominant class. The law, in the socialist context, expresses the requirement of economic development only after they have been recognized and formulated as political demands of the state[42].

Marxist philosophies, similarly accept law has the machinery of the ruling class backed by coercive force of the state with the aim of protecting and developing social relationships and arrangements, advantageous and acceptable to the dominant class[43]. Modern Communist doctrine has followed this theory and the practice of Eastern bloc states reflect the transitional stage of socialism under which the state and ruling party must play a major part in transforming society. According to Marx, "Law can never be more highly developed than the economic structure and the social state of culture caused by it"[44]. Consequently Marxist theory regards human rights and evolution thereof, as ultimately determined by the economic, political, moral and cultural conditions of society. Marxist theory lays emphasis on the economic infrastructure, on which the evolution of law as the superstructure depend. This theory therefore, precludes the existence of individual rights based on the state

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41 Quoted in M. Fawovskyi "Soviet Political Thought" in D. Lloyd op cit, p.672.

42 Marx/Engels, Works Vol 3, p.539; Marx/Engels, Works Vol 19, p.21.

43 M. Fawovskyi; op cit. p.672.

44 Marx/Engels op cit Vol.19, p.21

of nature which is prior to the State; only legal rights exist and these are predicated upon the fulfilment of obligations to society.

The main reservation on the socialist conceptualization of rights is based on the dogma that the State cannot formulate laws for whose implementation the conditions have not matured and that the artificial acceleration of social transformation with the aid of law will lead to havoc[45]. Some Soviet scholars do not assign primary significance to the law and believe in the development of an ethical system to change Russia's 'cold and formal' laws that have little beneficial influence on society and paralyse mans noblest impulses[46].

The Soviet approach to human rights reveals an inherently inadequate theory that does not provide a normative standard which secures State recognition of the individuals security against its power. The practice of communist States in their quest for societal goals often leads to the suppression of civil and political rights.

The impact of socialism on human rights has been in form of evolving the concept of economic and social rights[47] and their subsequent inclusion in the international human rights instruments. The paradox here is that, despite the recognition of economic and social rights by socialist and communist States, socialist theorists still maintain that laws cannot be utilised for the acceleration of social transformation. Evidently, these

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45 V. Chkhikvadze, The State, Democracy and Legality in the USSR: Lenins Idea Today (Moscow, Progress Publishers) 1972. pp. 41-42.

46 Alexander Solhenitsyn's speech at Harvard University on June 8 1978. New York Times June 9 1978.

47 These rights were first officially proclaimed in the 1918 "Declaration of the Rights of the Toiling and Exploited Peoples" adopted by the All Russian Congress of Soviets and later codified in the Soviet Constitution of 1936 and 1977. See E.H. Carr "The Rights of Man" in Human Rights: Comments and Interpretations (New York: UNESCO Columbia University Press) 1949, pp.19-20.

arguments are directed towards the civil and political rights as opposed to social and economic and social rights.

We subscribe to the view that human rights can only become a reality if political and economic rights are inextricably woven into the fabric of society[48].

The recent attempts to formulate and to an extent introduce African Socialism has failed due to two basic factors. Firstly, it is clear that Marxism did not address itself to the problems of transition from neo-colonial economy's to socialism[49]. Consequently, there exists a confusion among African socialists over the method to achieve African Socialism. One approach deems it necessary to develop the productive forces under capitalism before transition to socialism can be achieved. Another method advocates the instant recourse to socialism without necessarily developing capitalist productive institutions[50]. The approach sought by some African scholars advocates the demolishing of all developed capitalist socio-economic formations as well as the entire African capitalists class[51].

Secondly, the existing theories of African Socialism are defective in that they fail to take cognisance of Africa's triple heritage namely indigenous

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[48] Susan E. Heuman "A Socialist Conception of Human Rights: A Model from Pre-Revolutionary Russia" in A. Pollis & P. Schwab; Human Rights: Cultural and Ideological Perspectives (Praeger:London) 1979, p.46.

[49] M. Palmberg "Anti-Imperialism or Pro-Imperialism: Is There a Place for Non-Capitalist Development?" in K.M. Jyrkti (ed) The Mechanism of Neo-Colonialism (Finnish Peace Research Association: Proceedings of the Nordic Seminar, 1974) p.115.

[50] See J.K. Nyerere Ujamaa: Essays in Socialism (OUP Nairobi) 1968.

[51] O. Eze The Legal Status of Foreign Investments in East African Common Market, (Geneva - Institut Universitaine de Hautes Etudes Internationales/Leiden, Sijthoff) 1975 Chapter 2.

traditions, Westernisation and Islamization[52]. The efficacy of any theory or institution 'imported' into Africa is predicated upon its capacity to bridge the gap between contemporary circumstances and ancient values and ancestral traditions.

In practice, the predilection of several African scholars for socialism has influenced the adoption of the dogma by many regimes. This has invariably led to the suppression of certain fundamental human rights at the alter of the socialist ideology of the State. In the final analysis, socialism does not provide an adequate theory for the protection of the individual and the positive fulfilment of his needs.

(iv) Sociological Jurisprudence and Modern Theories

The approach of sociologists towards evolving a theory of human rights is based on the principle of "social engineering". The aim is to achieve an equitable protection of interests among prevailing moral sentiments and the subsisting social and economic conditions.

Roscoe Pound proposed the universal recognition and protection of human ants, human demands and social interests through politically organised society with minimal sacrifice to the totality of interests[53]. The sociological school does not however address itself to the critical role played by the state in its interaction with the other competing interests in society[54]. Although the sociologists suggest a catalogue of "individual interests" in need of protection and provide empirical basis for the survey of rights, the theory has been criticized for not addressing the

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52 Ali A. Mazrui; The Africans: A Triple Heritage. (BBC Publications, London) 1986 p.70.

53 Alan Hurt, The Sociological Movement in Law (The MacMillan Press, London) 1978 pp. 11-30.

54 Ibid

issue of priority of rights[55]. Thus the anthropocentric theorists have suggested an order of priority of "anthropocentric needs of planetary existence with justice" as the basis of the theory of human rights[56]. The anthropocentric theory is based on the fulfilment of human rights with justice. Thus whereas other sociological theories are in need of a philosophy, the anthropocentric school is predicated on justice.

Although the 'justice' is not defined by the anthropocentric theorists, an examination of John Rawls theory of justice[57] reveals that the latters principles of justice are arranged in a hierarchy that is apparently incompatible with the formers priority of needs. Rawls principle of justice gives priority first to liberty, whereas, the anthropocentric theory regards liberty as secondary to the primary needs of survival and economic rights. However a reconciliation between these ostensibly conflicting priorities may be achieved by subscribing to Rawls' "difference principle" which is based on the egalitarian concept of distributive justice or social justice under which individual liberty may be limited to further common good.

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55 S.P. Sinha "The Anthroprocentric Theory of International Law as a Basis for Human Rights"; Case Western Reserve Journal of International Law Vol 10, (1978) p.497.

56 The anthropocentric needs are classified as Primary Needs of air, food, water, procreation and the preservation of life; and the secondary needs of economic settlement, cultural enrichment and the achievement of intangible values such as freedoms and liberties. See S.P. Sinha Ibid.

57 J. Rawls, A Theory of Justice (Oxford, Clarendon) 1971 p.187. For an analysis of Rawls theory see Scanlan, 'Rawls Theory of Justice', University of Pennsylvania Law Review (1973) p.1020.

Without prejudice to the emerging modern human rights theories[58] and the continuing tension between liberty and equality, we subscribe to the notion that a human rights theory should be predicated on the fulfilment of man's needs of his existence based on social justice[59]. By utilizing efficient empirical methods of sociological research, human needs can be adequately determined, unlike a priori theories and other analytical forms of jurisprudence.

Secondly, an efficient human rights theory must produce a basis for the priority of rights and moral preferences as acknowledged by the social policy.

Thirdly, such a theory should accommodate cultural relativity. We do not subscribe to the notion of culture as a universal idea embodying universal and absolute value with its corollary being the adoption of a universal human culture as an absolute concept. It should be emphasised that the indiscriminatory application of liberal western or socialist theoretical conceptions of human rights to African countries is unrealistic[60]. The cultural relativist approach does not insulate social policies from the recognition of international human rights norms. In evolving, prescribing and applying the principles of international human rights adequate consideration should be given to the cultural relativity of

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58 These schools include: the Utilitarian School which emphasizes a maximixing and collectivizing principle that requires governments to maximise the total sum of the happiness of all their subjects as propounded by Jeremy Bentham. The main reservation regarding the utilitarian principles is that an individuals welfare and desires may be sacrifised for the increase in the aggregate satisfaction of welfare. Also, see the value-policy oriented approach based on the protection of human dignity as proposed by Professors McDougal, Laswell and Chen, in Human Rights and World Public Order (1980) op cit

59 Some western jurists have criticized the social justice theory of human rights as too inclusive. See J. Donnelly "Human Rights and Natural Rights. Human Rights Quarterly Vol.4 (1982) p.405.

60 A. Pollis and P. Schwab "Human Rights: a Western Construct with Limited Applicability" in A. Pollis and P. Schwab (eds) op cit

man. This approach does not reduce the fact that all peoples have a keen sense of injustice in an indisociable blend of reason and empathy[61]. Consequently there is a need for international law to adopt a functionalist approach to the fulfilment of specific values and needs of individuals.

Fourthly, human rights from an anthropocentric (viewpoint) are ontological in character and relate to man in historicity. In other words, human beings regardless of their culture were not transhistoric impersonal beings but dynamic individuals in the evolution of history. Therefore given the differences in historical experience and contemporary conditions, what was "natural" evolution in the west may not appear so "natural" in the developing world[62].

The foregoing appraisal of some of the main theories of human rights has revealed that each one has certain apparent inadequacies. While most of these theories have contributed to the development of human rights, they have failed to provide an acceptable conceptualization of human rights in the contemporary context.

One's inclination is towards a cross-cultural theory demonstrative of the naturalist, sociological, anthropological and justice theories. Eclectic though it may seem, this theory is predicated upon the satisfaction of man's needs based on human dignity and social justice and development. This conceptualization recognises that all societies acknowledge the need to protect the human dignity inherent in man. Thus, to preserve mans dignity, it is essential to fulfil his basic needs for subsistence. The concern for social justice and development as reflected in the theory, is

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61 Edwin Cahn, The Sence of Injustice; An Anthropocentric View of Law (New York, New York University Press, 1949) pp. 22-27.

62 A. Pollis and P. Schwab op cit p.14.

based on the belief that it will enhance the recognition of protection of human rights, increase universal participation, encourage the provision of basic services and infrastructure through the recognition of economic and social rights, and provide adequate and vital procedures for the redress of wrongs against individuals and groups.

A normative theory that encapsulates the foregoing characteristics will to a large extent provide the basis for accommodating the largely contrasting cultural and ideological conceptions of human rights.

In the absence of a universally acknowledged normative theory of human rights, it is pertinent to address the need at least for a common consensus on what should constitute the minimum content of human rights.

The content of international human rights spans several categories: civil, political, economic, social and cultural. In the human rights protection system there are:-

a) Rights which ought to be enjoyed by all individuals independent of legislation.
b) Rights that are not yet enjoyed but are accepted as ideals to be achieved, and
c) Limits on individual, group and government activities[63].

While it is not possible or necessary to define "human rights" as a collective term, there are however, minimal elements that are generally accepted as constituting the core of human rights. These elements are

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63 See generally: Vernon Van Dyke, Human Rights in the Unites States and the World Community (Oxford University Press: New York) 1970.

embodied in the Universal Declaration of Human Rights[64].

The Universal Declaration of Human Rights is normally regarded as the pivot of the international system for the protection of human rights since it provides for human rights that are acknowledged by the international community.

Essentially, the Universal Declaration reflects certain universally acknowledged principles. Although some provisions of the Declaration allow for flexible interpretations to suit particular ideological or socio-political views[65], other provisions like those pertaining to personal freedoms do not allow for broad interpretations.

From a jurisprudential standpoint, the Universal Declaration draws inspiration not only from the natural doctrine, but also from the positivist concept[66]. Ideologically, although the Declaration accommodates aspects of the socialists concepts of human rights, the Western Liberal doctrines of human rights are rather more extensively incorporated therein. A comparison between the socialist and western liberal concepts of human rights was achieved by the Declaration. Therefore, the Declaration is essentially a catalogue of principles characteristic of the systems of European civilisation and culture.

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64 Egon Schwelb "The International Court of Justice and the Human Rights Clauses" AJIL (April 1972) pp.337-351.

65 See articles 22 and 29 of the Universal Declaration of Human Rights in Ian Brownlie Basic Documents in International Law (Clarendon Press, Oxford) 1981.

66 Third preambular paragraph of the Universal Declaration states that "it is essential that these rights should be protected by the rule of law".

Although most of these principles are not exclusively European[67], the Declaration does not reflect African socio-cultural values and rules which considerably influence social relations and doctrinal concepts in the region.

The following rights are generally considered to be the content of western notions of human rights. These rights which are mainly civil and political include:

1) The right to life;
2) protection against arbitrary arrest, detention or exile;
3) equality within the law;
4) the right to effective remedy for acts violating the fundamental rights granted (an individual) by the constitution or by the law;
5) the right of fair trial;
6) the right to leave and return to ones country;
7) the right to nationality;
8) the right to seek asylum;
9) the right to property;
10) freedom of thought, conscience and religion;
11) the right to liberty.

The content of economic, social and cultural rights evolved mainly by Eastern European statutes include the right to:

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[67] The fact that all African states have consistently subscribed to the principles of the Universal Declaration confirms this view. Adherence to the Declaration was reiterated in a solemn declaration issued by the OAU to mark its Tenth Anniversary in 1973. See the preamble and article 2 (b) of the Charter of the OAU: (Appendix II post). See also Person Yves "L'OUA ou une deciennie d'epreuvres pour l'unite". Revue Francais d'Etudes Politique Africaines No. 93 (Sept 1973) pp. 26-30.

1) work;

2) equal pay for equal work;

3) leisure and rest;

4) a standard of living adequate for health and well-being of individuals and their families.

5) equal accessibility to education on the basis of merit;

6) freely participate in the cultural life of the community;

7) a social and international order in which the rights and freedoms can be fully realised.

The conservative western scholars recognise only the civil and political rights of individuals as human rights properly so called. According to this view human rights are concerned with what can and must be honoured now, not with what right is desirable to provide for in the future. The relegation of economic and social rights by conservative scholars on the basis that it would be impracticable to provide for them, cannot be justified. Firstly, the social and economic rights including the right to subsistence are as significant as civil and political rights[68]. Both groups of rights have a universal scope since the everyone is entitled to them, despite differentiations in the obligations imposed[69]. Secondly, we subscribe to the view that there is no general difference between both groups of rights whether based on their significance or on the scope of their correlative obligations. The issue of priority of human rights cannot be determined solely on the basis of the stated group of rights since their significance may indeed vary as much within

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[68] Tom Paine. The Rights of Man (Everyman edn. London, Dent. 1969) pp.246-56.

[69] The difference between civil and political rights and economic and social rights have been predicated upon the fact that the former can be held against everyone while the latter imposes duties only on governments. Ibid.

the groups[70].

Furthermore the distinction between negative and positive rights does not provide an adequate criteria for determining the relative importance of human rights. For instance, the negative civil and political right to security for life may require a framework of "positive" measures - such as effective policing - before the right can be adequately enjoyed. On the other hand, the perceived positive right of subsistence may only require a "negative" measure - such as the removal of interference - in order to allow a person to provide for himself[71]. The absence of a universally acknowledged right to subsistence can be attributed to the western socio-economic and legal system, influenced by schools advocating the primacy of civil and political rights that takes subsistence for granted. This attitude and the exploitative effects of the world financial system on Africa has fuelled the prevailing view in Africa that economic and social rights should take preference over civil and political rights.

The Third World is regarded in some quarters as the crucible in which global consciousness of human rights is moulded because it is the centre of the anti colonial and development process in which the two streams of individualistic and social human rights flowing from the two worlds meet[72]. Alternative definitions of the core of human rights have thus been proferred by human rights specialists, sensitive to the ideological dualism in our world.

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70 Henry Shue, Basic Rights: Subsistence, Affluence and US Foreign Policy (Princeton, Princeton University Press) 1980. p.7.

71 Ibid p.35-45.

72 Fouad Ajami, Human Rights and World Order (New York Institute for World Order) 1978. pp.28-29. Peter Berger "Are Human Rights Universal?" Commentary 64, No. 3 September 1977 No. 60-63.

Fouad Ajami in his monograph for the world order models project combines these concepts in his four sets of concerns to achieve "maximum feasible concerns":

1) The right to survive hence the concern with the war system and nuclear weaponry.
2) The right not to be subjected to torture.
3) The condemnation of apartheid; it is acknowledged that other societies violate racial equality but South Africa is blatant and officially sanctioned and codified racism is particularly intolerable.
4) The right to food[73].

This view sees rights as both inherent in the individual and socially derived by development. Political freedoms are not possible without initial social development and conflicts are resolved in terms of the welfare of the society. However, the fault with Fouad Ajamis appraisal is that he does not seek a philosophical or legal foundation for his proposals; secondly his model does not seek to relate to the alleviation of man's misery in the poor societies of the Third World.

Socialism and the control of individual rights in the interest of the whole, is increasingly becoming generally acceptable in the Third World[74]. In prescribing the minimum content of human rights such commentaries exclude the right to property, regarding it as a capitalist notion[75]. It is further suggested that principles should be classed

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[73] Ibid at p.28.

[74] Richard Falk "Comparative Protection of Human Rights in Capitalist and Socialist Third World Countries", Universal Human Rights 1, 2 (April-June) 1979. R. Falk agrues that socialism is the appropriate ideology for development of the Third World. p.28.

[75] Ibid at p.26

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under the "facilitative human rights" principle of self-determination as opposed to being regarded as inherent human rights. It is thus stated that "the acquisition and use of property cannot be said to be something that is inherent in a person. Since the appearance of peoples democracies, the specifically individualistic emphasis implied that the right to property can no longer be said to be happily accepted"[76].

The validity of the above argument is questionable. From all evidence, the establishment of socialist democracies (albeit authoritarian or dictatorships) imply that the right to liberty and the freedoms of conscience, expression and assembly are no longer inherent rights. Furthermore, the principle of self-determination is based on the dynamics of choice and consent, inherent factors which are virtually non-existent in so called "peoples democracies". Indeed, the African Charter on Human & Peoples Rights does not support the foregoing argument since it specifically provides for the right to property[77].

It is therefore submitted that the practice of identifying the minimum contents of human rights cannot ignore that the legal obligations of States under various international and regional human rights treaties. With regard to African States, the minimum content of human rights should consist of the provision of the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights, without prejudice to the International Human Rights instruments which each State has ratified.

Consequently, in identifying the minimum content of human rights the basic civil and political rights, and social and economic rights

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76 HWO Okoth-Ogendo National Implementation of International Responsibility, East African Law Journal Vol.10 (1974) p.3.

77 Article 14, AFCHPR.

particularly the right to subsistence should be recognised. Thus the right to life, for instance, will be deprived of its meaning unless it is a right to subsistence as well as to security. We thus propose to maintain this standpoint on the basic interdependence and interrelation of rights throughout this thesis.

Admittedly, the fulfilment of some of the rights protected by these instruments, especially the social and economic rights, will depend upon the ability of the states to provide for them. In relation to the civil and political rights, K. Vasak observes that the protection of such rights cannot be appreciated without taking into account the objective conditions created by the underdevelopment of the African Countries[78].

Such arguments assume that there are inherent conditions in Africa that inhibit the effective protection of human rights on the continent. Such conditions include the oft-misconceived factor of the absence of the notion of human rights in traditional pre-colonial African societies, the retrogressive and repressive effects of colonial institutions in Africa - ethnicity, racialism, and militarism. In the following section we propose to examine the nature of the traditional African legal systems with a view to establishing the existence of the notion of human rights and human dignity in traditional Africa.

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[78] K. Vasak "Les Droits De L'Homme Et L'Afrique (Pour une Convention des Droits de L'Homme)" Revue Juridique et Politique (April-June 1967) p.274.

(c) Human Rights in Pre-Colonial Traditional Africa[79].

The purpose of the analysis is to examine the concept of human rights in pre-colonial traditional African societies, establish its authenticity and reasons why it differs from the western liberal and eastern socialist concepts of human rights. Furthermore, the examination of human rights in the traditional African context should help us appreciate the rationale of the authors of the African Charter on Human and Peoples Rights (AFCHPR) in capturing the essence of traditional African values[80].

Due to the dearth of legal material available in this field, our method of research has been based primarily on deductions from anthropological, historical and other non-legal materials that reflect the level of social formations and consequently the evolution of African legal system. We have also attempted to derive the actual content of human rights in traditional Africa by analysing the customary laws and practices of selected African ethnic groups and societies. We have found it necessary to examine some colonial legislations and practices that either confirmed or abrogated practices that existed before and during colonial rule in Africa with a view of assessing the level of human rights protection in traditional Africa.

The preponderance of recent African anthropological and historical treatises reveal that traditional African societies had different systems of authority and administration of justice, social structures and religious beliefs and practices. Nevertheless, these structures enhanced social harmony and political equilibrium within their respective social units.

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79 By pre-colonial-traditional Africa, we are referring mainly to the period before 1830 when European interest in Africa consisted mainly of slave trading posts, Portugese enclaves and provision outposts. The French annexation of Algeria in 1830 was the first European claim to land in Africa.

80 The fourth preambular paragraph of the ARCHPR reaffirms "The virtues of the historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples rights".

Although Africa is inhabited by polyethnic societies, there are similarities in essential matters as reflected in the customary laws of the Yorubas, Bantus, Sudanese, Ashantis and Kongolese[81].

Nineteenth century western writers on Africa were sceptical about the existence of laws on the continent. They could not distinguish between law and custom. Legal, moral and religious rules were regarded as "interwoven into a single texture of customary behaviour"[82]. Modern anthropologists were however able to ascertain the existence of legal systems among the 'primitive' peoples of Africa[83]. The controversy over the existence of legal systems in traditional Africa may to some extent be seen as one between lawyers and sociologists and anthropologists. For instance, Elias[84] took Evans-Pritchard to task over the latter observation that "in the strict sense, the Nuer had no law"[85]. However, further reading of Evans-Pritchard does not imply that the Nuer were a lawless people[86]. The difficulty here seems to be the apparent absence of coincidence in the formal criteria for defining law, between the purists and the anthropologist. While Evans-Pritchard's denial of the existence of law among the Nuer was based primarily on the absence of formal judicial institutions, Elias' view is predicated on the definition of law as 'the body of rules which are recognized as obligatory by its members"[87].

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81 T.O. Elias, The Nature of African Customary Law (Manchester University Press, 1956) p.3.

82 D. Lloyd op cit p.566.

83 See M. Gluckman, The Judicial Process among the Barotse of Northern Rhodesia (Manchester University Press, 1967).

84 T.O. Elias, op cit p.31-32.

85 E. Evans-Pritchard. The Nuer (London OUP) 1940 p.162.

86 Ibid p.168.

87 T.O. Elias op cit p.55.

The main source of African law is custom. Custom prescribes the rules of inheritance, the obligations of kinship, marriage rules, compensation due for killing a man and so forth. Therefore, the subscription to and the acceptance by the majority of the members of a community of such rules suffices to regard them as laws.

African societies with centralized political systems tended to have a more developed body of legal principles and judicial techniques than those with more or less rudimentary political organisations. In the former, there were usually hierarchically graded courts ranging from the smaller chiefs to the Kings Court, with well defined machinery for the due enforcement of judicial decisions. In the latter, rules rather than rulers, functions rather than institutions characterize their judicial organisation[88]. Furthermore, the efficacy of rules was more profound in atomized or simple societies. Highly exact rules were more prevalent in simple societies than in sophisticates ones, because such exactness operated to maximise social efficiency over 'primitive' conditions[89].

It is submitted that whether African societies were centralized or atomised, they invariably met three necessary ingredients or universal aspects of law, namely: rules, procedures of inquiry or adjudication and modes of redress or enforcement. Indeed C.K. Meek contends that:

> "The mentality of 'primitive' peoples does not differ from our own, as any European knows who has lived in close quarters with 'natives'. It is not to be expected therefore that their norms of conduct should diverge very profoundly from ours. And so, what are crimes and torts to us are for the most part crimes or torts to them... their 'gentlemen' ours and

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88 Ibid p.30.

89 Richard A. Posner "A Theory of Primitive Society with Special Reference to Primitive Law" Journal of Law and Economics (1980) vol 23:1 p.31.

ours theirs"[90].

Many western commentators have used their own institutionalised systems and laws as a universal yardstick for measuring or validating African values and rules, and finding no similarities between the two systems, condemn the latter as inferior or even non-existent. Regrettably, this attitude has permeated into the sphere of human rights in Africa. Representative of this approach is J. Donnelly who states that "human rights, in the sense in which Westerners understand the terms - namely, rights (entitlements) held simply by virtue of being a human being - are quite foreign to Africans - approaches to human dignity[91]. He argues further that most non-western cultural and political traditions lack not only the practise of human rights but the very concept[92].

If we are to accept human rights as values and attributes which are inherent in men and women by virtue of their membership of the human race, Donnelley's approach is faulted. Although this argument is based on the natural law conceptions of human rights, Donnelly believes in the referral of human rights to strict established norms of positive law. In any case, an examination of the traditional African customary values and rules will reveal that both naturalist and positivist notions underline the African concept of human rights.

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90 C.K. Meek, Law and Authority in a Nigerian Tribe (London, OUP; 1937) p.xiii.

91 Jack Donnelly "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights. American Political Science Review (1982) Vol. 76(2) p.303.

92 Ibid

As a general rule, in traditional Africa, human rights existed within the context of the social group[93]. Whereas in the European context, human rights are encapsulated in a catalogue of principles essentially favouring the individual against groups to whom they are opposed[94]. Thus person had in traditional African society is intelligible only in the group and not against it, unlike in the west, individualism is expressed against the group. Herein lies one of the main differences between traditional African and Western conceptions of human rights. The African conception derives its validity from each societies acceptance and observance of basic principles and social values.

One of the early proponents of the view that concern for rights was part of the pre-colonial experience of Black Africans was Gboboh Cuguano of Ajumaku (now Ghana). In his work published two years before the French Revolution, the writer said of Africans taken away from Guinea that their "freedom and rights were so dear to them as those principles are to other people..." and as regards the Ethiopians the "freedom and liberty of enjoying their own privileges burn with a much zeal and fervour as in any other inhabitant of the globe"[95].

Cuguano's observation reflects the fact that the law of freedom is universal, as much as it underlines the existence of that insatiable urge by man to undermine his fellow man.

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93 E. Zvogbo "A Third World View" in D. Kammers and A. Loescher (eds) Human Rights and American Foreign Policy (1979) p.92-93.

94 Lakshman Marasinghe "Traditional Conceptions of Human Rights in Africa" in C.E. Welch and R.I. Meltzer (eds) Human Rights and Development in Africa (State University of New York Press, Albany) 1984; p.33.

95 Cited in Thomas L. Hodgkin "The relevance of Western Ideas for New African States" in J. Roland Pennock (ed) Self-Government in Modernizing Nations (Englewood Cliffs M.J.: Prentice-Hall) 1964 p.51

Although the majority of African societies were communal and egalitarian, the continent had its fair share of feudal socio-political formations which produced tyrannical rulers who suppressed the rights of their subjects. The Kiganda system of Baganda, now part of Uganda, probably exemplifies traditional African feudalism. The Kabaka, was the absolute ruler controlling every sphere of life. However, history reveals that many a Kabaka were killed by the Baganda in defence of their rights and freedoms[96].

Furthermore, some traditional African societies perpetuated practices that violated human rights. These practices include slavery, human sacrifice, trial by ordeal, stocks for offenders, killing of twins under the superstitious belief that they were purveyors of ill-luck. There was the "OSU" system, among the Ibos, which was a caste system epitomized by the untouchables.

However, the dynamism of traditional African society has ensured the evolution of traditional laws that have either completely eradicated or at lease discouraged most of these practices. In this regard, Davidson states that:

> "Borrowed as they often were from many currents and cross-currents of thoughts that had fertilized and deepened civilizations elsewhere, African peoples had moved by their own dynamic of advance, found their own way forward, worked out their own solutions. Stubbornly, slowly, they had gone across the lonely years. Only where slave trade made its worst ravages were they altogether stopped and their achievement rendered sterile; and much of the far interior was spared..."[97].

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[96] Lateef Adegbite, "African Attitudes to the Protection of Human Rights" International Protection of Human Rights (Proceedings of the 7th Nobel Symposium, Oslo, September 25-27 1967) p.70

[97] Basil Davidson, Old Africa Rediscovered (London, Longman Group Ltd) 1970 p.255.

The conception of human rights in traditional Africa derives its validity from a set of social values intrinsic in basic principles upheld by a substantial majority of a given society. These principles are reflected in the customary laws and practices of the given societies. Our research in the field of human rights protection in pre-colonial traditional Africa reveals the following rights were recognised[98];

(i) the equality of man

(ii) the right to life

(iii) freedom to receive justice

(iv) freedom of thought, speech and beliefs

(v) freedom of associations and

(vi) freedom to enjoy property

These rights and freedoms were based upon the principles of "respect"[99] and "participation"[100], they therefore existed mostly within the collective context. The rationale for the traditional African concept of human rights is social harmony in which both individual and collective rights are recognized. The individual's rights are inter-woven with his duties and functions in the society. The emphasis placed on duties and the

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98 Keba Mbaye comes to a similar conclusion in listing the human rights that existed in pre-colonial Africa, namely: the right ot life, freedom of expression, freedom of religion, freedom of association, freedom of movement, the right to work and the right to education. However Professor O. Eze has questioned the validity of Mbaye's claim that the rights to life and the right to work and other freedoms existed under feudal African socio-political systems. See Keba Mbaye "Organisation De L'Unite' Africaine", "Les Dimensions Internationales Des Droits De L'Homme", Paris UNESCO, 1978, pp.652-4. See also O.Eze, Human Rights in Africa op cit p.12-13.

99 Africant place a very high premium on "respect" for elders and societal norms, values and beliefs. The AFCHPR specifically imposes the duty on the individual to "respect his parents" and "to preserve and strengthen positive African values" - Article 29(1)and(7).

100 The "participation of all members of the society was an essential attribute of the traditional system. Because the individual is absorbed in the group. See Keba Mbaye op cit p.650-1.

rights of the collective ensures the conceptual contradistinction between western notions and traditional African notions of human rights. This fact does not however diminish the existence of human rights in traditional Africa.

To borrow a passage from the Privy Councils pronouncement in the celebrated case of:

> Re Southern Rhodesia:[101]
> "Some tribes are so low in the scale of social organisations that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society... On the other hand there are indigenous peoples whose legal conceptions, though differently developed are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English Law"[102].

Indeed, it is difficult to find any class of individuals lacking both in rights and duties under African law[103]. We thereby propose to establish the existence of the foregoing list of rights in traditional Africa by examining some traditional customs, values and practices in Africa.

(i) Equality

It is pertinent to ascertain the exact position of the individual in traditional African society because only through such a course can we assess the extent of his rights and duties.

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101 (1919) AC 211.

102 Ibid p.233-4.

103 A.N. Allot "Legal Personality in African Law" M. Gluckman (ed) Ideas and Procedures in African Customary Law. (OUP. London) 1969 p.184. Professor Allot states that even slaves were rarely rightless and in some societies like the Hausa, they could become generals or administrators. Among the Ashanti injuries to slaves were actionable by the master or even by the slave himself against the master. p.184.

African societies were basically communes. The observance of equality of individual members of the community was evident. However individual rights and duties vary within the type of social organisation and the degree of cohesion already achieved.

In societies with a hierarchical system, where political organisation was relatively well developed, much as there were tendencies for some kings of chiefs to be despotic and circumscribe the rights of individuals, abuses of power were checked by carefully devised mechanisms. The Ashanti's of Ghana provide an example of a political system characterised by checks and balances which maintained procedures for removing rulers who violated the laws of the land and disregard the rights of the people[104].

The system of clans and kinship groups also maintained the equality of members and protected their rights. Among the Bari of Sudan, for instance, a chief who acted arbitrarily would be checked by members of his own family or clan[105]. It is therefore evident that individuals in traditional African communities had the right to select their leaders and depose them through methods specifically evolved to ensure equality and protect individual dignity and welfare.

In less politically organised and atomised ethnic societies, equality of individuals was more pronounced. It should however be noted that equality here, is viewed from the context of each kindred group or age group. For example, among the Isos, members of each kindred or age group had equal rights and performed similar duties. The age-grade organisation was based on the social significance of seniority since elders

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[104] K.A. Busia, Africa in Search of Democracy (New York: Frederick A. Praeger) 1967; p.112.

[105] C.K. Meek op cit p.198.

were regarded as the guardians of social values of morality. The concept of the age group ensured the spirit of brotherhood and equality within the society.

Nevertheless, according to J. Nyerere, traditional societies were not devoid of inequalities; the African statesman contends that:

> "There was not complete equality; some individuals within the family and some families within the clan and tribe could own more than others, but in general they acquired this through extra efforts of their own and the social system was such that in time of need it was available to all. Inequalities existed but they were tempered by comparable family or social responsibilities and they could never become gross and offensive to social equality which was the basis of communal life"[106].

The position of women vis a vis men in the traditional African context has been consistently portrayed as slavish and depressed[107]. This view ignores the social, economic and political roles women play in Africa. The pre-eminence and predominance of women was secured in matrilineal and matrilocal systems of kinship in Africa. Communalism in its essence, prescribes duties for individuals within each constituent unit irrespective of gender. Although certain roles were reserved for women depending on the prevailing social norms.

The major role of women in most traditional communities was in the preservation of the family, therefore, the values which almost all societies attach to this role is reflected in the specific rights enjoyed by women. Customary law guaranteed the most rights for women in divorce, for instance where marriage breakdowns are issues for negotiations

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106 Julius Nyerere op cit p.108.

107 United Nations Centre for Social Development and Humanitarian Affairs, Law and Status of Women in Togo: Discrimination of Women in Togo (Prepared by Dagadzi, 1977) p.295.

between two families[108].

It must be conceded that the treatment of the woman sometimes goes against the grain of equality, however it has been observed that "her treatment is one thing, her legal status another, her capabilities and extent of her labours belong again to a distinct category"[109]. Consequently, the status of the woman in traditional African society is respected by virtue of the role she plays which more often than not is deemed equally important, if not more than the males.

In the area of property rights, the rights of women or indeed men to property in land arises from and is maintained by the fulfilment of obligations to others in society[110]. These obligations, however derive from membership of the society. For example access to land can only be denied on account of loss of membership of a given society. Viewed from this standpoint, the argument that traditional African societies exclude women from accruing or inheriting land cannot be a symbol of inferior status or in anyway a form of chauvinism.

The principle of equality is further exemplified in the status of children born out of wedlock in some African customs. The children born out of wedlock have equal rights as those born in wedlock. A Nigerian High Court in Phillip v Phillip[111] was asked to determine the question of the rights an "illegitimate son" under Yoruba Customary Law. The court

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108 Rhoda Howard "Womens Rights in English Speaking Sub-Saharan Africa" C.E. Welch and R. Meltzer (ed) Human Rights and Development in Africa. op cit R. Howard is of the opinion that despite the existence of other customs affecting the personal freedoms of women in marriage, many women prefer to live under those customs.

109 R.M. Lowrie "Primitive Society" (London: Routledge) 1912, p.178.

110 Max Gluxman, Ideas in Barotse Jurisprudence (Yale University Press) 1965.

111 Phillip v Phillip, 18 Nigerian Law Reports 102.

held that upon intestacy, of the deceased father, under Yoruba Customary Law, an illegitimate son can succeed to his father's property equally with the legitimate sons. Furthermore, research has also established that the traditional societies of Ethiopia hardly knew discrimination against illegitimate children[112].

Traditional African custom applies the concept of equality to the treatment of aliens. However the prerequisite is that the stranger or alien must have been introduced to the head of the clan or community and must have resided with his host for a reasonable period within which his decorum must justify suitability for membership of the group[113]. When he meets the criteria, he becomes a member of the group and is automatically subject to the laws and customs as well as the privileges and responsibilities of the group[114]. Traditional African humanitarian values underlined the treatment accorded to refugees[115].

In summation, it is evident that every individual in traditional African community is born with a certain status relative to all members of his community. This is not a personal status as obtains in an individualistic society and does not connote rank, but reciprocal obligations and benefits which he incurs as a member of the community. The customary rules and norms were applied to maintain equality of members of each community. An analysis of the existence of specific rights in traditional

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112 Brun-Otto Bryde The Politics and Sociology of African Legal Development. (Alfred Metzner Verlag GmbH: Frankfurt am Main: 1976) p.113.

113 T.O. Elias op cit p.106.

114 C. Mojekwu, International Human Rights: The African Perspective, J.L. Nelson and U.M. Green (eds) International Human Rights: Contemporary: Issues (Publishing Group New York) 1980 p.87.

115 G.O. Oguntomisin and Toyin Falola "Refugees in Yorubaland in the Nineteenth Century" Asian and African Studies Vol.21 No.2 (July 1987) p.175.

African Communities will reveal the equal protection of membership rights.

(ii) The Right to Life

As in all spheres of the traditional African socio-economic life, the community is responsible for protecting and maintaining the life of the group. Consequently the community maintains respect for the right to life of its members by ensuring the observance of customary rules and values which punish the arbitrary deprivation of life.

Although homicide is generally regarded as a crime in traditional Africa, the customary laws and practices prescribed varying penalties for such offences.

Among the Iteso of Uganda for instance, blood money is payable by the offender to the heirs of the person killed in all cases of homicide in which the offender is not executed[116]. Similarly, the Baganda of Uganda settled most homicide or murder cases by the imposition of fines; and they hardly imposed the death sentence[117].

In his study of the Bemba of Zambia, A.L. Epstein observed that:

> "The life principle is a sacred value which finds its highest embodiment in the whole human person, which ought not therefore to be diminished, save in special circumstances. It is this basic postulate... which accounts for the overriding concern that the [Bemba traditional] courts display in regard to physical violence to the person, and leads to the principle that one is liable in damages for any act which has as a

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116 J. Lawrence, The Iteso (London: OUP) p.257.

117 J. Roscoe The Baganda: Their Customs and Beliefs (London: MacMillan) 1911; p.266-7.

> direct consequence the diminishing of another person, even though the act itself may have been prompted by that others prior wrong"[118].

The right to life is deeply rooted in the traditions of the Ibo of Nigeria. The right to life is predicated here, as in other communities on traditional religious beliefs. Among the Ibo, the act of murder was an offence against Ala[119] and consequently it was the responsibility of the whole community to see that steps prescribed by custom are taken to purify the earth of such abomination[120]. The act of suicide was also condemned and abominable offence among the Ibo[121].

The Ashanti of Ghana regarded murder and suicide as "oman Akyi wadie" which literally translated means "things hateful to the tribe". Such acts were regarded as sins or taboos of which the central authority was bound to take swift official notice in order to avert the vengeance of certain supernatural powers upon those whose primary duty it is to protect their interests and punish the infringement of time honoured law and custom[122].

The customs of the Nuer[123], Basuto[124] and Kamba[125] reflect their sacred respect for life.

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118 A.L. Epstein, Injury and Liability in Africa: Customary Law in Zambia, in Max Gluckman (ed) Ideas and Procedures in African Customary Law (London: OUP) 1969, p.293.

119 Ala (The Earth Diety) is one of the high gods worshipped by the Ibos.

120 C.K. Meek op cit p.203-9.

121 Ibid p.213.

122 R.S. Rattray: Ashanti Law and Constitution (London OUP) 1929, pp.294-296.

123 P.P. Howell, Manual of Nuer Law, (London OUP) 1954, pp.69-70.

124 M. Ashton, The Basuto (London OUP) 1952 pp.253-6.

125 D.J. Penwill, Kamba Customary Law (East African Literature Bureau - Nairobi) 1951, p.78-80.

The foregoing examination of customary rules and practices establishes the fact that respect for life in traditional Africa is governed not only by negative rules but by positive responsibilities to respect life. Indeed, it is widely acknowledged that the establishment of the right to life merely requires legislation against murder[126]. However, positive aspects of the concern for human life are revealed in the existence and development of traditional health care institutions which were supplemented by psychological dependence on some form of deity[127].

The duty to respect and preserve life is based ab initio on human dignity and fortified by the communitarian spirit, customary law and the sociological sanctions of the supernatural, religious and other metaphysical forces. It has indeed been observed by some anthropologists that the dwindling respect for life in some African communities is due to contacts with western civilization[128].

(iii) The Right to Receive Justice

The right to receive justice is one of the main pillars of traditional African society. The protection of this right was ensured by customary laws and well defined rules procedure for settling disputes. The notion of due process of law as a corrolary of the right to receive justice is adequately reflected in indigenous laws. Professor Gluckman's testimony is very instructive:

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126 R.J. Vincent, Human Rights and International Politics (Cambridge University Press) 1086, p.12.

127 O.C. Eze "Right to Health as a Human Right in Africa" in Proceedings of Workshop on "Right to Health as a Human Right" (ed) R.J. Dupuy (Sijthoff and Noordoff, Alphen aan den Rijn) 1979, p.80.

128 C. Dundas "Native Laws of Some Bantu Tribes of East Africa" Journal of the Royal Anthropological Institute (1921) p.51.

> "African Legal Systems... are founded on principles of the reasonableness of man, responsibility, negligence, direct and circumstantial evidence etc. African judges and laymen apply these principles logically to a variety of situations in order to achieve justice"[129].

Justice is achieved through the application of customary rules, procedures of inquiry and adjudication, modes of redress and enforcement. Since the existence of customary laws is not in doubt, the right to receive justice is thus predicated upon the existence of efficient procedures of inquiry and adjudication and adequate modes of redress and enforcement.

There were two main types of socio-political systems in traditional Africa. Firstly, societies with hierarchical or centralized authority which possessed administrative and judicial institutions[130]. Secondly, the atomized societies with decentralized authority which lacked both administrative machineries and constituted judicial institutions[131].

Anthropological research on centralized societies like the Haya[132], Sukuma[133], Lozi[134], and Tswana[135] reveal the existence of courts - properly so called - which had chiefs (judges), assessors, and expert witnesses. These institutions possessed detailed rules of procedure and systems of appeal that guaranteed the right of the individual to receive justice.

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[129] Dr. Max Gluckmans article to "The Observer" July 15, 1951.

[130] For instance, the Sukuma, Haya, Lozi and Tswana ethnic groups.

[131] For example, the Arusha, Tiv and Ibo ethnic groups.

[132] M. Cory and M.M. Hartnoll; Customary Law of the Haya (Lund Humphries for the International African Institute) 1945, pp.236-241.

[133] M. Cory, Sukuma Law and Custom (London OUP) 1953 pp.9-11.

[134] M. Gluckman The Judicial Process among the Barotse of Northern Rhodesia, (Manchester University Press) 1955; pp.6-15.

[135] I. Schapera; A Handbook of Tswana Laws and Custom (London: OUP) 1938 pp.279-283.

In the atomized or acephalous societies such as the Arusha[136], Tiv[137], and Ibo[138], less formal procedures for dispute settlement were employed. They adopted the moot method which was simpler, more arbitral and conciliatory than the formal procedures of centralized societies. Similarly, in some centralized societies[139], the informal or arbitrative mode of procedure was adopted.

Accessibility to the forms of justice or courts were hardly impeded by formal requirements of fees for hearing cases[140].

The rules of adjudication in most traditional African societies - both centralized and atomised - observed the principle of 'audi alteram partem'. For instance, according to a popular Yoruba idiom "wicked and iniquitous is he who decides a case upon the testimony of one party to it". The right to legal representation was also available in most societies[141]. It must however be emphasized that legal representation did not vitiate the conciliatory approach to dispute settlement because the "champions at law" were not paid advocates of independent litigants

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136 P.M. Gulliver, Social Control in an African Society (Rutledge and Kegan Paul) 1963, pp.188-203.

137 P. Bohannon, Justice and Judgement among the Tiv, (OUP London) 1957, pp.160-169.

138 M.M. Green, Ibo Village Affairs (Sidgewick and Jackson, London) 1948, pp.206-110.

139 J.M. Beattie "Informal Judicial Activity in Bunyoro" Journal of African Administration (Ministry of Overseas Development) Vol.9 No.4 pp.118-195.

140 According to Bruno Gutmann, among the Chagga of Kilimanjaro, no fees were paid at Lower Courts. However in appeal to the Chiefs Courts litigants had to bring a beast of equal value to open proceedings. B. Gutmann, Das Recht de Dschagga (Munich 1926) (English Translation by A.M. Nagler, Human Relations Area Studies Files - New Haven; Yale University Press) pp.529-530.

141 T.O. Elias op cit p.240-41.

but legal guardians[142].

Despite the absence of modern technical rules of evidence and a trained judiciary, most judgements were based primarily on the merits of the case and the application of customary rules of evidence[143]. It is interesting to note that most customary rules of evidence disregard hearsay[144].

The execution of decisions was probably more effective in centralized societies where the existence of the institutionalized military and administrative machinery ensured the enforcement of the will of the community as expressed in judgements. The enforcement of the decisions of presiding elders in the informal forums of atomized societies were dependent mainly on social coercion through the family, clan or age grade[145].

The informal or arbitral method of administration of justice was the dominant practice in traditional Africa and was essentially predicated on the preservation of peace and homogeneity of interest. The right to receive justice was guaranteed in traditional African communities because crimes and civil wrongs were in general regarded as disturbances to the social to the social equilibrium and treatment was therefore concerned fundamentally with restoring the 'status quo ante'.

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142 Ibid

143 N.A. Ollenu "The Structure of African Judicial Authority and Problems of Evidence and Proof in Traditional Courts" in M. Gluckman (ed) Ideas and Procedures in African Customary Law (OUP London) 1969, p.111.

144 Ibid; see also M. Gluckman "The Reasonable Man in Barotse Law" Journal of African Administration (1955-6) vii, p.51.

145 M.M. Green op cit p.107.

(iv) Freedom of Though, Speech and Beliefs

These freedoms existed in traditional African societies and in forms not dissimilar to western notions. These societies protected the right to participate in debates, discussions, and in the taking of decisions by consensus[146]. Lord Hailey describes the position thus:

> "African sentiment attached special importance to the due observance of the procedure by which all members of the community concerned are able to have some voice in determining issues which are of major interest to it"[147].

The Ashanti of Ghana provide an example of a political system characterized by fora where discussions were open and those who were in opposition had no fear of "being punished for their stand"[148].

It is oft stated that freedom of thought in traditional societies was restricted by the influence of myths and the supernatural[149]. We believe that, myths and rituals are symbolic values that uphold the social order and encourage thought as opposed to obedience exacted by the secular sanction of force. Furthermore it has been observed that "myths, dogmas, rituals and beliefs make the social system intellectually tangible and coherent to an African and enable him to think and feel about it"[150].

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146 Y. Khushalani "Human Rights in Africa & Asia" Human Rights Law Journal Vol.4 No.3 1983 p.418.

147 Lord Hailey "Hative Administration in British Territories" Part IV London HMSO 1951 p.2.

148 K. Busia op cit p.112.

149 E.S. Hartland Primitive Law (London Methuen) 1924 p.138.

150 M. Fortes and E.E. Evans-Pritchard, African Political Systems (OUP, London) 1940, p.17.

The freedom of expression was basically recognised in traditional societies. Among the Yorubas, for instance, the freedom of expression was assumed subject to social norms of courtesy and respect for elders. Some scholars have identified the "principle of respect" for elders as a very real limitation to the freedom of speech among the Yorubas[151]. We submit that the principle of respect is, strictly speaking, not a restriction on the freedom of speech, rather it is a normative factor facilitating the freedom, through the usage of customs and non-derogatory language particularly when addressing elders. The principle of respect curtails the potential abuse of the freedom of speech and not the freedom itself. Thus the principle does not preclude criticism of the policies or actions of elders however such criticism must avoid discourteous or deprecating language.

In traditional societies, free speech was exercised publicly and at large community meetings, chiefs' courts and privately at family council meetings[152]. Limitations to freedom of speech were rare except in circumstances where statements threaten the social equilibrium. In such cases, the issue was subject to the adjudication or conciliatory procedures of the community, which in any event accords the person summoned an opportunity to justify his statement.

We can therefore deduct from the foregoing that the limitations on freedom of speech in modern societies do not differ radically from those of traditional African communities. It has been acknowledged elsewhere, that the significance of freedom of expression in pre-colonial African societies is enhanced by the concern for civil liberties and political

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151 L. Marasinghe "Traditional Conceptions of Human Rights in Africa" in C.E. Welch and R. Meltzer (eds) Human Rights and Development in Africa (State University of New York Press: Albany) 1984, p.37.

152 K. Busia op cit p.22-30.

rights which was an integral part of those communities[153].

The freedom of belief was more widely expressed in the political field than in the religious context. Adherence to the common religion of a community was not coerced by the legal machinery but by mystical forces [154]. Therefore non-believers in the prevailing religious practice in a given community are not coerced to worship but are left to the dire consequences of the supernatural. Where a particular community or ethnic group has a variety of gods, demi-gods, totems and tutelary spirits, individuals clearly had the freedom of belief or choice of religion[155].

In the socio-political context the traditional society was basically communal and no important decision affecting the community as a whole could be taken without a prior debate in public assemblies which were a common feature of indigenous African systems[156]. Decisions could not be taken without some form of prior consultation with counsellors or other representatives of people, especially elders who were the repository of wisdom and tradition. This practice was one of the main characteristics of atomised societies, such as the Basuto, Kamba and Ibo. In Basutoland for instance, customary legislation took place at public meetings called 'pitso' to which all adult males were summoned for general

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153 Thomas L. Hodgkin, The Relevance of Western Ideas for New African States J.R. Pennock (ed) Self Government in Modernizing Societies (Englewood Cliffs, New Jersey Prentice-Hall) 1964 p.53.

154 K.S. Carlston Social, Theory and African Tribal Organizations: The Development of Socio-Legal Theory (University of Illinois Press, Chicago) 1968 p.108.

155 Keba Mbaye Background paper to The United Nations Seminar on the Establishment of Regional Commission on Human Rights with Special Reference to Africa p.3 (HR/Liberia/1979/B p.2).

156 L. Adegbite "African Attitudes to the Protection of Human Rights" International Protection of Human Rights (Proceedings of the 7th Nobel Symposium, Oslo, Sept 25-27 1967) p.70.

discussions[157]. The dynamics of democracy was fully accepted and recognised, thus the distribution of power was made easier by the observance of the freedom of expression.

Freedom of expression in traditional communities therefore had its corollary in the right to participate in the political system. The failure of many a colonial government to recognise the existence of these rights in the traditional society context gave rise to many problems[158].

With regard to the traditional socio-political institutions and practices, the colonial administrators may no doubt have been discouraged because they constitute an "extraordinarily complex pattern of reciprocal interaction between the rulers and the ruled, permitting each element considerable leverage for influencing the behaviour of the other"[159].

However, the labyrinth of customary laws and practices can be unfolded to reveal the existence of the basic freedoms of thought, expression and belief which ensure social harmony and the efficacy of the political process, and establish cogniscability of legislative decisions in traditional African societies.

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157 M. Ashton The Basuto (London, Stevens) 1953 Ashton provides several examples of 'pitso' decisions including the 1888 prohibition of marriage (cattle) payment; pre 1840 abolition of death penalty for theft, and legal execution for sorcery. p.216.

158 For instance the 1927 Ibo womens riot in the colonial Eastern Protectorate of Nigeria was due partly to the imposition of an artificial channel of Native Courts operated by "Warrant Chiefs" arbitrarily appointed by the Colonial Administrators. According to Dr. Meek (then, the Anthropologist to the Colonial Government of Nigeria) the riots could have been avoided if the administrative system had been based on the traditional institutions of the Ibo people "which gave full freedom of expression" C.K. Meek op cit p.ix.

159 R.F. Weisfelder "The Decline of Human Rights in Lesotho: An Evaluation of Domestic and External Deterrents" A Quarterly Journal of Opinion Vol.6 (Winter 1976) p.22.

(v) Freedom of Association

Freedom of association was recognised and protected in traditional African communities as reflected in the variety of associations which flourished. These associations include cultural societies, age groups[160], occupational and trade associations, and those protecting occult practices[161].

The freedom of association was much more significant in the context of kinship and family systems. The community recognised the right to associate freely within ones kinship group and also protected the freedom of inter-kinship and inter-ethnic group associations. The existence of this medium is evidenced by the practice of inter-community marriages.

The limitations on the freedom of association appear mainly in the context of matrimonial customs. For instance when a couple enter into an inter-community or inter-ethnic marriage, the woman is endowed with the "nationality" of her husbands ethnic group with all the attendant rights and duties. Although the woman is allowed dual nationality as it were, the husband is not permitted to assume his wifes nationality even in matrilineal societies where he resides with the wifes community[162]. A widow has limitations placed on her freedom of association as far as remarriage is concerned. Most customs in Africa limit the widows choice of partner to her deceased husbands family. The rationale of this practice is based on the social imperative to maintain strong and unified

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[160] C.K. Meek op cit p.196. See also P.C. Lloyd "Agnatic and Coagnatic Dessent Among the Yoruba" Journal of the Royal Anthropological Institute I (New Series, 1966) p.484.

[161] For a study of ancestral cults among the Ibos, see C.K. Meek op cit p.61. Similarly K.S. Carlston describes the existence Ogboni Cult among the Yorubas as serving important social, political and judicial functions. K.S. Carlston op cit p.178.

[162] S.N.C. Obi, Modern Family Law in Nigeria (London: Sweet and Maxwell) 1966.

extended family structures and the need to protect the widow and children.

The practice of betrothal of girls and the imposition of high bride prices (dowries) establish further restrictions on the freedom of association and the freedom to choose marriage partners.

Thus, with the exception of aspects of matrimonial custom, the freedom of association was by and large respected and promoted in traditional Africa.

(iv) Freedom to Enjoy Property[163]

The freedom to enjoy property was guarded and observed in traditional Africa with respect to both personal chattels and immovable property. However, the existence of the right to ownership of property and its incidents as perceived in western legal philosophy does not exist. The nature of the right to enjoy property depends firstly, on the type of property involved and secondly on the type of community concerned. Consequently, in the course of our examination, we propose to show a distinction between landed property on one hand and other property.

(a) Land

Individual interest in land was community based, however, this does not necessarily imply the existence of "communal ownership" of land. Our contention is based on the fact that "communal ownership" implies the absence of individual rights in land. The term communal ownership as defined in English Law may not be apt to describe land holding in Africa.

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163 We find the title "Freedom to Enjoy Property" appropriate and suitable to reflect the aspects common to the various ramifications of mass relations to property in traditional Africa. Some of these ramifications are not necessarily on all fours with Article 17 (1) of the Universal Declaration of Human Rights which states that "everyone has the right to own property alone as well as in association with others".

The term "ownership" is a "nomen genera lissimum", which term can differ depending on the context in which it is used. The common feature of all English Law statutory definitions shows that the "owner" can alienate the fee simple, appropriate the rent and enjoy the profits without reference to anyone[164]. The owner can thus create degrees of lesser interests which are invariably encumbrances on the title of the fee simple holder. Consequently any holder of a subordinate interest or estate is not the owner of land. The Common Law did not regard land as a subject of absolute ownership by the Kings subjects, but only of tenure, absolute ownership being in the crown[165].

African customary law of tenure is devoid of land holding comparable to the English concept of fee simple absolute in possession[166]. The plenary dispositive rights which the term "ownership" under English Law implies is alien to customary land tenure. Some anthropologists have observed that 'communal ownership' can often be resolved into clusters of specific rights which groups and individuals hold over a piece of land, its uses and its products[167].

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164 See S.189(i) of the Housing Act 1957; S.4 of the New Towns Act 1965 and S.22 of the Town and Country Planning Act UK.

165 John Saunders, Words and Phrases Legally Defined (London 1969) Vol.4 p.61.

166 T.O. Elias The Nature of African Customary Law, op cit p.164.

167 M. Gluckman "Essays on Lozi Land Law and Royal Property". Rhodes Livingston Paper No. 10, (Livingston, Northern Rhodesia 1943) p.9.

In many hierarchical societies with centralized institutions, the King or chief has no legal right of ownership over land. He holds land on behalf of the whole community in the capacity of a caretaker or trustee only[168].

In the atomized or loosely structured societies, paramount title in land is generally vested in artificial legal persons of indigenous law. Natural persons are however, selected or elected to represent and act on behalf of these legal persons.

Thus in both types of societies, family land is not owned by any single member including its head, or chief; and no member has the right to sell such land without the consent of every adult member of the family[169].

In view of the foregoing observations, the question must be asked as to the nature and extent of the rights held by individuals under the canopy of group administration.

As earlier alluded to, individual interest in land is community based. Consequently as a general rule, an individual, whether he is a subject of a hierarchical society or a member of an atomized community, or kindred group or family, derives his enjoyment of rights in land from the group. The justification for this rule is based on the notion of land as a community clan or family asset and resource, an ancestral heritage that

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168 See the Privy Council decisions in the following cases: Amodu Tijanni V Secretary. S. Nigeria (1921) 2AC, 399; Sunmonu V Disu Raphael (1927) AC. 881 at pp.883-4, and Sobhuza II V. Miller (1926) AC 518 at p.525. In his stody of Ibo land holding, Meek observes that ownership of lands which are sacred or taboo is vested in deities or spirits, while the ownership of farmland is vested in the village, kindred or extended family. C. Meek op cit p.100-101.

169 The West African Court of Appeal (WACA) highlighted the significance of this customary law in Yoruba traditions and applied it in the following cases:
Buraimo v Gbamgboye (1940) Nigerian Law Reports p.139; Adedubu v Makanjuola, West African Court of Appeal 10 (1948) p.33. See also Onasanya v Shiwoniku (1960) Western Region Nigeria Law Reports p.166.

should be preserved for posterity and to which no individual can lay an absolute claim.

However, customary land law recognizes and protects individually created wealth of which land is an indispensable asset. Under the traditional system, land can be acquired exclusively by the individual in the following circumstances. Firstly, where land involved is family land, an individual as a member of the family can inherit a share of family land as beneficial part-owner, with perpetuity of tenure, and all incidents but absolute power of disposition[170]. A similar interest in land may be acquired by an individual where land is granted to him as a gift by a family. Secondly where an individual takes some uncultivated and unoccupied virgin land and makes it productive, he cannot be deprived of it and he can pledge it or transmit it to his children[171].

A further feature of the recognition of individual interest in land is that the individual is regarded as the owner of everything he has erected or cultivated on the land, even in circumstances were the ultimate title remains in the owning group. Communal interest in land is qualified as long as the individual continues to utilize the land and no-one including the community or family may deprive him of the land[172].

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[170] T.O. Elias Ibid p.166. In his study of the Tallensi of Ghana, K.S. Carlston observes that property fell into two categories: partrimonial rights and individual rights. In the case of the latter, the individually acquired property belonged to the individual subject to the rights of his father. In the former context, property belonged to the lineage and not to the individual but its holder was free to use it but not dispose of it - K.S. Carlston op cit p.101.

[171] C.K. Meek op cit p.101; See also T.O. Elias Nigerian Land Law and Custom (Routledge and Kegan Paul) 1953, p.143.

[172] Several West African Court of Appeal decisions have upheld the customary practice that where an individual continues to work or use an unappropriated piece of land, no-one has a right to alienate the land without his consent. See Quarm v Yankah 1930, WACA 80; Azuma v Fiscian (1955) 14 WACA 287; Golihtly v Ashrifi (1955) 14 WACA 676; Ohimen v Adjei (1957) 2 WALR 275; Kankrah v Ampofoah (1957) 2 WALR 303.

The individuals interest in land is therefore qualified, in the main, by customary rules of disposition and inheritance. The rationale for this qualification is that rights over land in traditional Africa are transgenerational, thus excluding the possibility of withholding access to future members of the society.

It must however be emphasized, that although the foregoing principles of customary laws of tenure are representative of most African traditional societies, variations do exist[173].

With regard to the freedom of women to enjoy property in traditional communities, womens interests in land has often been portrayed as limited at best or even non-existent at worst[174]. This view has been predicated on the arguments that traditional rules of inheritance normally exclude women and that they are excluded from the process and power of allocation by men. The apparent exclusion of women from the power to allocate land is based on the recognition of the need to balance the monopoly that women exercise over the process of production, the pattern of consumption and the disposal of surplus. Although the traditional rules of inheritance in patriarchal societies restricts the inheritance of women in land[175], in matriarchal societies the interests of men in land is virtually non-existent.

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[173] For instance the interests of individuals in land amongst hunting communities differ from those in agricultural and pastoral communities. See M. Gluckman "Property Rights and Status in African Traditional Law", in M. Gluckman (ed) Ideas and Procedures in African Customary Law (OUP, London) 1969, p.253.

[174] Ester Boserup, Womans Role in Economic Development (George Allen & Unwin, London 1970).

[175] In his study of the Ibos, C. Meek, observes that although women cannot inherit, land they may be assigned the use of a piece of land by their father or husband. In the latter case, they can transmit land to their male children, but if they have no children, the land reverts to the husband or the husbands inheritor. C.K. Meek, op cit p.203.

In the light of the foregoing, how can we therefore define the individuals interest under traditional land tenure?

The individuals interest in land has been described as a "possessory" right or title, a usufructuary title, or a "proprietory occupancy". These titles do not exactly reflect the characteristics of the individuals interest in land. The term "possessory" title is defective, firstly because almost any acquisition of interest in land involving occupation is a kind of possession; secondly, the occupier simply enjoys a degree of use; thirdly, the term "possessory title" gives the wrong impression in that the holder is subject to a tenancy-at-will.

The individuals interest cannot be described as "proprietory" because his interest does not carry the characteristic of absolute power of disposal of the fee simple owner of land in English Law.

The term "Usufructuary title" is often misleading in its application. While the usufruct in civil law implies the right to enjoy the property vested in another for life only, the customary law interest is inheritable and continues until it is abandoned. Furthermore, the individual under customary land tenure rules holds no rights comparable of transmission as the Roman concept of usufruct suggests.

Although these attempts at discovering a suitable nomenclature for the individuals interests in traditional African land tenure may assist in appreciating the nature of the interest, we submit that the application of preconceived Common Law and civil law ideas fail to reflect the true nature of land holding in traditional Africa.

The freedom of the individual to enjoy landed property in traditional African communities is founded upon his concurrent right to enjoy access

to and usage of land, including the right to exclusive use of allocated family land and the right to appropriate uncultivated land. The power of disposition is however subject to communal or family approval.

(b) Other Property

The "right to own property" is probably more apt a description with respect to the individuals interest in personal chattels than his interest in land under traditional African custom. Elias has observed that the relationship between the owner and the thing owned is one of "absolute dominion" unaffected by the competing claims of the family or community which in the case of land almost regularly limit the individuals power of disposition[176].

The individual is entitled to exclusive right over whatever is self acquired and as we have seen, this also applies to uncultivated and unappropriated land. The significance of the right to own property is underlined by the heavy penalties provided for theft[177], which is not unlike the penalty of death hitherto provided by English criminal law for theft.

It has also been observed that in some of traditional African communities, all chattels acquire the personality of the possessor[178]. This extended personality notion illuminates the existence of individual rights to property under customary laws, the rationale of which is the need to protect the community from the seeds of mistrust.

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176 T.O. Elias The Nature of African Customary Law, op cit p.178.

177 For instance, among the Ibo of the Isu community, a thief caught 'inflangrante delicto' is normally sentenced to death, C.K. Meek op cit p.217; see also K.S. Carlston op cit p.133. J.H. Drisberg "The Lango: A Nilotic Tribe of Uganda" (London: T. Fisher Unwin) 1923 p.235.

178 C.S. Kenny, Outlines of Criminal Law (London Methuen) 1952 p.208, p.249.

It should however be noted that the individuals right to own property was restricted by the concept of "legal theft" that obtained in some societies. Legal theft, allowed a kinsman or family member to take the belongings of his relation without necessarily exposing himself to the charge of theft[179]. The rationale for this concept is that the family, kinship or lineage, being the basis of communal existence, cannot be allowed to be destroyed by the degradation of a delinquent individual. Although this concept is arguably an incursion into the right of individual ownership of property, the preponderance of African customs reveals that the individual right to acquire and own personal chattels are generally respected and protected in most traditional communities.

An Overview

The foregoing examination of the concept of human rights reveals that it was not a phenomenon confined only to Judeo-Christian traditions, but that human rights existed in pre-colonial traditional African societies. However the conception of a right as a legal claim which an individual can sanction against his state or community, as it were, does not always prove true in the traditional African structure. In the African context, individual rights were recognised and protected within the community as opposed to the scenario where the individual enforces his claims and demands against his community and others. The harmonious existence of individual and collective rights is predicated on the foundation of kinship of the family and clan, and moral codes fortified by legal and religious sanctions.

These customary rules and practices reflected concern for rights, democratic institutions and the rule of law in a sense relative but not exactly in syncopation with western notions. Individual rights were

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179 M. Gluckman 'Property Rights and Status in African Traditional Law' op cit p.259.

exercised within the framework of the legitimate concerns of the community.

A study of traditional African law has suggested that "distributive justice, in the social economic spheres is the cardinal principle that is shared by most Africans"[180]. Consequently, one of the basis of the African concept of human rights is the notion of distributive justice. However, it has been argued elsewhere that since classical theorists of distributive justice, such as Plato, Burke and Bentham did not expressly relate human rights on that basis, distributive justice and human rights are separate issues[181]. We submit that distributive justice and human rights are not mutually exclusive concepts but inter-related[182]. Distributive justice implies the protection of rights of individuals through giving to each his own. The fact that the individual rights are protected on the basis of communal or group membership in traditional communities underlines the significance of the group or community as the vehicle through which distributive justice is achieved.

One of the major differences between the concept of human rights in traditional African societies and the Western concept is that the former is fundamentally based on ascribed status. The content of an individuals rights is dependent on the membership of a particular social unit. Furthermore, the European liberal conceptualization of human rights is a departure from the traditional African concept which latter concept places emphasis on collective or group rights. The European concept of the

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180 Asmaron Legesse "Human Rights in African Politican Culture" in Kenneth W. Thompson The Moral Imperatives of Human Rights: A World Survey (Washington DC: University Press of America) 1980; p.117.

181 Jack Donnelly "The Right to Development: How Not to Link Human Rights and Development in Human Rights" in C. Welch and R. Meltzer (ed) Human Rights and Development in Africa 1983 p.269.

182 See Charles R. Beitz "Economic Rights and Distributive Justice in Developing Societies" World Politics 53.3 (April 1981) p.321-346.

nation-state and attendant ideas of sovereignty and impersonal authority were evolved from the peculiar socio-political circumstances of the region. Thus these impersonal structures were deemed necessary to accommodate and control peoples of different ethnic, social and cultural origins within the western nation-state. Traditional African communities or 'cultural-nations' controlled kinship groups within their cultural boundaries. A cultural nation governed through familial chiefs and elders who shared authority with the community at large. Thus while the western concept emphasises the freedom of the individual and his right to detach himself from the group, the African conception stresses the right of the individual to become part of the group. Secondly, in western thought, law takes precedence over morality while in African conceptions, morality based upon communal consensus takes precedence over formal rules of law.

The essence of traditional moral values was the preservation of kinship ties of the clan, age group and other social units. These values were indeed recognised by the colonial rulers who incorporated some of them into legislation. For instance, under the Nigerian Workmens Compensation Ordinance, where money is due to a workman, it is provided that distribution to members of his family will be "according as the family is based on the paternal or the maternal system"[183]. Furthermore, gratuities due to a deceased soldier can be distributed to his relations "according to the rules of kinship" of his tribe or if a Muslim "in accordance with Mohammedan (sic) law"[184].

We have attempted to establish that traditional African societies observed the respect for equality, the right to life, right to receive justice,

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183 S.3. Workmens Compensation Ordinance (Nigeria).

184 S.103. Royal West African Frontier Force (Nigeria Regiment) Ordinance.

freedom of thought, speech and beliefs, freedom of association and the freedom to enjoy property. These rights and freedoms were assured through the imposition of both positive and negative customary values and rules. Group and collective rights were recognised as well as individual duties to the community. Distributive justice was one of the main basis of the concept of human rights and members of the community shared wealth and assumed responsibilities towards one another and to the community.

All these values are not yet fully reflected in international human rights instruments. The African Charter of Human and Peoples Rights has taken most of these traditional values on board, not only by recognizing the "historical traditions and the values of African civilizations"[185] but by incorporating specific rights and duties reflecting these values[186].

Our examination of the concept of human rights in traditional African societies has endeavoured not to gloss over some inhuman practices that obtained in the past and which were eliminated in the main by the dynamic development of customary laws. These violations can be understood in the context of the contradictions of human rights across history. Such an appraisal would not exclude western practices such as slavery, colonialism, fascism, which were hardly regarded as violations during the relevant periods. Lately economic practices such as the primitive accumulation of wealth on private and public basis are justified as effective prescriptions for general economic growth despite their obvious negative effects on the socio-economic rights of others. Herein lies the thrust of our argument linking distributive justice with human rights, otherwise referred to as the right to development.

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185 APCHPR, preambular paragraph 5.

186 See Chapter Seven post.

The foregoing analysis has attempted to clarify the traditional African concept of human rights despite the reservations of some academics. Adamantia Polllis for instance states that "the effort to clarify the different notions of human rights, their philosophic, historical, and institutional roots, seem to put a relativistic view on human rights and to the futility of enforcement by any international or regional body"[187].

We submit, to the contrary, that the appreciation of the contextual notions of human rights enhances the promotion and protection of human rights. The universality of many basic human rights cannot be denied, however the effective implementation of these rights have been prevented because, in certain regions such as Africa, the role of the individual in society has not been fully appreciated. In Africa, for instance, the recognition of individual duties and collective rights is intertwined with the effective protection of individual rights and the achievement of social justice.

The incorporation of some of the traditional notions of human rights in the AFCHPR should ensure a more effective human rights protection regime than hitherto experienced on the continent.

Indeed, the political instability and economic depression that now exists in Africa has been attributed mainly to the policies and structures established by European colonial administrators and also their oblivious attitude to traditional African socio-political institutions and values. The effect of colonialism on human rights in Africa shall be examined presently with a view to establishing whether colonial practices were indeed a total negation of human rights.

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187 A. Pollis Liberal, Socialist and Third World Perspectives on Human Rights (New York Praeger) 1982 p.22.

(d) Colonialism and Human Rights in Africa

The history of Western European contacts with Africa can be traced back to the beginnings of the slave trade in the 17th Century. This, most horrifying human haemorrhage in the history of man, disintegrated numerous African peoples and profoundly traumatized many an African society.

Apart from the unspeakable suffering which befell the population as a result of the slave trade, it also provoked incalculable consequences for the economic and political development of Africa. The destruction and confusion it bred opened up gaps through which gushed colonization and its consequent impact on the history of Africa. Both the slave trade and colonization were to refashion the basis of development of the African continent towards a dependence upon Europe and integration with the world capitalist system.

The 1885 Conference of Berlin defined the rules for the partition of Africa thus setting the grounds for the effective colonization of Africa. The effect of the Berlin Conference was to bury imperialist rivalries by burying the fundamental rights of African humanity.

In the comparative study of Algeria, Tunisia and Morocco, E. Harmassi distinguishes three types of colonialism: "total colonialism" (Algeria) which destroys the indigenous social system completely, "segmentary colonialism" (Morocco) which manipulates traditional forces, and "instrumental colonialism" (Tunisia) which develops and modernises the indigenous society in the interest of the metropole[188]. Most African countries came under the influence of a cocktail of these colonial strategies. It has, however been observed that the main aim of the

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188 Elbaki Hermassi Leadership and National Development in North Africa: A Comparative Study. (Berkleley: 1972) p.57

colonisers was to transform the indigenous communities into replicas of western nation states[189]. In so doing, the colonisers greatly oversimplified the complex systems of authority, justice and social administration of Africa; and thus gradually distorted and destroyed them.

It must however be emphasized that, much as the colonisers imposed their own systems of administration, the economic and social systems installed were not meant to be replicas of the European systems but were moulded towards meeting the needs of the metropolis. For instance, the system of education they established was geared towards the liberal arts tradition rather than technical or scientific. The colonial education system thus produced a new African elite which was to a large extent dislodged from the realities of African cultural traditions.

Colonization also brought about the alienation of traditional religion and thus contributed to social instability. It has also contributed to the insecurity which lies at the root of contemporary African leadership crises through the existence of colonial bureaucratic structures and the duality of life which is manifest in the religious, political, economic and cultural sphere of present day Africa.

One of the lasting consequences of colonization is the economic structures imposed. In traditional society, sophisticated systems of social welfare existed but since the advent of colonialism there has been a marked gap between the rich and the poor. The complete collapse of the traditional social formation has been averted by the existence of the extended family

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189 L. Pye Aspects of Political Development (Boston; Little Brown & Co; 1966) p.87; see also C. Mojekwa "International Human Rights: The African Perspective" in J.L. Nelson & U.M. Green (eds) International Human Rights: Contemporary Issues (Human Rights Publishing Group: New York 1980) p.87.

social welfare system. Colonialism represented the brutal dispossession of rural communities, creation of indigenous reserves to provide an abundant and cheap workforce, and heavy tax demands to oblige the Africans to work on farms and plantations. In extreme cases, colonial manpower problems were solved by forced labour[190]. For instance colonial legal instruments were used indirectly to guarantee the employer services of native workers. Breach of contract and insubordination by the native employee was treated as criminal offences under British Colonial Master and Servant Laws[191].

It is pertinent to state that these practices were in utter disregard for the Treaty of Versailles. These inhuman labour policies were based on the colonial view that Africans cannot be motivated to work except by coercion[192]. However, comparative research on labour policies in Africa has proved that using incentives were a much more effective means to providing for an adequate supply of determined and qualified labour[193].

Colonialism can hardly be said to have been protective of human rights in Africa[194]. For the most part, colonial regimes were authoritarian and

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190 During the years of King Leopolds private rule in the Belgian Colonies (Congo)(1885-1908) explicit authorization was given to use force of arms to procure labour, J. Davies, African Trade Unions (Harmsworth Press) 1966 p.36.

191 In Ghana (Gold Coast) see Ordinance 8/1893 (as ammended through 1919, Laws of the Gold Coast 1922 Cap 77) S.29. In Kenya see Ordinance 4/1910 (as amended through 1926 Laws of Kenya 1926 Cop 139) SS.47-49. In Tanganyika see Ordinance 32/1923 (as amended through 1946, Laws of Tanzania 1946) SS.35 & 36.

192 Joan Davies, African Trade Unions, op cit p.36.

193 John F. Weeks "Wage Policy and the Colonial Legacy: A Comparative Study" in Journal of African Studies Vol.9 p.361.

194 See Frantz Fannon, The Wretched of the Earth (Penguin, London, 1968); Ngugi wa Thiongo, Petals of Blood (London, Heineman, 1977) and Detained (Nairobi, Heineman, 1977).

repressive. There were no bill of rights[195] and the law was used to coerce, regulate, tax and deter rather than facilitate the emergence of "indigenous interest articulation", dissent and the use of the legal system to resolve disputes[196]. Colonial law was used to perpetrate preventative detention, censorship and ancillary practices. The judges who were part of the colonial bureaucracy operated a system of rule by law rather than of law.

In the social context, the system of indirect rule and its corollary "legal pluralism" (the retention of customary law where not displaced by colonial law) polarized the rural populace from urban sectors of the African society. While the rural populace conducted their affairs by custom which usually involved the settlement of disputes through informal processes or in local customary court, the common law system was only useful and available to the elite who engaged in modern commercial transactions. The impact of the common law system was felt by the rural people only when they had to face sanctions of taxation or the criminal process which were authoritarian in nature. Quite congenital to colonial rule was the philosophy that stressed the "natural inequality of man", "the rightness" of a hierarchical structure of society, in which the "irrational majority" would submit to the authority of a "rational few"[197].

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195 It is noteworthy that although the UK endorsed the European Convention on Human Rights to apply to some of its colonies, it could not be invoked by the inhabitants of these colonies.

196 J.C.N. PAUL, "Human Rights and Legal Development: Observations on Some African Experiences" in J.C. Tuttle (ed) Internatinal Human Rights (Law and Practice) 1978, p.26. See also M.B. Hooker, Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws (Oxford: Clarendon Press) 1975.

197 T.L. Hodgkin, op cit p.51.

In Francophone Africa, the basis of French colonialism was that of political and cultural assimilation. Although the French appreciated that the application of French laws 'en suite' to African colonies was impracticable, they only recognized the customary and Islamic laws that were not "contrary to the principles of French civilization". This blanket policy led to the abolition of inhuman practices such as witchcraft and slavery and also modified and abrogated customary laws especially in the area of family law[198].

The French colonial policy that created legal distinctions between Africans with "statut civil Francais" (French civil status) and Africans with "statut contumier" (customary status) infringed the principle of equality. Africans in Francophone colonies experienced the suppression of traditional rights of participation in their established local socio-political systems. Freedom of movement was restricted through the confinement of native workers to work camps.

In the Belgian colony of the Congo, the suppression of human rights was vivid[199]. The alliance between the state and private enterprise to exploit the Congo without due regard to the basic dignity of the local inhabitants was undertaken with the express authority of King Leopold who declared that "the Congo has been and would have been but a personal undertaking. There is no more legitimate or respectable right than that of an author over his own work, the fruit of his labour... My rights over the Congo are to be shared with no one, they are the fruits

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198 J.W. Salacuse. An Introduction to Law in French Speaking Africa Vol.1 Africa South of the Sahara (Charlottesville, Virginia, The Michie Co. Law Publishers, New York) 1969 p.60.

199 Crawford Young "Colonial Rule Through Direct Rule: The Belgian Model" in W. Cartey & M. Kilson eds The African Reader: Colonial Africa (New York, Vantage Books) pp.87-88.

of my struggles and expenditure"[200].

Although King Leopold's control over the Congo was cut off by the Belgian Parliaments Colonial Charter of 1908, due largely to protests in the USA and Europe, no significant reform was undertaken thereafter, until independence in 1960.

In Anglophone Africa, the basis of the colonial philosophy may be summed up in Lord Lugards statement:

> "there, then, is the true conception of the inter-relation of colour - complete uniformity of ideals, absolute equality in the paths of knowledge and culture, equal opportunity for those who strive, equal admiration for those who achieve; in matters of social and racial, a separate path, each pursuing his own interested traditions, preserving his own race purity and race pride, equality in things spiritual, agreed divergence in the physical or material"[201].

Lord Lugards statement is basically a reflection of the segregationalist policy of separate but equal development. The statement is an apparent contradiction of the notion of equal opportunity.

The Native Authorities Ordinance[202] of Nigeria established the indirect rule system of administration which empowered the colonial government to appoint local intermediaries arbitrarily and endowed the latter with the obligation to maintain order and good government. Indirect rule, thus led to the infusion of more powers on local chiefs who abused these powers beyond the bounds that would have been unacceptable in

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200 Quoted in Ruth Slade "King Leopolds Congo" (London, Oxford University Press) 1962 p.174.

201 Lord Lugard "The Dual Mandate in British Tropical Africa" (Hamden, Conn, Action Books 1965) p.5.

202 Native Authorities Ordinance (Nigeria) 1953.

traditional African societies[203].

The British Colonial Administration subjected all native laws and customs to the text of the "repugnancy rule"[204]. Thus any customary law or practice that was in the opinions of the judiciary contrary to "natural justice, equity of good conscience" or any colonial law was thus abolished[205]. While this rule led to the abolition of some practices such as slavery, osu system[206], witchcraft, the infanticide of twins[207], it also led to authoritarianism and racial discrimination[208]. According to Read "colonial rule was essentially authoritarian and even the introduction of English law as the basis for local legal systems did not result in the colonial subjects enjoying the full rights of liberty, due process, free speech and the rest which the common law is said to guarantee the Englishman himself"[209].

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[203] M. Crowther - West Africa Under Colonial Rule (Lond, Hutchinson 1968) p.198.

[204] Cap 211 of 1948 Laws of Nigeria, S.19 states that "Nothing in this ordinance shall deprive the courts of the right to observe and enforce the observance, or shall deprive any person of the benefit of any native law or custom not being repugnant to natural justice, equity or good conscience or incompatible either in terms or by necessary implication with any ordinance or rule...made under ordinance for the time being in force in the territory".

[205] T.W. Bennet "Conflict of Laws: The Application of Customary Law and the Common Law in Zimbabwe" Vol.30 (1981) ICLQ p.59.

[206] Osu were slaves offered to dieties for the purpose of appeasement. See C.A. Oputa "Crime and the Nigerian Society" in African Indigenous Laws (eds) T.O. Elias S.N. Nwabara & C.O.Akamgbo. (Enugu, Government Printer 1975) p.48.

[207] Ibid p.12.

[208] Y. Ghai & J.P.W.B. McAuslan "Public Law and Political Change in Kenya" (Nairobi OUP) 1970 pp.407-8.

[209] J. Read op cit.

In the economic field, the British colonisers practised forced labour[210] and trade unions were not allowed to exist[211]. Exploitation of the economic resources of the colonies for the benefit of the metropolis was perpetuated by the colonial administrators. The colonial state neither assumed obligations for the economic development of the colonies nor made allowances for a limited range of social welfare provisions for the indigenous[212].

Such was the intervention of colonialism which was more effective in destroying indigenous African structures than its culture. Colonialism was essentially antithetical to human rights. The only voices that protested the excesses of colonialism were missionary groups and nationalist movements[213].

The states that evolved and perpetuated colonial policies were in direct contravention of the provisions of the Universal Declaration of Human Rights, particularly Article 1 which states that "The subjection of peoples to alien domination and exploitation constitutes a denial of the fundamental human rights...". This provision was a major catalyst to demand for self-determination on the African continent. The right to self determination both in its external and internal dimensions was denied to the colonized peoples.

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210 Roger G. Thomas. "Forced Labour in British West Africa: The Case of the Northern Territories of the Gold Coast 1906-1927" in Journal of African History 14 (1974) p.74-103.

211 A.T. Nzula, I.I. Potekhin and A.Z. Zusmanovich Forced Labour in Colonial Africa (London: Zed Press 1979) p.119.

212 Rhoda Howard "Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons" in Human Rights Quarterly 1984 p.172.

213 E.A. Brett Colonialism and Underdevelopment in East Africa: The Politics of Economic Change (1919-39) (London Heineman) 1973 p.171.

Human rights, self determination and Africanism or African Unity were the major goals of African nationalist movements. In the following chapter we propose to examine the institutional evolution of the OAU, its impact on the promotion and protection of human rights on the continent and its efforts towards dismantling institutional and legal obstacles to human rights protection in Africa.

Chapter Two

The Evolution of the OAU

The OAU represents a realisation of the myth of Pan-Africanism. The idea of Pan-Africanism was conceived at the end of the 19th Century and evolved as a manifestation of fraternal solidarity among Africans and peoples of African descent[1].

What is Pan-Africanism? It is difficult to define comprehensively for the simple reason that it has assumed different meanings and orientations at various stages in its evolution[2]. The wider view of this movement is probably what may be described as "Pan-Negroism"[3] i.e. the re-proclamation of the rights of the blackman despite his experience of racial oppression; colonialism and his history of slavery. The second narrower definition adopts the political approach which views pan-Africanism as a quest for continental unity through political cooperation[4].

What may be described as "proto"- Pan-African ideas evolved as a response to the slave trade, slavery and racial discrimination in the New World. This broader view of Pan-Africanism as an emotional expression by self educated or mission educated protagonists of common African descent found its first platforms of expression at the Pan African Conference in 1900. The Conference passed resolutions which focused on Africa and appealed to the world to stop the exploitation of Africa and

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1 George Padmore, Pan Africanism or Communism, (London, Dobson 1955) pp.117-18.

2 Jabez Ayodele Langley, West African Aspects of Pan African Movements 1900-1945. PhD Thesis, The University of Edinburgh 1963 p.14.

3 B.A. Duncke, The Rule of the OAU in African Conflicts MSc Thesis, University of Edinburgh 1974.

4 I.Geiss "Notes on the development of pan-Africanism" in Journal of the Historical Society of Nigeria (Vol.III No. 4) June 1967 p.719 at p.720.

grant "responsible government" as soon as possible to Africa and the West Indies[5].

The first Pan-African Congress held in 1919 embraced a variety of themes, one of which was the right of colonized peoples of Africa to self determination, their right to their own lands, their rights not to be exploited by investment capital. Nevertheless, the Congress adopted a lengthy resolution which was silent on the right of Africans to independence[6]. Compared with the 1900 Pan-African Conference this was a retrogressive resolution. However it is conceivable that the prevailing climate in Africa was of total economic and political subjugation by the Imperial powers and "outright demands for self government and independence would have been hopelessly premature"[7].

Resolutions for Self Government did not emerge until after the Fourth Pan-African Congress of 1927 in New York[8]. However, it was not until the Fifth Pan-African Congress in 1945 that the movement became more politicized and the lead finally taken by Africans[9]. One of the more striking resolutions was the Congress's "demand for Black African autonomy and independence so far and no further that it is possible in this one world for groups and peoples to rule themselves subject to inevitable world unity and federation"[10]. The significance of the 1945 Congress was the demise of the pan-Negro characteristics of the Pan-

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5 Geiss, op cit, p.750.

6 Colin Legum, Pan-Africanism: A Short Political Guide (New York, 1963) p.29.

7 Basil Davidson, Which Way Africa: Search for a New Society, (Harmondsworth, Middlesex, 1967) p.63.

8 The earlier Congresses were the 1921 London and Brussels Congress and the 1923 London and Lisbon Congress.

9 J. Woronoff, Organising African Unity (Metuchen N.J., 1970) p.23.

10 V.B. Thompson, "Africa and Unity, (London 1969) p.59.

African Movement. Duncke states this conference "saw the end of the pan-Negro movement based on racial solidarity, and established a new goal of the unity of the African continent as a whole, including non-Negro people"[11].

With the end of World War II came the wave of nationalism which engulfed Africa. The Egyptian resolution of July 23rd, 1952 gave African nationalism a revolutionary impetus despite the fact that there was a gulf between the Arab states of North Africa and the sub-Saharan states[12]. The Pan-African movement split into units of nationalist movements to continue the struggle for self determination and independence within their respective territorial units in Africa. We therefore share Dunke's opinion that both Pan-Africanism and African nationalism are manifestations of the same general urge towards unity and freedom[13].

By 1958 several African colonies had been granted independence. The necessary corollary of this was the realignment of the Pan-African movement. The movement was re-established on a "doctrine of continental exclusiveness implicit in the very composition of the OAU" thus relinquishing its intercontinental origins[14]. The geopolitical barrier that existed between the North African States and the sub-Saharan states was partially scaled by the first All African Peoples Conference of

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11 Duncke, op cit p.17.

12 F.C. O'Kaye, International Law and the New African States, (London, 1972) p.121.

13 op cit p.29.

14 Ali Mazrui, Towards a Pax Africana (London, 1966) p.182.

Independent African States which was held in 1958 at Accra, Ghana[15]. This conference was attended by the then eight independent African states, namely Ethiopia, Ghana, Liberia, Libya, Morocco, Sudan, Tunisia and the United Arab Republic[16]. Thus the presence of Anglophane, Francophane as well as Arab African nations was clearly a manifestation of the determination to forge regional unity between countries with different colonial and cultural legacies. The convening of the conference may be attributed to the efforts of Nkrumah[17] despite the fact that his plan for a summit meeting of the Heads of State was not successful. Apart from Nkrumah and Liberia President Tubman, no other country was represented by its Head of Government.

Despite Nkrumah's charisma and domination of this conference, the participating states endorsed the formation of regional groupings which should not be prejudicial to the ultimate goal of Pan-Africanism. Furthermore, they condemned colonialism and racialism and supported African liberation movements in their struggle for freedom and independence[18]. This latter resolution stemmed from the United Arab Republic's sponsored motion which was inspired by the war of liberation which was then raging in Cammeroon and Algeria.

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15 The main objectives of the conference were (i) To consider means of safeguarding the political independence and sovereignty of participating states, (ii) to formulate the mutual policy of extending assistance to dependent African territories in the attempt of the attainment os self-government, (iii) to discuss problems of common interest and to strengthen mutual understanding.

16 Carol A. Johnson, "Political and Regional Groupings in Africa, in International Organisation, Vol.16, No.2, 1962, p.426.

17 Nkrumah had written that "African nationalism was not confinedto the Gold Coast - th new Ghana. From now on it must be Pan-African nationalism, and the ideology of African political consciousness and African political emancipation must spread throughout the whole continent": see Nkrumah, Ghana (London, Nelson, 1956) p.290.

18 Paul A. Thorpe, Regional International Organisations: Structure and Functions (St. Martins Press, New York 1971) p.48.

The institutional or organizational machinery which was evolved during the conference was fragile. The Conference of Independent African States was to be held every second year. In between these meetings, States were to maintain links through their respective permanent representatives at the United Nations. However, should disputes arise between African states, they were to be referred to the ad-hoc meetings of foreign ministers or experts[19]. The conference may, therefore be viewed as a "limited tangible success"[20] because there was no inclination by the participating States to sacrifice their dearly won independence by creating a feasible regional machinery that may disapprove of the policy of a sovereign state or advise it to fulfil pledges made on the alter of African unity.

The second Conference of Independent African States was held on June 15th 1960 at Addis Ababa, Ethiopia. The spirit of compromise was all pervasive as the sessions. Consequently decisions were reached by consensus on decolonization, African foreign policy, economic, social and cultural objectives, despite the ideological camps which had emerged. The struggle between the federalists and the functionalists culminated in the failure of the second Conference to adopt a genuine framework for African Unity.

The federalists view (otherwise known as the radical view) and that held by Nkrumah of Ghana and Sekon Toure of Guinea was that political integration was the solution to achieving continental unity and total emancipation of Africa[21]; this faction also believed in the establishment of a United States of Africa with the Joint African High Command as its

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19 C.A. Johnson, op cit, p.428.

20 J. Woronoff, op cit, p.85.

21 Duncke op cit, 30, 32.

military force. On the other hand the functionalists believed that unity could only be achieved gradually by strengthening economic and cultural relationships between States. The functionalists believed in the preference of State sovereignty over that of African Unity[22].

The atmosphere of the second Conference can be gleaned from the exchange between the Ghanaian representative Ako Adjei and Alhaji Maitama Sule from Nigeria. Adjei insisted on "the complete political union of African states" while Alhaji Sule maintained that the idea of forming a Union of African States was premature[23].

It is therefore not surprising that the conference adopted the very delicately worded resolution on "Promotion of African Unity" which stated that "the Conference of Independent African States (CIAS) requests the President of the CIAS to address a communication to the Heads of these States to initiate consultations through diplomatic channels with a view to promoting African Unity"[24]. The resolution reveals that the functionalists were the majority. The second conference was the last meeting of independent African states for some years to come.

However, while the Conference of Independent African States were meeting, a parallel All African Peoples Conference (AAPC) was taking place in which representatives of peoples who had not as yet gained independence also participated. A close examination of the participants and decisions taken at African Peoples Conferences shows that they were very different from those of the Conference of Independent African States. The first Conference of African Peoples held at Accra, Ghana

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22 Ibid.

23 Keesing's Contemporary Archives; Vol.XII; 1959-60, p.17554.

24 Reprinted in C. Legum, op cit, p.152.

between 5th-13th December 1958 involved the participation of 200 representatives from 50 African political parties, trade unions, student movements, and other organisations[25].

Secondly, the resolutions adopted by the (AAPC) were more radical than the mild toned CIAS ones. In its resolutions on "Frontiers, Boundaries and Federations", it stated "that the conference (a) endorses Pan-Africanism and the desire for unity among African peoples; (b) declares that its ultimate objective is the evolution of a Commonwealth of Free African States. The (AAPC) also resolved that the objective of unity could be achieved by means of regional federations provided that they "should not be prejudicial to the ultimate objectives of a Pan-African Commonwealth by hardening as separate entities"[26].

The AAPC also took several practical or organizational decisions, notably to set up a permanent secretariat in Accra. The aims of this body were to "accelerate the liberation of Africa and the development of a feeling of Pan-African solidarity", to "pave the way for the eventual creation of the United States of Africa"[27].

The tone of the (AAPC) resolutions became more radical at the Second Conference in January 1960 at Tunis and at the Third Conference held in March 1961 at Cairo. The Leadership Committee elected by the Tunis Conference included Ahmed Benmendjd of Algeria and Patrice Lumumba of Congo, names which amply testify to the resolutely anti-imperialist spirit of the conference. This spirit manifested itself in the special resolutions passed on Algeria which called for "the recognition of The Provisional

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25 Keesings Contemporary Archives, Vol.XII, 1959-60 p.16612.

26 Reprinted in C. Legum, op cit, p.230.

27 Phillipe Decraene, Le Panafricanisme, Que Sais-Je? (Paris, PUF) p.52.

Government of the Algerian Republic (G.P.R.A.) by all African states, the creation of a volunteer brigade, regular contributions from the budgets of African states and the withdrawal of all black troops committed to the Algerian conflict by the French Republic"[28]. On the other hand, the Second CIAS which had met earlier in August 1959 at Monrovia had refused to recognise nay, support the GPRA which was then leading the Algerian peoples colonial struggle under the aegis of the National Liberation Front[29].

The AAPC resolutions at its 3rd conference in March 1961 at Cairo approved the use of force to eliminate imperialism, denounced UN intervention in Congo and called for the independence of Portuguese colonies[30]. Despite the unanimity that characterized the AAPC resolutions, they lacked any form of coercion to ensure their implementation by independent African States. Only Nkrumah and Sekou Toure granted full support to the AAPC, and this did not endear them to the hearts of their fellow statesmen[31].

Consequently, we agree with J. Woronoff[32] that despite its more pragmatic program, the AAPC was actually less effective than the CIAS in conducting inter-African relations. However, it must be recognized

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[28] Ibid, p.53-54.

[29] Elenga Mbuyinga, Pan Africanism or Neo-Colonialism? The Bankruptcy of the OAU (Zed, London, 1982) p.42.

[30] P. Decraene, op cit, p.55.

[31] C. Hoskyns, Pan-Africanism and Integration" in A. Hazlewood, African Integration and Disintegration (London Publishers, 1967) p.363.

[32] J. Woronoff, op cit, p.89.

that the AAPC's endeavours to conduct and determine inter-African relations on the basis of political organisations, independent of State action was more of a success[33].

The Congo crisis and the Algerian struggle for independence led to a polarisation of attitudes amongst the independent states. This emergence of regional groupings amongst African states was probably unavoidable considering the different colonial experiences of these states. This development was probably encouraged by the metropolitan powers, Great Britain and France, both of whom expected to retain some sort of influence over their former colonies.

Three main organisations preceded the formation of the OAU. They were the African States of the Casablanca Charter (Casablanca Group)[34], the African and Malagasy Union [U.A.M.] (the Brazzaville Group)[35] and the Organisation of Inter-African and Malagasy States (Monrovia Group)[36]. These Groups represented the radical, conservative and moderate opinions on African unity respectively[37].

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[33] I.W. Zartman, International Relations in the New African, (Englewood Cliffs, New Jersey, 1966).

[34] The Casablanca Group was established on 7 January 1961 and was composed of Ghana, Guinea, Mali, U.A.R., Algeria, Morocco and Libya.

[35] The Brazaville Group was formed on 12 September 1961 and was composed of Cameroun, Central African Republic, Chad, Congo, Brazaville, Gabon, Dahomey, Ivory Coast, Malagasy, Mauritania, Niger, Senegal and the Upper Volta.

[36] The Monrovia Group was formed on 30 January 1962, following a preliminary conference in Monrovia on 12 May 1961, and was composed of Ethiopia, Liberia, Nigeria, Sierra Leone, Tunisia, Togo.

[37] J. Mayall, "African Unity and the OAU" in Yearbook of World Affairs, 27 1973 pp.110-33 at p.112.

The UAM was the first group to emerge as "une organisation de cooperation politique, une union d'Etats"[38]. It should be observed that the common bond of language and a shared colonial experience had encouraged them to cooperate in an exploration of mutual concern for their economic and foreign policy. At a meeting of the Brazzaville states held on 27 March 1961 at Yaounde, Cameroon, the African and Malagasy Organisation for Economic Cooperation (Organisation Africaine et Malgache de Co-operation Economique) (OAMCE) was established to coordinate economic cooperation[39]. The members of the Brazzaville Group were united by "ideological sympathies and common objectives rather than regional proximity"[40]. The main rationale behind their policies was the desire to maintain cordial links with France. According to C. Hoskyns "there was no commitment, even in the distant future, to African unity, and no support for liberation movements"[41]. Although the U.A.M. Charter presents the organisation as a union of independent and sovereign states to which all independent African States were eligible for membership, the organisation remained restricted to French-speaking African States[42]. The main objectives of the UAM was to organise co-operation among member States with a view to maintaining and promoting solidarity, collective security, development in various fields and peace in Africa and the world at large[43].

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38 Guy Feuer, "Les Conferences Africaines et 'Organisation de la Communante Africo-Malagche d'expression francaise" in Annuaire Francais de Droit International, Vol.VII 1961, p.767.

39 A.J.G.M. Sanders, International Jurisprudence in African Context, (Butterworths, London 1979), p.104.

40 C. Hoskyns, Pan Africanism and Integration op cit p.364.

41 C. Hoskyne, Ibid p.364.

42 A.J.G.M. Sanders op cit p.105.

43 F.C. Okoye op cit P.123-124.

Meanwhile, the Casablanca group had adopted the Casablanca Charter[44] which provided for the establishment of a supra-national African Consultative Assembly which would hold periodic sessions and would consist of representatives of every African State. The Charter also provided for three permanent functional committees. The African Political Committee comprising the Heads of State or their representatives, which was charged with the responsibility for co-ordinating the general policies of the various African States; the Charter established an African Economic Committee and the Cultural Committee with the latter body composed of Ministers of Education and the former comprising Ministers of Economic Development, The Joint African High Command was also instituted.

An examination of the Casablanca Charter reveals that is shares the same aims and goals as those of the Charter of the African and Malagasy Unions with the notable exception that the latter charter did not make provision for a Joint African High Command. In practice, the UAM States were basically inward-looking and defensive while the Casablanca group was militant and determined to spread its influence in Africa and abroad[45].

To prevent further regional polarization, some of the newly independent States namely, Nigeria, Liberia, Sierra Leone[46] organised a conference in Monrovia, Liberia on 8 May 1961 ostensibly to discuss the Algerian and Congolese crises. However, the conference, which was attended by twenty-two of the then twenty-seven independent African States, was

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44 The Charter was adopted at the meeting of Casablanca states held in Casablanca, from 3 to 7 January 1961.

45 C. Hoskyns op cit p.365-366.

46 These independent states were termed "The Monrovia Group" of moderate states.

confronted with an agenda designed to explore the means of establishing a "universal" organisation as opposed to "partial organisations"[47]. The conference agreed that membership was open to all independent African states and observer status was granted to several liberation movements[48]. The conference adopted several resolutions which, in the main, called for the establishment of a regional machinery for political and economic cooperation in Africa. It established a provisional secretariat which would be responsible for preparing a draft charter of the proposed Inter-African and Malagasy Organisations (IAMO) to be submitted to the second meeting of the group scheduled to be held on 25 January 1962 at Lagos, Nigeria. The conference also agreed on basic principles to govern the relationship between African States, viz, (1) absolute equality of states, (2) non interference in the internal affairs of states, (3) respect for territorial integrity, (4) the inalienable right to political independence, (5) peaceful settlement of disputes and (6) the promotion of cooperation among member states[49].

The consensus reached provided the basis for the Lagos draft Charter. The draft Charter provided for three principal organs:

(a) The Assembly of Heads of State and Government,

(b) Council of Ministers, and

(c) General Secretariat as the central administrative organ of the organisation.

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47 C. Hoskyns, "Trends and Developments in the OAU", in Yearbook of World Affairs, 1967, p.166.167.

48 Paul A. Thorpe, Regional International Organisations: Structure and Function, (St. Martin Press, New York 1971) p.48.

49 T.O. Elias "The Charter of the Organisation of African Unity in, The American Journal of International Law (1965) Vol.59, p.244. T.O. Elias then the Attorney General of Nigeria was The Chairman of the Legal and Political Committee of the Conference.

Furthermore, the draft Charter incorporated the principle of settlement of disputes between contracting states by peaceful means.

The Charter did not come into force because of the reluctance of the 'radical' Casablanca group. The reluctance of the Casablanca group, thus stunted the progress toward the establishment of a truly regional organisation[50]. It is to be noted that, at the Lagos Conference, strongly worded resolutions were adopted affirming the principle of the right of all peoples to self determination, and condemning apartheid in South Africa, the colonial wars in Algeria and Angola and all forms of colonialism in Africa.

The achievement of Algeria's independence in June 1962 and the end of the Congo conflict January 1963 created a conciliatory atmosphere among the three groups; Casablanca, Brazzaville and Monrovia. The two main issues that had split the factions had thus been removed[51]. Ethiopia and the members of the moderate group of states proposed an alternate African Conference to reconcile the differences that existed amongst the groups. The conference was held in Addis Ababa on 23 May 1963 and in attendance were thirty African Heads of State and Government[52]. The conference was preceded by a preparatory meeting of foreign ministers which considered three draft Charters, namely, the Casablanca Charter,

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50 N.J. Padelford, The Organisation of African Unity, Journal of International Organisation Vol.18, 1964 pp.521-522.

51 J. Mayall op cit, p.114.

52 The thirty independent African states that attended the conference were: Algeria, Burundi, Cameroon, Central African Republic, Chad, Congo-Brazaville, Congo-Leopoldville, Dahomey, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Tanganyika, Tunisia, Uganda, United Arab Republic and Upper Volta. Morocco sent an observer. The Togolese President Grunitzky was refused membership.

the Lagos Charter and the Ethiopian draft Charter[53]. The meeting of foreign ministers did not reach a definite agreement and it was finally resolved to submit the Ethiopian draft "as a basis for discussion"[54]. The Conference for Heads of State and Governments, eventually adopted a Charter of the Organisation of African Unity having regard to the collective efforts of the participating states which had common interests in regional peace, security, liberty, economic cooperation and in finding solutions to African problems[55].

The foregoing discourse reveals that the Pan-African movement was not only a continental unification force, but also a champion of the rights of Africans in an epoch marked by racial oppression, colonialism and economic subjugation. Some of the major advocates of Pan-Africanism, notably George Padmore, Nkrumah, Dubois and Jomo Kenyatta, had long before the grant of independence to the majority of African States shown concern for human rights. At the Fifth Pan-African Congress held in Manchester in 1945, where the first conscious effort was made to establish a link between human rights and the crusade against colonialism on the one hand and between Pan-Africanism and human rights on the other, they called for the abolition of all racial discrimination, for freedom of expression, of the press and assembly and for compulsory education up to the age of sixteen[56]. These rights were pursued during that era in order to facilitate the struggle against colonialism especially

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53 I. Wallerstein, The Early Years of the OAU: The Search for Organisational Pre-eminence; Journal of International Organisation, Vol.20 1966, pp.774-775.

54 J. Woronoff op cit p.128.

55 P. Duncan Towards Unity in Africa, Journal of Foreign Affairs Vol.42, 1964 pp.267.

56 Karel Vasak "Problems Concerning the Setting Up of Regional Commissions on Human Rights, with Special Reference to Africa", Background paper for United Nations Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Cairo, 2-15 September 1969, SO 216/3(17) 1969 p.11.

as they typified the rights denied to the colonised peoples[57]. Thus, concern for human rights was a recurring theme throughout the Pan-African movement.

We now propose to analyse the legal framework of the OAU Charter, including its aims, objectives and organs with a view to establishing its relevance to human rights.

(b) Human Rights and the OAU Charter

The OAU Charter was signed in Addis Ababa on 26 May 1963 by 31 member states and entered into force immediately. The main issue that had delayed the establishment of the OAU - whether the institutions should be union of states or an association of independent units - was resolved in favour of the latter. However this conclusion was not achieved without acrimony.

During the Addis Ababa Conference immediately preceding the signing of the OAU Charter, Nkumah stated that:

> "African Unity is above all a political Kingdom which can be gained by political means. The social and economic development of Africa will come only within the political kingdom, not the other way round. The United States of America, the Union of Soviet Socialist Republics, were the political decisions of revolutionary peoples before they became mighty realities of social power and material wealth"[58].

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57 James Read "Bill of Rights in The Third World, Some Commonwealth Experiences", in Verfassung und Recht in Ubersee, (ed. Prof. Dr. Herbert Kruger), 1. Heft 1, Quartal 1973, p.29.

58 Quoted in Chimelu Chime, Integration and Politics Among African States (Scandinavian Institute of African Studies, Uppsalla 1977) n.7, p.185.

This last stand taken by Nkrumah representing the federalist position was overwhelmed by the moderates/functionalists group which was in majority at the conference. President Tsiranana of the Malagasy Republic summarized the functionalists positions thus:

> "We intend to conserve the total sovereignty of our states... I should underline that our adhesion means, by the same token, a rejection of a formula for a federation of African States because federalism presupposes a surrender of a large part of national sovereignty. Similarly we would reject a confederal formula seeing that the authority we superimpose on the States might impose demands which would be unacceptable for certain of us"[59].

An examination of the OAU Charter betrays the strong mood of African States to jealously safeguard their hard won independence. However, the OAU Charter reveals the awareness of the responsibility for the promotion and protection of human rights.

The preamble of the OAU Charter of which great care and time was devoted reflects this awareness. Almost half of the time spend on considering the Charter as a whole had been devoted to the preamble above[60]. The preamble opens with a recital of the principle of the inalienable right of all peoples to self determination, freedom, equality, justice and dignity in order to promote co-operation among African peoples based on mutual understanding and transcending ethnic and national differences.

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[59] Ibid, p.188.

[60] T.O. Elias, "The Charter of the OAU" American Journal of International Law, 59, 1965, p.246.

Further the preamble reaffirms the adherence of state parties to the principles of the Charter of the UN and the Universal Declaration of Human Rights as a "solid foundation for peaceful and positive cooperation among states[61].

Some commentators have criticized this verbal allegiance to the western inspired Universal Declaration of Human Rights as unrealistic because it ignores the peculiarity of the African continent particularly her cultures, tradition and values[62]. We submit that the recital is a recognition of the existence of basic universal minimum standards of human rights which should be observed. Furthermore, taking the preamble of the OAU Charter as a whole, the cumulative impression is that the founding fathers must have been convinced that adherence to the Charter of the OAU and the Universal Declaration is consistent with the "common determination to promote understanding and collaboration among (African) States"[63] and the "responsibility to harness the natural and human resources of (Africa) for the total advancement of (Africans) in spheres of human endeavour"[64]. These stipulations can be said to have always expressed an ideological if not judicial purpose which respect human rights.

All independent African States are members of the United Nations and the OAU. By acceding to the Charters of these organisations they have voluntarily assumed responsibility for the respect of human rights[65].

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61 The 8th Preambular OAU Charter, See Appendix II.

62 O. Aluko "The Organisation of African Unity and Human Rights" Roundtable 282 July 1981, pp.234-44.

63 The 4th Preambular Paragraph, OAU Charter.

64 Ibid 3rd Preambular Paragraph.

65 See Address of the OAU Secretary-General to the Meeting of Experts Preparing the Draft African Charter on Human and Peoples Rights, Dakar, Senegal 28 Nov-8 Dec 1974, p.4.

The Universal Declaration has been universally acknowledged as valid international law. Saario and Cass state that "as new nations have referred to it or incorporated it into their constitutions or fundamental law, as national judicial decisions have cited it approvingly, and as it has been acknowledge by or incorporated into a wide range of international conventions, declarations and recommendations, its justifiable principles at least have been elevated with considerable authority to status of customary international law"[66]. Furthermore, Professor Humphrey lends support to this view by stating that "whatever its drafters may have intended, (the Universal Declaration of Human Rights) is now part of the customary law of nations" and therefore binding on all states[67].

The reference to the Universal Declaration in the preamble of the OAU Charter, strictly speaking does not impose any obligations on OAU member states, because preambular provisions, whether in treaties or domestic legal instruments, are not usually legally binding. However, the preambular reference to the Universal Declaration does establish the basis for the positive provisions that are embodied in the Charter.

Some of the provisions of the "purposes" of the OAU are consecrated to human rights. One of the main "purposes" of the organisation is the promotion of "international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights"[68]. The reference to the UN Charter and the Universal Declaration denotes not merely the adherence of Member States to the principles contained in

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66 Saario and Cass, The United Nations and the International Protection of Human Rights: A Legal Analysis and Interpretation. 7 California, Western International Law Journal (1977) p.596.

67 J.P. Humphrey, The Implementation of International Human Rights Law, 24 NYLSC Review (1978) p.32.

68 Article II (1)(e) OAU Charter.

these instruments but also to the awareness of the African States of the need for international cooperation in practical terms[69]. The OAU Charter also requires Member States "to coordinate and intensify their collaboration and efforts to achieve a better life for the peoples of Africa"[70] and "eradicate all forms of colonialism from Africa"[71]. It can thus be established that the OAU expects its members to protect human rights guaranteed in the UN Charter and as especially expounded in the Universal Declaration of Human Rights. We must, however, hazard that this expectation does not necessarily amount to an obligation on OAU Member States to promote and protect human rights. Indeed, the emphasis on sovereignty in the OAU Charter and the fanaticism with which the OAU has defended the doctrines of territorial sovereignty - even in the face of near genocide instructive of this view[72]. The obligation on OAU Member States to promote and protect human rights arises not out of the "purposes" provisions OAU Charter per se but from their status as signatories to the UN Charter and or the Universal Declaration. Not unlike the provisions of the preamble, the "purposes" provisions are generally not regarded as imposing any legal obligations on parties to a treaty.

The principles or articles of faith of the OAU are contained in Article III of the Charter which affirms the following principles:

(1) The sovereign equality of all Member States;

(2) Non-interference in the internal affairs of States;

(3) Respect for the sovereignty and territorial integrity of each

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69 Elias op cit p.247.

70 Article II (1)(b) OAU Charter.

71 Ibid Article II (1)(d).

72 H.W.U. Okotu Ogendo "National Implementations of International Responsibility, East African Law Journal Vol.10, 1974, p.11.

State and for its inalienable right to independent existence;

(4) Peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration;

(5) Unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other States;

(6) Absolute dedication to the total emancipation of the African territories which are still dependent;

(7) Affirmation of a policy of nonalignment with regard to all blocs.

The principle of the sovereign equality of all OAU Member States, restates the position of the UN Charter, Article 2(1) of which states that the U.N.O. "is based on the principle of the sovereign equality of all its Members"[73]. The main rationale for the OAU provision was the desire of larger members to allay the fears of the smaller states in the context of the prevailing spirit of unity and solidarity[74].

Ancillary to the principle of the sovereign equality of OAU Member States is the principle of non-interference in the internal affairs of states. This latter principle is similar to Article 2(7) of the UN Charter which prohibits UN intervention in matters which are essentially within the domestic jurisdiction of any state.

In his interpretation of the issue whether human rights matters are within the domestic jurisdiction of States, Professor Rateb delineates three approaches namely:

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73 Article 2(1) UN Charter.

74 T.O. Elias op cit p.248.

(a) Those who recognise the power of the State concerned to exercise its own sovereign decision in a disputed question;

(b) Those who believe that the competence of deciding on admissibility of an objection (incidental plea) belongs to the body against which objection is directed;

(c) Those who do not directly uphold the power of the United Nations bodies to take a decision in the matter, but who attach the main importance to the term 'intervene' applied to Article 2, paragraph 7, and are of the opinion that the intervention of which this Article speaks refers only to peaceful non-coercive intervention of the United Nations in the domestic affairs of a Member State without the consent or against the wish of that State[75].

The UN on its part, has often asserted jurisdiction over a wide range of matters especially those of human rights. The rationale for this can be found in the Advisory Opinion of the International Court of Justice in the Certain Expenses case which states that;

> "...when an Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the organisations"[76].

Therefore, the OAU can take action on human rights in furtherance of "international cooperation having due regard to the UN Charter and the Universal Declaration of Human Rights"[77].

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75 A. Rateb, Background paper prepared for the United Nations Seminar on the Establishment of Regional Commissions on Human Rights, Cairo 2-15 September 1969, p.8-9.

76 I.C.J. Reports 1962 p.151; See also Louis B. Sohn "Recent Cases on United Nations Law" (1963) p.37.

77 Article II (1)(e) OAU Charter.

However, it may be argued that the relevance of the interpretations of the UN provision is limited since the OAU provision differs in two major respects. Firstly, whereas the UN provision forbids 'intervention", the OAU provision adopts a broader term in outlawing "interference". Secondly, while the UN provision reserves to States matters "essentially" within their domestic jurisdiction, the OAU Charter exclusively reserves to states matters within the ambit of their internal affairs. Consequently, due to the wider scope covered by the OAU Charter provision, human rights issues may fall within the ambit of matters within the domestic jurisdiction of Member States. Thus some scholars contend that human rights promotions and protections are limited to inter-state co-operation under the OAU Charter[78].

On the other hand, it is evident that since the OAU Charter only imposes obligations of non-interference upon Member States and not upon the organisation itself[79], nothing estopps the OAU from taking action on human rights issues in furtherance or in fulfilment of its stated purposes. In this context, Article 15 the Charter of the Organisation of American States (OAS) provides that "no state or group of states has the right to intervene directly or indirectly in the internal or external affairs of any other state". Therefore, the OAS principle prohibits all forms of interference or attempted threat against the personality of the State or against its political, economic and cultural elements[80]. However, international instruments impose obligations upon State Parties to refrain from threats to peace and, above all, to respect principles of human rights. Therefore it is submitted that the OAS cannot evade its

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78 O. Eze Human Rights in Africa: Some Selected Problems (MacMillan, Nigeria) 1984, p.199.

79 Onyeonoro Kononu "Secession and the Right of Self-determination: An OAU Dilemma" Journal of Modern African Studies Vol.12, 1974, p.371.

80 Marjorie Whiteman "Digest of International Law" Vol.5 1963, (Department of State Publication, Washington DC 1971), p.463.

responsibility to observe these obligations and act if investigations reveal that international peace or human rights are violated.

An analysis of the OAU Charter reveals that it allows for exemptions to the rule of non-interference in the domestic affairs of a member state. Justice Elias has however, asserted that the principle of non-interference is an absolute prohibition[81]. If this is so, what do we make of Article III (7) of the OAU Charter which is an "affirmation of a policy of non-alignment with regard to all blocs"[82]. Dr. B. Akinyemi contends that "The fact that this article [III (7)] does not impose a limitation on the foreign policy alternatives available to Member States and to the extent that foreign policy is to a large extent determined by domestic affairs of Member States..." the principle of non-interference is not sacrosanct[83].

Furthermore, the UN in its articulation of Article 2(7) of its Charter applies the principle that any action which furthers the realisation of the purposes of the organisation can not be ultra vires the organisation. Applying this principle to the OAU, it is evident that the OAU Charters reaffirmation of adherence of its Members to the Charter of the UN and the Universal Declaration of Human Rights implies that human rights promotion and protection is one of the purposes of the OAU. Thus OAU Member States being members of the UN have an obligation to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or

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81 T.O. Elias Africa and the Development of International Law (Oceana Publications Inc. 1972) p.127.

82 Article III (7) OAU Charter.

83 Bolaji Akinyemi "The Organisation of African Unity and the Concept of Non-interference in the Internal Affairs of Member States" British Yearbook of International Law (1972-73) p.398. Despite the fact that many OAU Member States support the policy of non-allignment, several States do not effectively pursue the policy. See Adekunle Ajala "The OAU and Non-Alignment" Nigerian Journal of International Affairs, Vol.7, 1981, No. 1&2, p.116.

religion[84]. Thus OAU Member States cannot rely on the OAU Charter or any other treaty to violate the human rights that the UN Charter recognises. This submission is based on the presumption that the OAU is a regional arrangement within Article 52 of the UN Charter. According to T.O. Elias, the reference to the UN in both the Preamble and Article III of the OAU Charter is an indication that OAU Member States regard their organisation as falling within the category of regional arrangements envisages in Article 52(1) of the UN Charter[85]. Furthermore H. Levie contends that there is an implied acceptance that OAU's authority is subject to the obligations to which its members have agreed under the UN Charter and acts as such as a limitation on its legitimate functions[86].

Gross violations of human rights have been consistently viewed by the UN as matters of international concern since they violate international obligations of the delinquent State (under the UN Charter) and they cause international friction. A study of UN practice shows that for these reasons, human rights violations cannot be regarded as matters encapsulated by domestic jurisdiction clauses. Thus the attempt to confine human rights issues to the domestic jurisprudence domain by reference to Article III(2) of the OAU Charter, though plausible, is nevertheless handicapped by the obligations assumed by the States as UN Members and also by the practice of the UN.

Although the scope of the human rights obligations of States under the

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84 The provision of Articles 1(3); 55(c) and 56 of the UN Charter impose obligations on all UN Member States to promote respect for and observance of human rights.

85 T.O. Elias "The Charter of the OAU" American Journal of International Law 59, 1965, p.247.

86 Howard S. Levie "Some Constitutional Aspects of Selected Regional Organisations - A Comparative Study" Colonbia Journal of Transnational Law Vol.5, p.64.

UN Charter remains unsettled, the meaning of "human rights and fundamental freedoms" is generally determined by reference to the catalogue of rights proclaimed in UN human rights instruments, especially the Universal Declaration of Human Rights, to which most African states subscribe. Since its adoption, by the General Assembly in 1948, the Universal Declaration has been increasingly viewed as having achieved a measure of legal significance in spite of the clear original intention not to regard it as imposing legal obligations[87]. This view is predicated upon Article 38 of the Statute of the International Court of Justice which permits the application of "international custom, as evidence or a general principle accepted as law" and "the general principle of law recognized by civilized nations"[88]. Furthermore, several international fora on international law have declared that the Universal Declaration on Human Rights has become part of customary international law[89]. The Declaration has also been viewed as setting forth "general principles of international law"[90] and binding on all States whether they are members of the UN or not[91]. It is therefore our submission that the Universal Declaration is now part of the law of nations and thus binding not because it was adopted by the General Assembly, but for other reasons including subsequent events and the emergence of a juridical consensus

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87 In his dissenting opinion in the South West Africa Cases (Second Phase), Tanaka J. states that although not binding in itself, the Universal Declaration constituted evidence of the interpretation and application of the relevant Charter provisions. I.C.J. Reports 1966 pp.288-293.

88 The Statute of the International Court of Justice, June 26, 1945 Article 38, 59. Stat. 1055 T.S. No. 993.

89 For instance, see Montreal Statement of Assembly for Human Rights reprinted in 9. International Commission of Jurists at 94, 95 (1968); and also the International Conference on Human Rights, Proclamation of Tehran; UN Doc. ST/HRI; UN Doc. A/Conf. 32/41 1968.

90 Barcelona Traction Light and Power Company (Belgium v Spain) 1970 ICJ, 3, 303 (Judgement, Separate Opinion of Judge Ammoun).

91 Professor J.P. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character" B.G. Ramcharan (ed) Human Rights After Thirty Years (Martinus/Nijhoff Hague, 1979.

endorsed by the practice of states.

Most African States subscribe to the Universal Declaration in addition to reaffirming the Declaration in the OAU Charter. Thus since OAU Member States have assumed international obligations relating to human rights under the UN Charter and the Universal Declaration, disputes among them regarding these obligations are certainly matters of international rather than domestic concern. Consequently, the provision of Article III(2) of the OAU Charter which established the principle of "non-interference in the internal affairs of states" cannot prevent one OAU Member State from asking another to live up to its international obligations in the matter of human rights.

The third principle of the OAU establishes "the respect for sovereignty and territorial integrity for each state and for its inalienable right to independent existence"[92]. This principle is an extension of the two preceding principles since it guarantees the inviolability of the territory of each Member State by forbidding any act on the part of another State which is calculated either to deprive that other State of its existence as a polity or which in any way impedes the exercise of its prerogatives or attributes of sovereignty. The UN equivalent of this policy is enshrined in Article 2(4) of the UN Charter which states that; "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the Purposes of the United Nations".

Unlike the UN Charter, the Charter of the OAU does not make provision for an institution akin to the UN Security Council, where major powers may exercise exclusive votes on matters of war and peace. This was a

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92 Article III (3) OAU Charter.

deliberate act on the part of the OAU's founding fathers to prevent the emergence of power blocs on the continent. The OAU Charter adopts a "one State, one vote" formulae[93], in comparison to the weighted voting formula currently adopted by the EEC and some UN Specialised Agencies, International Monetary Fund (IMF) and the International Finance Cooperation (IFC).

The fourth main principle of the OAU is that of the peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration[94]. With a view to effecting the peaceful settlement of disputes, Article XIX of the OAU Charter provides for the establishment of a Commission of Mediation, Conciliation and Arbitration which is one of the four principal institutions of the OAU. An appraisal of the Commission shall be undertaken very shortly. Article III(4) of the OAU Charter is comparable to Article 33(1) of the UN Charter which requires "the Parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall first seek a solution by negotiation, enquiry mediation, conciliation, arbitration and judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice". It is however evident that the OAU Charter does not envisage the settlement of disputes by judicial means.

It is arguable whether other institutions or agencies can participate in the resolution of African disputes under the auspices of the UN. The position depends upon the view one takes regarding the issue of whether the OAU is a regional arrangement or agency within Chapter VIII of the UN Charter. We subscribe to the view that the OAU is a regional

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93 Article XIV OAU Charter.

94 Article III (4) Ibid.

arrangement[94] and thus perceive no obstacles to the participation of extra-OAU agencies in the resolution or settlement of African disputes.

However, the practice of the OAU and indeed the UN has been one of "try OAU first". This approach implies that whenever a serious problem of a basically regional character defies all peacemaking efforts of the OAU, the UN organ(s) would in the appropriate manner organise moral and political support for such efforts and if necessary play a complimentary diplomatic role.

The "try OAU first" approach or principle, finds support in Article 52(2) of the UN Charter which requires UN Member States that are also members of regional organisations to make every effort to achieve peaceful settlement of local disputes before referring them to the Security Council. An examination of OAU efforts in the resolution of various conflicts reveals that the OAU has established undisputed jurisdiction as a body of first instance, but that in spite of its lack of success in many cases, no concerted attempt has been made to seek solutions through the UN[95]. Moreover, in the instances when disputes were brought to the UN, the Security Council did not as required by Article 34, conduct an investigation and recommend any method of adjustment other than a regional one, nor did it propose appropriate terms of settlement under Article 37. For instance, after the Congo Crisis in 1964 the Security Council made it clear that is regarded the OAU as a regional arrangement by stating that it was "convinced that the OAU should be able in the context of Article 52 of the Charter of the UN to help find a peaceful solution to all the problems and disputes

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94 Rose M. D'Sa The Relationship Between the UN and the OAU in the Fields of International Peace and Security, and of Economic and Social Development, Ph.D. Thesis University of Birmingham, 1983, pp.24-25.

95 B. Andemicael (ed) Regionalism and the United Nations. Part II (Dobbs Ferry: Oceana) p.233-59.

affecting peace and security in the continent of Africa"[96]. However, this has not affected the role of the UN Security General in providing diplomatic assistance in the settlement of African disputes[97]. Indeed the UN Secretary General has on various occasions taken diplomatic initiatives as a matter of duty before OAU organs could meet and discuss them.

It is pertinent to refer to the equivalent provision of the OAS Charter which provides for the submissions of all disputes between American States to the peaceful procedures of the OAS before being referred to the UN Security Council[98]. The OAS Charter thus differs from the OAU Charter as far as the former specifically provides for the settlement of disputes within the procedures of the OAS before being referred to the Security Council.

In pursuit of its stated purposes, the OAU Charter consecrates in the fifth principle, "the unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other State"[99]. The incorporation of the condemnation of political assassinations and subversive actions were a response, firstly, to the assassination of President S. Olympio of Togo in January 1963 in a coup d'etat and secondly, to the constant complaints by some Member States that other States within the OAU were fuelling subversive activities against duly constituted authorities[100].

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96 UN Security Council Resolution 199 (164) of December 30 1964.

97 B. Andemicael and D. Nicol "The OAU: Primacy in Seeking African Solutions within the UN Charter" in Y. El-Ayouty and W. Zartman (eds) The OAU After Twenty Years (Praeger: New York, 1984) p.103.

98 Article 20 Charter of the OAS. 2 UST 2394 TIAS No. 2361, 119 UNTS 3. (1948).

99 Article III (5) OAU Charter.

100 T.O. Elias "The Charter of the OAU" op cit p.249.

Furthermore the OAU Charters unreserved condemnation of political assassinations highlights the awareness of Member States of the need to protect the right to life, albeit betraying the anxiety of the Heads of State for their self-preservation.

The sixth OAU principle imposes on the organisation and the Members States the duty of absolute dedication to the total emancipation of the African territories which are still dependent. In this regard, the Preamble to the Charter of the OAU lays the foundation by emphasising the determination of the OAU "to fight against neo-colonialism in all its forms". It will be recalled that one of the purposes of the UN Charter as expressed in Article 1(2) is "to develop friendly relations among nations based on respect for the principle of equal rights and self determination of all peoples". The principle of self determination has been a permanent item on the agenda of the UN since its inception. By virtue of Resolution 421(V) of December 4, 1950, the UN General Assembly recognized that "the right of peoples and nations to self-determination is a fundamental human right". The most significant trend towards the recognition of the principle of self-determination as a legal right was the 1960 Declaration of the Granting of Independence to Colonial Countries and Peoples[101]. The representatives of African States at the UN played a significant role in the formulation of this Declaration which established a 13 member committee with a view to supervising the implementation of the Declaration[102].

The OAU, in pursuance of the principle, established a Liberation Committee with headquarters in Dar-es-Salaam, Tanzania. The Committee

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[101] General Assembly Resolution 1514 (XV) of 4 December 1960.

[102] Maya Krishnan "African States Practice Relating to Certain Issues of International Law" Indian Yearbook of International Affairs Vol. XIV (1965) p.197.

was charged with the responsibility of providing and coordinating financial assistance for all African Liberation Movements which are struggling for the political independence of their territories. The OAU Liberation Committee suffered from the lack of cooperation from several African States and problems of internal organisation. The extent of the Committee's problems is reflected in the sharp criticism levelled against it by the Ghanaian daily, The Spark which accused the Committee of "exceeding its mandate for planning the strategy of the liberation struggle; surrendered powers of vital points to individual African States without authority, [has] shown little concern in its budget for the liberation struggle, disregarded secrecy by revealing its military intelligence"[103].

Several African States refused or neglected to contribute to what had hitherto been voluntary sums to the Committee. In response, the 1964 Cairo Summit of the OAU Assembly of Heads of States and Government decided that all OAU Member States should contribute a compulsory minimum sum to the Committee based on the formulae of payments to the UN. The legality of the military and financial contributions to Liberation Movements will be addressed in Chapter Four.

At the level of the UN, the African State representatives actively pursued the principle of the total emancipation of African territories from colonial domination. Towards this end they endeavoured to secure the legitimacy of armed struggle against colonial powers in order to achieve the legal recognition of Liberation Movements. Consequently, the UN General Assembly adopted Resolution 2189 on 13 December 1966 which reaffirmed "the legitimacy of the struggle of the peoples under colonial rule to exercise thought of self determination and independence" and

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103 African Research Bulletin PSC Series Vol. No. 1 January 1964, p.12.

urged "all States to give material and moral assistance to national liberation movements in colonial territories[104]. Despite the apparent success of African States in establishing universal opprobrium against colonialism and apartheid, the enforcement of resolutions by them has been poor. In the Rhodesian affair, for instance, the OAU Member States were preoccupied with safeguarding their sovereignty and were reluctant to interfere in a matter which was regarded as within the sovereign authority of the United Kingdom[105]. Furthermore, despite the zeal and determination of some of the OAU Members, the problems of legitimacy, resources and operational competence posed obstacles to the goal of total emancipation of the African territories which were dependent. We propose to address these problems in the following Chapter on Self Determination.

The seventh basic principle of the OAU is the affirmation of the policy of nonalignment with regard to all blocs[106]. The same principle is expounded in the OAU Solemn Declaration on General Policy as follows:

> "In order to help reduce the tension between blocs, we have subscribed to the policy of nonalignment and to give meaning to this commitment, we have expressed our deep desire to see Africa rid itself of all foreign military bases and stand aloof from any military alliances and from armaments race"[107].

It is the foreign policy of most OAU Member States that absolute

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104 R. Yakemtchouk, The OAU and International Law, Y.El. Ayouty (ed) The OAU After Ten Years: Comparative Perspectives (Praeger: New York 1975) p.99.

105 O. Eze "OAU Faces Rhodesia" Africa Review (1978) Vol. 5, No.1, p.60.

106 Article III (7) OAU Charter.

107 The Solemn Declaration of General Policy. Published by the OAU Division of Press and Information, General Secretariat, Addis Abbaba 1973, p.2.

neutrality must be maintained in their relations with both Eastern and Western powers. The policy of nonalignment was first declared by the late Jawaharlal Nehru of India and implies the avoidance of involvement in the cold war between the so called free and unfree worlds[108]. Despite the avowed determination of most African States to maintain a policy of nonalignment the existence of financial and technical aid from both East and or West weakens the resolve of some States to maintain the policy. In recent years, the mounting Third World debt crises has forced several African States to adopt Western economic models in order to stay creditworthy. However deliberate and well-conceived the non-alignment programme may be, it can only succeed on the basis of a reformed regional economic model based on self-reliance.

It is significant that out of the seven basic Principles examined, four are clearly in defence of sovereign rights of Member States as prescribed by the Monrovia Group of African States. The first principle being the sovereign equality of Member States, was a rejection of the Pan-Africanist view that there were too many unviable and unjustifiably small sovereign states in Africa. Only two principles appear to be concessions to the Casablanca Group, namely, the dedication to liberate the dependent territories and the declaration of adherence to the principle of nonalignment. The assiduity of the OAU founding fathers to protect both sovereignty and equality of States is reflected in the principles enunciated in the OAU Charter[109].

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108 T.O. Elias "The Charter of the OAU" op cit p.250.

109 K. Mathews 'The Organisation of African Unity' in D. Mazzeo (ed) African Regional Organisations (Cambridge University Press 1984) p.58.

The Charter of the OAU embodies relevant provisions relating to "economic, social and cultural rights" amongst its purposes[110]. The Preamble of the OAU Charter proclaims the desire that all African States should unite to assume the welfare and well-being of their peoples[111]. Furthermore, Article II(2) lists six fields[112] in which OAU Member States shall coordinate and harmonize their general policies towards the goals set in Article II(1) which include the promotion of international cooperation having due regard to the Charter of the UN and the Universal Declaration of Human Rights[113]. It is pertinent to observe that the OAU Charter in requiring Member States to coordinate and harmonize their general policies in the six fields, omits the specific field of human rights. The partially redeeming factor here, according to T.O. Elias, is that these categories "do not exhaust all the possibilities of continental endeavours towards the attainment of unity and solidarity among the peoples of Africa"[114], or indeed the protection of their rights. The adoption and coming into force of the African Charter on Human and Peoples Rights by OAU Member States supports this view. With regard to harmonization of policies in the specified fields, Considerable emphasis has been laid on the field of economic cooperation. Sub-regional economic organisations have arisen out of the post-colonial heritage (such as the West African Economic Community [G.E.A.O.] or

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110 B.G. Ramcharan "Human Rights in Africa, Wither Now?" University of Ghana Law Review Vol. XII (1975) No.2, p.91.

111 Preambular Paragraph 9, OAU Charter.

112 OAU Member States are required by Article II (2) to harmonize and coordinate their general policies in the following fields:
(a) political and diplomatic cooperation;
(b) economic cooperation, including transport and communications;
(c) educational and cultural cooperation;
(d) health, sanitation and nutritional cooperation;
(e) scientific and technical cooperation; and
(f) cooperation for defence and security

113 Article II (1)(e) Ibid.

114 T.O. Elias The Organisation of African Unity op cit p.247.

the Customs and Economic Union of Equatorial Africa [U.D.E.A.C.]), or as a result of initiatives of the UN Economic Commission for Africa [E.C.A.] (such as the Economic Community of West African States [E.C.O.W.A.S.], and the Eastern African Preferential Trade Area [P.T.A.] or in response to particular sub-regional needs (such as the S.A.D.C.C.)[115].

The foregoing examination of the aims and objectives of the OAU Charter reveals that the founding fathers of the OAU recognized the need for the promotion and protection of human rights. The OAU Charter is the first regional Charter to subscribe to the Universal Declaration of Human Rights. The Member States of the OAU have a duty to cooperate in the promotion and protection of human rights. However the effective promotion and protection of human rights is not enhanced by the principles of sovereignty and non-interference in the internal affairs of Member States. It is however submitted, that due to the obligations that OAU Member States have assumed by being Members of the UN and by endorsing the Universal Declaration of Human Rights, these States cannot claim that human rights issues are matters solely confined to domestic jurisdiction.

(c) <u>The Principal Organs of the OAU</u>

We propose to examine the institutional framework of the principle organs of the OAU in the context of human rights promotion and protection. As indicated in the organizational chart of the OAU[116], the OAU Charter provides for the following principle institutions:

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115 I. William Zartman "The OAU in the African State System: Interaction and Evaluation" in Y. El-Ayouty and I.W. Zartman (eds) <u>The OAU After Twenty Years</u> (Praeger New York 1984) p.34.

116 See Appendix VI

(1) The Assembly of Heads of State and Government;

(2) The Council of Ministers;

(3) The General Secretariat;

(4) The Commission of Mediation, Conciliation and Arbitration

In Addition to the foregoing principal institutions, Article XX of the OAU Charter provides for the following specialised Commissions:

(1) Economic and Social Commission;

(2) Educational and Cultural Commission;

(3) Health, Sanitation and Nutrition Commission;

(4) Defence Commission;

(5) Scientific, Technical and Research Commission

The Assembly of Heads of State and Government is "the supreme organ" of the OAU[117]. The Council of Ministers ranks second and it acts as a "cabinet" to the Assembly[118]. The General Secretariat is subordinate to the Council of Ministers to which it is directly responsible. The Commission of Mediation, Conciliation and Arbitration is not to be confused with the specialised Commissions established under Article XX. The Commission is rates on a par with the Secretariat, the Council of Ministers and the Assembly of Heads of State and Government[119]. Whereas these four organs are the principal institutions of the organisation, the specialized commissions are answerable to the Assembly of Heads of State and Government through the Council of Ministers.

The fact that the Charter does not provide for a Commission on Human

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117 Article VIII OAU Charter.

118 Z. Cervenka op cit P.49.

119 T.O. Elias, "The OAU and its Charter" op cit p.264.

Rights is probably significant of the attitude of African States towards the effective protection of human rights during the OAU's formative years. Again, the desire to seek solace in the fact that the list is not exhaustive proves attractive.

(i) The Assembly of Heads of State and Government (The Assembly)

Article VIII of the OAU Charter provides that the Assembly shall be the supreme organ of the organization. It shall subject to the provisions of the Charter discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the organization. It may, in addition, review the structure, functions and acts of all the organs and any specified agencies which may be created in accordance with the Charter.

Article II of the Charter lists as one of the purposes of the OAU, the promotion of "international cooperation having due regard to the Charter of the UN and the Universal Declaration of Human Rights". Consequently, violations of human rights in Africa would fall within the "matters of common concern to Africa" and hence subject to discussion by the Assembly being the main deliberative organ. This role of the Assembly is significant because, the Charter assigns to each specialised Commission functions which do not include human rights[120].

The Assembly is composed of the Heads of State and Government of OAU Member States or their duly accredited representatives[121]. The Assembly meets once a year. However, extraordinary sessions are convened, if any Member State makes a request to that effect and it is

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120 See Article II (2) and Article XX, OAU Charter.

121 Article IX Ibid.

approved by a two-thirds majority of Member States[122]. The Assembly decides by a simple majority at its ordinary session, the place of its next session[123]. It has become customary for the head of the host government to be elected the Assembly's Chairman. All the meetings of the Assembly are held in private except where a simple majority of member states decide otherwise[124].

A quorum of at least two-thirds of the membership of the OAU is required before any business can be transacted, at either an ordinary or extraordinary session. Each Member State has one vote in the Assembly[125] and all resolutions and decisions are determined by the two-thirds majority of the members of the organisation[126]. However, questions of procedure require only a simple majority[127].

The deliberation of the Assembly are envisaged to lead to resolutions or decisions. Neither the Charter nor the Rules of Procedure render any definition of what constitutes a "decision" or a "resolution". However, the Rules of Procedure reveal that decisions are to be taken regarding the appointment of the Secretary General and the Assistant Secretaries General[128]. Decisions are also envisaged regarding budgetary matters and amendments to the Charter and Rules of Procedure. Other instances

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[122] Rule 5, OAU Rules of Procedure of the Assembly of Heads of State and Government (OAU General Secretariat, Division of Press and Information) Jan 1982. 1.

[123] Rule 6 Ibid.

[124] Rule 7 Ibid.

[125] Rule 24 Ibid.

[126] Rule 25 Ibid: See also Article X (2) OAU Charter.

[127] Rule 26. Rules of Procedure of the Assembly.

[128] Rules 32 and 34 Ibid.

include decisions regarding the interpretation[129] of the Charter and the admission of new members[130].

The legal effect of OAU resolutions or decisions is that they impose obligations on Member States. For instance the recommendations of the UN General Assembly are binding on Member States precisely because they have assumed the obligation to be so bound by signing the UN Charter. Similarly, the resolutions of the OAU Assembly are binding upon OAU Member States because of the obligations they have voluntarily assumed under the OAU Charter[131]. Furthermore, the Charter provides the conditions subject to which its decision in the form of resolutions or otherwise must be taken if they are to be binding. Article 10(2) states that "all resolutions shall be determined by a two-thirds majority of the Members of the Organisation". In practise resolutions adopted by the Assembly take the form of recommendations to Member States[132]. The fact that most OAU resolutions in the form of recommendations may be attributed to the emphasis laid by the Charter on non-interference in the internal affairs of Member States. Some scholars are however of the view that only those resolutions dealing with the structure and operation of the OAU would be binding on the members[133].

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129 Article XXVIII OAU Charter.

130 Article XXXIII OAU Charter.

131 T.O. Elias "The Legality of the OAU Council of Ministers Resolution on Rhodesia in December 1965" The Nigerian Law Journal (1969) Vol.3, p.7.

132 D. Meyers "International Conflict Management by the OAU" Journal of International Organizations Vol.28 (1974) p.348.

133 Z. Cervenka op cit p.45-46. K. Mathews, "The Organization of African Unity" Domenico Mazzeo (ed) African Regional Organisations (Cambridge University Press 1984) p.59.

Unlike the Statute of the Council of Europe which provides for the suspension of any Member that seriously violates Article 3 thereof[134], the OAU Charter does not make any provision for the suspension or expulsion of a member that violates the Charter provisions or OAU resolutions. There is no machinery for the enforcement of discipline in ensuring compliance with OAU Resolutions. These factors have eroded the succinct positivity that ought to characterize State reactions to OAU resolutions[135]. Members of the OAU Assembly strive to achieve unanimity at the expense of depriving most resultant resolutions of the necessary legal impact, thus rendering the resolutions mere declaratory pronouncements. Although OAU resolutions are meant to be binding, they have in practice been of only persuasive value; in this lies one of the main weaknesses of the OAU.

The most significant decision[136] taken by the Assembly with regard to human rights was the "Decision on Human and Peoples Rights in Africa" on July 20 1979[137], which called for the convening of a Meeting of African Experts to prepare a preliminary draft of the African Charter on

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[134] Article 8 of the Statute of the Council of Europe 1949. Article 3, thereof states that "Every Member of the Council of Europe must accept the principles of the Rule of Law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms and collaborate sincerely and effectively in realization of the aim of the Council as specified in Chapter 1".

[135] Instances, of non-compliance by African States include the refusal of Morocco to recognise the admission of SADR by the OAU; the defiance of Malawi in maintaining diplomatic relations with South Africa despite the decisive OAU majority resolution on the diplomatic and economic boycott of South Africa; and the actions of Liberia, Egypt and Zaire in reestablishing diplomatic relations with Israel in defiance of the 1973 OAU Resolution calling on States to sever links with Israel. It is noteworthy that Swaziland, Lesotho and Malawi never observed this boycott.

[136] This is without prejudice to the numerous OAU Assembly resolutions adopted in furtherance of the decolonization campaign which were implicitly humanitarian in nature. See Assembly of Heads of State and Government Resolutions, Decisions and Declarations of Ordinary and Extraordinary Sessions (OAU DOC AHG/Res. and AMG/Doc Series).

[137] OAU Assembly Decision 115 XVI, Rev.1; OAU Doc AHG/115.

Human and Peoples Rights (AFCHPR). The impact of this decision led to the adoption of the AFCHPR in Nairobi on June 28 1981 and eventually to its entering into force on October 21 1986.

(ii) The Council of Ministers

The second most important organ of the OAU is the Council of Ministers. The Council is composed of "Foreign Ministers or such other ministers as are designated by the Governments of Member States"[138]. The composition of the Council allows flexibility in that it accommodates any Minister of a Member State to attend its sessions, and not necessarily the Foreign Minister. The Council meets at least twice a year[139] and acts as a "Cabinet" to the Assembly because it is specifically responsible for the implementation of the Assembly's decisions[140]. However, this responsibility does not assume parliamentary forms.

Under Article XII of the OAU Charter, the Council has three major functions, namely, the preparation of the Agenda for the Assembly's sessions, the implementation of the decisions of the Assembly and the coordination of inter-African cooperation in accordance with the Assembly's instructions and in conformity with Article II(2). Pursuant to discharging its functions, the Council of Ministers is to hold biennial meetings; the first of which is "its ordinary annual session which shall be held in February each year, it shall consider and approve, inter alia, the programme and Budget of the Organisation"[141]. The second ordinary annual session is devoted to the preparation of the Assembly's annual Summit Conference. Justice T.O. Elias states that these biennial

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138 Article 12(1) OAU Charter; Rule 1, Rules of Procedure of the Council of Ministers.

139 Article 12(2) OAU Charter.

140 Z. Cervenka op cit p.49.

141 Rule 6. Rules of Procedure of the Council of Ministers.

meetings provide a measure of continuity for the work of the organisation as a whole[142]. The Councils meetings, ordinary and extraordinary, require a quorum of two-thirds majority of the total membership of the OAU[143]. At all Council meetings, each Member State has one vote and all resolutions are determined by a simple majority of members[144]. It is pertinent to note in this context that the resolutions of the Assembly require a two-thirds majority. The rationale for this difference may be that the conclusions of the Council on important issues take the form of mere recommendations to the Assembly, while the Assembly which has the power to take final decisions needs the desirable force of a larger majority.

Consequently, the decisions of the Council of Ministers cannot be intended to be legally binding especially in the light of its restricted powers under the Charter which has been described as "supervising or just noting the implementations of resolutions voluntarily by Member States and reporting back to the Assembly"[145]. It is pertinent to refer to the matter of the Council of Ministers Resolution on Rhodesia of 1965, in a bid to illustrate the limits of the power of the Council.

At its sixth Extraordinary Session held in Addis Ababa (December 3-5 1965) the Council of Ministers adopted a resolution which that:

> "The Council of Ministers of the OAU... having considered the illegal action of independence by the European Settler Minority Government of Southern Rhodesia... decides... that if the United Kingdom does not crush the rebellion and restore law and order, and thereby prepare way for majority

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142 T.O. Elias "The Organisatin of African Unity" op cit.

143 Rule 28 Rules of Procedure.

144 Rule 29 Ibid; Article XIV (2) OAU Charter.

145 J. Worronof op cit p.163.

> rule in Southern Rhodesia by December 15, 1965, the Member States of the OAU shall sever diplomatic relations on that date with the United Kingdom"[146].

By December 15th only 9 Member States had broken off diplomatic relations with the UK[147]; twenty-seven Members of the organisation did not follow suit. Although the Assembly of Heads of State and Government had earlier passed a resolution requiring Member States "to reconsider all their political, economic, diplomatic and financial relations with the United Kingdom"[148], it had stopped short of imposing an obligation on Member Stated to sever diplomatic relations with the U.K. if the latter failed to take steps to end Ian Smiths rebellion in Southern Rhodesia. However, the Council of Ministers proceeded to adopt a resolution in which it "decided" to impose an obligation on Member States to sever diplomatic relations with the U.K. The majority of Member States that refused to implement the Resolution of the Council were right because the Council can only make recommendations, for the consideration and decision of the Assembly of Heads of State and Government[149].

The Council of Ministers is not an executive body capable of taking binding decisions. In a strongly worded statement at the meeting of the Assembly held in Addis Ababa (from 29 October to 9 November 1966) the Liberian President stated that:

> "The Foreign Ministers who met in Addis Ababa exceeded the

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146 Resolution ECM/Res 13 (VI) of 3 December 1965, paragraph 2.

147 These countries were the United Arab Republic, Algeria, Sudan, Mauritania, Ghana, Guinea, Mali, Congo (Brazaville) and Tanzania.

148 Resolution of the Assembly of Heads of State and Government AHC/Res 39 of October 22, 1965.

149 T.O. Elias "The Legality of the OAU Council of Ministers Resolution on Rhodesia in December 1965" op cit p.9.

> scope of their authority. No Foreign Minister on the Liberian political level would direct a breach of diplomatic relations between Liberia and any foreign government. This can only be done by the President of Liberia... This procedure and condition imposed by the resolution is considered to be harsh, unreasonable and impracticable"[150].

The attempt by the Council of Ministers to "usurp" the powers of the Assembly of Heads of State and Government may be explained in the light of the Councils desire to respond spontaneously to an exigent situation. It also highlights the need for the creation of a new organ which could be competent to deal with urgent matters during periods of recess between one session of the Assembly and the next. The absence of an organ equivalent to the UN Security Council which has the "primary responsibility for the maintenance of international peace and security" (Article 24, Charter of the United Nations) has inevitably led to the relatively slow response of the OAU to massive violations of human rights and to regional inter-state disputes. Ad-hoc solutions to this problem have been either through the convening of extraordinary sessions which are rather difficult to summon or through the good offices of the Chairman of the Assembly. A final solution may however be on the horizon because the Council of Ministers have adopted a Resolution (CM/Res 789(XXXVI) of 1979) which proposed the establishment of a Political Security Council with powers to respond instantly to major problems. In this regard an Ad-hoc Ministerial Committee has been established to study and submit an in-depth report on the issue[151]. In the meantime, however, the Council has continued to perform the role of promoting the peaceful settlement of disputes by establishing ad-hoc commissions to investigate disputes and reconcile state 'parties'.

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[150] Quoted in M.J. Polhemus "The OAU and Intra-Systems Conflict Management (1963-68); Ph.D. Dissertation, Duke University, 1971, p.96.

[151] The Ad-hoc Ministerial Committee was established by CM/Res 860 (XXXVII).

One of the main contributions of the Council of Ministers to the evolution of a regional machinery for the promotion and protection of human rights in African has been its preparation of the "Decision on Human and Peoples Rights in Africa"[152] which called for the convening of a Meeting of African Experts to prepare a preliminary draft of the African Charter on Human and Peoples Rights. In response to this Decision, the Meeting of African Experts met in Dakar, Senegal from November 28 to December 8, 1979 to prepare the first Draft of the African Charter.

In a bid to draft a Charter reflecting African realities, a Ministerial Conference composed mainly of African Ministers of Justice and Legal Experts met in Banjul, The Gambia, from 8 to 15 June 1980 to complete the Draft Charter. At the end of this debate, only eleven articles had been approved. Spurred by this progress, the OAU Council of Ministers requested that the Ministerial Conference reconvene in Banjul "as soon as possible" to complete the Charter[153]. The Ministerial Conference on the Draft Charter convened again at Banjul from 7-19th January 1981 and completed the Draft Charter[154]. The Ministerial Conference thus passed on the completed Draft Charter to the 37th Ordinary Session of the Council of Ministers. The Council of Ministers took note of the Draft Charter and decided to submit it with no comments to the Assembly for its consideration. On June 17, 1981, the 18th Session of the Assembly deliberated on the Charter and adopted it with no amendments.

(iii) <u>The General Secretariat</u>

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152 Decision 115 (XVI) Rev.1. OAU Doc. AHG/115 (XVI) 1979 adopted by the OAU Assembly of Heads of State and Government on 20th July 1979.

153 OAU Doc. CM/Res 792 XXV (1980). The Meeting of the 35th Ordinary Session of the Council of Ministers, Freetown, Sierra Leone, June 18-28, 1980.

154 Report of the OAu Secretary General on the Draft African Charter on Human and Peoples Rights. OAU Doc. CM/1149 XXXVII at 2 (1981).

The pivot of most international organisations is found in the permanent secretariat; the OAU is no different. Article XVI of the OAU Charter provides that a Secretary General appointed by the Assembly shall direct the affairs of the organisation. The founders of the OAU had initially provided for an "administrative secretary-general" because the Secretariat was envisaged "to be an administrative body and not a political one; "a body which implemented decisions but did not make them"[155]. Thus the authority given the administrative secretary general were those necessary for directing the routine affairs of the secretariat[156]. However, due to institutional reviews which were effected in July 1979, the prefix "administrative" was deleted and the Secretary-General's functions became more executive in effect.

The Secretariat, located in Addis Ababa, is the permanent organ of the organization and headed by the Secretary-General. In accordance with Article XVII, the Secretary-General is to be assisted by one or more Assistant Secretaries-General who are to be appointed by the Assembly.

The appointment of the Secretary-General is not subject to the sub-regional considerations[157]. However, the Assistant Secretaries-General, each of whom heads a department within the Secretariat, are chosen from four countries on a basis of geographic, linguistic and political balance. The Assistant Secretaries-General are nominated by their home governments and are invariably senior civil servants in the diplomatic corps of Member States. This policy probably informs the official comment that the OAU's future was threatened by "tensions in the

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155 Speech of Senegals President Leopold Senghor at the Addis Ababa Summit, 1963 (Ministry of Information, Ethiopia) p.53

156 B. David Meyer "The OAU Administrative Secretary General" International Organization No.3 Vol.30 Augumn 1976 p.510.

157 Rule 8; Functions and Regulations of the General Secretariat, OAU. Jan. 1982. Addis Ababa.

Secretariat" and "a growing tendency towards nationalism and regionalism"[158]. Thus there is a tendency for Member States to risk breaching Article XVIII(2) of the OAU Charter which imposes an obligation on Member States to respect the exclusive character of the responsibilities of the Secretary General and the staff and not to seek to influence them in the discharge of their responsibilities.

The main functions of the OAU General Secretariat are:-

- to supervise the implementation of all economic, social, legal and cultural exchanges of Member States;
- to keep custody of the official documents and records of all OAU organs;
- to place at the disposal of the Specialized Commissions all available technical and administrative services;
- to receive communications of ratification of instruments of agreements entered into between Member States;
- to prepare an Annual Report of the activities of the OAU; and,
- to prepare the Programme and Budget of the OAU for each fiscal year[159].

In the performance of their functions, the Secretary General and his staff are not to seek or receive instructions from any government or any other authority external to the OAU[160]. OAU officials are thus protected from such influences by Article XXXI of the Charter which grants the Council of Ministers power to "decide on the privileges and immunities to be accorded to the personnel of the Secretariat in the respective territories of the Member States". Accordingly, the General Convention on the Privileges and Immunities of the OAU was signed by twenty-seven OAU Member States on October 25 1965 at Accra,

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158 'Report of the Administrative Secretary-General' (1974) in Africa Research Bulletin, Political Series, June 1974, p.3258.

159 Rule 2, Functions and Regulations of the General Secretariat op cit.

160 Article XVIII (2) OAU Charter.

Ghana[161]. Due to the fact that the General Convention applies only to the representatives of the Members of the OAU and OAU Officials, to the exclusion of the officers serving the Specialized Commissions, an Additional Protocol[162] was prepared by the General Secretariat and approved the Assembly on 3 July 1980. The Additional Protocol provides for privileges and immunities including the issue of the OAU laissez-passer to OAU officials and other staff members, and travel certificates to expert and non-nationals of OAU Member States employed by the Specialized agencies. The General Convention on Privileges and Immunities is envisaged to apply to the members of the African Commission on Human and Peoples Rights by virtue of Article 43 of the African Charter on Human and Peoples Rights (AFCHPR).

An examination of the OAU Charter and the Functions and Regulations of the General Secretariat reveals that no specific mention is made of the Secretariat's responsibility on human rights issues. However, in practice, the General Secretariat has recently discharged duties, pertaining to human rights by virtue of the decision of the Assembly to evolve a regional machinery for the promotion and protection of human rights. Hitherto, the response of the General Secretariat to human rights issues has been dismal. It is instructive to note that despite being officially invited to several UN sponsored African Regional Seminars on Human Rights[163], the OAU Secretary General attended only

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[161] 34 out of 51 OAU Member States have signed the General Convention on Privileges and Immunities, the latest signatory being Equitorial Guinea (16 June 1986). The following countries are yet to sign the Convention: Chad, Cameroon, Djibouti, Gambia, Buinea Bissau, Mauritius, Morocco, Mozambique, Saharawi, Sao Tome and Principie, Togo, Zambia and Zimbabwe.

[162] Additional Prorocol to the OAU General Convention on Privileges and Immunities; OAU Doc CM 1034 XXXV Rev.3 Annex 1.

[163] The first of these UN seminars was the UN Seminar on Human Rights in Developing Countries held at Dakar, Senegal from 8-22 February 1966. For a chronological list of major human rights Conferences and Seminars in Africa, see Appendix VII.

the September, 1979 UN Seminar on the Establishment of Regional Commission on Human Rights with Particular Reference to Africa[164]. The OAU Secretary-General's presence at this September 1979 UN Seminar may have been encouraged by the earlier July 1979 Session of the OAU Assembly "Decision on Human Rights and Peoples Rights in Africa" adopted in July 1979. The Decision of the Assembly called on the Secretary-General of the OAU to:

> "organize as soon as possible in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an African Charter on Human Rights, providing, inter alia, for the establishment of bodies to promote and protect human rights"[165].

We consider this Decision as the first clear mandate giving the Secretary-General power to discharge duties concerning the promotion and protection of human rights in Africa. In compliance with the Decision, the Secretary-General convened a Meeting of African Experts to prepare a preliminary Draft Charter on Human and Peoples Rights. At the inaugural Meeting of Experts the Secretary-General stated that the preliminary draft Charter should reflect the African concept of human rights[166a]. Although no specific definition of the African concept of human and peoples rights was proffered, the Secretary-General suggested that it was essential that the draft Charter should:

(a) "give importance to the principles of non-discrimination;

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164 UN Doc ST/HRSER.A/4 (10-21 Sept. 1979). The OAU was represented at this Seminar by its Secretary-General, Mr. Edem Kodjo and its Chief Legal Adviser, Mr. C.O. Egbunike.

165 "Decision on Human Rights and Peoples Rights in Africa" Decision 115 (XVI) Rev.1, OAU Doc AHG/115 (XVI).

166 Report of the Secretary-General on the Draft African Charter on Human and Peoples Rights (Meeting of African Experts for the Preparation of a preliminary draft of the African Charter on Human and Peoples Rights) Dakar, Senegal, Nov. 28-Dec. 8, 1979, p.1.

(b) lay emphasis on the principles and objectives of the OAU as defined in Article 2 of the Charter of the OAU with particular reference to respect for sovereignty and territorial integrity of each state and for its inalienable right to independent existence; and to absolute dedication to the total emancipation of the African territories which are still dependent;
(c) include peoples rights beside individual rights;
(d) determine the duties of each person towards the community in which the lives and more particularly towards the family and the state;
(e) show that African values as well as morals still have an important place in our societies;
(f) give economic, social and cultural rights the place they deserve"[167].

The extent to which the African Charter on Human and Peoples Rights (AFCHPR) reflects these guidelines will be examined in Chapter Seven.

The Secretary-General has been instrumental to bringing the AFCHPR into force through the dispatch of regular communications and reminders to OAU Member States with a view to ensuring the ratification of the Charter[168]. From our interview with Ambassador Dede, the OAU Assistant Secretary-General (Political Division) held at Addis Ababa on 8th April 1987, one comes away with the impression that the Secretariat has committed most of its available resources to ensure the early enforcement of the AFCHPR. According to Ambassador Dede, the OAU Legal Department is directly responsible for the coordination of the Secretariat's activities in the field of human rights especially the preparation and convening of the Meetings of the African Experts appointed to draft the Charter. The OAU's Acting Chief Legal Adviser, Madame T. Moussa was the OAU's representative at all meetings and deliberations of the Meeting of Experts. She describes the function of

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167 Ibid p.1.

168 OAU Secretary-General Communications to Ministers of Foreign and External Affairs of Member States (CAB/LEG/67/1/12) of 7 September 1981. The OAU Secretary-General also issued similar appeals on each Human Rights Day (Dec. 10) from 1981 to 1986. See for instance OAU Press Release No. 65/81 of 10 Dec. 1981.

the Legal Department as the "engine room" facilitating the metamorphosis of the African Charter on Human and Peoples Rights (AFCHPR). The OAU Legal Department was also responsible for responding to comments and inquiries from external sources regarding human rights in Africa generally, and the AFCHPR in particular.

During our sojourn at the OAU Secretariat, it was evident that the Legal Department is understaffed. We recommend that a separate unit be created solely for human rights issues and such a unit could form part of the Legal Department. This suggestion is particularly pertinent in view of the fact that the AFCHPR envisages the OAU Secretariat to provide both staff and services to the African Commission on Human Peoples Rights. The OAU Secretariat's library and facilities for research are unsatisfactory and require an overhaul to provide services to the African Commission.

Despite its regrettable cold start in pursuing human rights issues, the OAU Secretariat has so far played its role fairly satisfactory since being given the relevant mandate by Assembly. The dismal response of the Secretariat to human rights issues may to an extent be blamed on the administrative nature of the Secretary-General's duties. Nevertheless, past OAU Secretaries General could have used their initiative and personal qualities to expand the powers by exploiting human rights issues or at least responding to violations of human rights. Admittedly, one of the major problems restricting the potential influence of the Secretary-General is the failure of Member States to provide the Secretariat with material resources. Minimal funding restricts the Secretary-General's activity to one of merely providing services to meetings of OAU organs. Membership dues are often withheld as much

out of political pique as financial necessity[169]. The OAU is caught in a vicious circle; the efficiency and effectiveness of the Secretariat is handicapped by the failure of Members to pay dues; similarly, the ineffectiveness of the Secretariat does not encourage members to grant financial resources to it.

The OAU Budget has expanded five-fold from the first budget of US $4,500,000.00 for 1963/64 to US $23,254,236.00 for the 1985/86 Budgetary Year[170]. Article XXIII of the OAU Charter stipulates that Member States should make contributions to the budget "in accordance with the scale of assessment of the UN, no Member State shall be assessed an amount exceeding twenty per cent of the yearly (OAU) regular budget". During the first year of the OAU, less than half of the assessments were actually paid. Similarly in the year 1985/86, only US $9,692,514.00 was paid as contributions to an approved budget of US $23,254,236.00[171]. At the close of the financial year on 31 May 1986 the total amount of arrears of contributions stood at US $34,371,145.00[172]. This state of affairs poses dire problems for the institutional growth, nay effectiveness of the OAU. Indeed, according to the OAU Secretary-General, "if the current trend continues, the completion of a number of activities already started is very much in doubt"[173]. We were constrained to inquire if the establishment and

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169 M. Wolfers "The Institutional Evolution of the OAU" in El. Ayouty & W. Zartman (eds) The OAU After Twenty Years. op cit p.98.

170 Report of the OAU Secretary-General on the Activities of the General Secretariat (July 1986 to February 1987) Addis Ababa Feb. 1987; CM/1406 (XLV) Part II, p.1.

171 Ibid.

172 Ibid p.2.

173 Ibid p.3.

operations of the African Commission of Human and Peoples Rights is amongst the 'activities' envisaged by the Secretary-General to be aversely affected. Ambassador Dede's answer[174] was affirmative.

In the absence of any imminent and concerted resolve by Member States to clear arrears and pay dues promptly, it is likely that the proposed modernisation and computerisation of the OAU Financial Management System will identify weaknesses in the present system and enhance accountability[175]. Thus, an efficient Secretariat should encourage dithering states to deposit their dues timely, thereby erasing both the circular problem and more importantly any likelihood of a stillborn African Commission on Human and Peoples Rights.

(iv) The Commission of Mediation, Conciliation and Arbitration

With a view to ensuring efficiency in achieving "peaceful settlement of disputes by negotiation, mediation, conciliation and arbitration[176], the OAU Charter provides for the Commission of Mediation, Conciliation and Arbitration as its fourth principal organ[177]. The functions of the Commission as outlined by its Protocol[178] were mediation, conciliation and arbitration. It is pertinent to emphasise that the Commission has hardly ever functioned because OAU Member States preferred to settle disputes by recourse to flexible ad-hoc processes. Thus the Commission was

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174 OAU's Assistant Secretary-General (Political Division).

175 The OAU Secretariat has initiated plans to switch from its present manual or semi-mechanised financial management system to an integrated computerised system. This transformation is expected to be completed in 1988. Ibid p.3.

176 Article III (4) OAU Charter.

177 Articles VII (4) and XIX, Ibid.

178 The Protocol of the Commission of Mediation, Conciliation and Arbitration (CMCA) was approved by the Assembly on 21 July 1963.

abolished in 1969[179]. We nevertheless propose to briefly examine the theoretical framework of the Commission with the object of ascertaining, firstly its shortcomings, and secondly to establish its hitherto unexplained potential relevance to human rights promotion and protection.

Article XIII of the Protocol provides that "a dispute may be referred to the Commission" and where "parties have refused to submit to the jurisdiction of the Commission" the matter shall be referred to the Council of Ministers[180]. One of the weaknesses of the Commission therefore is the fact that its jurisdiction was not compulsory and this was exploited by Member States.

The Protocol provides for the settlement of disputes by three alternative processes:- mediation, conciliation or arbitration.

The Mediation procedure is governed by Article XX of the Protocol which provides that when a dispute between Member States is referred to the Commission for Mediation, the President shall, with the consent of the parties, appoint one or more members of the Commission to mediate on the dispute[181]. When the parties in the dispute decide on an acceptable means of reconciliation, proposed by the mediator, the proposed mode consequently constitutes the basis of a protocol of arrangement between the parties[182]. It must be observed that the procedure adopted by the Protocol is similar to the provisions of Article 4 of the 1895 and 1907

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179 In November 1966, The President of the Commission suggested to the Assembly that because OAU Member States were reluctant to submit themselves to the Commission's jurisdiction, there was no necessity to maintain it. See Higbie Polhemus op cit p.127.

180 [Underlines for emphasis.]

181 Article XX Protocol of the CMCA.

182 Article XXI Ibid.

Hague Conventions for the Peaceful Settlement of International Disputes. Furthermore, the possibility of parties to the dispute resorting to 'good offices', though not mentioned, is not necessarily precluded. Indeed it has been observed that the absence of a reference to 'good offices' is not a major omission because in practice it is very similar to mediation[183]. The 'good offices' procedure basically involved a third party bringing the two disputing parties together to negotiate.

With regard to the conciliation procedure, the Protocol states that "...requests for settlement of a dispute by conciliation may be submitted to the Commission by means of a petition addressed to the President by one or more of the parties to the dispute. The petition shall include a summary explanation of the grounds of the dispute"[184]. Upon receipt of the petition, a Board of Conciliators is established to clarify the issues and bring about an agreement upon mutually acceptable terms[185]. The Board is granted powers to determine its own procedures; therefore it may decide to invite counsel, experts or all persons whose evidence appears to be relevant. Although this process appears to be more formal than mediation, the Board had no means to enforce any settlement.

Arbitration differs from the two foregoing procedures because of its judicial nature. The Protocol provides for the establishment of an Arbitral Tribunal which consists of three arbitrators of which at least two must have legal qualifications[186]. The Protocol also stipulates that the arbitrators should not be nationals of either of the disputing State

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183 T.O. Elias, Africa and the Development of International Law (Ocean Publications Inc. 1972) p.170.

184 Article XXII, Protocol of the CMCA op cit.

185 Articles XXIII and XXIV, Ibid.

186 Article XXVII Ibid.

parties nor should they be domiciled in the territories of the parties[187]. These provisions ensure the neutrality of the arbitrators which ought to guarantee impartial awards. However, before reaching a final award, the Tribunal must in each case conclude a compromise with the parties with regard to the legal effect of the award, the subject matter of the controversy and the law to be applied[188]. If no specific provisions are made regarding the law applicable, the parties may apply the principles of international law. The Protocol also takes cognisance of the need to settle disputes, by avoiding existing law, and granting the Tribunal power to judge "ex aequo et bono"[189]. This provision is often regarded as a reflection of the selective attitude of most African States to certain established rules of international law and their preference to have disputes settled by standards to which they have themselves agreed, such as in new conventions[190]. We however submit that while this provision may be viewed as a vehicle for bypassing purely adjudicative procedures and possibly customary international law, it is certainly not peculiar to the Commission of Mediation, Conciliation and Arbitration. For instance, Article 38(2) of the Statute of the International Court of Justice[191] provides that the Court may decide cases 'ex aequo et bono', if the parties agree. Similarly, the Bolivia-Peru Treaty of 1902 stipulates that a boundary dispute can be determined by arbitration 'ex aequo et bono' and the arbitrators are empowered to each decision based on true knowledge, understanding and in conformity with justice, equity

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187 Article XXVII (3) Ibid.

188 Article XXIX Ibid.

189 Article XXX Ibid.

190 Z. Cervenka op cit p.9.

191 See D.J. Harris, Cases and Materials on International Law (Sweet and Maxwell, London 1979) p.797.

and fairness[192]. The ultimate benefit of such a provision is the latitude or the 'carte blanche' it bestows on adjudicators to seek resolution of disputes.

The OAU Commission of Mediation, Conciliation and Arbitration rarely performed its duties despite the flexibility and adaptability of its procedures. A study of the settlement of African disputes reveals that the predominant OAU practice has been the creation of Ad-Hoc Committees to deal with specific disputes[193]. Furthermore, individual Heads of State have responded to disputes by using their 'good offices' to reconcile parties. It is beyond the scope of this study to conduct research into the settlement of African disputes, however, suffice it to say that an effective machinery for dispute settlement in Africa will remain an illusion unless states are prepared to grant compulsory jurisdiction in such matters to the OAU and thereafter submit to its enforcement procedures and decisions. There may also be a need to consider amending the OAU Charter to introduce suspension or indeed expulsion as a sanction for non-compliance with OAU principles and procedures.

How far was the Commission of Mediation, Conciliation and Arbitration relevant to human rights protection in Africa?

Article VII of the OAU Charter established the Commission as one of four main groups to accomplish the "organisations purposes"[194] which include

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192 A.L.W. Munkman, "Adjudication and Adjustment: International Decisions and the Settlement of Boundary Disputes" BYIL. Vol.46 1972-73 pp.24-25.

193 For instance, the Ad-Hoc Consultative Commission on Nigeria established as a response to the Nigerian Civil War; the Ad-Hoc Committee of Good Offices on the Somalia-Ethiopia dispute; and the Ad-Hoc Wisemens Committee on the Western Sahara Issue.

194 Article VII OAU Charter.

"the promotion of international cooperation having due regard to the Charter of United Nations and the Universal Declaration of Human Rights"[195]. It is therefore submitted that in addition to the Commissions specific duties of Mediation, Conciliation and Arbitration, it also has a general duty to promote international understanding with a view to enhancing the promotion and protection of human rights. More specifically, Article XII of the Protocol of the Commission grants it "jurisdiction over disputes between states only"[196]. We interpret this phrase to mean that the Commission may exercise jurisdiction over <u>any dispute</u> submitted to is by a state party (as opposed to one presented by an individual). Furthermore, since the Protocol does not define the word "dispute", we submit that the ordinary meaning of the word includes the instance where a the basis of a dispute or conflict is the objection of a State Party to the massive infraction of human rights in another State. Admittedly, both States must be willing to submit themselves to the Commission's jurisdiction. The basic underlying principle requiring the consent of the parties to the Commission's procedures may have proved the undoing of any attempt by the Commission to execute its jurisdiction on 'human rights disputes'. A further obstacle to the Commission's attempt would have been the defence of political prerogatives as couched in the principle of "non-interference in the internal affairs of states"[197]. Nevertheless the OAU's practise in a few instances shows that it is willing to create exceptions to the principle of non-interference. For instance, during the Nigerian Civil War, the Western Sahara Crisis, and the Ethiopia/Somalia War, it would seem that the presence or threat of foreign and extra continental intervention and the consequent implications to regional stability rather

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195 Article II (1) <u>Ibid</u>.

196 Article XII Protocol of the CMCA <u>op cit</u>.

197 Article III (2) OAU Charter.

than human rights have led to the piercing of the veil of non-interference through the establishment of Ad-hoc Committees.

In summation, we believe that there was sufficient scope within the OAU Charter and the Protocol of the Commission for Mediation, Conciliation and Arbitration to exploit solutions to human rights violations. However, the prerequisite of consent of State Parties to the Commission's jurisdiction may have reduced the feasibility of such a procedure.

(v) Specialised Commissions

The OAU Charter provides for establishment of the following specialised Commissions:-

(1) Economic and Social Commissions;

(2) Education and Cultural Commissions;

(3) Health, Sanitation and Nutrition Commissions;

(4) Defence Commissions;

(5) Scientific, Technical and Research Commissions[198].

The foregoing Commissions have very little relevance to human rights protection and the OAU Charter did not provide for the establishment of a Commission on Human Rights. In comparison, the Charter of the UN is more expressly facilitative in providing that:

"The Economic and Social Council shall setup Commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions"[199].

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198 Article XX OAU Charter.

199 Article 68, Charter of the UN.

However, the OAU Charter does grant the Assembly of Heads of State and Government the facilitative power to "...establish such Specialised Commissions as it may deem necessary...". The Assembly has not utilized this provision to setup a Human Rights Commission. In 1964, the Assembly created two new Commissions, namely: (a) the Commission of African Jurists[200] and (b) the Commission of Transport and Communications[201].

The functions of the Commission of African Jurists were:-

(i) to promote and develop understanding and cooperation among African Jurists;
(ii) to promote the development of the concept of justice;
(iii) to consider the legal problems of common interest and those that may be referred to it by any of the members, and by the OAU and to make recommendations thereon;
(iv) to encourage the study of African Law, especially African Customary Law in the universities and institutions of legal studies in African and elsewhere, and its progressive development or codification by African Governments;
(v) to consider and study international law in its relation to African States[202].

According to Dr. T.O. Elias, the Commission also had the mandate to "study African Political Institutions and legal ideas with particular reference to the promotion of the rule of law and the observance and protection of fundamental human rights throughout the continent"[203]. The Commission of African Jurists was dissolved in 1966 by virtue of a recommendation by the OAU's Institutional Committee. The Assembly at

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200 OAU Res. AHG/4-1, 1964.

201 OAU Res. AHG/20-1, 1964.

202 Article 1 Statute of the Commission of African Jurists adopted on 29 January 1964. See L.B. Sohn "Basic Documents of African Regional Organizations" (Oceana 1971) p.100.

203 T.O. Elias, Background Paper to the UN Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Monrovia, Liberia 10-21 Sept. 1979, p.8.

its 3rd Session in November 1966 also decided to reduce the number of Commissions from six to three, namely (a) the Economic and Social Commission, (b) the Educational, Cultural, Scientific and Health Commission, and (c) the Defence Commission.

The rationale for the reorganisation was that the Commissions did not meet regularly due to the lack of quorum. It has also been suggested that there was a lot of duplication in the functions which the Commissions were called upon to fulfil[204]. We cannot see the justification in the foregoing reasons for the abolition of the Commission of African Jurists especially as there were no other Specialised Commissions sharing the same functions as the Commission of African Jurists.

The functions of the Commission of African Jurists was probably handicapped by the political implication of Article XXI of the OAU Charter which states that: "each Specialised Commission... shall be composed of Ministers concerned or other Ministers or Plenipotentiaries designated by the Government of Member States". One cannot overemphasise the need for a Commission, which is charged with human rights protection, to be comprised of independent members elected in a personal capacity. It is thus evident that the creation of a Human Rights body within the framework of the OAU Charter was not seriously contemplated.

From the foregoing analysis, it is evident that the OAU Charter formally subscribes to human rights principles as expounded in the UN Charter and the Universal Declaration of Human Rights. OAU Member States have a duty to promote and protect human rights through inter-state cooperation. The organs established by the OAU Charter are not

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204 Z. Cervenka op cit p.68.

endowed with express powers to pursue human rights promotion and protection. However, it is possible to argue that since one of the purposes of the organisation is to promote international cooperation having due regard to the UN Charter and the Universal Declaration of Human Rights, OAU organs are enjoined to pursue human rights issues. The difficulty with such an argument is that all OAU organs are subject to the executive power of the Assembly of Heads of State and Government. Thus the concentration of power on the Assembly has been a restrictive factor in the pursuance of human rights matters within the OAU regime, since the Assembly has been reluctant to respond to massive human rights violations on the continent.

In the last 25 years, the OAU has not done too badly in its emphasis on the peaceful settlement of disputes, and the maintenance of existing boundaries[205], consequently there are prospects for the future. The OAU and its Charter have also responded to the promotion of human rights in the following areas:

(1) The Self Determination of peoples[206];

(2) Non-discrimination[207];

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205 William Gutteridge "The Organisation of African Unity 1963-1983" Journal of Contemporary African Studies Vol.3 No.1/2 Octobeer 1983/April 1984.

206 Preambular paragraph 1, Articles II (1)(d) and III (6) OAU Charter; The Lusaka Manifesto adopted by the OAU in 1969; see also the UN Res.2505 adopting the Manifesto - UN Doc A/PV/1815 of 10 Nov. 1969. See further N.M. Shamuyarira "The Lusaka Manifesto in Southern Africa" African Review Vol.1(1) Nairobi, March 1971, pp.67-69.

207 Preambular Paragraph 2, Articles II (1)(e) and III (1).

(3) Protection of and assistance to refugees[208];

(4) Economic, social and cultural rights[209]; and

(5) The settlement of disputes[210].

The preponderance of opinion regarding OAU's human rights practice is summed up by O. Aluko's observations that:

> "In terms of the denial of human rights and fundamental freedoms in independent African States, the OAU's record has been dismal. It has remained throughout, a passive spectator of violations of human rights among Member States. ...the prospects for human rights in Africa are not bright"[211].

We submit that the efforts of the OAU in recent years, with particular reference to the evolving African regional machinery for human rights, should convince skeptics that the prospects for human rights in Africa are not gloomy.

(d) Membership & Termination of Membership

Membership of the Organisation of African Unity is restricted to independent African States. Article IV accordingly provides that "each independent sovereign state shall be entitled to become a member of the organisation[212]. Consequently, the aforesaid Article excludes all territories under colonial rule, liberation movements, as well as countries like the Republic of South Africa on account of its apartheid policy which dramatically contradicts the aims and purposes of the OAU Charter.

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208 See the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force on 27 September 1969).

209 Preambular Paragraph 3, OAU Charter.

210 Articles III (4) and VII (4) Ibid.

211 A. Oluko "The OAU and Human Rights" Roundtable (1981) p.240.

212 Article IV OAU Charter - See Appendix II.

Article XXIV of the OAU Charter stipulates that "...The Charter shall be open for signature to all independent sovereign African States and shall be ratified by the signatory states in accordance with their respective constitutional processes"[213]. Thus all independent sovereign African states that signed and ratified the Charter became the founding members. An independent African State may also become a member by adhesion or accession to the Charter[214].

According to Elias[215], there was a protracted debate over the eligibility for membership of an African country with a multiracial society but with a European Prime Minister. Majority of the states preferred an independent state under an African Prime Minister as a candidate for membership[216]. Nevertheless, no provision of the Charter precludes an independent sovereign African State who Prime Minister is of extra African origin or descent from being member. Therefore the fears expressed by Cevenka[217] about the considerable implications of the majority opinion, for the status of non-African citizens in African States should be dispelled. However, the individual practice of a few African States toward non-African citizens has left much to be desired. The case of Idi Amin's ill treatment of the East African Asians is instructive on this matter.

The OAU Charter did not envisage the phenomenon of coup detat, hence no provision exists to debar independent sovereign African States whose Heads of State seized power through "the barrel of the gun". Indeed

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213 Article XXIV, OAU Charter, See Appendix II.

214 Article XXVII, OAU Charter.

215 Elias op cit, p.251.

216 Ibid.

217 Z. Cevenka, The OAU and its Charter, New York 1969, p.37.

there is no provision in the OAU Charter for the expulsion of Members for breach of its obligations. However Article III(5) of the Charter states the OAU's "unreserved condemnation in all its forms of political assassination as well as of subversive activities on the part of neighbouring States or any other State". Thus it may be argued that any change in government that is effected by such means is illegal and thus should be precluded from OAU proceedings. Furthermore it is worth considering whether any neighbouring state which takes part in subversive activities should be suspended or expelled[218]. The practice of the OAU has been one of granting recognition to new regimes that exercise de facto power and consequently, no qualifications are attached to their right of membership[219].

It is noteworthy that by comparison, Article 6 of the United Nations Charter makes specific provision for the expulsion of Members which have persistently violated its principles[220].

The rationale for the deliberate omission of an expulsion/or suspension provision in the OAU Charter may lie in the effect that such expulsion/or suspension may have on the organization. It would lead to cessation of relations between Member States and an expelled State; this may ultimately lead to a split in the organization. It has been argued

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218 At the 16th OAU Summit held in Monrovia, Liberia from July 17-21 1979, President Nimiery of Sudan issued a statement (regarding the Tanzanian invasion of Uganda which resulted in the overthrow of the Amin regime), to the effect that such an invasion was a violation of the principles of the OAU. The Summit did not take any decision on the issue of either rights of admission or expulsion of a Member State. See Africa Research Bulletin Vol.16 No.7 August 1979, pp.5328-5331.

219 J. Mayall, "African Unity and the OAU" in Yearbook of World Affairs 27, 1973 p.116.

220 Article 6 of the UN Charter, p.5.

that expulsion is an unrealistic sanction[221]. Expulsion can also act as a double-edged sword. It is probably in realisation of this fact that the institutions of several specialised agencies and organisations contain no provision for expulsion; for instance the World Health Organisation (FAO) and the International Labour Organisation (ILO). Although the Charter of the Organisation of American States does not provide for expulsion of Members, its interpretation of the inherent powers of an international regional organisation in the Cuban issue is instructive. The OAS accepted the argument that the organisation was responsible for the interpretation of its own Charter, which interpretation should give effect to the organisation's primary purposes and that no regional organisation could be made to accept a member which the organisation felt was violating its Charter and furthermore that the organisation should have the inherent right to decide on who should be permitted to participate in its activities[222].

Consequently, if we are to hold that the OAU is a regional organisation, matatis mutandis, there exists a bridgehead that the OAU may hold to facilitate the expulsion of members that habitually violate its central purposes. This rather non-restrictive interpretation of the inherent powers of expulsion in the OAU Charter should be used not as a sword but as a shield to coerce members into abiding to the principles of the organisation. Furthermore, the ultimate benefits of having a Member State remaining in an organisation far outweighs the consequences of an expulsion. Sohn's suggestion of a temporary suspension rather than the outright expulsion of a recalcitrant Member is a worthwhile alternative.

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221 Louis B. Sohn "Expulsion or Forced Withdrawal from an International Organisation" in Harvard Law Review Vol.77 June 1964 No.8, p.1400.

222 Sohn, op cit p.1419.

In any event there are several means by which expulsion can be achieved in the absence of an express expulsion clause. For instance through veiled invitations to a recalcitrant Member State to withdraw by a concert of other Member States calculated to embarrass a Member to withdraw. The procedure for termination of membership in the OAU is straightforward. Article 32 provides that: "any state which desires to remove its membership shall forward a written notification to the Secretary General. At the end of one year from the date of such notification, if not withdrawn, the Charter shall cease to apply with respect to the renouncing state, which shall thereby cease to belong to the organisation[223].

The original intention of the draftsmen in prescribing the one year period between the submission of the notification and the cessation of membership is to give both parties time to adjust all pending obligations and rights.

As at present no state has carried out a withdrawal except Morocco, which withdrew its membership in 1985 in reaction to the OAU's recognition of the Saharan Democratic Republic. In 1971 when Dr. Milton Obote was overthrown in Uganda by Idi Amin, President Nyerere of Tanzania attempted to raise the matter of criteria for OAU membership. The Tanzanian delegation was precluded from discussing the matter because it breached the Charter principles of non-interference in the internal affairs of states, in this instance Uganda[224]. A similar attempt was made in 1975 when the OAU Assembly of Heads of State met in Kampala. The Tanzanian Government then issued a statement that objected to the OAU double standard in condemning the atrocities of

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223 Article 32 of the OAU Charter, See Appendix II.

224 M. Wolfers: "The Institutional Evolution of the OAU" in "The OAU After Twenty Years" eds. El Ayouty & W. Zartman op.cit p.95.

colonial and racist states, and remaining silent "when massacres, oppressions and torture are used against Africans in the independent states in Africa"[225].

In the light of our submission that the OAU Charter imposes obligations on Member States to promote and protect human rights through inter state cooperation, an amendment to the OAU Charter is necessary to incorporate a provision on the suspension and termination of membership for the massive violation of human rights in addition to the violation of the central principles of the Charter. Such a provision should prove to be an effective deterrent to States especially in light of the increasing succeptibility of some States to violate human rights.

(e) Observer Status at the OAU[226]

The OAU Charter does not provide for the granting of Observer Status. This lacuna was filled by the resolution of the 14th Session of the OAU Assembly on The Criteria for Granting Observer Status with the OAU[227].

An Organization applying for Observer Status with the OAU must have objectives and perform activities that conform with the fundamental principles and objectives of the OAU Charter[228]. Such an organisation must be registered in Africa and have its headquarters in Africa. The

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225 Ibid.

226 See Appendix VIII for the List of Organisations with Observer Status at the OAU.

227 OAU Doc. CAB/LEG/117/82.

228 Part I, Article 1(a), The Criteria for Granting Observer Status with the OAU Ibid.

membership of the organisation is required to be African, however where the membership is external to Africa, such latter membership should not have voting rights[229].

Observer Status is granted by the Council of Ministers to organisations which the Council deem to have satisfied the terms of the Criteria. There are three categories of Observers at the OAU.

The first category includes Governments-in-exile and the Liberation Movements, which are recognised by the OAU. For instance, the Patriotic Front of Zimbabwe[230] and the Polisario Front[231] have enjoyed the OAU Observer Status. Furthermore African intergovernmental organisations which have important interests in the activities of OAU Member States are included in this category[232].

The second category is reserved for African intergovernmental organisations having a specialised competence and having interest in the activities of the OAU. The African Re-insurance Corporation[233] and The Lake Chad Basin Commission[234], amongst others, belong to this group.

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229 Article 1(b) Ibid.

230 Prior to 1975, the OAU had given recognition to both the ZAPU and ZANU before their merger to form the Patriotic Front (for the Liberation of Zimbabwe).

231 The Polisario Front later formed the Saharawi Arab Democratic Republic (SADR) which was admitted to the OAU by the "Administrative Decision" of the OAU Secretary-General based on a formal notification by a majority of OAU members of their recognition of the SADR. See Djamel Abdel Nasso Manna "The Western Sahara dispute and International Law" M.Phil Thesis of the University of Hull, 1985.

232 For instance, the African Regional Standardization Organisation (Observer Status No.36 of 22 February 1982).

233 OAU Observer Status No.34 of 1 March 1981.

234 OAU Observer Status No.9 of 31 August 1970.

The majority of OAU Observers belong to the third category which is reserved for Inter-African non-governmental organisation, institutions, associations or unions. The Organisation of African Trade Union Unity[235] and the Pan-African Women Association[236] belong to this category.

All Observers may be invited to attend in inaugural and closing meetings of all OAU Conferences. Participation in the proceedings by observers is limited to cases where the Chairman of the Conference or Session of an OAU Institution grants express authorisation. However in the case of the Sessions of OAU Specialised Commissions, observers may participate by requesting the inclusion of items of particular interest on the agenda of the Session and by making written or oral statements thereon.

The list of current organisations granted Observer Status with the OAU reveals that only two organisations, the Anti-Apartheid Committee[237] and the African Jurists Association (AJA)[238] have a direct interest or relevance to human rights matters. The significance of gaining Observer Status at the OAU is reflected in the invaluable access observers are granted to the proceedings of OAU institutions, thus enabling them to lobby African statesmen and technocrats. It is significant that up until 1986, apart from the AJA no organisation of Lawyers or human rights interest groups, have attempted to explore this avenue to influence the OAU on human rights issues. The African Jurists Association (AJA) was granted Observer Status on 4 March 1986, and it has utilized this status to endure that at lease six of its members were appointed to the eleven

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235 OAU Observer Status No.12 of 4 April 1974.

236 OAU Observer Status No.1 of 12 September 1968.

237 OAU Observer Status No.15 of 11 June 1974.

238 OAU Observer Status No.38 of 4 March 1986.

man African Commission on Human and Peoples Rights[239]. African human rights interest groups could utilize the status of being OAU Observers to influence human rights promotion in Africa and ensure compliance of OAU Member States to the provisions of the AFCHPR. This approach is pertinent, in the light of vague guidelines on status of "persons" permitted to enlighten and/or submit communications to the African Commission on Human and Peoples Rights[240].

It is noteworthy that the OAU Criteria on Granting Observer Status is restrictive in comparison to the Council of Europe, especially as the former permits non-member States of the Council of Europe and non-governmental international organizations (NGO's) to obtain Observer Status[241].

The AFCHPR permits international cooperation in the field of human rights and allows "any person" to "enlighten" the African Commission, and may facilitate the Commission access to data banks of NGO's. Reciprocity may demand that NGO's be granted "consultative" or "observer status" with the OAU ergo, the African Commission. In the absence of formal rules governing this area apart from the OAU Criteria

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239 Daily Times, (Lagos Nigeria) 17 December 1987; See Appendix XII for the List of Members of the African Commission on Human and Peoples Rights.

240 Article 46 of the AFCHPR states that the African Commission on Human and Peoples Rights "may hear from any...person capable of enlightening it". While Article 55(1) states that the Commission "may interpret all the provisions of the Charter at the request of a State Party, an institution of the OAU or an African organization recognized by the OAU". Article 45(1)(c) provides that the Commission shall "cooperate with other African and international institutions concerned with the promotion and protection of human and peoples rights". [Underlines for emphasis.] We shall analyse the implications of these provisions in Chapter 2.

241 Committee of Ministers Resolution 76(3). To date, the following have been admitted as observers to the Councils Steering Committee for Human Rights:- Canada, The Holy See, Amnesty International, the ICJ and UNESCO.

for Granting Observer Status, the OAU may consider evolving a Regional Convention on the status of national and international NGO's, not unlike the European Convention on the Recognition of the Legal Personality of International Non-Government Organizations[242].

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242 For the text of this Convention see M. Bettati and P.M. Dupuy eds Les ONG et le Droit International (Economica, 1986) pp.272-291. See also Andrew Drzemczewski "The Role of NGO's in Human Rights Matters in the Council of Europe" Human Rights Law Journal Vol.8, Nos.2-4 (1987) pp.273-282.

Chapter Three

Self-Determination in Africa

The struggle for African independence was waged under the banner of the right of self-determination. Self-determination in essence being the right of self-government. However in its process of evolution, the concept has assumed varied characteristics depending on the historical context, the social and economic conditions prevailing in given societies as well as on the political groups seeking to exercise it as a right.

We propose to trace briefly the historical evolution of the concept with particular emphasis on its relevance to Africa. Furthermore we shall examine the application of the concept in colonial and post-colonial Africa, and especially the OAU role in the latter period. The Charter of the United Nations provides for the promotion of universal respect for and observance of human rights and fundamental freedoms for all, so as to assure "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination"[1]. Is self-determination a human right, a fundamental freedom? Is it a legal right? What is self-determination? We propose to answer these and other questions which inevitably flow from an analysis of what has been described as the "elusive goal of African self-determination"[2].

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1 Article 55, United Nations Charter.

2 T.M. Shaw "The Political Economy of Self-Determination: A World Systems Approach to Human Rights in Africa" in C.E. Welch and R.I. Meltzer (eds) Human Rights & Development in Africa (State University of New York Press Albany 1979) p.226.

(a) Evolution of the Concept of Self-Determination

The history of self-determination is traceable to the time of the Greek city states and the period of the Roman Empire[3]. However the principle was significantly magnified by the French Revolution of 1789 which transformed the monarchical status quo into a popular and democratic nation state by virtue of the twin proclamations of human rights and popular sovereignty[4]. The growth of nationalism and democracy in West and Central Europe led to the germination of the concept of self-determination. Although some legal scholars of the period believed that national self-determination was a legal right, the prevailing practice of the era reveals a preponderance of opinion to the contrary[5].

While the external aspects of self-determination of nations emphasised the notion of the nation and the state, the concept also promoted an internal democratisation process which emphasised the rights of citizens. The American Declaration of Independence evolved from the colonial experience of inhabitants of United Colonies and their determination to be free and independent. This resolve is evident in the Declaration of Independence which states that:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men deriving their just powers from the Consent of the Governed, that whenever any form of Government becomes destructive of these Ends, it is the right of the People to alter or abolish it and to institute

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[3] U.O. Umozerike, Self Determination in International Law, (Hamden, Connecticut, Archan Books 1972) p.3.

[4] M. Shaw Title to Territory in Africa: International Legal Issues (Clarendon Press, Oxford 1986) p.59. See also H.S. Johnson Self Determination Within the Community of Nations (Leiden, A.W. Sijthoff, 1967) p.25.

[5] M. Shaw op.cit at p.3.

> new Government, laying its foundations in such Principles and Organising its Powers in such form as to them shall seem most likely to effect their safety and happiness"[6].

The impact of the American Declaration on the African struggle for self-determination and independence cannot be overemphasized. The colonial experience of the United Colonies can to a very large extent be equated to African experience. The former having laid the precedence of successfully challenging the basis of colonial rule.

The internal democratisation aspect of self-determination was further enhanced by the French Declaration of the Rights of Man and Citizen of 1789. The French Declaration can be summed up as the first complete code of principles of constitutional government and rule of law[7].

Although the American Declaration of Independence and the French Declaration enshrined principles which were later to be restated in modern constitutions, French colonial practice and the American attitudes to blacks, Indians and lower class whites negated the democratisation process, being the internal aspect of self-determination[8].

Self-Determination assumed a prominent profile in international law and politics during the two world wars. Indeed, the wars were fought under

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[6] H.C. Commager (ed) Documents of American History, (London & New York, Appleton-Century-Crofts 1948) p.103.

[7] I. Brownlie (ed) Basic Documents on Human Rights, (Oxford, Clarendon Press, 1971) p.8. et. seq. The Declaration established various democractic principles: that men are born and remain free and equal in respect of right; that the purpose of all civil associations is the preservation of the natural and imprescriptible rights of man nd that these rights are liberty, property and resistance to oppression, and finally that the nation is essentially the source of all sovereignty, nor shall any body of men or any individual exercise authority which is not expressly derived from it. (Ibid).

[8] O.C. Eze "Prospects for International Protection of Human Rights in Africa" in African Review, Vol.4, No.1, 1974 p.79.

the banner of right of self-determination of nations. In 1916 President Wilson of the United States emphasised the right of every people to choose the sovereignty under which they will live[9]. In his address to the Congress on 11 February 1918, President Wilson stated that '"self-determination" is not a mere phrase; it is an imperative principle of action, which statesmen will henceforth ignore to their own peril'[10]. Nevertheless neither the 1919 Peace Conference nor the final draft of the Covenant of the League of Nations regarded national self-determination as a significant principle of legal application[11]. The Peace Conferences and the League of Nations addressed the issue of boundaries and minorities in Europe and emerged with agreements and treaties which provided limited self-determination for the minorities[12]. A parallel could be drawn here between the problems faced in Europe then and the contemporary minority problems of many modern African States[13]. The fact that a collection of ethnic groups coexisted peacefully under colonial rule was not necessarily an indication that such groups could coexist in the post colonial period. In some cases, colonial boundaries cut across ethnic groups[14].

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[9] M. Shaw op cit p.60.

[10] Foreign Relations (1918) Suppl.1 Vol.1, p.110.

[11] M. Shaw op.cit p.60.

[12] Ibid.

[13] Many African States are composed of heterogeneous groups with distinct cultural and religious values. Peaceful ceexistence between minority groups and the majority within the State has proved an onerous task. For instance, the inter Kikuyu/Luo conflict in Uganda; the Tutsi/Hutu conflict in Burundi and Rwanda; and the Hausa-Yoruba/Ibo conflicts in Nigeria.

[14] Examples of such ethnic groups bisected boundary lines include the Masai in Kenya and Tanzania; the Somalis in Djibouti, Kenya and Ethiopia; the Yoruba in Benin Republic and Nigeria and the Ewes in Ghana and Togo. For further analysis of this problem see S. Chime, "The OAU and African Boundaries" in C.G. Widstrand (ed) African Boundary Review (Uppsala, 1969) p.63.

Although the League of Nations introduced the Mandate System which was restricted to territories taken from defeated enemies, and only supervisory powers were exercised by the League, nevertheless, it heralded the "beginning of systematic international intrusion into the workings of colonialism"[15]. Article 22 of the League of Nations Covenant subjected the mandated territories to a process of international supervision by which the peoples of the concerned territories were to be guided towards self government[16].

(b) The UN & Self Determination

The end of the Second World War not only eradicated Germany's expansionist dreams but also the shattered myth of Western supremacy. The death knoll of the latter was sounded by two forces. Firstly, the Western educated elites in Africa and Asia who challenged the basis of

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15 Inis L. Claude, Jr. Swords into Plowshares: The Problems and Progress of International Organisation (New York: Random House, 1964) p.3.

16 Legal Consequence for States of the Continued Presence of South Africa in Namibia, (S.W.A. Opinion) 1970 I.C.J. pp.28-32.

colonial authority by invoking the right of self-determination. Secondly Western liberal commentators questioned the legitimacy of colonialism in the light of instruments such as the Atlantic Charter[17].

Thus prior to the adoption of the United Nations Charter, self-determination was perceived as a principle, as the Atlantic Charter recognised the right of self-determination. However the Dumbarton Oaks proposals of 1944 did not include the right of self-determination.

The concept of self-determination has acquired universal acceptance and recognition since the establishment of the United Nations and the inclusion of the principle in the UN Charter[18]. The consecration of the principle of self-determination of peoples in Articles 1(2) and 55 of the UN Charter has instigated debates as to its juridical character. Article 1(2) provides for the development of "...friendly relations between states based on respect for the principle of equal rights and self-determination of peoples". Furthermore, Article 55 provides that with a

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17 For the text of the Declaration of Principles known as the Atlantic Charter see J.A.S. Grenville, The Major International Treaties 1914-173 : A History and Guide with Texts, (London, Mathews & Co. Ltd. 1974) pp.198-199. The Atlantic Charter embodied a joint declaration by President Roosevelt of the United States and Winston Churchill, which states inter alia their "desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned and that they respect the right of all peoples to choose the form of government under which they will live and they wish to see sovereign rights and self government restored to those who have been forcefully deprived of them. Ibid. However it has been noted that Churchill later stated that the Atlantic Charter was only intended to apply to conquered Europe (See M. Huber "National Self-Determination", in Social Research X (1943) 1). Churchills statement may well be better appreciated in the context of the fourth paragraph of the Declaration which provides that "The (declarants) will endeavour with due respect to their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and raw materials of the world which are needed for economis prosperity". The assumption of equal status among states in this context cannot, thus, be extended to colonies which were at any rate subjugated.

18 It is noteworthy that the Soviet Union was instrumental to the inclusion of the principle of self-determination in the UN Charter. See U.O. Umozerike Self-Determination in International Law, op.cit p.44-5.

view to the creation of conditions of stability and well being among nations, based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote certain social and economic objectives. Articles 1(2) and 55, thus, establish self-determination, the essential elements of which are the free and genuine expression of the will of the people[19] and the promotion of their social and economic well-being[20].

The principle of self-determination is further affirmed by Chapters XI, XII and XIII of the UN Charter. Chapter XI deals with the administration of non-self-governing territories while Chapter XII deals with the trusteeship system. In the administration of non-self-governing territories, the administrators were to "take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions"[21]. One of the major objectives of the trusteeship system is the "progressive development towards self government or independence"[22]. Consequently, in the administration of non-self-governing territories which have been subjected to the UN Trusteeship, system the guiding principle was self-determination[23].

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[19] L.M. Goodrich & El Hambro, Charter of the United Nations (Boston, World Peace Foundation 1949) p.95.

[20] Towards the achievement of these essential elements the United Nations evolved the International Covenant on Economic, Social & Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966).

[21] Article 73(b) UN Charter.

[22] Article 76 UN Charter.

[23] Rosalyn Higgins, The Development of International Law through the Political Organs of the UN (Oxford University Press; London 1963) pp.91-106.

However, the concept of self-determination as expressed in Chapter XI does seem to have subjugated the will of the peoples of the concerned territories to those of the administering powers. Firstly, the provisions do not expressly refer to independence as a necessary corollary of self-determination and secondly the intention of the UN Charters authors', especially with regard to Articles 73(b) and 76(b) appears to be that the granting of independence was to be a transitorial or gradual process depending on the particular circumstances of each territory.

Consequently it would be difficult to take the view that the cumulative effect of Articles 1(2) and 55 and Chapters XI, XII and XIII establish binding legal objectives on states to grant self-determination to non-independent peoples. First, in considering the intention of the original contributing parties at the time as a basis of the interpretation of the Charter provisions regarding self-determination, one cannot but submit that there was no intention to create legal obligations on the parties; Articles 73(b) and 76(b) support this argument. Secondly, the UN Charter refers to self-determination as a "principle" rather than a "right" and may indeed be comparable to a non-justiceable "directive principle" as expressed in some national constitutions[24].

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[24] J.E.S. Fawcett, 'The Role of the United Nations in Relation to Human Rights - Is It Misconcieved?" Proceedings of the Nobel Symposium 7 (1968) 95-101; See Part IV, Article 37 of the Constitution of India, which lists the Directive Principles of State Objectives in.

On the other hand, Professor H. Lachs[25] argues that by 1945 the right of self-determination was already in existence as part of the general international law and that the UN Charter was merely endorsing a principle which was most certainly a "right" and had gained general recognition[26].

Is the right of self-determination, therefore, a legal right? It could be argued that the UN Charter imposes binding obligations on Member States by virtue of Article 56 which requires all members to pledge themselves to "take...action for the purposes set forth in Article 55". It may be argued that by ratifying the UN Charter, States have subscribed to legal obligations including the right to self-determination[27].

M. Shaw however argues that, such a conclusion is non tenable, firstly, because Article 55 has an ominous quality that may exclude the principle of self determination; secondly the expression 'pledge' alone can hardly "convert the humanitarian aims set out into binding legal obligations"[28]. The appeal of Shaw's argument is evident, however, subsequent UN practice has shed light on the issue.

Since its inception, the UN has adopted more than fifty resolutions dealing generally or specifically with the concept of self-determination. The most important UN manifestation of its recognition of self-determination as a legal right was the 1960 Declaration of the Granting of

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25 Prof. H. Lachs, "The Law in and out of the UN - Reflections on the principle of Self-Determination" Indian Journal of International Law 1961 pp.429-42 at p.432.

26 Lachs, Ibid p.432.

27 Quincy Wright Recognition & Self-Determination" PASK (Proceedings of the American Society of International Law) 1954 p.23-37.

28 M. Shaw "Title to Territory in Africa" op cit p.63.

Independence to Colonial Countries and Peoples[29]. The significance of the Declaration is underlined by its record of having the highest citation per session of the General Assembly[30]. The Declaration sets the objective of immediate transmission of power, to peoples of all territories not yet independent, without any reservations[31]. The Declaration specifically notes that "all peoples have the right to self determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"[32]. The significance of the Declaration and its impact on international affairs is not unconnected with the zeal with which developing states have prosecuted its provisions. Indeed, it has been described as "only less sacred than the Charter for the Afro-Asian States"[33].

In furtherance of the right of self-determination the General Assembly legitimized the use of force by dependent peoples to assert their right of self-determination[34], and declared the use of force to suppress colonial revolts to be contrary to the principles, objectives and obligations

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29 General Assembly Resolution 1514 XI of 14 December 1960.

30 A. Bleicher "The Legal Significance of the Citation of General Assembly Resolutions" AJIL p.475.

31 General Assembly Resolution 1514 (XV) Para.5. The significance of the Declaration is further reflected in the fact that the General Assembly [in General Assembly Resolution 1724 (XV)] recognised the Algerian right to self-determinatin basing its stand on the 1960 Declaration. During the Angolan struggle for independence, the General Assembly [in Resolution 1819 (XVII) of 18 December 1962] called on the Government of Portugal to transfer power immediately to the people of Angola in accordance with the 1960 Declaration. Furthermore, with regard to the Rhodesian issue, the General Assembly [in Resolution 1515 (XV)] specifically mentions the United Kingdom's failure to fulfil the requirements of Paragraph 5 of the 1960 Declaration.

32 General Assembly Resolution 1514 (XV).

33 R. Rosenstock "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey: 65 AJIL (1971) p.730.

34 Paragraph 10, General Assembly Resolution 2105 (XX) of 20 December 1965; preamble, General Assembly Resolution 2160 (XXI) of 30 November 1966; and Paragraph 7, General Assembly Resolution 2189 (XXI) of 13 December 1966.

undertaken by the administering powers[35].

In light of the foregoing, can the 1960 Declaration be viewed as an interpretation of the principle of self-determination as contained in the Charter?

The problem of the legal effect of General Assembly Resolutions and arguments about the relevance and applications of the traditional sources of law to the development of international legal rules through the organs of the UN have already been mentioned[36], thus we shall limit ourselves to the issue raised.

A proposition advanced by H. Bokor-Szego is that the 1960 Declaration is not an authoritative interpretation of the Charter since some parts of the Declaration go "beyond the Charter provisions included in Chapter XI and XII when it condemns all forms of colonial rule, puts an end to differentiation between the status of trust and non-self-governing territories and demands the immediate independence to all dependent territories"[37]. The moderate view is advanced by Castenada who believes that despite the fact that the Declaration differs in certain respects with some Charter provisions, the former is nevertheless "the modern interpretation of the principle of self-determination" by the

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[35] General Assembly Resolution 2105 (XX) of 20 December 1965; General Assembly Resolution 2160 (XXI) of 30 November 1966.

[36] See M. Shaw op cit pp.64-91, p.73; R. Higgins The Development of International Law Through the Political Organs of the UN op cit p.4-7; and B. Cheng "UN Resolutions on Outer Space: Instantaneous Generation of Customary Law" 5, IJIL 1965 pp.23-114. Judge Tanaka's dissenting opinions in the South West African Case (2nd phase) 1966 ICJ Report at p.292; J. Castenada, The Legal Effect of United Nations Resolutions, L.M. Goodrich and T.R. Fox (eds) No.6 Columbian University Studies in International Organisation (New York, Columbia University Press 1969) p.174.

[37] Hannah Boko-Szego, New States and International Law (Budapest: Akademiai Kiado, 1970) p.29.

UN[38]. Furthermore, since all interpretations refine and develop particular concepts in a manner acceptable to the parties, this alone should not diminish their influence or effect[39]. In the Western Sahara Case, the International Court of Justice (ICJ) upheld the principle of self-determination as a binding principle of international law. However, in reaching this conclusion the ICJ did not reveal how it came to this conclusion.

In his analysis of the issue, Dr. M. Shaw states that the core of the 1960 Declaration constitutes an interpretation of the UN Charter, although the provision of the Declaration limiting self-determination to the attainment of independence should be regarded as a suggestion and not an authoritative interpretation of the Charter[40]. We share Dr. Shaw's opinion on the basis that aspects of the Declaration are apparently inconsistent with subsequent UN practice[41].

In addition to proclaiming the general right to self-determination, several UN Resolutions have also specifically proclaimed the right of self-

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38 Judge Castenada "Legal Effects of United Nations Resolutions" op cit p.175.

39 Ibid.

40 M. Shaw op cit p.79.

41 Whereas the 1960 Declaration limits self-determination to the attainment of independence, subsequent UN practice and trends, as manifested in the 1970 Declaration of Principles of Internatinal Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN (Res. 2625 (XXV), expand the application of the principle. The 1970 Declaration states that "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people".

determination in specific situations[42] and these proclamations have been predicated upon the 1960 Declaration. The adoption of the two International Covenants on Human Rights[43] and the subsequent signature and ratification thereto by states have given the right of peoples to self-determination the quality of a mandatory rule of international law. These UN resolutions should be regarded as evidence of State practice and universal practice of significant proportions to justify the conclusion that the right of self-determination is a legal right arising from charter interpretation and indeed may amount to a customary right.

A few jurists[44] and some States resist this conclusion, the former because of their unshakeable commitment to the postulates of classical international law, and the latter because of their concern for their traditional interests[45]. However ICJ opinions on this matter seem to support the view that self-determination is a basic principle of international law of universal application, and thus a legal right of which

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[42] For instance, in May 1967, the UN General Assembly specifically reaffirmed the right of South West Africa to "freedom and independence" and created a UN Council for the Territory - Questions of South West Africa, General Assembly Resolution 2372, 22 UN GAOR Supp.16A UN Doc A/6716/Add.1 1968.

[43] The two International Covenants state that "all peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development" - Article 1 of the International Covenant on Economic, Social and Cultural Rights; Article 1 International Covenant on Civil and Political Rights General Assembly Resolution 2200, 21 UN GAOR (Supp.16) UN Doc. A/6316 (1966).

[44] See D.J. Devine "The Status of Rhodesia in International Law" Actar Juridica 1974 p.182 at pp.183-209; I.G.Schwarzenberger, A Manual of International Law (6th ed) (Professional Books Ltd. Milton 1976) p.59; I. Brownlie, Principles of Public International Law (OUP, 1966) p.483. These jurists believe that self-determination does not constitute part of customary international law, but a formative legal principle of the law of nations because of its recognition by the UN Charter and due to post 1945 UN Declaration.

[45] See Judge Ammouns dicta, ICJ Reports 1971, pp.16, 75.

may be part of "Jus cogens"[46]. Indeed, R. Higgins has observed that self-determination is a "legal right backed by a legal obligation and not merely a pious hope devoid of substance"[47]. The development of human rights in the international arena has made its greatest strides as part of customary international law by way of self-determination[48].

(c) The OAU and Self Determination

Our examination of the OAU's institutional evolution reveals that the campaigns against colonialism and racial discrimination contributed to the formation of the organisation[49]. Consequently, the OAU Charter, provides for the eradication of all forms of colonisation from Africa[50] and the "total emancipation of the African territories which are still dependent"[51]. The OAU Charter also subscribes to the principles of the UN Charter and the Universal Declaration of Human Rights[52], instruments which uphold the principles of equal rights and self-determination of peoples.

The overwhelming African view of self-determination in the post-colonial era is succinctly proffered by the Kenyan delegations memorandum to the 1963 OAU inaugural Summit at Addis Ababa:

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46 The Namibia Case ICJ Reports 1971, pp.16, 31; The Western Sahara Case ICJ Reports 1975, p.122.

47 R. Higgins op cit p.90.

48 H. Lauterpacht "Some Concepts of Human Rights" Harvard Law Journal (1965) p.264.

49 See Chapter Two.

50 Article II(1)(d), OAU Charter.

51 Article III(6) Ibid.

52 Article II(1)(e) Ibid.

> "The Principle of self-determination has relevance where foreign domination is the issue. It has no relevance where the issue is territorial disintegration by dissident citizens"[53].

This view finds support from some scholars who contend that international law does not recognise self-determination beyond independence or decolonization[54]. The legal basis of this approach in the African context, is predicated upon Article II(1)(c) of the OAU Charter which specifies as one of the purposes of the OAU, the defence of the sovereign and territorial integrity and independence of Member States[55]. Furthermore, by virtue of Article III, OAU Member States "solemnly affirm and declare their adherence (inter alia) to respect...the sovereign and territorial integrity of each State and its inalienable right to independent existence".

Thus, once self-determination has been exercised by a particular colony through independence, it is debarred from further exercise of the right, not unlike the effect of "res judicata"[56]. This view presupposes that the entity or "self" entitled to exercise the right of self-determination is not an individual ethnic group constituting part of a multi-ethnic colony or State, but the aggregate of the diverse groups collectively inhabiting the colony.

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[53] Proceedings of the OAU Inaugural Summit: Addis Ababa, 1963. CAB/LEG File, 1963.

[54] R. Emerson states that "The room left for self-determination in the sence of the attainment of independent statehood is very slight with the great current exception of decolonization - Rupert Emerson "Self Determination" (1971) 65 AJIL p.459. See also R. Higgins op cit p.104-105.

[55] Similarly, Article 2(4) of the UN Charter provides that "All Members shall refrain... from the threat or use of force against the territorial integrity or political independence of any state...".

[56] R. Emerson op cit p.465.

The basic rationale here is that to extend the right of self-determination beyond national boundaries will encourage secession and thus undermine the stability of multi-ethnic states and indeed threaten universal nay, regional, peace and security[57].

The second school of thought advocates that there is a general and continuous right of self-determination to all peoples irrespective of the fact that a colony has been granted independence[58]. Consequently, any ethnic group with an independent multi-ethnic State may, if it wishes, demand statehood[59] and in effect secede. Y. Dinstein states that "just as a people under colonial domination is entitled to create a new State where none existed before, so can a people living within the framework of an extant state secede from it and establish its own independent country"[60].

The third school of thought submits that general international law neither forbids nor supports the grant, demand for or the denial of self-determination in the post-colonial era[61]. This view is based on the observation that international law is neutral on the issue of secession until the claim is successful. We submit that the argument based on the

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[57] S.K. Panter - Brick "The Right to Self-Determination: its Application to Nigeria" International Affairs (London) Vol.44, April 1968, p.254.

[58] C.C. Mojekwu, "Self Determination: The African Perspective" in Alexander and Friedlander (eds) Self-Determination op cit pp.228-229; R. Rosenstock "The Declarations of International Law Concerning Friendly Relations: A Survey" (1971) 65 AJIL pp.713, 732; See also Y. Dinstein "Collective Human Rights of Peoples and Minorities" ICLQ Vol.25, (1976) pp.103-120.

[59] Jack Forbes "Do Tribes Have Rights? The Question of Self-Determination for Small Nations" Journal of Human Relations (Wilberforce) Vol.18,1 (1970) pp.670-9.

[60] Y. Dinstein op cit p.109.

[61] S.K.N. Blay "Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples Rights" Journal of African Law (1985) p.148.

neutrality of international law to secessionist action, neglects one pertinent factor.

Self-determination is not recognised by international law in secession situations because it constitutes a violation of the territorial integrity and independence of the State[62]. A former UN Secretary-General U Thant, has stated that "the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member States"[63]. Admittedly, it is possible to argue that Article III of the OAU Charter relates only to international relations between OAU Member States and consequently, political and territorial claims arising out of intra-national frictions, like the Nigerian [Biafran] Civil War[64], are not affected by the Article. However, in the light of Article III antecedents, such an argument cannot prevail because the intentions of the parties to the OAU Charter is clearly indicated by subsequent State practice[65] shows that the respect for territorial integrity is not predicated upon any conditions or exceptions.

Furthermore, the OAU has passed several resolutions, notably the Resolution of 1964, in which Member States restated their pledge to "respect boundaries existing on their achievement of national independence"[66]. OAU resolutions on the inviolability of existing boundaries have established a standard of African State practice and consequently serve as the basis for a rule of regional customary

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[62] Article III OAU Charter; Article 2(4) Charter of the UN.

[63] UNMC 9 February 1970 p.36.

[64] See S.K. Panter-Brick op cit p.254; KWJ Post "Is There a Case for Biafra?" 44 International Affairs 1968 p.28.

[65] Article 31, Vienna Convention on the Law of Treaties 1969 in D.J. Harris, Cases and Materials on International Law (2nd ed) (Sweet & Maxwell, London, 1979) p.620-1.

[66] OAU Res. AHG/16/1 (July 1964).

international law binding on the States which have subscribed to the existing boundary regimes at independence[67]. Dr. Shaw refers to the Biafran experience as "a crucial piece of state practice in Africa with regard to post independence secession; and the high level of consensus reached by African States on this basis principle of territorial integrity demonstrates a strongly held belief militating against secessionist attempts"[68].

In light of the foregoing conclusion, the question arises as to whether all legal avenues are shut to oppressed minority or other ethnic groups in Africa, seeking to assert their right of self-determination?

Although the general attitude of the OAU and the UN is basically anti-secession, one may interpret certain international instruments as having opened up some avenues for the exercise of self-determination by peoples in the post-colonial context.

Firstly, UN practice reveals that non-intervention does not seem to be an absolute principle. In situations where internal or domestic upheavals constitute threats to international peace and security, the UN has 'pierced the veil' of the principle of non-intervention[69]. For instance, Paragraph 7 of the General Assembly Declaration on Friendly Relations and Cooperation Among States states that:

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67 The Resolution of July 1964 may thus serve as the foundation of regional customary law rule not dissimilar to the principle of 'usi possidentis' as applied in the Latin American Republic. See the "Colombia - Venezuela Award" (1922) 16 AJIL p.428.

68 M. Shaw op cit p.210.

69 In such situations Article 2(7) of the UN Charter appears to be in applicable. R. Higgins believes that UN practice upholds the view that there can be varying degrees of threats to peace, less drastic than those necessitating enforcement measures under Article 42, yet which - inspite of Article 2(7) - allow actions under Chapter VI in order to maintain international peace - R. Higgins, op cit pp.79-81.

> "Nothing in the foregoing Paragraph shall be construed as authorising or encouraging any action which would dismember or impair totally or in part the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction to the race, creed or colour".

It is possible to deduce from the foregoing paragraph that the inviolability of colonial, nay territorial boundaries and therefore the denial of the right of secession is predicated upon the observance and protection of the right of self-determination of peoples constituting a particular State. Consequently, it is possible to argue that an oppressed group can justifiably exercise the right of self-determination if the government of the relevant state does not represent all the peoples or if distinctions exist based on race, creed or colour[70].

Secondly, the emerging concept of peoples rights to self-determination as pronounced in recent international legal instruments - can be construed in specific contexts as creating legal inroads to the hitherto sacrosanct principle of the territorial integrity of states. As A. Cassese rightly observes, under the Covenant on Civil and Political Rights "one may continue to question whether the government of, a sovereign State complies with Article 1; whether it truly recognizes its peoples rights to internal self-determination or has become oppressive"[71].

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70 This argument is further buttressed by one of the principles of the Declaration which states that:
"The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status feeely determined by a people constitute modes of implementating thought of self determination by that people" - Res.2625 (XXV) of 24 October 1970.

71 A. Cassese, "The Self Determination of Peoples" in The International Bill of Rights (ed) L. Menkin, Columbia University Press, 1981 p.98.

The inevitable question that arises is, what constitutes "peoples". Two types of units have been accorded or thought to be entitled to self-determination. One defines "peoples" by geography and political history, the other by its origins and culture. The former relates mainly to a land-territory with natural or otherwise clearly demarcated boundaries falling under a single administration; the latter to the observable characteristics of the group[72].

This divergence of opinion on what constitutes "peoples" manifested itself at the drafting session of the International Convention Economic & Social Rights and the International Convention on Civil & Political Rights, whence the United Kingdom delegate stated that the term 'people' necessarily meant the sovereign state[73]. On the other hand, the El Salvador delegate disagreed and illustrated his own conceptions of 'people' to include a tribe in Tanganyika (Tanzania) being deprived of its ancestral land, requiring settlement against its will[74]. The concept of people has also been defined as:

> "(a) a social entity possessing a clear identity and its own characteristics;
> (b) which has a relationship with a territory, even if it has been wrongfully expelled from it and artificially replaced by other populations; and
> (c) a people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognised in Article 27 of the International Covenant on Civil and Political Rights"[75].

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72 Harris O. Schoenberg "The Concept of 'People' in the Principle of Self-Determination". Ph.D. Thesis Faculty of Political Science, Columbia University (1972).

73 James N. Hyde "Permanent Sovereignty over Natural Wealth & Resources" 50 AJIL (1956) 854 at 859.

74 Ibid.

75 A. Cristescu, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Right of Self-Determination, UN Doc.E/CN.4/Sub.2/408/Rev.1, p.41.

Cristescu's definition appears to be a broad reconciliation of Schoenberg's differentials and does not indicate criteria with which to measure terms such as "social entity", a "clear identity" and "its own characteristics"[76].

The restrictive approach to the definition of "peoples" has been adopted by Professor Cassese who contends that the people of a national component of a State must be of dimensions which are comparable with other national groups in the same state and not only a minority group; secondly that the unit should be accorded a distinct legal status in the constitutions of the State[77].

We submit that it is not advisable to formulate a 'straight-jacket' definition for such an amorphous, nay amoebic, concept such as "peoples"[78], such attempts inevitably lead to anamorphosis. Rather, a categorization of the concept is preferable, consequently we ought to consider Francois Rigaux approach which categorises the concept of peoples into three units:

> "(a) The people constitute a human community who are quite significantly different from other peoples;
> (b) The people is the entirety or the majority of the population of a State and have one fundamental right: that they are not subject to the power of the minority;
> (c) The people can be a homogeneous people structured in a State, or they can be national minority whose collective rights are recognized in that state"[79].

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[76] See M. Shaw op cit p.103.

[77] A. Cassese op cit p.95.

[78] cf. Jean-Bernard Marie suggests a methodological approach where conservative methods should be adopted to specify entities which cannot claim to qualify as "peoples" by eliminating ineligible entities such as the State - Jean Bernard Marie, "Semantic and Methodological Distinctions" Human Rights Law Journal (1986) Vol.7 p.202.

[79] Francois Rigaux "The Algiers Declaration of the Rights of Peoples" in Antonia Cassese (ed) UN Law: Fundamental Rights (Alphen aan den Rijn, Netherlands, 1979) pp.211-218.

With regard to Rigaux's first category, additional criteria or definition would be required to measure, for instance, how a community differs 'significantly' from other peoples. Such a criteria would admittedly involve anthropological and other sociological considerations such as historical and cultural homogeneity. Although this category may serve as a basis for establishing a definition of peoples to suit political purposes, we must not loose sight of the fact that the definition of peoples is not a sociological but a legal one when determining the nature of "self" in self-determination[80]. Rigaux second and third categories recognise the state and thus territory as a basic criteria in the determination of the term "peoples"; this coincides with the present legal approach to the right of self-determination of peoples.

It is therefore in the context of the Rigaux categories that we may better appreciate the concept of peoples rights as stated in the African Charter on Human and Peoples Rights (AFCHPR).

Article 20 of the AFCHPR provides that:

> (1) ...all peoples...shall have the unquestionable and inalienable right to self-determination.. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
>
> (2) Colonised or oppressed peoples have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community."[81]

Although the AFCHPR does not define the term "peoples", a contextual approach indicates that the term refers to the collection of individuals who constitute distinct communities in Africa and to whom the collective

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80 M. Shaw op cit p.100-101.

81 Underlines for emphasis only.

rights stated in the AFCHPR apply[81]. The contextual approach hinges upon the issue of recognising the very identity of diverse cultures, civilizations and peoples with due respect for fundamental and universal values of humanity[82]. Furthermore, the fact that the AFCHPR does not affirm the concept of "territorial integrity", unlike the OAU Charter and other OAU Resolutions is a very important indication that the right of self-determination may be liberally interpreted, within the regime of the AFCHPR, as applicable in the post-colonial context.

Nevertheless, an OAU Member State may decide to raise the shield of "non-interference in (its) internal affairs"[83] against any assertion of a peoples right to self-determination since the relationship between a State and its own nationals is almost exclusively regulated by internal law. We submit that, quite apart from the fact that the protection of human rights is no longer exclusively within the domestic jurisdiction of States[84] the new African Charter on Human and Peoples Rights (AFCHPR) creates binding legal obligations on signatory States to observe the terms of the Charter and submit to its procedures. Consequently, the competence of the African Commission on Human and Peoples Rights as prescribed by the AFCHPR, constitutes a negation of the view that the principle of "non-interference in the internal affairs of Member States" is absolute. However, the competence of the Commission, as we shall review presently[85], is delimited to investigative powers only, while binding decisions on concrete violations of human and peoples

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81 See, preambular Paragraph 4, and Article 22(1) AFCHPR.

82 Theo Van Boven "The Relations between Peoples Rights and Human Rights in the African Charter" Human Rights Law Journal, Vol.7 (1986) p.186.

83 Article III (2) OAU Charter.

84 Rudolf Benhardt "Domestic Jurisdiction of States and International Human Rights Organs" Human Rights Law Journal Vol.7 (1986) p.205.

85 Chapter Seven, post.

rights are to be taken by the Assembly of Heads of States and Government. Furthermore, the competence of these organs are restricted "ratione personae" and "ratione materiare" with the framework of the AFCHPR.

In the light of the foregoing, we submit that self-determination is a legal right which excludes the right of secession. Although international law is percieved as neutral on the issue secession[86], we submit that here is a presumption against secession in international law on the basis that the principle of territorial integrity places obligations upon the state to observe the rule[87]. The causes of secessionist trends[88], which invariably include the denial of rights, should be more seriously addressed by African States. Ian Brownlie has suggested that under present positive international law, a solution "could be precisely the granting of autonomy to peoples - whether minorities, indigenous peoples or other ethnic groups inside multi-ethnic states"[89]. The legal basis for this suggestion under current international law is doubtful, however it is possible to argue that in the African regional regime, there is a viable exception to the presumption against secession. For instance, under the regime of the AFCHPR, where an ethnic group or "people" are "oppressed" and as a result seek the expression of their right to self-

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86 M. Shaw op cit p.215.

87 Although most secessionist movements are perpetuated by the inhabitants of affected States, (who are arguably not under any international obligation to observe the principle of territorial integrity), secessionist claims cannot be successful without achieving the criteria of Statehood founded upon effectiveness in establishing a viable State (with international cooperation) and recognition by other States. See M. Lauterpacht Recognition in International Law (Cambridge University Press 1948). See also J.L. Kunz "Critical Remarks on Lauterpachts Recognition in International Law" 44 AJIL (1950)p.713; and M. Shaw op cit p.162.

88 Discussed in Chapter Four, post.

89 Ian Brownlie "The Rights of Peoples in Modern International Law" Bulletin of the Australian Society of Legal Philosophy Vol.9 p.117.

determination via secession on universally acknowledged humanitarian grounds, the presumptions against secession may be rebutted subject to the exhaustion of the AFCHPR procedures and the attainment of the criteria of statehood[90]. Admittedly, African States will jealously guard their hard won independence and resist any international or regional trend aimed at establishing a right to secessionist self-determination. The OAU is also committed to the preservation of the territorial status quo of States in Africa. Consequently, a more realistic solution is the utilization of the machinery of the AFCHPR through which the rights of peoples to self-determination can be amplified and thus hopefully influence the decentralization of socio-political and economic structures in multi-ethnic African States.

Secessionist claims and political instability in Africa is caused not only by the denial of peoples civil and political rights, but is also influenced by the denial of their rights to socio-economic self-determination. Consequently we propose to address the issue of socio-economic Self Determination in Africa.

(d) Socio-Economic Self Determination

The concept of self-determination has hitherto been limited to the process of political emancipation and independence. Immediately after being granted political independence, African States realised that the vestiges of colonialism extended beyond political structures. President Nyerere highlighted the issue when he stated that:

> "Liberation is a historical process. It is not a single action which can be completed and have that action celebrated

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90 Article 1 of the Montevideo Convention on the Rights and Duties of States stipulates that:
"the State as a person in international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states.

> annually. And for Africa, liberation has four aspects or stages: first is the freedom from colonialism and racialist minority rule; second is freedom from external economic domination; third is the freedom from injustice and oppression imposed by Africans upon Africans. And fourth is mental freedom - an end to the mental subjugation which makes Africans look upon other peoples or other nations as inherently superior and their experiences as being automatically transferable to Africa's needs and aspirations"[91].

While the first of Nyerere's categories, (i.e. freedom from colonisation and racialism) has been achieved to a very large extent, with the exception of South Africa and Namibia, the achievement of the remaining freedoms have for all practical purposes remained elusive. Nevertheless, conscious of economic imperatives, the African nations have recognised the nature of neo-colonialism[92] and have taken steps to protect the social and economic right of their peoples. African leaders have thus, directed attention to foreign economic control as they once did on colonial political control. Their basic imperative is to ensure control over natural wealth and resources as a foundation to national development[93]. African nations are subject to the system of international economic relations which is grossly inadequate for their needs. The system allowed the industrialised nations to grow rich by the exploitation of the developing

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[91] The Process of Liberation, Address given by President Julius K. Nyerere to the Convocation of Ibadan University, Nigeria, 17 November 1976 p.2.

[92] Neo-colonialism has been described as "the survival of colonial systems in spite of formal recognition of political independence in emerging countries, which became the victims of an indirect and subtle form of domination by political, economic, social, military or technical (forces)..." - M.B. Brown, Economics of Imerpialism, (Harmondsworth, Penquin Books, 1974) pp.256-257. Nkrumah defines neo-colonialism as the endeavour of "imperialists to achieve their ends not merely by military means, but by economic penetration, cultural assimilation, ideological domination, psychological infiltration and subversive acitivies even to the point of inspiring and promoting assassination and civil strife" Statement to the First Conference of Independent African States (Accra, April 1958).

[93] See Osita Eze, "Public International Law, Private Foreign Investment and New International Economic Order" Nigerian Journal of International Studies, 1980.

countries. It demarcated the world into capital-importing nations - who export basically raw materials and primary goods at dismally low prices to capital-exporting nations and the latter who export manufactured goods in turn to the already impoverished developing nations at high prices.

This gross economic imbalance has propelled African States to intensify the campaign to assume full control over their natural resources. Thus, the attitudes of industrialised nations to the issue of permanent sovereignty over national resources was in collision with Third World expectations. Indeed, the Supreme Court of the United States has observed that there are a few, if any issues in international law on which opinions are so divided as the limitation on a states power to expropriate the property of aliens[94].

The OAU approach to the issue has been to seek UN support in evolving an acceptable formula of permanent sovereignty over natural resources. The legal basis of OAU's relationship with the UN is stated in several OAU and UN Resolutions, the first being the OAU Resolution on Africa, Non-Alignment, and the United Nations issued at the 1963 inaugural Summit. The Resolution expressed the OAU's view that "the United Nations is an important instrument for the maintenance of peace and security among nations and for the promotion of the economic and social advancement of all peoples"[95]. On 11 October 1965, the UN General Assembly, at the request of the OAU Member States, adopted a Resolution on Cooperation between the United Nations and the Organisations of African Unity[96]. A few weeks later on 25 October the

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94 Banco Nacional de Cuba V Sabbatino 376 US 398,428 (1964).

95 OAU Summit, CIAS/Pters.2/Rev.2/Res.C. 1963.

96 General Assembly Resolution 2011 (XX).

OAU Assembly of Heads of State and Government, at its second ordinary session held in Accra, in turn adopted a Resolution on Relations between the Organisations of African Unity and the United Nations[97]. It noted with satisfaction that the UN Charter had been amended in a way that would improve African representation on the Security Council and on the Economic and Social Council. The resolution also requested the OAU Administrative Secretary-General to invite the UN Secretary-General to follow the work of the Assembly of Heads of State and Government and the Council of Ministers as well as those of all the OAU Specialised Commissions as an observer, and to do his utmost to ensure that the cooperation between the two organisations be as close as possible and cover all fields that interest both organisations[98]. The foregoing resolutions constitute the basic framework of OAU-UN relationships. In the field of technical and economic cooperation these resolutions have led to mutual activities towards the evolution of rules regarding the natural wealth and resources of developing countries[99].

The UN in December 1954[100] adopted the formula of permanent sovereignty of natural resources outside the context of human rights and self-determination, however in December 1962, the General Assembly passed The Declaration on Permanent Sovereignty over Natural Resources which was based upon the idea of a "right of peoples and nations to

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97 AHG/Res.33 (II).

98 Ibid.

99 It has been argued that the nationalisation of foreign assets are in violation of international law because the catalogue of agreements between the companies and colonizers (on behalf of indigenous peoples) amounts to "pact sunt servanda". We subscribe to the view that in international law, these agreements were not international treaties as they were not concluded between the subjects of international law. See further: Charles C. Okolie, International Law Perspectives of Developing Countries: The Relationship of Law and Economic Develoment of Basic Human Rights (NOK Publishers, London, 1978) p.343.

100 UN Res. A/837 (IX).

Permanent Sovereignty over Natural Resources"[101]. Consequently "peoples and nations" were the subjects of this right. The Resolution states that the "right...must be exercised in the interest of national development and of the well being of the people of the state concerned"[102]; furthermore, exploration, development and disposition have to take place in accordance with the rules which the peoples and nations freely consider to be necessary or desirable[103]. The Resolution further states that in "cases of nationalisation, expropriation or requisitioning...based on grounds or reasons of public utility, security or the national interest", the owner "shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty, and in accordance with international law[104].

The 1962 Resolution represented the first major step by developing countries to assert control over their natural resources. Although the Resolution was in itself a compromise between the developing and industrialised countries[105], international law remained the standard of treatment of foreign investments.

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[101] UN Res A/837(IX).

[102] Res. 1803 (XVII) of 14 December 1962, Paragraph (1).

[103] Ibid Paragraph (2).

[104] Paragraph (4) Ibid.

[105] The 1962 Resolution has been criticised by many scholars. For instance G. Fitzmaurice refers to it as "a highly deficient and ambiguous injunction that takes back with one hand all it purports to give with the other". - G. Fitzmaurice "The Future of Public International Law and of the International Letgal System in the Circumstances of Today in Institute de Droit Internationale, Livre du Centenaire (1973) pp.196 also G. Schwarzenberger The Principles and Standards of International Economic Law, 117 Recueil des Cours, (1966) (I) p.7.
G. Schwarzenberger regards the resolution as "an outright denial of the rule of international customary law that the legality of expropriations depends on the payment of full, prompt and effective compensation" p.321.

The concerted action of OAU Member States together with other developing countries led to a further erosion of the customary international law approach through the adoption of the 1966 International Covenants[106]. The Covenants also reflect a compromise in the provision that "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligation based upon the principle of mutual benefit and international law..."[107].

Between 1966 and 1974, several resolutions[108] were passed by the UN which represented a progressive trend towards the 'domesticization' of the rules of permanent sovereignty over natural resources, culminating in the Charter of Economic Rights and Duties of States (CERDS)[109]. The essence of CERDS is that it emphasises the relevance of the laws and regulations of the State over issues of national resources and economic activities; furthermore with regard to compensation, disputes are to "be settled under the domestic law of the nationalizing State and by its tribunals[110].

The significance of the CERDS, to African States, is that it provided a political, nay legal, basis for the restructuring of their national economies by nationalization and localisation. Whether CERDS amounts to

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106 General Assembly Resolution 2200, 21 UN GAOR Supp.16. UN Doc A/6316 (1966).

107 Article 2, of the International Covenant of Social Economic and Cultural Rights (1966), Ibid.

108 For instance see, General Assembly Resolution A/2158 (XXI) of 25 November 1966 which confirms that the exploration of natural resources in each country should always be conducted according to national laws and traditions; General Assembly Resolution A/3201 (S-VI) of 1 May 1974 being the Declaration on the Establishment of a New International Economic Order; UNCTAD Declaration in Resolution 88 (XII) of 19 October 1974 which states that any dispute over State expropriation of foreign property "falls within the jurisdiction of its courts".

109 General Assembly Resolution 3281 (XXIX) of 12 December 1974.

110 Ibid.

declaration or evidence of customary international law governing the nationalisation of foreign assets is a controversial issue. A definitive answer, if there is one, will depend upon ones view on the effect of UN voting distribution[111] and State practice. An overwhelming majority of States voted for the CERDS, thus indicating the recognition of new principles of international law, notwithstanding the fact that the states that voted against CERDS or abstained, represent industrialised countries. Furthermore, even though the industrialised countries voted against or abstained on the Charter, they nevertheless expressed support for the initiative and the basic objectives of the document[112]. This seems to suggest that there is a vivid western acceptance that international economic order is unfair.

On the other hand, State practice provides limited support for the argument that CERDS is declaratory evidence of new principles governing foreign investment. Recent economic policies and legal developments reveal that there is a growing tendency on the part of developing countries to attract foreign companies by amending national laws on industrialisation and taxation, and by the conclusion of bilateral

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111 The CERDS was adopted by 120 votes; (6 votes against and 10 abstentions. The negative votes were cast by Belgium, Denmark, The Federal Republic of Germany, Luxembourg, the UK, and the US. The countries that abstained were Austria, Canada, France, Israel, Italy, Japan, Finland, Netherlands, Norway and Spain. Admittedly, it is questionable if the voting distribution can be regarded as near-unanimity, a prerequisite for the adoption of a UN resolution that is declaratory of law.

112 Canada for instance described CERDS as the formulation of principles and guidelines to enable the international community to establish and maintain an equitable distribution of the worlds wealth. Japan on its part was in full agreement with the objectives of the Charter and expressed the hope that efforts would be successful for a universally acceptable solution of the economic and social problems facing all states in an era of growing interdependence - See Yearbook of the United Nations 1974 Vol.28 (Office of Public Information, UN New York 1977).

agreements[113] which represent a retreat to the regime of traditional concessions[114]. However, it has been submitted that most of these bilateral and multilateral agreements are evidence of the withering of classical rules of international law relating to the expropriation of foreign assets because they are in effect a type of investment insurance which do not necessarily give cover to ensure compensation for loss of foreign investments[115] .

The modern rules of Permanent Sovereignty over National Resources are still evolving. There has admittedly been a noticeable shift from the progressive stance of the domesticization towards the accommodation of the internationalization of agreements, a trend not unconnected with the contemporary third world debt problem.

It is pertinent to stress the moral, political and legal justification for the right of economic self-determination. Numerous UN Resolutions, the 1966 International Covenants and the Charter of Economic Rights and Duties of States have established the right to economic self-determination, however the legal effect of the right remains doubtful.

In the absence of a world debt amnesty, what practical options are left to African States in the pursuance of economic self-determination?

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[113] See The International Chamber of Commerce - Bilateral Treaties for the Encouragement of International Private Investment (ICC Commission on International Investments & Economic Development, 1 Dec 1970). See also International Economic Law and Developing States (British Institute of International and Comparative Law (ed)) 1988.

[114] Rudolph Dolzer "Permanent Sovereignty over National Resources and Economic Decolonization" in Human Rights Law Journal No. 2-4 Vol.17 (1986) p.217, at p.224; T. Wolde, Third World Mineral Development in Crisis, 19 Journal of World Trade Law (1985) p.3.

[115] J.E.S. Fawcett and A. Parry, Law and International Resource Conflicts, (Clarendon Press, Oxford, 1981) p.16.

Our suggestion is self-reliance. By self-reliance we mean the harnessing and utilization of all existing resources in African countries for the primary purpose of achieving what development experts refer to as Basic Human Needs[116]. The strategy of most African states, be they, capitalist, state capitalist or state socialist, has been primarily predicated upon the prompt response to international demand for primary commodities[117]. The limited foreign reserve proceeds of the sale of such commodities are used to finance the local elite demand for western finished products, thus satisfying the secondary needs of a minority class. Lately, a significant proportion of the foreign reserves of African Countries have been committed to servicing international debts[118]. The effect of self-reliance through the Basic Human Needs approach will lead to the reduction of poverty, disease and consequently inequality. The eradication of poverty and inequality will lead to the transformation of society by providing a basis for economic self-determination.

In view of the apparent apathy of industrialised nations towards restructuring the international economic order, it is pertinent to examine existing African regional, legal and economic structures with a view to reflect on their disposition to ensure economic self-determination.

During the first decade of its existence, the Organisation of African Unity (OAU) achieved limited success in the economic field, on the continent. However the OAU succeeded in rallying the African Lobby at

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116 The primary considerations of Basic Human Needs are food, shelter and clothing. See F.B. Liser "A Basic Human Needs and the Physical Quality of Life Index" in T. Shaw (ed) Alternative Futures for Africa (Boulder, Colorado. Westview 1982).

117 T.M. Shaw "The Political Economy of African International Relations" Issue 5 No.4 Winter 1975 pp.671-88.

118 For instance, 25% of the 1987 Nigerian Natinal Budget of ₦ 8 billion naira (i.e. £1.2 billion) was earmarked for debt servicing. (1987 Budget Speech of President Ibrahim Babangida; 31 December 1986 - Federal Ministry of Information - Lagos, Nigeria).

the UN to effect the passing of a resolution towards the establishment of a New International Economic Order. The reasons for this initial inertia in the field of continental economic cooperation are threefold.

Firstly, the OAU, being basically a political organisation, concentrated on consolidating the fragile political unity achieved through compromise between the Casablanca Group of radical/progressive states and the Monrovia Group of moderate states. Furthermore, the domestic economic policies of African States differed and were wholly based on the inherited colonial economic structures which were designed to serve the needs of the colonial powers. Consequently, African economies were vulnerable to the incessantly inclement international economic environment.

Secondly, the OAU's loose political structure and administrative machinery which favoured national independence over continental unity, restricted the organisations power and authority to implement resolutions effectively. The OAU was also preoccupied with settling regional conflicts[119] during its first decade, and thus had limited scope to evolve regional economic programmes. The OAU administrative machinery was provided with limited financial support to acquire skilled staff, technical knowledge and data resources in the economic field.

Thirdly, the relationship between the OAU and other international aid regional organisations such as the Economic Commission for Africa (ECA) on economic and related issues defied definition and scope. The ECA was established on 29 April 1958, as a subsidiary organ of the UN Economic and Social Council, to assist African countries to achieve social and economic development. Towards this end, Resolution 671(XXV) establishing the Commission provides that:

119 For instance, the Moroccan-Algerian War of 1963; the Ethiopian-Somalia Conflict Since 1964; the Congo Crisis of 1964; the unilateral declaration of independence by Rhodisia (UDI) in 1965; the Nigerian Civil War (1967-1970) and the internal wars in Rwanda, Burundi and Sudan.

"The Economic Commission for Africa acting within the policies of the United Nations and subject to the general supervision of the Economic and Social Council, shall, provided that the Commission takes no action with respect to any country without the agreement of the government of that country:

(a) Initiate and participate in measures for facilitating concerted action for the economic development of Africa, including its social aspects, with a view to raising the level of economic activity and levels of living in Africa, and for maintaining and strengthening to economic relations of countries and territories of Africa both amongst themselves and with other countries of the world".

The ECA was not conceived primarily as an institution for the promotion and protection of human rights, however its activities in the social and economic spheres of Africa do enhance the basic needs and rights of Africans. Efforts at involving the ECA in human rights protection was not encouraged by many African States. For instance, a draft resolution sponsored by Nigeria, requesting the Economic and Social Council to invite regional economic commissions to study ways and means by which they could contribute to the promotion and protection of human rights was scuttled due to its rejection by several African States. Nevertheless the General Assembly accepted the principle of regional human rights arrangements without reference to regional economic commissions[120].

The ECA's role in the promotion and protection of economic and social rights was however recognized by the 1976 ECOSOC Resolution which called for "all the organisations and agencies in the system to work closely with regional commissions to achieve the overall economic and social development objectives at the regional level"[121].

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[120] UN Doc. C/CN 4/L 907; E/4322 pp.84-88; See J. Blaustein "Regional Promotion and Protection of Human Right" Commission to Study Organisation of Peace, 40th Anniversary Year. Append. Sent. Draft 1979 pp.38.

[121] ECOSOC Resolution 2043 (LXI) 5 August 1976.

The objectives of the ECA are similar to the states goals of the OAU's Economic and Social Commission. This duplication of functions has led to complications in the sphere of economic cooperation between the two bodies[122]. A framework for effective cooperation between the OAU and the ECA was established in an Agreement signed on 15 November 1965. The Agreement provides for mutual consultation between the OAU and the ECA on all matters of common concern, the exchange of observers, cooperation in matters of statistics and documentation and inter-secretariat liaison. Whereas the Agreement allows only for a loose form of cooperation, in practise, the OAU's inactiveness has allowed the ECA to establish a nominal preeminence in the promotion of economic cooperation on the continent. The failure of African countries to contribute to the expansion and development of the OAU's Economic and Social Commission is due to the fact that they perceive the latter organ as duplicating the functions of the ECA.

Despite the ECA's handsome efforts towards assisting several African States in achieving the social and economic needs of their peoples, the problems still persist. The rapid deterioration in the social and economic conditions at both national and regional levels became more evident at the beginning of the OAU's second decade. The economic and social crisis had been fermenting, since the early 1970's, as a result of the cumulative impact of a number of adverse factors, both internal and external to the region. The crisis has escalated and reached a critical level in the 1980's as a result of widespread severe and persistent climatic and ecological conditions and the deterioration of national economies. All these factors have interacted to create monumental

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122 For a detailed examination of the conflict between the OAU and the ECA - See B. Andimichael, The OAU and the UN: Relations between the Organization of African Unity and the United Nations (New York: Africana, 1975); Z. Cervenka. The Unfinished Quest for Unity: Africa and the OAU (London Julian Friedman 1977) pp.177-182.

economic and social problems, solutions to which seem beyond the ability of African countries, many of which are just surviving[123].

The OAU's response to these gloomy indicators was to conduct a total reappraisal of the efficacy of its dependence on the UN institutional machinery. It is evident that although the UN recognised the benefits of an integrated-multi-disciplinary-approach to developments[124], it was nevertheless, institutionally incapable of adopting such a strategy[125].

With a view to securing alternative strategies for the economic development of Africa, the OAU Member States initiated external deliberations with the European Community (EC) under the Lome Convention. The Lome II Convention of 1979 which was signed on 31 October 1979 applied to fifty-eight African Caribbean Pacific (ACP) States. The Convention is based on six main principles, namely:

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123 The terms of trade of African countries declined by more than 50% between 1977 and 1981. The annual loss of external resources because of the deterioration is equivalent to their total annual aid receipts. The fall in commodity prices has been particularly devastating in Africa. Statistical evidence shows that between 1979 and 1981, African countries exporting coffee, copper, cocoa, banana, vegetable oils, and tea suffered a loss of earnings of about US $2.2 billion due to the sharp decline in the prices of those commodities. The ratio of debt service to export earnings for Africa as a whole amounted to 22.5% in 1983 compared with 10.7% in 1980 - Special Memorandum by the ECA Conference of Ministers on Africas Economic and Social Crisis. E/ECA/CM 10/37/RW2. Addis Ababa; and "Critical Economic Situations in Africa", Report of the UN Secretary-General to the 39th Session of the General Assembly A/39/594, 2 October 1984.

124 United Nations Action in the Field of Human Rights 1980, (New York United Nations Publications, 1981) pp.251-255.

125 The UN's inability to evolve an intersectional approach to human rights and development is based on two factors. Firstly, the political differences among Member States regarding the objectives and authority of UN organs dealing with development. Secondly, bureaucratic conflicts between UN bodies as to jurisdictional issues. See R.I. Meltzer "UN Structural Reform: Institutional Developments in International Economic and Social Affairs" in Toby T. Gati (ed) The US, the UN and the Management of Global Change (New York. New York University Press 1963).

- the promotion and development of trade between the ACP and the European Community;
- industrialization of ACP States, the main prerequisite for their economic development and for increased trade to the benefit of these countries;
- stabilization of export earning from commodities;
- improvements in the agricultural sector, with the particular aims of guaranteeing the ACP's food supply;
- special measures for the least developed ACP countries[126].

Although the Lome II is primarily a conventional trade and aid agreement, during its negotiation attempts were made to integrate human rights into the comprehensive development programme[127]. The Lome II Convention reflected a prominent characteristic of conventional North-South trade agreements by emphasizing economic growth, trade and foreign exchange remittance objectives rather than responding to meeting human needs and social problems. Its integrated approach to development is restrictive and it failed to establish a relationship between development and human rights within its programme[128]. The failure to incorporate human rights was due to several factors. The EC took the initiative to include human rights in the civil and political context to the exclusion of social and economic rights. The EC, thus proposed a two-pronged approach to the inclusion of human rights in Lome II. Firstly,

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[126] EC Doc 1-559/80, p.31.

[127] R.I. Meltzer, International Human Rights and Development: Evolving Conceptions and their Applications to Relations between the European Community and the African-Carribean-Pacific States in C.E. Welch and R.I. Meltzer (eds) Human Rights and Development in Africa op cit p.221.

[128] Amy-Young Anawaty "Human Rights and the ACP-EEC Lome II Convention: Business as Usual at the EEC", New York University Journal of International Law and Politics (1980 Spring) pp.88-90. See also, Nantang Jua, ACP-EEC Lome Regime: Implementing the Comprehensive Development Strategy Ph.D. Thesis State University of New York at Buffallo, (1982).

it proposed a preambular clause that stated unequivocally, the signatories obligation to promote and protect human rights. Secondly the European Community proposed that it would commit itself to the public condemnation of human rights abuses by any of the signatory States, and that such condemnation may lead to the suspension of aid to violators but may not necessarily occasion the termination of commercial transactions[129].

The ACP States responded by proposing the extension of reciprocal human rights obligations on EEC States with particular reference to the protection of ACP migrant workers in Europe and the discontinuation of EEC interests in South Africa. The ACP proposal was rejected by the EEC and thus led to the exclusion of human rights provisions in the Convention. The ACP States also contributed to this failure to include human rights provisions in Lane II because they believed that the EEC proposal would justify European intervention in the internal affairs of ACP States[130]. This attitude reflects the resistance of African States to the fact that the protection of human rights is no longer a matter solely of domestic domain but had risen to the level of international jurisdiction. Indeed, the fact that African States had contemporaneously adopted the Monrovia Declaration to draft an African Charter on Human and Peoples Rights[131] probably establishes the resolve of African States to limit human rights promotion and protection to the regional jurisdiction rather than the international. The failure to integrate human rights into the Lome II Convention may also be attributed to the statements of ACP States that economic considerations and advantages must precede the

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129 Amy-Young Anawaty Ibid p.80.

130 Statement of Mr. Adjibade of the Republic of Benin in the Summary Report of the Proceedings of June 8-10 1972 ACP-EEC Consultative Assembly (2nd Annual Meeting) Doc: No. CA/47/48/49/fin; p.27.

131 Decision on Human and Peoples Rights in Africa, OAU Asembly of Heads of State and Government, 16th Session (July 17-20, 1979).

guarantee of civil and political rights. In the final analysis, both the ACP and EEC groups of States are jointly responsible for not seizing the opportunity to establish a commitment to human rights principles. This attitude reflects a vivid insincerity of purpose[132].

Notwithstanding the limited economic advantages of the Lane II, the OAU Assembly had earlier in July 1976 initiated a parallel economic programme by adopting the Monrovia "Declaration of Commitment on Guidelines and Measures for National and Collective Self Reliance in Social and Economic Self-Reliance in Social and Economic Development for the Establishment of a New International Economic Order". The Declaration called for the ECA and the OAU to collaborate in drawing up plans for the implementation of the Declaration to be presented to a special economic Summit to be held in Nigeria. Consequently, the Lagos Plan of Action for the Economic Development of Africa (LPA) and the Final Act of Lagos were adopted by the extraordinary Summit of the OAU Assembly of Heads of State and Government in April 1980[133].

The main objectives of the LPA "is the establishment of self sustaining development and economic growth, based on collective self-reliance and aimed at improving the standards of living of the mass of the African people and reducing unemployment"[134]. The LPA also recommends "that Member States should take appropriate measures to ensure that all citizens have equal opportunities to the acquisition of the means of

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132 At signing the Lome II Convention on 31 October 1979, it was a paradox that the major ceremonial speeches emphasised the need for human rights protection while the main Convention was devoid of such resolve. See Speech of Mr. H.B. St. John, President of the ACP Council of Ministers. The Courier November 1979 at p.5 and 9 (No.58 Special Issue) ACP-EEC Convention at Lome II.

133 The OAU Lagos Plan of Action for the Development of Africa 1980-2000, UN Economic Commission for Africa 'Implementation of the Lagos Plan of Action' (Addis Ababa: ECA 1982) UN Doc.E/ECA/PSB.2/12/Rev.1.

134 Ibid p.2.

production - education and training, including health facilities, physical factors of production and equitable access to the benefits of development and economic growth - food, water, health services, and money income"[135].

The LPA provides programmes for different areas of endeavour, including food and agriculture, trade and finance, transport and communication, scientific skills and the role of women in development. The ultimate goal of the LPA is the creation of an African Common Market by the year 2000. If African countries can remain solidly committed to the objectives and recommendations of the LPA, the continent will be insulated to a large extent from the vagaries and depressive effect of the prevailing inequitable international economic order.

The World Bank proposals for the economic development of Africa as heralded in the World Development Report[136] in our opinion exposes the continent to the idiosyncrasies of the world economic system. The Report emphasises the relevance of "global economic conditions" to the survival of the continents and provides that "the development of the poorest most slowly growing countries in the Sub-Saharan Africa in the immediate future depends very much on aid and trade trends., but in the longer run, domestic policies are critical"[137].

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135 Ibid p.9.

136 World Bank, Accelerated Development in Sub-Saharan Africa: An Agenda for Action. (Washington: International Bank for Reconstruction and Development) (World Bank) 1981.

137 Ibid pp.35-36. For an incisive critique of the LPA and the World Bank Report, see T.M. Shaw "Debates about Africa's Future: The Brandt World Bank and Lagos Plan Blueprints" Third World Quarterly (1983)(5) 2, 331.

The thrust of the LPA and the World Bank Report represent two sharply contrasting strategies. The LPA aims to satisfy basic human needs and human rights as a stepping stone to development. The World Bank Report, on the other hand, espouses the erstwhile colonial strategy of unrestrained growth for export as a prerequisite for achieving basic human needs. The World Bank Report has been criticized by social scientists as representing only the interests of foreign capital and for "adopting a very negative and demeaning attitude on the ability of African leadership and institutions"[138]. The OAU Secretary-General has also dismissed the World Bank Report as "incomparable with the continental self-reliance proposed in the Lagos Plan"[139].

We subscribe to the theorem that negative rights of protection and participation can only be achieved when the positive rights of satisfaction of basic human needs are present. We also submit that the LPA can achieve this objective if African leaders can go beyond the symbolic endorsement of the LPA and commit themselves to a regime of binding rules and supervisory organs in ensuring the implementation of the LPA. The problem encountered by the OAU during its first decade was the reluctance of Member States to scale their varied ideological political and economic differences. During its second decade of existence, the OAU has, to an extent, scaled those hurdles by adopting the LPA. However, economic self-determination will remain elusive unless the OAU ensures that African States commit themselves to economic integration through

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138 Report of the CODESRIA/ECA, (Conference of Directors of Social Science Research Institutes and Policy Makers of the Third World UN Development Decade), the Monrovia Strategy and the Lagos Plan of Action, March 1982, Africa Development 7, No.1 and 2 (Jan-June 1982) p.199.

139 Report of the Secretary-General on the World Bank Report (OAU Council of Ministers, 38th Ordinary Session, Addis Ababa) 23 February-1 March 1982; OAU/1177 Appendix II; 3.

self-reliance. The emergence of sub-regional economic organisations[140] in Africa is an indication of the will of African States to pursue the goal of economic self-determination through self-reliance and cooperation. The implementation of a Basic Human Needs strategy will no doubt face barriers such as the reluctance of the ruling elites in Africa who will feel threatened since the basic needs strategy would redistribute income to the benefit of the poor and the detriment of the elite[141]. The OAU LPA represents an authentic continental strategy towards achieving economic self-determination and is not incompatible with the Basic Human Needs approach.

Africa needs to gradually disengage itself from dependency on global economic and ideological networks[142]. These networks are represented by foreign currency and capital exchange, Western multinational corporations and international aid; and also by socialist armies and 'advisers' and so-called interest-free grants. We do not advocate a total break with the international financial network but a gradual disengagement which should retain only meaningful and beneficial relationships. It is evident that these links cannot be easily relinquished because of the debt trap to which African States have succumbed to. Consequently, the calls of total and immediate disengagement from the world financial network sound hollow. We thus, suggest a concerted action by African States to engage Western Creditors in working out a 'debt amnesty' rather than adopting unilateral threats or

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140 These organisations include the Economic Community of West African States (ECOWAS), and the Southern African Developmental Coordination Conference (SADCC). See O. Onwuka and A. Sesay (eds) The Future of Regional and Sub-Regional Institutions in Africa (London, Macmillan 1983). p.XX.

141 A. Schecter "The Views of the 'Chartists' and 'Skeptics' on Human Rights in the World Order: Two Wrongs Don't Make a Right" 9. Hofstra Law Review (1981) p.374.

142 Chimelu Chime, Integration and Politics Among African States (Uppsala: Scandinavian Institute of AFrican Studies, 1972) pp.391.

declarations on the repudiation of loans. The basis of such an amnesty is not charity but economic justice, which is the basis of the New International Economic Order (NIEO). The present international economic order is riddled with inadequacies and inequalities, thus necessitating the universal clamour for a NIEO which has been described as "a means to achieve equity, justice between nations and within nations"[143].

The LPA represents a redefinition of the relationship between the OAU and the ECA[144], its success will depend on the capability of both organisations to harness their resources for the benefit of social and economic self-determination. It will also depend on the realisation by States of their duty to ensure economic self-determination and development of their peoples. As earlier stated, the Basic Human Needs (BHN) approach is not incompatible with the LPA. The BHN strategy also reflects some of the characteristics of the 1966 International Covenant for Economic, Social and Cultural Rights, in its prescription for "an adequate standard of living". Article 11 of the International Covenant provides for a comprehensive right to an "adequate standard of living" by requiring State Parties to "recognize the right of everyone to an adequate standard of living...including food, clothing and housing, and to the continuous improvement of living standards". The Covenant also establishes the "fundamental right" of all "to be free from hunger". The International Covenant constitutes treaty obligations for ratifying States and consequently, African States which have ratified the

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143 "Unjust International Economic Order and Human Rights" Address of Theo Van Boven, Director of the UN Division of Human Rights (1977-1982) to the UN Seminar on "The effects of the existing unjust international economic order on the economies of developing countries and the obstable that this represents for the implementation of Human Rights", Geneva 30 June 1980 in T. Van Boven "People Matter: Views on Human Rights Policy" (Menlenhoft, Nederland bv, 1982, p.175.

144 Isebill V. Grahn "The ECA/OAU Conflict and Collaboration" in R. Onwuka and A. Sesay (eds) The Future of Regional and Sub-Regional Institutions in Africa op cit p.30.

Covenants have assumed the obligations to provide food, clothing and housing subject to their respective domestic margins of economic appreciation[145].

In addition to the duties assumed by African State Parties under the International Covenants, the African Charter on Human and Peoples Rights (AFCHPR) specifically protects the peoples rights to social and economic self-determination[146] and their right to development[147]. Furthermore, the AFCHPR imposes a duty on States "individually and collectively to ensure the exercise of the right to development"[148]. The AFCHPR does not however specifically refer to the LPA, an omission which we believe would have given greater legal force to the implementation of the LPA. An examination of the legal effect and implication of the AFCHPR provision on social and economic self-determination will be undertaken in Chapter 7.

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[145] The International Covenant for Economic, Social and Cultural rights imposes on signatory States obligations to observe minimum standards of civil and political rights but the responsibility for the implementation of economic and social rights depends upon the availabillty of resources. See Article XXX.

[146] Article 21 AFCHPR.

[147] Article 22(1) Ibid.

[148] Article 22(2) Ibid.

Chapter Four

Obstacles to the Protection of Human Rights in Africa: Selected Problems

(a) Introduction

One of the main factors responsible for deficient human rights protection in Africa has been colonialism. The political and economic structures inherited from the colonial powers continue to contribute to the violation of human rights in Africa[1]. Upon achieving independence, many African states proceeded to embark on egalitarian programmes which they sought to achieve for Africans the enjoyment of living conditions long denied them: sufficient food, clean water, communication facilities, roads, health care, education, good housing and other benefits of a developed society. However these desires could not be achieved because many States possessed limited and/or undeveloped resources, and lacked strong and determined governments.

The quest for rapid development and modernization can only be feasible, within a stable political framework and there can be no political stability without a national political consensus. Many newly independent African States, by their very nature artificial creations of the colonial powers, encompass heterogeneous collections of tribes and represent at best, colonial convenience. National boundaries are not based on any definable criteria other than the accident of colonial partition[2]. Therefore, African governments on attaining independence were confronted with a situation in which the very existence of their respective nations were threatened by cross boundary claims.

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[1] Oboro Ikime "Towards Understanding the National Question" in Africa Events, London, April 1987 p.34.

[2] S.K.B. Asante; "National Building and Human Rights in Emergent Nations" Vol.2, Cornell International Law Journal (1969) p.83.

These boundary demarcations have led to the deportation of Africans from one territory to another[3]. Nigerians were deported from the Cameroons and Ghana soon after independence, Ghanaians from Ivory Coast, Rwandans from Burundi and vice versa; Liberians were in 1971 deported from Ivory Coast; and nationals of West African were deported from Nigeria in April 1983[4]. The First All Africa Peoples Conference meeting in Accra, in 1958, denounced the "artificial frontiers" and called for their "abolition or adjustment". However, African leaders, fearing the catastrophic consequences, have refrained from venturing into boundary readjustments[5]. Rather, they have preferred the ad hoc solution of mass expulsion of non-nationals. R. Emerson has observed that "the balkanization of Africa was an old established matter to which colonialism only added a new dimension"[6].

African States have to take on the fundamental problems of welding heterogeneous conglomeration of tribes and communities into a united nation. The withdrawal of colonial powers often meant the removal of the only rationale holding a country together, and the nightmare of disintegration haunts every African government. Indeed, unity is a recurring theme in the rhetoric of most African governments and it is obviously a value which must be fostered in plural states which have a weak base of national loyalty. Yet, the paradox of the theme is that, because tribal identities and loyalties are historical, primordial and cultural in a very authentic sense, any attempt to suppress them too

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[3] U.O. Umozerike, International Law and Colonialism in Africa, (Nwamife Publishers (Enugu) Nigeria), p.106.

[4] See "The Expulsion of West African Aliens", Journal of Modern African Studies IX No.2 (1971) pp.205-30.

[5] Rupert Emerson, "Pan-Africanism" in M.E. Doro and N.M. Stultz, Governing in Black Africa: Perspectives on New States, (Englewood Cliffs N.J. Prentice Hall (1970)) p.5.

[6] Ibid at p.311.

much by overemphasizing unity may be regarded as an attempt to extinguish the very root of ones identity. Nevertheless, effective participation by all the diverse communities in the life of a new national entity is the key to national unity and stability in Africa[7]. Where such participation is denied, or the security of one community is threatened, the most natural form of protest is to attempt secession[8]. As S.K.B. Asante has observed, in striving for national unity, "bogey of tribalism should not be invoked to stifle legitimate political expression, it certainly should not be invoked to gloss over the fundamental requirement of effective participation by all groups in the natural political process, and the critical problems posed by such requirements[9].

Much as the ideal of unity ought to be sought, we should not gloss over the reality of African States as comprising ethnic groups which face each other as distinct groups competing for economic, social and political advantages. Civilian governments have been overthrown by military coup d'etat for reasons not unconnected with the former inability to ensure the equitable distribution of these opportunities. The military in turn has resorted to the use of authoritarian measures to prevent social and political disintegration. Thus some scholars have thus justified the existence of pragmatic authoritarian governments as a preferable option of Marxist-Leninist governments for the enhancement of human rights[10]. In his study of the military in Africa, C. Liebenow concludes that the increasing involvement of the military in politics gives little hope for the

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[7] W.A. Lewis, Politics in West Africa (Allen and Unwin 1965).

[8] K.A. Busia notes that "tribal pressures and tensions in Congo, Burundi, Rwanda and the Sudan erupted in civil wars, murders and massacres. Tribal cleavages also contributed to the January 1966 events leading to the military take-over in Nigeria"; op cit p.112.

[9] S.K.B. Asante op cit p.95.

[10] M. Haile, "Human Rights, Stability and Development in Africa: Some Observations on Concept and Reality"; Virginia Journal of International Law (1984) Vol.24.3 p.611.

modification of the dismal state of human rights observance in Africa[11].

It is thus pertinent to examine the major objective conditions existing on the continent that present obstacles to the protection of human rights; these obstacles include ethnicity, racism, apartheid and militarism. We also propose to examine OAU efforts towards the resolution of these problems and the legality thereof.

(b) Ethnicity & Racism

One of the major obstacles to the promotion and protection of human rights in Africa is ethnicity. An ethnic group has been defined as "a collectivity within a large society having real or putative ancestry, memories of shared historical past and a cultural focus on one or more symbolic elements defined as the epitome of their peoplehood. Examples of such symbolic elements are: kinship patterns, physical ambiguity as in (localism or sectionalism), religious affiliations, nationality, phenotypical features, or any combinations of these"[12].

Ethnicity, therefore is a conscious effort on the part of an ethnic group, within a State, to discriminate against all others to its own advantage. Most of pre-colonial Africa was divided along ethnic lines. The colonial rulers imposed boundaries without giving due consideration to existing ethnic boundaries. Nevertheless, the newly independent African States reaffirmed their commitment to the colonial boundaries and sought to ensure cohesion between the heterogeneous groups within their national boundaries. It was probably inevitable that some of the efforts at

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11 Gus Liebenow, "The Military in African Politics: A 25 Year Perspective" in G.M. Carter and P. O'Meara (eds) African Independence: The First Twenty Five Years, (Bloomington, Indiana University Press, 1985) pp.126-159.

12 R.A.S. Schermerhorn, Comparative Ethnic Relations: A Framework for Theory and Research (New York, Random House, 1970) p.12.

unification were bound to fail[13]. One of the major factors that has encouraged ethnicity in Africa has been the manipulation of the fragile national socio-economic structures by the African elite and ruling groups to perpetuate ethnocentric policies[14]. The ideology of the ethnic leader has been used to perpetuate exploitation. Archie Mafeje, thus observes that "there is a real difference between a man who on behalf of his tribe, strives to maintain its traditional integrity and autonomy, and the man who invokes tribal ideology in order to maintain a power position, not in the tribal area but in the modern capital city and whose ultimate aim is to undermine and exploit the supposed tribesmen"[15].

The exploitation of the socio-economic systems by dominant ethnic groups within African States, to the disadvantage of other groups has led to gross violations of human rights. A brief analysis of this practice in some selected African countries is necessary.

In Uganda, ethnic differences since independence have led to abhorrent human rights violations. Ethnic differences in Uganda are broadly delimited between a northern power base and a southern power base competing for State power over the economic and military structures. On the attainment of independence, the British helped the Southerners to attain a greater degree of prosperity, education and urbanization than the North. The agricultural and mining industries were located in the south, thus the southerners were in control of the economy. On the other hand, the British in forming the Ugandan Army, had recruited

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[13] W.J. Breytenbach "Inter-Ethnic Conflict in Africa" Human Rights Case Studies Vol.1 The Hague 1975 p.31; C. Ake Explanatory Notes on the Political Economy of Africa, Journal of Modern African Studies Vol.14,1 (1976) pp.4-9.

[14] O. Nnoli "Socio-Economic Insecurity and Ethnic Policies in Africa" African Review, Vol.V No.2 (1974) p.12.

[15] Archie Mafeje "The Ideology of Tribalism", Journal of Modern African Studies, Vol.IX (1971) p.258.

soldiers overwhelmingly from the northern ethnic groups, thus reposing military power with the Northerners. The lack of balance in power thus reinforced the ethnic divide.

Under Idi Amin (1971-1979), Uganda witnessed the most atrocious violations of human rights. Amin was a Northerner who in 1972 attempted to rectify the southern domination of the economy by expelling Asians (who opted for British citizenship) with the aim of giving the Northerners more economic power. It is arguable that Idi Amin succeeded, albeit unintentionally, in integrating the country to the extent that he achieved the balance of power between the north and the south in the economic sphere[16]. Earlier Milton Obote (President, 1967-71) had in realization of the numerical strength of the south over the north, adopted a popular ideology of "Move to the left" in an attempt to create a northern power base through political ideology. However in his second coming, 1980-1985, Obote adopted an aggressive strategy by the military intimidation of the south. The Southern ethnic groups who had already suffered under Amin resorted to guerilla warfare against the Obote regime. The Southern reaction culminated in the formation of two military groups, the first under Yusufu K. Lule (briefly Ugandan President in 1979) and the second under Yoweri Museveni (Ugandan President since 1986). The Obote government was toppled by another Northerner General Tito Okello, who ruled until Musevenis National Resistance Army (NRA) gained power in January 1986. Musevenis rule may be viewed as a restoration of the military balance between the Northern and the Southern ethnic groups. His success will depend upon his ability to extend this balance to the political and economic spheres. The ruling government should evolve a system that gives adequate

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16 Ali A. Mazrui and O.H. Kokole "Ethnicity and the North-South Divide in Ugandan Politics" in 1987, Britannica World Data Annual 1987 (Encyclopedia Britannica Inc., Chicago/London, 1987); p.441.

representation to each ethnic group or indeed consider granting some form of autonomy to the groups[17]. A basically stereotyped theory has been evolved to justify the disposition of descendants of certain Ugandan ethnic groups to 'democratic' rule than others[18]. We submit that such theories only serve to exacerbate the problems of unification rather than solve them.

In Nigeria, ethnic groups compete for the control of the socio-political and economic systems. Civil politics in Nigeria has been characterized by political parties which represented the ethnic interests of the Hausa-Fulani (North), Ibo (East) and Yoruba (West). In the early 1960's the three main political parties were the Northern Peoples Congress (NPC) representing the Hausa-Fulani ethnic groups, the Action Group (AG) of the Yoruba's and the National Council for Nigeria and the Cameroons (NCNC) which mainly represented the Ibo's. The political dominance of the NPC and NCNC alliance led to resentment and riots on the part of the Yoruba Action Group in 1964. A socio-political upheaval ensued in 1966, characterized by antagonism between the Ibo's and Hausas culminating in the country's first military coup, and the civil war which

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[17] Milton Obote's government consisted mostly of Langi and the Ancholi to the exclusion of the Buganda. Idi Amin excluded the Langi and the Ancholi from power and thereafter proceeded to annihilate them systematically. The present government of Y. Museveni has so far achieved a greater degree of success in ensuring relative representation of the ethnic groups. Nevertheless, ex-President Milton Obote's National Liberation Army, has continued to campaign against Musevenis rule by launching brutal guerilla attacks on Ancholi regions and causing the exodus of some 50,000 refugees - Africa Confidential Vol.27 No.18, 3 Sept 1987, p.8.

[18] Ali Mazrui and O. Kokole base their contention on the fact that 'republican' northern ethnic communities have produced human rights violators like Idi Amin, Milton Obote and Tito Okello; while the "monarchial" southern ethnic groups have descendants such as George Kanyeihamba (Attorney General) and G. Binaisa, (President 1979-80) who are both human rights exponents. Ali A. Mazrui, op cit p.441.

lasted from 1967 to 1970[19]. Since the end of the civil war, consecutive Nigerian civil and military regimes have attempted to evolve systems that will ensure an equitable balance of power between the various ethnic groups, but with limited success. The devolution of central power to the regions was effected by General Yakubu Gowon in 1967 through the creation of 12 states out of the 3 main regions. The formulae of the creation of states has had a calming influence on ethnic nationalism. Consequently, successive military regions have pursued this policy of state creation and at present there are 21 states in the Federation of Nigeria. Nevertheless, the fact that Nigeria has had several military coups detat and several attempted coups is evidence of the continuing manipulation of the socio-economic system by ethnocentric military and vicilian elites. Thus, ethnicity is one of the main bases of instability, economic problems and the deprivation of human rights in Nigeria.

In Burundi, the minority Tutsi hegemony over the majority Hutus led to the 1972 bloodletting in Burundi when about 2,000 Batutsi and upwards of 100,000 Bahutu were massacred[20]. In Rwanda, the political parties that struggled for independence were established along ethnic lines. Although the Hutu majority now control power in Rwanda, they have nevertheless continued to discriminate against the Tutsi minority. According to J. Greenland, one of the major factors responsible for the Hutu virtual monopoly of the socio-political and economic systems in Rwanda was an overreaction to the fact that the Tutsi minority being better qualified, occupied important positions in the political and

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19 W.J. Breytenbach 'Inter Ethnic Conflicts in Africa' op cit pp.314-316; P. Pergham 'Reflections on the Nigerian Civil War' International Affairs, London Vol.46 No.2 (1970) pp.231-246; A.H.M. Kirk-Green, Crisis and Conflict in Nigeria: A Documentary Sourcebook (1966-1970) Vol.III July 1967-January 1970, (London OUP, 1971).

20 Jeremy Greenland, "The Two Options New Facing Burundi"; Rene Lenerchand, "Ethnic Genocide"; and Warren Weinstein, "Burundi: Ethnic Alternatives to Violence" in Issue Vol.V No.2 (Summer 1975).

economic structure[21]. The Hutu's have thus succeeded in consolidating their control over the political system in Rwanda.

In Burundi, politics is based on ethnic division and since independence, the Tutsi who constitute about 12% of the population have continued to control the political system to the displeasure of the Hutu who constitute 83% of the population. The Tutsi minority rule has led to several futile attempts by the Hutu majority to seize political control with the inevitable massacre of the Hutus. The deliberate discriminatory policies evolved by the Tutsi minority government is exemplified by the October 1986 Government Order banning 300,000 Hutu children from participating in literacy and religious education programmes known as "Yaka Mukama"[22]. The discriminatory policies have also been exercised against the Hutus in employment and other social services[23]. As recently as August 1988, the Tutsi controlled government used its modern army to slaughter an estimated 5,000 unarmed Hutus, while about 35,000 Burundi refugees have fled the country.

The OAU response to thee violations of human rights in Burundi has been disappointing[24]. One of the only OAU responses to the Burundi issue was the visit of the OAU Secretary-General, Diablo Telli, to Burundi in May 1972 during which he declared his "total solidarity" with President Micombero of Burundi. At the OAU Summit Conference, a

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21 J. Greenland "Ethnic Discriminatinon in Rwanda and Burundi" Human Rights Case Studies, Vol.4, The Hague, 1976, p.114.

22 "Burundi: Holy War" in Africa Confidential Vol.28; No.1; 7 January 1987, p.8.

23 J. Greenland op cit p.122-124.

24 R. Lemarchand 'Selective Genocide in Burundi', Report No.20 (Minority Rights Group, London) Part I, (July 1984).

month later, no public statement referred to the massacres[25].

The foregoing ethnic conflicts are representative of a common practice in heterogeneous African States. Ethnicity creates barriers to the protection of human rights in Africa. Ethnic hegemony pervades the socio-political strata of African States and implications on human rights protection are not abysmal.

In addition to ethnicity, the practice of racial discrimination and apartheid constitute barriers to the promotion and protection of human rights in Africa. Racism has been defined as "any set of beliefs that organic, genetically transmitted differences (whether real or imagined) between human groups are intrinsically associated with the presence or characteristics, hence that such differences are a legitimate basis of invidious distinctions between groups socially defined as races"[26].

There is no doubt that colonialism played a major role in the introduction and development of racism in Africa[27]. When the Europeans colonized Africa, one of the main justifications for the system introduced was the inability of indigenous peoples to rule themselves and manage the resources of their land. Thus under the mask of "civilizing" the indigenous peoples the colonial rulers proceeded to establish political systems that were not representative of the people. The economic structures installed were to exploit the resources of the colonies to the

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25 J. Meiser, "Holocoust in Burundi 1972" 5. Case Studies on Human Rights and Fundamental Freedoms: A World Survey W. Veehoven (ed) (1976) p.225.

26 P. vander Berghe, Race and Racism: A Comprehensive Prospective (London- John Wiley & Sons Inc) 1967 p.11.

27 M. Haile op cit p.594.

advantage of the metropolis[28].

The practice of racism is evident in post-colonial independent African States such as Chad, Sudan, Tanzania, Kenya and Uganda despite the fact that these states have promulgated laws that proscribe discrimination based on race[29]. The Sudan and Chad can be singled out as two States that their peoples have experienced discrimination along racial lines.

In Chad, the Sara Negroid peoples of the South who are mainly Christians and traditional religionists have traditionally dominated the Sudanic-Arab Tonbou and Gorane groups constituting the North. During the 1960's and early 1970's, the country was politically and economically under the control of the southern Chadians. Although France had maintained the administration of the Northern Regions after independence, in 1965 France succumbed to the nationalistic claims of President Tombalbaye. The French administrators of the Northern region were replaced by southern Sara's who initiated aggressive policies which led to uprisings. The Sara administrators were forced to withdraw in the wake of attacks by disparate dissident northern groups which eventually coalesced under the Front de Liberation Nationale du Tchad (Frolinat).

Thus, from its genesis, the political instability that is Chad, today, has been based by racial discrimination despite inter breeding between the races and ethnic groups[30]. The Chadian civil war was exacerbated through the external intervention of Libya and France. In 1979, the

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[28] M. Santa Cruz, Racial Discrimination (New York United Nations) E/CN.4/Sub.2/307/Rev.1/1971 p.8.

[29] For a discussion on the provisions on human rights in the Constitutions of African States, see Chapter Five, post.

[30] Africa South of the Sahara, Europa Publications Limited (1975) p.235.

central government collapsed giving rise to approximately eleven different rebel forces claiming legitimacy and demanding a role in the formation of a new government[31]. Recently, Hissein Habre and his Gorane dominated Forces armees du nord (FAN) succeeded in reimposing a workable central government and expelled the foreign invaders[32], but not without the support of the central eastern Hadjerai ethnic group. The battles along ethnic lines have continued in Chad with the creation of the Gorane dominated Chadian ruling party the Union nationale pour l'independence et la revolution (UNIR).

The Chadian civil war created many human rights problems including the exodus of refugees to neighbouring states of Nigeria, Sudan, Central African Republic (CAR), Cameroon and Niger[33]. The success of any government in Chad will depend on its ability to accommodate the interests of the diverse races and ethnic groups in Chad thus limiting the explosive potential of deliberate discriminatory policies.

The Sudan has witnessed the installation and perpetration of northern Arab rule over the southern Negroid ethnic groups. Since independence from the British, the Sudan has experienced the Arab monopoly of economic, social, educational, administrative and military institutions[34]. In 1951, the legislative Assembly of the Sudan approved Article 100 of the Self-Government Statute of the Sudan, which guaranteed effective

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[31] D. Pitman, "The OAU and Chad" in Y. el Ayouty and I.W. Zartman (eds) The OAU After Twenty Years op cit p.302.

[32] Chad: The Factions Return, Africa Confidential Vol.28, No.15, 22 July 1987 p.5.

[33] The United Nations office of the High Commissioner for Refugees (UNHCR) reports that the Chadian refugee population as at March 1985 were 47,000 (in CAR), 123,000 (in Sudan), and 40,000 (in Cameroon). UNCHR Report 1985-6, A/AC.96/677(II).

[34] O. Albino, The Sudan: A Southern Viewpoint (London OUP 1970) pp.3-4; M.O. Bechir, Revolution and Nationalism in the Sudan (London, Rex Collings, 1974) p.2.

participation of the south in the political system. However, the Anglo-Egyptian Agreement of 12 February 1953 cancelled this protection given to the South by Article 100. In 1955, the Sudanese Parliament embarked on a Sudonization programme which effectively excluded the Southern ethnic groups from occupying senior political positions. The failure of the Sudanese Government to grant effective autonomy to the Southern peoples led to civil war, which temporarily ceased in 1972[35].

Despite the enactment of the law for Regional Self-Government in the Southern Provinces[36] the Southerners have continued to demand self-determination and independence, by launching guerilla warfare against the Sudanese Government, mainly under the banner of the Sudan Peoples Liberation Army (SPLA) by Dr. John Gurang[37]. The dissatisfaction of the southerners, despite the enactment of the Organic Law and Interim Agreements[38] is based on their conviction that the government lacks the will to implement these legislations. It must however be emphasised that the Organic Law sets out conditions for the effective and equitable

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35 O. Albino op cit pp.4-5.

36 The Sudanese Government and the Southern Liberation Movement signed an agreement on 24 February 1972, which preceded the historic legislation named the Organic Law for Regional Self-Government in the Southern Provinces. The Organic Law provides for regional autonomy by granting the Southern Peoples (of the provinces of Bahr El Ghazal, Equatoria and Upper Nile) the right to elect a Peoples Regional Assembly that can legislate on matters such as public order, education, public health, internal security, the promotion of trade and tourism (Article 11). However, matters such as mining and land use are subject to Central Government control. (Article 11 (XIV) and (XVI). Chapter VIII grants the Peoples Regional Assembly the power to levy regional duties and taxes. The Organic Law also provides for the freedom of religion, and the right of minorities to use their languages and develop their culture - Paras. 4 and 6.

37 The other pro-divisionist organisations are the Sudanese African National Union (SANU), the Sudanese Progressive Party (PPP). The only southern profunity party is the Southern Sudan Political Association.

38 The Interim Agreements provide for the recruitment and integration of citizens from the Southern Regions into the Sudanese Peoples Armed Forces.

participation of the southerners in the government of the Sudan. Political stability in Sudan can only be assured if the Government can ensure the effective participation of southerners in government and in the economic institutions.

The Sudanese civil war has created refugee problems, duly acknowledged by the UNHCR in its Report which records the registration of 86,670 refugees of Sudanese origin settled in Ethiopia refugee camps of Itang on the Sudan/Ethiopian border[39]. The refugee problem has been exacerbated by the famine in Ethiopia and recent floord in the Sudan. During this writers visit to Ethiopia in April 1987, attempts to visit the refugee camps were frustrated because of Ethiopian government restrictions. Ethiopian regulations allow only UNCHR officials access to the refugee camps. Interviews with UNCHR officials at Addis Ababa confirmed that the rationale for such restrictions are not unconnected with the fact that the SPLA use these camps as rear bases and recruitment centres for its guerilla army.

It is evident that a military solution to the interracial civil war in Sudan is not feasible. A viable solution lies in the exploration of a federal or confederal system of government that would ensure autonomy for the southern provinces[40]. The parties to the conflict may also consider exploiting the newly created avenue of the African Commission on Human and Peoples Rights. The Sudan, having ratified the AFCHPR is obliged to observe the principles enunciated in the Charter. Article 19 of the Charter provides that "nothing shall justify the domination of a people by another". Furthermore, Article 20(2) guarantees the "right of colonized and oppressed peoples to free themselves from the bonds of

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39 UNCHR Report for 1985-8 op cit p.29.

40 Moyigahorokoto Nduru "Sudan: Sharie by Another Name" Afric Asia No.40 April 1987, p.20.

domination by resorting to any means recognized by the international community". Although the Charter does not define "peoples" it is possible for the peoples of southern Sudan to justify their demands especially if it can be proved that they have been 'oppressed" and that there has been a consistent or massive violation of their rights. It is however, doubtful whether multi-ethnic African States, such as the Sudan, will allow the establishment of such an interpretation. Nevertheless, once the African Commission on Human and Peoples Rights is seized of the matter, it will enjoin the OAU Assembly of Heads of State and Government to act on a matter it has hitherto neglected.

The problem of racism as an obstacle to the protection of human rights in Africa is further exemplified by the plight of East African Asians. Intercontinental trade between the Indian subcontinent and Eastern Africa over the centuries produced a large Asian community in East Africa. During the era of British colonialism in East Africa, Asians continued to participate effectively in trade and commerce in the region. Thus the nationalist struggles in East Africa was two-pronged, against the British and the Asians, because of their joint domination of the economic spheres[41]. Although the reaction to British rule was basically due to political domination, the resentment of Asian presence was due to the latter's commercial malpractices and segregationist inclinations which were no doubt fuelled by the caste syndrome.

On the granting of independence to the East African States of Kenya, Tanganyika and Uganda, the Asians were given the choice of either becoming British Citizens in Kenya[42], British protected persons in

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41 D.P. Ghai (ed) Portrait of a Minority: Asians in East Africa (London OUP, 1965) pp.1-4.

42 Kenya, being a colony.

Tanganyika and Uganda[43] or registered citizens of these States.

The problem of racism in East Africa is highlighted by the treatment of the Asians that decided to become citizens of these States. In Uganda, Asians of Indian origin or those with British passports regardless of the fact that they were registered citizens of Uganda were expelled by Idi Amin. The despicable action of the massive expulsion of citizens on racial grounds was paradoxically justified by Idi Amin on grounds of nationalization[44].

In Kenya, the expulsion of Asians was carried out in a more systematic manner. The Asians who were Kenyan citizens had constituted themselves as small but dominant groups in control of the trade and commerce in Kenya. In realization of this fact, the newly independent Kenyan State gradually revoked the citizenship of the Kenyans of Asian origin. The Kenyan government justified its action on the need to effect fundamental structural changes in the State with a view to generating greater social and economic mobility for Africans[45]. Indeed, Tom Mboya emphasised the need to restructure the economy "in which the poverty line dangerously coincided with the racial lines"[46]. Consequently,

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[43] Tanganyika and Uganda being a Trusteeship and Protectorate respectively.

[44] Idi Amin's justification was that "the Asian community frustrated attempts by Ugandan Africans to participate in the economic and business life of their country. Asians have used their economic power to ensure that Ugandan Africans are effectively excluded from participating in the economic life of their own country. They have used their family ties, their languages which are unknown to Ugandans to exclude Ugandan Africans from business life of their own country. They have refused to identify themselves with Uganda..." quoted in Osita Eze, The Legal Status of Foreign Investments in the East African Common Market (Geneva, Institut Universitaire des Hautes Etudes Internationales/Leiden Sigthoff, 1975) pp.302-303.

[45] Y.P. Ghai American Society of International Law, Proceedings of the 67th Annual Meeting, Washington DC, 12-14 April 1973, p.123-4.

[46] T. Mboya quoted in A. Mohiddin "Socialism or Capitalism?" Sessional Paper No. 10 reviewed in East Africa Journal, March 1969 p.43.

official Kenyan government policies discriminated against the Kenyans of Asian origin despite constitutional guarantees to the contrary.

The practice of restructuring the national economy on racial lines was also evident in Tanzania. Some writers have claimed that Tanzanian socialist practices based on the Arusha Declaration of 1967[47] were non-discriminating in spite of the fact that the brunt of the policies were borne by the citizens of Asian origin[48]. We cannot subscribe to the notion that because the Arusha Declaration consecrates the principles of social justice, and economic equality, this fact alone absolves the State from charges of implementing a policy with particularly dire implications for a predetermined race. The controls and restrictions imposed by the Tanzanian government on economic activity and property ownership divested Tanzanian Asians of their right and means of livelihood. Consequently, we cannot appreciate any distinction between the desired effects of the policies of Tanzania, Kenya and Uganda on their citizens of Asian origin; the only difference being the method of implementation.

The need to restructure the economic and social systems of African States cannot be overemphasised. Indeed, economic self-determination and self reliance cannot be achieved without structural intra-national and global economic changes. However these intra-national or domestic policies should take due cognisance of the equal rights of individual and groups within the national polity. Ethnic or racially biased socio-economic policies cannot achieve unity and the egalitarian objectives sought by African States. Such policies only serve to alienate the minorities and fuel calls for full political and economic self-determination.

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47 J. Nyerere, Ujamaa: Essays on Socialism, (Nairobi, OUP 1968) p.13-37.

48 O. Eze, Human Rights in Africa: Some Selected Problems, op cit, p.111.

Individuals, ethnic and racial groups within a State also have a duty to identify with and contribute to national aspirations and refrain from forming ethnic or racial enclaves for exploitable purposes.

(c) Apartheid

Apartheid is the extreme form of racism. It is a formalized and established system of racial discrimination evolved from the factual conditions existing in South Africa and Namibia. The institutions and instruments of State are calibrated to ensure the maintenance of inequality and distinction between racial groups. Apartheid is thus the foremost barrier to the protection of human rights in Africa.

South Africa officially declared the apartheid policy in 1948, thus "legalizing" the practice of segregation and racial prejudice perpetuated by previous regimes. Apartheid is based on four distinctive but mutually complementary factors, namely; (a) racial prejudice and discrimination, (b) racial segregation and separation, (c) economic exploitation of natural and human resources and (d) legal, administrative and police terror. These ramifications of terror have been described as apartheid's "most indestructible component on which it is dependent for its continuation"[49].

The basic objective of apartheid is to ensure a stratified society through the imposition of restrictions on Africans, coloureds and Asians, thus securing status and employment for whites who constitute only 20% of the population of South Africa. Political control is vested in the white population by virtue of the Act to Constitute the Republic of South

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49 J.R. Friedman, Basic Facts on the Republic of South Africa and the Policy of Apartheid. New York, United Nations, 1978 Doc ST/PSCA/SER.A/K p.34.

Africa[50]. Consequently only the whites can be voted into Parliament. Africans and coloureds are barred from voting[51] except in the homelands where they are allowed to participate in legislative functions subject to the veto powers of the Minister for Bantu Administration[52].

The control of the economy is firmly in the hands of the white minority and restrictions are placed on the participation of blacks and coloureds in the economy. Several legal instruments have been promulgated to place restrictions and regulate the jobs that Africans and coloureds can perform. For instance, the Native Labour Act and the Bantu Laws Amendment Act of 1967 grant the Minister of Bantu Administration powers to define which categories of work Africans may not engage in, and also to prescribe the numerical strength of Africans in certain categories of employment.

The minority racist government of South Africa has passed laws to ensure effective control of trade unions by restricting the rights of workers and prohibiting strikes[53].

South African Laws and practices violate the fundamental rights of the majority of its citizens[54]. The right to life, liberty and security of the

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[50] Act No.33 of 1961 (superceding the amended South Africa Act of 1909).

[51] J.R. Friedman, op cit p.19.

[52] International Commission of Justits (ICJ), A Study by the ICJ on Apartheid in South Africa and South West Africa, (Geneva, 1967) pp.13-14.

[53] Industrial Conciliations Acts of 1959 and 1965; The Native Labour (Settlement of Disputes) Act, 1953; See South Africa: Detention and Torture of Trade Unionists, Amnesty International, London, August 1986.

[54] Kader Asmal "The South African Constitution: Racism in the Basic Law of Apartheid" International Review of Contemporary Law 2 (1985) pp.65.

person[55] and the right not to be subjected to torture, cruel and inhuman or degrading treatment are not protected or observed[56]. The Government of South Africa also violates the citizens rights to recognition as a person before the law as well as equal protection by the law[57]. South African Laws violate the prohibition of arbitrary interference within the individuals privacy, family, home or correspondence[58], the right to freedom of movement and residence within the borders of ones state[59], the right to leave any country including his own and return to his country, the right to marry and found a family[60],

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[55] For instance, the Bantu Administration Act No. 38 of 1927 (as amended) grants the State President power to banish Africans in the public interest. The Criminal Law Amendment Act No.8 of 1953 (as amended in 1965) permits detention of persons for 180 days without trial. The Terrorism Act No.83 of 1967 restricts the right of habeus corpus; S.50A of the Internal Security Act also restricts the right to liberty.

[56] Police violence, torture and ill-treatment of detainees and deaths in police custody have been reported. See Amnesty International Report for 1987 (AI Publications, London 1987) p.99.

[57] The cumulative effect of South African Laws has been described as amounting to denying Africans recognition as human beings. - International Commission of Jurists - Study by the ICJ on Apartheid, op cit p.6.

[58] Under the State of Emergency imposed by the Public Safety Act since 11 June 1986 (renewed on 11 June 1988), security policy have raided homes arbitrarily and without warrants - Amnesty International Report 1987, op cit p.100; For a catalogue of restrictions imposed by the Emergency Regulations - See "Human Rights Index" South African Journal on Human Rights (1988) Vol.4 p.110.

[59] The South African regime of Pass Laws have led to the imprisonment of up to a quarter of a million black people each year on grounds of race. Although President P.W. Botha withdrew the Pass Laws on 1 July 1986, other Laws continue to provide for the registration of people by race and requires all adults to possess individual identity documents. For instance the Group Areas Act (1950) is still in force and the various anti-squatter legislations which ensure racial segregation - Ibid p.99-100.

[60] The Prohibition of Mixed Marriages Act of 1949 imposed a criminal penalty on mixed marriages; inter-racial intercourse is criminal under the Immorality Act of 1957; The Mixed Marriages Act of 1967 renders null and void marriages contracted by white South African males with non-whites.

the right to property[61], the right to freedom of thought, conscience and religion, the right to freedom of opinion and expression[62], the right to freedom of peaceful assembly[63], the right to the standard of living adequate for health and the wellbeing of the subject and his family, the right to education and the right to freely participate in the cultural life of the community.

By its Bantustan policy[64] of granting 'national' self-determination to the homelands, the South African government is evolving a cordon of so-called "national" client "states"[65] designed to be dependant on the Republic[66]. The Bantustans are not representative of the will of the black South Africans because the political leadership of these client homelands is predefined by the Pretoria regime. The UN has consistently declared the Bantustans as fraudulent and contrary to the principle of self-determination. Furthermore, apartheid laws are applied in these homelands[67]. The dependency of these homelands on the South African regime is graphically illustrated by Dr. C. Phatudi of Lebowa:

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[61] The right to property is violated by The Native Land Act (1913), Native Trust Land Act (1936), Natives Consolidation Act (1945). The effect of these laws is to reserve to the white minority (19% of the population) 87% of the land, while the African majority (69% of the population) holds only 13% of the land. The most fertile and economically viable lands are held by the minority.

[62] Marcus Gilbert "The Wider Reaches of Censorship" South African Journal on Human Rights 1.1 (May 1988) p.69.

[63] Ibid.

[64] Bantu Homelands Citizenship Act 1970.

[65] The so-called national states are: Gazankulu, Ka Ngwane, Kwa Ndebele, Kwazulu, Lebowa and Quaqua. See Henry Richardson "Self-determination, international law, and the South African bantustan policy" Columbia Journal of International Law 2. 1978 p.185.

[66] The Bantustan Programme: Its Domestic and International Implications, document submitted by the British Anti-Apartheid Movement to the United Nations pp.25-26.

[67] The Second Bantu Laws Amendment Act No.71 (1974).

"We became vast reservoirs of labour for the industrial and mining sectors of the Republic of South Africa. We are omni-dependent on the Republic of South Africa for all the electrical power consumed in these territories as well as for most of our water requirements. We are also absolutely dependent on the Republic for our transportation requirement as well as every aspect of telecommunications, postal and the like.

If you add to this pattern of dependence, the considerably high disparity in the level of development, demographic explosions and in pure economic power between the territories and our white ruled neighbours, you will understand why we have been dismissed as a hostage or client state"[68]

The continued existence of the racist regime in South Africa is dependent to a large extent on its economic relationship with industrialised nations[69]. Foreign investors are perpetuating apartheid by colluding with the regime in exploitation of the socio-economic resources of South Africa. The military might of South Africa was built upon the appeal of its argument that highlights the Country's significance as a strategic geopolitical location as a bulwark against communism in the region[70].

The installation of the apparatus of a totalitarian state by the establishment of the South African National Security Management System with branches in all State agencies and even in private enterprise is paradoxical, in the light of South Africa's expressed fear of Marxist totalitarian threats. The government of South Africa, though not Marxist has become a true Leviathan.

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[68] The Bantustan Programme op cit p.25-26.

[69] The major export destination of South African minerals and goods are U.S. 9.7%, Japan 7.7%, Switzerland 6.6%, U.K. 4.2%, West Germany 3.9%, Italy 2.6%. South Africa imports goods from the U.S. 19.7%, West Germany 15.8%, Japan 12.9%, U.K. 11.2% - Britannica World Data 1987 op cit p.747.

[70] O. Eze The United Nations and Decolonization in Southern Africa: Nigerian Journal of International Affairs, Vol.3, Nos. 1 and 2, 1977, pp.55-56.

Most of the industrialised nations have resisted the universal call to relinquish trade links with South Africa. The justification proferred by these nations is that the continuing foreign trade and investment in South Africa will lead to the integration of Africans into the main socio-economic system, thus gradually withering down apartheid[71]. It has also been stated that total imposition of mandatory economic sanctions against South Africa would have a devastating effect on the material conditions of South African blacks[72]. We submit that the present living conditions of the majority of South Africans barely satisfies their basic human needs; consequently, the imposition of mandatory economic sanctions on South Africa will not have significant adverse effects on their condition. Furthermore, the effect of such sanctions will force the South African regime to make a choice between imminent economic collapse and/or socio-political upheaval.

The high birth rate among black South Africans and the changing political economy means that the blacks must be brought into government to head off a revolution, which will be made more imminent if comprehensive and mandatory sanctions are imposed. In realisation of this fact, the South African Government is attempting to raise the standard of living of urban blacks by establishing Joint Management Committees that are granting financial support to strategic townships for the improvement of housing and infrastructure[73]. The perceived effect of this policy, is the creation of a moderate black opinion sympathetic to the government. We submit that as long as the structures of apartheid exist, especially the Group Areas Act and the State of Emergency, attempts to dissuade the aspiration of blacks for self-determination and freedom will most certainly fail.

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[71] J.R. Friedman, op cit p.57.

[72] Ibid Prime Minister M. Thatcher of U.K. has rigidly subscribed to this argument.

[73] Africa Confidential (1988) May p.1-2.

South Africa has continued its occupation of Namibia and extended its apartheid policy to the territory; an analysis of the Namibian issue is thus pertinent.

(d) Namibia (South West Africa)

By virtue of the Treaty of Versailles, Germany renounced all her overseas possessions including South West Africa, and a Mandates system was created over these territories. Under the Mandates System, these territories were declared "sacred trusts" to be administered by Mandatory powers with the aim of protecting the interests of the inhabitants. Article 22 of the Treaty granted His Britannic Majesty a Mandate over South West Africa to be held on his behalf by the Government of the Union of South Africa.

Under Article 22(6) of the Treaty, South West Africa was designated one of the Class "C" Mandated territories "which, owing to the sparseness of their population, or their small size, or other remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory", were "best administered under the laws of the Mandatory as integral portions of its territory", subject to specific safeguards for the indigenous inhabitants.

The Treaty spelled doom for the people of South West Africa because the Mandatory State extended its laws and practices of apartheid and social segregation to the territory. Although the Mandates system provided safeguards such as reposing the ultimate responsibility over the territory in the Council of the League, it however failed to act unanimously, as required under Article 5(1) of the Leagues Covenant, to prevent the South African violations.

At the end of the Second World War the United Nations introduced the International Trusteeship System as a successor regime to the territories held under the Mandate System. South Africa breached the principle of self-determination, as expressed in the UN Charter, by refusing to negotiate under the new system, and proceeded to annex South West Africa as part of its own territory. The legal thrust of South African position was that, with the dissolution of the League of Nations, South Africa was not internationally accountable to the UN for its actions in South West Africa.

The General Assembly, consequently referred the issue of the status of South West Africa to the International Court of Justice for an Advisory Opinion. The ICJ Advisory Opinion[74] stated that Chapter XII of the UN Charter did not impose a legal obligation on South Africa to negotiate a trusteeship agreement, however, it was under an obligation to submit reports on its administration of South West Africa.

In 1960, Ethiopia and Liberia raised the issue of South West Africa before the International Court of Justice, (ICJ) in response to a decision of the 1960 Summit Conference of Independent African States. Liberia and Ethiopia asked the ICJ to confirm inter alia;

(a) that the Mandate was a Treaty still in force under Article 37 of the Statute of the Court and that the Union of South Africa was subject to international obligations as set out in Article 22 of the Leagues Covenant and in the Mandate; and

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74 South West Africa Case (1950) ICJ Reports p.130.

(b) that South Africa was internationally accountable to the supervisory jurisdiction of the UN regarding the exercise of the Mandate[75].

South Africa raised preliminary objections which challenged the jurisdiction of the Court and the locus standi of Ethiopia and Liberia, however the Court held that it did have jurisdiction by virtue of Article 7 of the Mandate. In the Second Phase of its judgement, given on 18 July 1966, the Court decided that Ethiopia and Liberia had no locus standi because they had no independent interest under the Mandate to bring the action[76]. The relative merits and demerits of the ICJ judgement have been referred to elsewhere[77], however suffice it to say that for all practical purposes South Africa refused to alter its policy on South West Africa. South Africa reinforced its control over the economic and political processes in Namibia, thus effectively turning the territory into a colony.

South Africa established a political system in South West Africa which was composed of a Senate, a House of Assembly and territorial legislative houses all of whose members were white South Africans. The indigenous black populations were effectively excluded from exercising their civil and political rights. The territory's socio-economic infrastructure including commerce, industry, land, mining, immigration, civil service, health, customs and excise were subjected to the administrative and

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75 South West Africa Cases (1962) (Preliminary Objections) Ethiopia v South Africa; Liberia v South Africa. Phase 1 ICJ Reports pp.132-147.

76 South West Africa Cases, Second Phase, Ethiopia v South Africa; Liberia v South Africa, ICJ Reports (1966) p.6.

77 B. Cheng "The 1966 South West Africa Judgement of the World Court" Current Legal Problems (1967) pp.181-213; S.S. Lonin, South West Africa and the United Nations, (Baltimore, London- John Hopkins University Press, 1973) p.298.

legislative control of the South African government[78]. South Africa also extended the system of homelands to South West Africa by passing the Native Nations Act[79]. The International Commission of Jurists Study refers to the powers of the South African State President as "drastic" and "unlimited" including the appointment and removal of chiefs, the amalgamation of tribal communities, deportations and banishment; the President can also order the removal of any person from one part of the territory to another without any form of access or appeal to courts[80].

The last two decades have witnessed mounting international concern over the situation in South West Africa. The UN General Assembly has passed a series of Resolutions by virtue of which the UN assumed responsibility for South West Africa and terminated the Mandate[81]. The UN also passed Resolution 2372 which renamed the territory Namibia and declared that the continued occupation of the territory by South Africa "constituted a grave threat to international peace and security"[82].

In addition to the General Assembly Resolutions, the UN Security Council has also passed several resolutions on Namibia, including Resolution 249 (1969) which re-emphasized the UN termination of the Mandate and UN responsibility over the territory. The Security Council also declared South Africa's refusal to comply with the UN Charter and the UN resolutions on Namibia as "an aggressive encroachment on the authority of the United Nations" and thus issued an ultimatum to South Africa to

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78 International Commission of Jurists (ICJ), A Study of the ICJ on Apartheid op cit p.19.

79 Elizabeth A. Landis "Namibia and Human Rights" Human Rights Journal Vol.4, 2-3 (1976) p.321.

80 ICJ Report on Apartheid, op cit p.19.

81 General Assembly Resolution 2145 (XXI) of 28 October 1966.

82 General Assembly Resolution 2372 (XXII) of 11 June 1968.

leave Namibia before 4 October 1969, failing which the Council would decide upon "effective measures in accordance with the appropriate provisions of the relevant chapters of the UN Charter"[83]. The Security Council consequently, passed several resolutions including 276 (1970), 284 (1970) and 283 (1970) calling on all States to relinquish diplomatic and other relations with South Africa in so far as these applied to Namibia[84].

The Security Council in July 1970 requested an Advisory Opinion on the following questions:

(i) Was South Africa's presence in Namibia illegal and was there a duty on South Africa to withdraw?

(ii) Whether States (Members or not) are under an obligation to recognize the illegality of South Africa's presence in Namibia and act accordingly[85]?

The ICJ answered both questions in the affirmative. With regard to the second question, the court was of the opinion that the decisions of the Security Council were binding on all Member States. Regarding the first question, the Court held that the termination of the Mandate was not ultra vires because the UN was successor to the League regarding Mandated territories and thus could exercise any supervisory powers

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83 UN Security Council Resolution 269 (1969).

84 France and the United Kingdom abstained from voting on these resolutions.

85 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970) Advisory Opinion ICJ Reports 1971, p.16.

over them which the League was competent to do[86]. The Court also took judicial notice of apartheid and declared that it is a flagrant violation of the purposes and principles of the Charter.

The OAU 8th Assembly reacted to the ICJ opinion, by sending a delegation to the Security Council with the aim of seeking means of implementing earlier UN Resolutions[87]. The OAU Member States accepted the method of dialogue rather than confrontation with South Africa. The UN Security Council thus, adopted Resolution 309 (1972) inviting Secretary-General Waldheim in consultation with the representatives of Argentina, Somalia and Yugoslavia to enter into dialogue with South Africa.

Despite these discussions, which took place in 1972, South Africa continued to apply its "homelands" policy and apartheid laws in Namibia[88]. On 24 May 1973, the OAU Council of Ministers acting on the advice of the OAU Liberation Committee called on the UN Security Council to revoke the UN Secretary-General's talks with South Africa[89]. The UN General Assembly acceded to this request on 12 December 1973, after the UN Council on Namibia re-echoed the OAU request[90]. The UN General Assembly took a further step on 12 December 1973 by adopting a resolution which acknowledged the special role of the OAU in recognising

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86 In his disssenting opinion, Judge Sir Gerald Fitzmaurice stated that the General Assembly lacked the power to terminate the Mandate. Ibid. See R. Higgins "The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?" ICLQ, (1972) Vol.20 pp.270-289.

87 AHU/Res 65 (VII) 23 June 1971.

88 "Apartheid in Namibia: a study by the Inernational Commission of Jurists" Objective: Justice 6.1 (Jan-March 1974) p.16.

89 William J. Foltz and J. Widner "The OAU and Southern African Liberation" in Y. El Ayouty and W. Zartman (eds) The OAU After Twenty Years op cit p.258.

90 Ibid p.259.

liberation movements and declared the South West African Peoples Organisation (SWAPO) as the "authentic representative of the Namibian people"[91].

It has been observed that the effect of the Resolution 3111 (1973) was to strengthen South African intransigence[92]. The Resolution also had the effect of influencing a lull in SWAPO's military activities because the organisation nursed expectations that the UN would effectively resolve the issue. The UN Security Council adopted Resolution 435 which called for UN supervised elections in Namibia. By virtue of Resolution 435, diplomatic dialogue commenced between the Western "Contact Group" (comprising the United Kingdom, US, France, Western Germany and Canada) and South Africa with a view to finding an arrangement acceptable to the Front Line States and SWAPO.

Notwithstanding these negotiations, the South African Government installed the so-called Transitional Government of National Unity (TGNU) in June 1985. The TGNU has very limited powers because the South African Government retains direct responsibility for defence, foreign affairs and the constitutional status of Namibia. Eleven second tier ethnic authorities (one white and ten black) were established, under Administrator Generals Proclamation No.8 (AG8) of 1980, to control health and education services. In August 1987, the majority of the TGNU's Constitutional Council voted for a constitution which would abolish AG8 and its racially and ethnically biased provisions. However, the all white Afrikaaner National Party in Namibia and the government of South Africa refused to accept the vote.

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91 UN Resolution 3111 (XXVIII), 12 December 1973.

92 W.J. Foltz and J. Widner op cit p.259.

It is pertinent to note that the Proclamation of the State, establishing the TGNU, has a Bill of Fundamental Rights attached thereto as an annex[91a]. The rights proclaimed include the freedom of association, assembly and expression, the rights to a fair trial, equality before the law and the freedom from torture, ill treatment and arbitrary detention without trial. The legal validity of the Bill of Fundamental Rights if very doubtful because it is attached as an annex to the Proclamation. Furthermore, the existence and application of laws such as the Terrorism Act (1967), the Suppression of Communism Act, the Internal Security Act (1950), and Proclamation AG9 (1977), the provisions of which negate those of the Bill of Fundamental Bill of Rights, casts severe doubts as to the legal positivity of the Bill of Rights.

In August 1980, the Windhoek Supreme Court of Namibia was asked to determine the validity of these laws in the light of the provisions of the Bill of Fundamental Rights[93]. Before the court could pass a ruling on the matter, the State President of South Africa, issued a new decree, Proclamation 157 of 1986, which stated that no court could be competent "to inquire into or pronounce upon the validity of" any act passed by the South African Parliament before or after the formation of the TGNU. Nevertheless, in October 1986, the Windhoek High Court took a courageous decision which in effect declared that the Terrorism Act effectively became invalid when the Bill of Fundamental Rights was introduced as part of the Proclamations establishing the TGNU[94]. In December 1986, the Appelate Division overturned the October judgement

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91a Proclamation R101 of 1985.

93 "Namibia" Amnesty AI Report, op cit p.82.

94 See The State v Heita & 7 Others (1986) 3. South African Journal on Human Rights (SAJHR) 400.

and held that the Bill of Fundamental Rights did not affect laws such as the Terrorism Act which were already in force at the time of its introduction[95].

The foregoing scenario and the reported cases of widespread detentions without trial, torture, "disappearances", deaths in detention[96] coupled with the legal immunity conferred on the security forces[97], reflect the intransigence of South Africa and its determination to resist international efforts at ensuring self-determination and human rights in Namibia[98].

The efforts of the Western Contact groups at ensuring self-determination in Namibia has yielded little[99]. The main obstacle to self-determination in Namibia is South Africa's insistence on the withdrawal of Cuban troops in Angola prior to its withdrawal from Namibia. A multilateral agreement between South Africa, Cuba, SWAPO and Angola may open the door to negotiations for Namibia's independence[100].

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95 Cabinet of the Interim Government v Katofa (1987) 3 SAJHR pp.140-141.

96 "File on Torture in Namibia" (A.I. Publications, London, 1985).

97 Proclamation AG9 of 1977.

98 Gay J. McDougall, "International Law, Human Rights and Namibian Independence" Human Rights Quarterly (1987) p.443.

99 Sanford J. Ungar and Peter Vale "South Africa: Why Constructive Engagement Failed" Foreign Affairs, 64.2 (Winter 1985/86) p.234.

100 Between 8-9 September 1987, in London, the Angolan President Eduardo dos Santos held talks with the US Secretary of State for African Affairs in which the Angolan President announced that a withdrawal of Cuban forces will take place over two years involving all Cuban troups south of the 16th parallel. "Angola/US: More Talks" Africa Confidential Vol.28, No.19, 23 September 1987 p.8.

(e) Evaluation of OAU Solutions to the Problem of Racism & Apartheid

The struggle against racism and apartheid as manifested in southern Africa has been pursued directly by liberation movements with the cooperation and assistance of the OAU.

The OAU Charter emphasises the determination of Member States to safeguard their hard won independence and to fight neo-colonialism in all its forms[101]. One of the purposes of the OAU is "to eradicate all forms of colonialism from Africa"[102]. Article III(6) of the OAU Charter reaffirms the "absolute dedication" of all Member States to the "total emancipation of the African territories which are still dependent". The Charter stipulates that this and other objectives shall be achieved by "political and diplomatic cooperation, economic cooperation and cooperation for defence and security"[103]. Thus, OAU unequivocal measures against neo-colonialism and racial oppression derive their justification from the Charter. The struggle against racism and apartheid in Africa has thus become a fundamental tenet of the OAU[104]. Two major methods are adopted by the OAU in its struggle against racism and apartheid; namely, diplomatic and economic measures, and secondly, military and financial assistance to national liberation movements.

(i) Diplomatic & Economic Measures

At its inaugural Conference in 1963, where the OAU Charter was adopted, the OAU Member States unanimously adopted a resolution, in response to apartheid, racism and colonialism in Africa. The resolution

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101 6th Preambular Paragraph; OAU Charter.

102 Article II(1)(d), Ibid.

103 Article II(2) Ibid.

104 Z. Cervenka, The OAU and Its Charter op cit p.37. See also W.E. Langley and J.E. Okolo "The Organisation of African Unity and Apartheid: Constraints on Resolution" World Afairs, 137.3 (Winter 1974-1975) p.206.

called on Member States to grant "effective moral and practical support to any legitimate measures which the African nationalists leaders may devise for the purpose of recovering such power and restoring it to the African majority"[105]. Prior to the 1963 Conference independent African and Asian States at the UN had demanded an immediate and unconditional end to colonialism and racial discrimination by minority governments. The UN consequently passed the General Assembly Resolution 1514(XV) of 14 December 1960 entitled "The Declaration of the Granting of Independence to Colonial Countries and Peoples".

Portugal's persistent refusal to comply with Resolution 1514 led the African Group at the UN in 1963 to initiate a Security Council meeting on the applications of an arms embargo on Portugal[106]. The Security Council resisted the African request to declare such an embargo. However in 1965, the UN General Assembly adopted Resolution 2107(XX) which recommended sanctions against Portugal. The legal efficacy of this recommendation is doubtful, since the Security Council, being the competent organ to make such a recommendation, did not do so. OAU Member States were thus constrained to pass OAU Resolution 9(1) which established a Bureau to supervise and coordinate the application of sanctions by African and non-African States[107]. The OAU's efforts at imposing sanctions on Portugal was not very effective because the response of African States was not encouraging.

In contrast, OAU's efforts against the minority regime of Ian Smith in Southern Rhodesia (Zimbabwe) were more pronounced and effective. Prior to Ian Smith's Unilateral Declaration of Independence (UDI) in

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105 Z. Cervenka op cit p.16.

106 Andemichael op cit p.109.

107 AHG/Res 9(1) of 21 July 1964.

December 1965, the OAU had passed several resolutions which declared support for the liberation movements of Southern Rhodesia[108] and condemned the racialist policy of the regime[109].

In response to the UDI, the OAU Council of Ministers passed a resolution on 5 December 1965 "deciding", firstly on the severance of all communications and commercial links between OAU Member States and Southern Rhodesia and secondly, the severance of diplomatic relations with Great Britain in the event of her failure to end Ian Smith's regime and pave the way for majority rule before 15 December 1965[110]. The resolution also called on African States to render financial and military assistance to liberation movements in Rhodesia. The poor response of African States to the resolution was due to two main factors. Firstly, many African States, being members of the Commonwealth, had very close economic and diplomatic ties with Britain and were thus reluctant to relinquish such ties easily. Secondly, the OAU Assembly of Heads of State and Government felt that the Council of Ministers had exceeded its scope of authority by deciding to impose an obligation on Member States to break off diplomatic relations with Great Britain[111]. However, despite this reaction, the OAU continued to render financial and military assistance to the liberation movements.

At the level of the UN, the efforts of OAU Member States was directed at ensuring the imposition of diplomatic and comprehensive mandatory

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[108] Osita Eze "OAU faces Rhodesia" The African Review, Vol.5 No.1 (1975) p.46.

[109] C.H. Zimmerli "Human Rights and the Rule of Law in Southern Rhodesia" ICLQ Vol.20 1971 p.231.

[110] OAU Council of Ministers Resolution ECM/Res.13(VI), ECM/Res.14(VI) of 5 December 1965.

[111] For a discussion of the powers of the Council of Ministers, see Chapter 2 above at p.XX. See also T.O. Elias, "The Legality of OAU Council of Ministers Resolutions on Rhodesia" op cit p.9.

economic sanctions on Southern Rhodesia. The UN Security Council responded by adopting Resolution 232 which declared the situation in Southern Rhodesia as constituting a "threat to international peace and security" and banned UN Member States from importing several major Rhodesian minerals including iron ore and asbestos; the supply of oil, oil products and arms to Southern Rhodesia was also prohibited[112]. The General Assembly also declared that the violation of the Resolution by Member States would constitute a violation of Article 25 of the UN Charter. Despite this Covenant, several States including the United Kingdom, U.S., and Japan continued to trade with Southern Rhodesia[113].

The determination of the OAU to ensure the imposition of diplomatic and economic sanctions as a response to racism and apartheid is reflected in several OAU Resolutions. At the 1967 OAU Assembly held in Kinshasa, a resolution was adopted which declared "that the continued existence of apartheid and racial discrimination constitutes an odious crime against humanity and represents a menace to peace and security"[114]. The 1967 Resolution also condemned the continuance of economic, political and military collaboration of Western countries with South Africa and Southern Rhodesia. The apparent reluctance of the UN to impose comprehensive mandatory sanctions on Southern Rhodesia and South

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112 UN Security Council Resolution 232, of 16 December 1966.

113 P.J. Kuyper, The Implementation of Sanctions - The Netherlands and Rhodesia (Sijthoff and Noordoft International Publications, 1978); Report on the Supply of Petroleum Products to Rhodesia (Bingham and Gray) HMSO/1978 p.212.

114 Quoted in Z. Cervenka "Thre Organisation of African Unity and its Charter" op cit p.21.

Africa coupled with the sporadic attacks on Tanzania and Zambia by South Africa propelled the OAU Council of Ministers to pass Resolution 153 of 12 September 1968[115].

Resolution 153 strongly condemned three permanent members of the UN Security Council, United Kingdom, the U.S. and France, for their refusal to apply economic sanctions in accordance with Chapter VII of the UN Charter, and called on them to sever all ties with South Africa[116]. The Resolution also strongly condemned several NATO members, in particular, West Germany, Italy and France, for continuing to sell military equipment to South Africa and assisting in the production of arms, ammunition and poison gas in violation of the UN Security Council and General Assembly resolutions[117]. The resolution concludes with a note of regret on the failure of the UN Security Council to bring about an end to apartheid in South Africa because of the resistance of the main trading partners of South Africa, including the three permanent members of the Security Council[118].

However in 1970, the UN Security Council adopted Resolution 277 which in effect called on UN Member States to withdraw consular and commercial representatives in Southern Rhodesia. The Security Council Resolution also imposed mandatory transportation barriers between Southern Rhodesia and UN Member States[119]. Resolution 277 has formed the basis of several UN General Assembly and Security Council Resolutions on the effective implication of sanctions against Southern Rhodesia. Sanctions

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115 CRM/Res 153(XI) of 12 September 1968.

116 Paragraph (1), Ibid.

117 Paragraph (4), Ibid.

118 Paragraph (8), Ibid.

119 UN Security Council Resolution 277, 1970.

were eventually lifted by the UN Security Council in December 1979, in response to the Lancaster House Agreement of 17 September 1979 which paved the way for self-determination in Zimbabwe.

The campaign of African States against apartheid in Southern Africa was waged mainly within the framework of the UN and resulted in the adoption of a number of UN resolutions and several declarations[120]. Several UN Members including a few African countries especially Malawi, continued to disregard UN resolutions on diplomatic and economic sanctions against South Africa.

Notwithstanding these setbacks, the UN established a legal framework, for the campaign against apartheid, which consisted of two treaties. The first, is the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965[121], the second is the International Convention on the Suppression and Punishment of the Crime

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120 For instance, UN General Assembly Resolution 1761(XVII) of 6 November 1962 which called on UN Member States to take diplomatic and economic measures to effect the eradication of racial policies in South Africa including the boycott of all South African goods. The resolution also established the Special Committee on the Policies of Apartheid of the Government of South Africa. This Committee was later renamed the Special Committee on Apartheid and was responsible for monitoting the racial policies of the goverment of South Africa. The General Assembly reinforced the mandate of the Committee by virtue of Resolution 1978 A (XVIII) of 16 December 1962. The UN Security Council Resolution 181 (1965) called on States to stop sales of arms and ammunition and military vehicles to South Africa; UN General Assembly Resolution 2396 (XXIII) of 1968 called on the UN Security Council to declare the situation in South Africa a grave threat to international peace under Chapter VII of the UN Charter and thus implement mandatory sanctions. The resolution also called on all States to render "moral, political and material assistance to the South African Liberation Movement in its legitimate struggle" The UN Security Council Resolution 282 of 1970 condemned all violations of the arms embargo.

121 The Convention was declared open for signature and ratification by UN General Assembly Resolution 2106 A(XX) of 21 December 1965, and entered into force on 4 January 1969 after being adhered to by twenty seven states. See Human Rights, A compilation of International Instruments of the United Nations, (New York, UN; 10973/DOC ST/I+R/1, pp.24-29).

of Apartheid of 30 November 1973[122].

Article 1 of the 1965 Convention on Racial Discrimination defines racial discrimination as:

"any distinction or preference based on race, colour, descent or national or ethnic origin with the purpose of the effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of human life".

State Parties to the Convention are required to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. In pursuance of this objective, State Parties to the Convention are required under Article 5 to guarantee the right of everyone to equality before the law, the enjoyment of civil and political rights, and economic, social and cultural rights. Article 8 of the Convention establishes a Committee on the Elimination of Racial Discrimination[123] which is empowered to make recommendations to affected parties or specific organs of the UN. The Committee has however encountered significant drawbacks; firstly it does not have decision making powers. Secondly, South Africa not being a party to the Convention can neither be expected to be bound by its provisions, nor make declarations allowing individual or group communications to the

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[122] The International Convention on the Suppression and Punishment of Apartheid entered into force on 18 July 1976; International Legal Materials, Vol.13, 1974 p.51.

[123] The functions of the Committee include the consideration of reports of measures which State Parties have adopted to give effect to the provisions of the Convention, and the consideration of matters arising from allegations of infractions of the Convention brought before it by a party to the Convention. The Committee shall also consider communications from individuals or groups of individuals within the jurisdiction of State Parties which have accepted the competence of the Committee to receive such communications.

Committee. Consequently, the Committee has been forced to rely on informal and indirect methods of receiving information from South African refugees and other non-governmental bodies such as the Amnesty International and the World Council of Churches[124].

The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid declared organisations, institutions and individuals that practice apartheid as criminals[125]. The Convention defines apartheid as including policies and practices of racial segregation and discrimination as practised in southern Africa. The Convention also provides a list of the inhuman acts declared illegal including any act committed for the purpose of establishing and maintaining discrimination by one racial group of persons over any other racial group or persons and thus systematically oppressing them[126]. The Convention also endows international criminal responsibility upon any individual, institution or representative of States that commit, perpetuate in, directly incite or inspire in the crime of apartheid or directly abet, encourage or cooperate in the commission of the same[127]. The effect of this provision is that an accused person cannot plead the absence of criminal intent or that he was acting in the course of official duty. State Parties to the Convention have jurisdiction to apprehend and punish the persons committing the crime of apartheid whether or not such person is a resident or national of the State in which the acts are committed, or of

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124 K. Das "Measures of Implementation of the International Covenant in the Elimination of All Forms of Racial Discrimination with Special Reference to the Provisions Concerning Reports from State Parties to the Convention" Human Rights Journal, Vol.V 1971, p.213.

125 Article 1 International Convention on the Suppression and Punishment of the Crime of Apartheid.

126 Article II Ibid.

127 Article III Ibid.

some other State[128]. Consequently, a South African resident or citizen found to have committed the crime of apartheid can be punished by any State Party to the Convention. The Convention requires State Parties to submit periodic reports to a group consisting of three members of the UN Commission on Human Rights who are representatives of State Parties to the Convention and appointed by the Chairman of the Commission on Human Rights. These periodic reports are required to disclose the legislative, judicial and administrative measures that the State Party has adopted that give effect to the provisions of the Convention. The copies of the Report are to be transmitted through the UN Secretary-General to the Special Committee on Apartheid[129].

By virtue of Article X(C) of the Convention, the Commission on Human Rights is empowered to request information from UN organs on reports of alleged apartheid crimes, not only in State Parties but also in the Dependant Territories and Trust Territories; therefore, the Commission's jurisdiction will cover Namibia.

We submit that the cumulative effect of UN Resolutions and the two Conventions on the issue of apartheid, is that there now exists established international law rules on the crime of apartheid[130]. Judge Ammoun has observed that the principles of "equality and fundamental rights violated by apartheid constitute obligations which are in fact placed under the protection of international law"[131]. States now have an international responsibility under the UN Charter and under customary

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128 Article IV Ibid.

129 Article VII Ibid.

130 United Nations Centre against Apartheid, Declaration of the Seminar on the Legal Status of the Apartheid Regime and Other Legal Aspects of the Struggle Against Apartheid held at Lagos, Nigeria 13-16 August 1984, UN Doc A/39/423-S/16709 (1984).

131 Advisory Opinion ICJ Reports (1971) pp.16, 79.

international law not only to do nothing to assist apartheid but to take action to end apartheid[132]. The establishment of an international legal regime for the eradication of the crime of apartheid is an eloquent testimony to the determination of Member States of the OAU and the administrative machinery of the UN to surmount the most intractable barrier to the protection of human rights in Africa.

The OAU's concerted efforts to ensure the imposition of comprehensive and mandatory economic sanctions against South Africa[133], led the UN General Assembly on 12 December 1979 to request the UN Security Council to put a stop to:

"All military or nuclear collaboration with South Africa. Deliveries of oil, allied products and other strategic materials. Loans and investments, including guarantees and other investments inducements. Preferential tariffs and other measures favouring South African exports. All trade with the country."

At the OAU's 18th Ordinary Session in June 1981, the Assembly endorsed a Council of Ministers Resolution CM/Res 865(XXVII) which imposed an oil embargo and other comprehensive economic sanctions on South Africa. The OAU cooperation with the UN led to the adoption of the Paris Declaration on Sanctions against South Africa which reaffirmed that sanctions under Chapter VII of the UN Charter are the most effective and appropriate means of ensuring South Africa's compliance with UN resolutions[134].

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132 G.T. Butcher, "Legal Consequences for States of the Illegality of Apartheid" Human Rights Quarterly (1986) Vol.8 No.3 p.442.

133 For instance see the OAU Council of Ministers Resolution CM/Res.865 XXVII endorsed by the OAU Assembly in June 1981.

134 Paris Declaration on Sanctions against South Africa 27 May 1981 (UN Charter Against Apartheid) p.20.

Universal calls for the imposition of economic sanctions have been resisted by several States, mainly the U.S., Japan and members of the European Community. Admittedly, the European Community had adopted some restrictive measures against South Africa under the EEC Code of Conduct for South Africa[135] however these measures have been of partial and symbolic effect[136]. The reluctance of many EC Members to adopt substantive measures is no doubt linked to the self centred economic interests of certain Members camouflaged by the argument against the efficacy of sanctions. We submit that sanctions cannot be effective when they are denied any opportunity to succeed by inadequate universal and regional political consensus to effect adequate provisions for implementing them. Even if doubts are cast over the legal efficacy of UN resolutions on South Africa, one cannot deny the binding legal effect of EEC regulations which have only but once been utilized to enforce sanctions[137]. The EEC should consider adopting further measures such as a ban on the importation of newly mined South African gold, coal and other minerals and the withdrawal of international loan facilities. These measures should meet the objectives of sanctions which include "raising the price of imports; preventing the sale of exports and halting other flows" which will in effect reduce South Africa's revenue and limit its capacity to import[138]. It is thus pertinent for the OAU not to confine its sanctions campaign to the UN form alone, but explore ways and means of influencing a reformulation of EEC's reflective policy on South

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135 Martin Holland, "The EEC Code for South Africa: a reassessment" The World Today 1985 Vol.41, No.1, p.12.

136 For instance the Community-wide ban on the import of gold-coins originating in South Africa (Council Resolution No. 3302/86) and the suppression of the import of certain iron and steel products from South Africa (ECSC decision 86/459).

137 EC Council Regulation No. 3302/86 Ibid.

138 Joseph Hanlan and Roger Omond, The Sanctions Handbook (London, Penguin 1987) p.217.

Africa[139]. The EEC should take a leaf from the US House of Representatives which has recently approved a Bill barring all US investment in apartheid South Africa and imposing a near total embargo against the country[140]. Subject to the US Senate and US Presidential approval, the Bill will become law presently.

(ii) Military and Financial Assistance to Liberation Movements

The OAU has, since its inception, resolved to bringing every kind of pressure to bear, including the use of force, against colonial regimes and minority racist regimes in Africa with a view to ensuring self-determination and the eradication of apartheid. In 1963, the OAU established the Coordinating Committee for the Liberation of Africa[141], to provide moral, financial and military assistance to national liberation movements. OAU Member States agreed to contribute one per cent of their national budget to the Special Liberation Fund[142]. Unlike the OAU Assembly and the Council of Ministers, which were organs of deliberation, the Liberation Committee was adversely affected by lack of funding, organizational problems and conflict among member states. Member States used the Liberation Committee as a symbolic forum to herald their foreign policies and other self-interests. The Liberation Committee nevertheless, succeeded in providing a degree of financial assistance to liberation movements during this period. For instance, it provided arms for Liberation Movements procurred from Soviet Union and

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139 Martin Holland The European Community and South Africa: In search of a policy for the 1990's in International Affairs (Summer 1988) Vol.64, No.3, p.417.

140 "US Sanctions Law approved" West Africa (29 Aug-4 Sep 1988) p.1598.

141 The Liberation Committee is composed of Algeria, Ethiopia, Guinea, Congo, Nigeria, Senegal, Somalia, Tanganyika (Tanzania), the United Arab Republic, Uganda and Zambia.

142 U. Umozerike, International Law and Colonialism in Africa (Nwanife Publishers: Enugu Nigeria 1979) p.113.

China and it provided funds to the MPLA in Angola and purchased military trucks for the ZANU in Southern Rhodesia[143]. The paucity of funds available to the Liberation Movements is exemplified by the fact that during 1977-78, the Swedish International Development Agency alone, contributed almost twice the amount provided by the Liberation Committee[144].

The efforts of the OAU to provide financial and military assistance to Liberation Movements were hindered by two main factors. First, the sharp division between African States over strategy. A group of African States led by Malawi and the Ivory Coast preferred peaceful dialogue and trade with South Africa rather than the imposition of diplomatic and economic sanctions. The pro-sanctions group was led by Nigeria, Ghana and Zaire. At the 7th OAU Summit in October 1971, Nigeria's representative declared that: "Nigeria will oppose to the last drop of its blood any suggestion that the OAU, as an organisation which speaks on behalf of all independent Africa, should enter into a dialogue with South Africa"[145].

Secondly, there was a division between African States regarding which of the competing liberation movements should be supported. For instance, in 1963, the OAU Liberation Committee tried to unite the various liberation movements in Angola[146] and finally decided to support the

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[143] D. Martin and P. Johnson. The Struggle for Zimbabwe (London: Faber and Faber, 1981) p.78. C. Cevenka, op cit p.60.

[144] Ibid.

[145] Colin Legum: Africa Contemporary Record (1971-72) (New York, Africana Publishing) p.A76-A78.

[146] The Liberation Movements in Angola were the Movement for the Liberation of Angola (MPLA); the National Front for the Liberation of Angola (FNLA), and the National Union for the Total Independence of Angola (UNITA).

FNLA[147]. However due to pressure from progressive African States, the Liberation Committee decided to share funds earmarked for the Angolan Struggle equally between the FNLA and the MPLA[148].

In 1970 the OAU finally decided to grant official recognition to the following Liberation Movements; the African National Congress of South Africa, African Party for the Independence of Guinea and Cape Verde; Comoro National Liberation Movement; Front for the Liberation of Mozambique; Liberation Front for Somalia Coast; Liberation Movement for Djibouti; National Front for the Liberation of Angola; Pan Africanist Congress of South Africa; Popular Movement for the Liberation of Angola; South West African Peoples Organization; Zimbabwe African National Union (ZANU) and the Zimbabwe African Peoples Union (ZAPU). Between 1972-3 the OAU established ad-hoc committees of African foreign ministers to ensure cooperation among the liberation movements. To ensure discipline between the Liberation Movements they were threatened with the termination of aid if they failed to comply with the ministers resolutions[149].

The liberation struggle was pursued in Southern Rhodesia by the ZAPU and the ZANU. The OAU achieved very little success in uniting these two rival groups. Although temporary unity between the ZANU and ZAPU was however achieved through the good offices of several African leaders[150], the two liberation groups split again. It was however mainly

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147 Richard Gibson, African Liberation Movements (London OUP, 1972) p.231.

148 Ibid p.219-20.

149 B. Andemicael "Trends in the OAU Quest for African Liberation with the help of the UN" in International Organisations in World Politics Yearbook (1975) p.186.

150 In particular, Kenneth Kaunda of Zambia, Seretse Khama of Botswana, Julius Nyerere of Tanzania and Samora Machel of Mozambique. Ibid p.191.

through the efforts of the Ministers of the Frontline States that they eventually merged as a military and political alliance in November 1975, initially as the ZIPA Front and later as the Patriotic Front[151]. The Patriotic Front alliance was a significant step towards the success of the Lancaster House Conference and ultimate independence in 1980.

The success of most of the liberation movements in Guinea-Bissau, Mozambique and Angola was dependent on the efforts of the OAU in coercing and maintaining order between the groups. Furthermore, the unequivocal stance of the OAU during its second decade, with regard to military and financial assistance to liberation movements accelerated the process of liberation[152]. It is pertinent to note that OAU's success in coordinating liberation activities is predicated on the prompt and effective decisions taken by the Frontline States. Indeed, the Frontline States have been described as the OAU's "executive committee" on liberation struggles"[153].

The effectiveness of the OAU's resolute policy on financial assistance to liberation movements is reflected in the achievement of independence by Guinea Bissau (10 September 1974), Mozambique (25 June 1974), Angola (11 November 1975) and Zimbabwe (18 April 1980).

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151 African Contemporary Record 1974-75 p.A20 op cit.

152 At the 1976 OAU Summit in Mauritius, the OAU designated Mozambique Bank for Solidarity as an official channel for OAU Funds to Liberation Movements. The volume of military assistance and financial aid by the OAU to liberation movements is a secret, however, symbolic individual state donations are publicized. For instance at the 1976 OAU Summit, Nigeria donated the sum of US $250,000 to Mozambiques MPLA directly - African Contemporary Record 1974-1975 p.A20.

153 W.J. Folz and J. Widner "The OAU and Southern Africa Liberation" in Y. El. Ayouty and W. Zartman (eds) The OAU After Twenty Years op cit p.260.

In Namibia, the OAU has continued to provide military and financial assistance to the SWAPO. The basis of the OAU's support for the SWAPO is the "Dar-es-Salaam Declaration" issued by the Liberation Committee on 14 January 1975 which pledged the Committee's determination to end apartheid and minority rule in South Africa through the allocation of financial and military assistance to the SWAPO.

In the light of the foregoing evidence of OAU's financial and military assistance to national liberation movements, the questions arise as to the legality of the use of force by national liberation movements in Africa; and the legal basis of OAU's financial and military support to these movements.

It has been argued that national liberation movements are not recognized in international law because international law is concerned with "war" as a contest between subjects of international law[154]. We contend that liberation movements are recognized by international law. It is evident that many national liberation movements have been granted quasi-international status[155] and platforms at the UN. Furthermore, the opinion of the majority of States is that national liberation movements qualify for belligerent status[156]. It is significant that recognition is no longer required as far as the contested colonial power is concerned, however where there are rival national liberation movements, the

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154 Amechi Uchegbu "Armed Struggles for National Liberation and International Law" African Review 1, (1977) p.61.

155 See Preamble and Article 12 of the International Hostages Convention in (1981) 75 AJIL p.81.

156 To qualify as international legal subjects, traditional international law rules require a "movement" or "insurgents" to meet the following criteria: (i) they must be waging a war, (ii) they must be grouped under a central command, (iii) they must be in control of part of the territory and population and (iv) they must have been accorded "recognition of belligerancy" - Georges Abi-Saab "Wars of National Liberation and the Laws of War" Annals of International Studies 3 (1972) p.93.

international community may recognize one of them to the exclusion of others[157]. Furthermore, contemporary international law in recognizing the legal right of colonized peoples to self-determination and the corresponding duty on colonial powers to the dependent peoples, mutatis mutandis, amounts to the recognition of national liberation movements established to pursue self-determination. Thus the legality of the use of force by national liberation movements is based on the right of self-determination as expressed in a number of UN General Assembly and Security Council Resolutions[158]. During the liberation struggle for the independence of Zimbabwe, the UN Security Council passed more than nine resolutions which reaffirmed "the inalienable right of Southern Rhodesia to self-determination and independence in accordance with General Assembly Resolution 1514(XV)...and the legitimacy of their struggle to secure the enjoyment of such rights set forth in the Charter of the United Nations"[159]. The UN Resolutions, especially the Declaration of Friendly Relations and Cooperation Among States[160] establish two basic pillars in support of the legitimate use of force; firstly, they establish the right of colonized peoples to rebel against colonialism and forbid states from using any forcible action which deprives colonized peoples of their right to self-determination, freedom and independence. Secondly, they establish the legitimacy of liberation movements to seek and receive the support from third states.

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157 For instance, by virtue of A/Res.3111(XXVIII) the UN General Assembly recognized the SWAPO as the authentic representative of the Namibian People.

158 For instance, UN General Assembly Resolution 2625 (XXV) of 24 October 1970.

159 Resolution 232 (1966). See also UN Security Council Resolution 253 (1968); 277 (1970); 318 (1977); 326 (1973); 328 (1973); 442 (1979); 455 (1979) and 448 (1979).

160 General Assembly Resolution 2625 (XXV) 24 October 1970.

Although these UN resolutions do not specifically refer to the use of force, it is now universally acknowledged that struggles for national liberation are invariably effected by armed force. Indeed it has been argued elsewhere that the right to effect liberation struggles by use of force should be a rule of customary international law[161]. Much as such a conclusion is desirable, its efficacy will depend upon the role and capacity of international organizations in the formation of customary international law, and the content of these resolutions. The capacity of international organisations in the formation of international law has been acknowledged by many scholars of international law[162]. Much as the UN resolutions do not specifically refer to the use of force, the implied acceptance of this mode of enforcement is vivid from the legitimacy and practice of military and financial support rendered by third states to national liberation movements.

South Africa and Portugal have indeed raised objections to the practice of OAU Member States in providing military and financial aid to national liberation movements[163]. The objections regard the practice of OAU States as contravening Article 2(4) of the UN Charter[164]. The practice of African States as reflected in the various OAU resolutions and in the provision of financial and military support to liberation movements is also

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161 J.C. Nkala "Legality of Use of Force by National Liberation Movements" in K. Ginther and W. Benedek (eds) New Perspectives and Conceptions of International Law: An Afro-European Dialogue (Springer-Verlag: Wien; New York, 1983) p.196. See, Kader Asmal "Legal Status of National Liberation Movements (with particular reference to South Africa)" Zambian Law Journal (1983) Vol.15 p.32.

162 See R. Higgins "The Development of International Law Through the Organs of the UN op cit; B. Cheng "UN Resolutions on Outer Space: Instantaneous Generation of Customary Law" op cit.

163 S.C.O.R. 18th Year Proceedings of 1042nd Meeting; Paragraphs 13 and 38-19.

164 Article 2 (4) UN Charter provides that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations".

regarded by some commentators as unjustifiable "threat" or "use of force" within the meaning of Article 2(4)[165]. It may be argued, to the contrary, that these actions are indirect and not direct actions, thus do not amount to 'threats' or 'use of force' by OAU Member States against the independence or territorial integrity of another state[166]. However, such arguments avoid the issue, since it is evident that OAU Member States have consistently and unequivocably stated their determination to liberate all colonies in Africa and "intensify efforts to put an end to the South African governments criminal policy of apartheid and wipe out racial discrimination in all its forms"[167]. The OAU Lusaka Manifesto of April 1969 clearly indicates the OAU's resolve to resort to a non-peaceful plan of action in the light of the disappointing response of the racists of Southern African States to its peaceful overtures[168]. In addition to these facts, the provisions of military training facilities and other logistical support to liberation movements especially by the frontline States establish sufficient proof of a "threat" if not "use of force" by African States against the territorial integrity of another 'State'.

Several arguments may be adduced to justify OAU's military support for the armed struggle in Southern Africa. Firstly, Article 51(1) of the UN Charter permits the use of force by a State or a group of States in self-defence to an armed attack against one of them. Thus, the OAU being a regional arrangement within Chapter VIV (UN Charter) is not precluded from the use of the right of self-defence. The right can be invoked by the OAU in response to the constant South African bombings and armed

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165 C.J.R. Dugard "The OAU and Colonialism: An Inquiry into the plea of self-defence as a justification for the use of force in the eradication of colonialism" ICLQ (1967) p.160.

166 B. Andimicael "Peaceful Settlement Among African States: Roles of the OAU and the UN" UNITAR, New York 1972, p.102.

167 Z. Cervenka op cit p.20.

168 UN Doc A17754 of 9 November 1969.

incursions into Angola, Zambia and Zimbabwe[169]. The main difficulty with this argument will be how to determine the aggressor in the absence of an objective international fact-finding machinery. A further problem is whether, as Rosalyn Higgins suggests, Article 51 allows for a right of anticipatory self-defence[170]. If so, it may be argued that since South Africa nuclear and massive conventional military power overwhelms the combined military capability of African States, this fact gives the latter a right to anticipatory self-defence.

Secondly, the OAU may justify its military support for the liberation struggle in Southern Africa as an "enforcement action" within the meaning of Article 53 of the UN Charter. Although the Security Council's approval is required for such an action, it has been held that in the sphere of international peace and security, the Security Council's role, though primary, does not exclude the role of the General Assembly[171]. Consequently it may be proffered that the UN General Assembly's approval of the OAU Lusaka Manifesto by 113 votes to 2 (Portugal and South Africa against)[172] amounts to UN authorization or endorsement of OAU military action in Southern Africa[173]. The main reservation with this teleological interpretation of the UN Charter is the doubt over the dispositive legal effect of General Assembly

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169 UN Doc 5/PV 1590 (Memo) 8 October 1971.

170 R. Higgins, The Development of International Law through the Political Organs of the UN, op cit p.200 fn.49; and Thomas H. Franck "Who Killed Article 2 (4) or the Changing Norms Governing the Use of Force by States" AJIL (1970) p.809.

171 Expenses Case ICJ Reports (1962) p.151.

172 General Assembly Resolution 2505 (XXIC) of 29 November 1969.

173 See J.N. Nwodo, The Relations between the UN and Selected Regional Organizations in Peaceful Settlement. PhD Thesis University of London 1974.

Resolutions[174]. Therefore, it will be difficult to assert that the General Assembly can legally authorize "enforcement" within Article 53(1).

We submit that the justification of OAU's financial and military support to the armed action of national liberation movements in Southern Africa is based on the fact that it is consistent with the purposes of the UN Charter since OAU action in this context is in pursuance of the legal right of self-determination. Although the legal right of self-determination does not per se endow a right to assist armed struggles in pursuance of that objective, several UN resolutions seem to allow financial and military action and support thereof.

In this context, Principle 5 of the Declaration on Friendly Relations and Cooperation among States which relates the principles of equal rights and self-determination of peoples states that:

> "Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against or resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter"[175].

Evidently, the Declaration does not define the term "support" however, it may be safely assumed that this includes political support. Any attempt to stretch the term "support" to include military or financial assistance is discouraged by Principle 1(8) of the Declaration which states that:

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[174] Justice Tanaka however observes that "the accumulation of authoritative pronouncements, such as resolutions declarations, decisions, etc., concerning interpretation of the competent organs of the international community can be characterized as evidence of custom referred to in Article 38 paragraph 11(b)" South West Africa Case (Phase Two) ICJ Reports (1966) (Judegement on Merits) p.248 at 292.

[175] Underlines for emphasis.

> "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State".

The absence of a definitive scope in the Declaration regarding the term "support" has been clarified by subsequent UN Resolutions. For instance, General Assembly Resolution 2105(xx) of 20 December 1965:

> "recognizes...the legitimacy of the struggle by the peoples under colonial rule to exercise the right to self-determination and independence and invite all states to provide <u>material and moral assistance</u> to national liberation movements in colonial territories"[176].

Likewise, the General Assembly Resolution 2396 XXIII of December 1968 invited States "to provide greater moral and political and <u>material assistance</u> to the (South African) liberation movement in its legitimate struggle".

It can thus be submitted that UN Resolutions seem to permit the financial and military assistance provided by the OAU to national liberation movements. However such assistance can only be justified and rendered if the peoples concerned are forcibly restrained from exercising their right of self-determination. We submit that the action of the South African government as evidenced by institutionalized oppression and force to circumscribe the legitimate aspirations of South African blacks to self-determination amounts to "forcible action" sufficient to justify the OAU military and financial support accorded the liberation movements in South Africa.

(f) <u>Overview</u>

The foregoing analysis of selected problems of human rights in Africa

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[176] Underlines for emphasis.

reveals several trends. First, the mechanisms of power and status in Africa are based upon ethnic loyalties. The dominance of a particular ethnic group in a heterogeneous state is predicated upon its ability to monopolise or at least control major socio-economic and political institutions. The implications of this phenomenon on human rights arises where this control or power is utilized by the dominant ethnic group to secure advantages to itself to the detriment of others and without due regard to established or prescribed norms of equality, merit and justice. Ethnic hegemony therefore ensures discrimination, subjugation and in some cases genocide. Ethnicity has become more pronounced with modernization and urbanization. Urbanization has brought the relatively ethnically homogenous rural peoples into urban melting pots of diverse ethnic groups within the national polity. Survival in urban areas for many Africans is dependent on the formation of cultural and ethnic associations through which ethnic sentiments and patronages are kept alive. Although, these ethnic associations provide psychological, moral and social security for their members, they are invariably more destructive as a basis for promoting the political and economic dominance other ethnic groups ergo national institutions.

The effectiveness of any prescribed solution to the problem of ethnicity as an obstacle to human rights, will depend mainly on the will of African political leaders. Such solutions should include, the enactment of constitutional provisions which will ensure that ethnically composite entities within a state are granted relative self-government subject to limited central government supervision. Secondly, the enactment of constitutional provisions that will ensure equal representation of different ethnic groups in national social, political and economic institutions. Thirdly, African multi-ethnic states should consider the introduction of integrated rural development schemes, in the field of agriculture and industry, to ensure the commercial viability of rural areas, thus

stemming the problems of urbanization. Fourthly, we have seen that the problems of racism in East Africa stem from the cultural arrogance and exploitative practices of the settler Asian communities which have in turn invited nationalization and mass expulsion orders. We submit that, while the policy of Africanization creates job opportunities for the hitherto deprived and disadvantaged citizens of African States, it ought to be tempered with a liberal "citizenization" policy whereby aliens, with genuine contributions to the social-economic systems, can be integrated. These states should also encourage establishment of interracial organisations with the object of promoting goodwill amongst the various groups.

The problem of racism and apartheid have largely been borne by those 'locus situs'. The OAU's battles against apartheid and racism have been fought both regionally and at the level of the UN. These efforts have been responsible for the universal declaration of apartheid as a crime against humanity. At the regional level, the OAU grants financial and military aid to national liberation movements. We have attempted to establish the legality of such activities as not being inconsistent with the Charter of the UN. In spite of universal condemnation of its evil practices, the racist South African regime has persisted in its apartheid mould. The reluctance of western countries to impoe comprehensive and mandatory economic sanctions against South Africa, represents one of the greatest barrier to dismantling the apartheid regime. The OAU should thus direct its efforts at achieving a change of EEC policy towards South Africa, which has so far been one of the selective and symbolic albeit ineffective, solutions.

Chapter Five

The Relevance of National Constitution in the Protection of Human Rights in Africa

Traditionally, the question of human rights in national and international law is viewed in the context of categories of competence between States and the international community acting through universal or regional organisations.

Internationally, several factors are responsible for the establishment of a conducive atmosphere for human rights. First, the Charter of the UN, which devotes its preamble and several articles to "encouraging" and "promoting" respect for human rights[1]; second, the adoption of the Universal Declaration of Human Rights which is the main yardstick for determining the content of human rights and has been inspirational to the shaping of human rights in Africa[2]. Third, the European Convention on Human Rights[3] which translated human rights into precise legal rights has directly influenced the constitution of several African countries. Finally, the American Convention on Human Rights[4], which was the first regional organisation to be evolved by some of the developing States of the 'Third World'. The American Convention spurred African states to start serious deliberations on the establishment of a similar regional structure for Africa.

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[1] The UN Charter, Articles 1,13,55,62,73 and 76.

[2] Universal Declaration of Human Rights, General Assembly Resolution 217(III) A, UN Doc.A/810 at 71, (hereinafter referred to as the Universal Declaration).

[3] The European Convention for the Protection of Human Rights and Fundamental Freedom, 4 November 1950, 213 UNTS, 1953 Gr. Britain T.S. No.71 (Cmd 8969) (entered into force 3 September 1953) (hereinafter referred to as the European Convention).

[4] The American Convention on Human Rights, No.22, 1969, O.A.S. T.S. No.36 at 1 O.A.S. Doc. OEA/Ser. L/V/11.23 doc. 21 rev.6 (entered intoi force 8 July 1978), reprinted in 9 I.L.M. (1970) (hereinafter referred to as the American Convention).

However, the immediate impact of these factors on Africa is reflected in the constitutional provisions of many African states which were, needless to say, initially moulded on English and French models. The human rights provisions of the constitutions of Francophone African States are directly traceable to the French Declaration of Rights of 1789, as restated in the French Constitution of 1946 and 1958. The constitution of English speaking, African states include human rights principles that reflect the influence of the Magna Carta, the English Bill of Rights of 1689, the American Declaration of Independence and the Bill of Rights of the American Constitution enacted in 1791. It is worth noting that while the fundamental rights in English Law are located in the labyrinths of the Laws of England, the constitutions of ex-British colonies have detailed human rights sectors. Indeed some of the Constitutions of African States precede the adoption of the Universal Declaration, for instance, the 1st Liberian constitution, which has a Bill of Rights modelled on that of the United States, was issued on 26 July 1947. We propose to undertake an analysis of the types of constitutional guarantees of human rights in African countries; in addition a study of the efficacy of the domestic implementation of this international responsibility will also be embarked upon.

The rights protected in most constitutions, not least in African constitutions, are subject to exceptions; thus it is difficult if not impossible to provide for rights in absolute terms. This fact no doubt inspired the oft-quoted remark of Professor Wheare:

> "The ideal constitution...would contain few or no declarations of rights, though the ideal system of law would define or guarantee many rights; rights cannot be declared in a constitution except in absolute and unqualified terms, unless indeed they are so qualified as to be meaningless[5].

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5 A.D. Wheare Modern Constitutions (Oxford University Press 1960) p.71.

The ideal constitution as perceived by Professor Wheare does not exist in Africa, because most African Constitutions contain human rights provisions which subject the rights protected to certain qualifications, limitations or derogation. However an analysis of African State Constitutions will establish the fact that these rights are not necessarily rendered meaningless by virtue of the derogations permitted. In the quest to protect the rights of the individual, the rights of the society must not be sacrificed. A delicate balance must be struck between the interest of the society and the interest of the individual. Consequently an ideal constitution should be the standard reference point for those competing claims in the interest of peace, order and good government in the State, and political, social and economic progress of its citizens. Thus, a constitution is expected to play a role as one of the instruments of political socialization by prescribing in general terms, rules of behaviour[6].

Most African States recognise the quintessence of constitutionalism by providing constitutional guarantees of individual freedom, civil liberties and political, social, legal and participatory rights. However, these constitutions vary in their approach to the protection of human rights. Furthermore, practise may remain distant from the ideal, nevertheless African jurists and statesmen recognize the value of written guarantees as guiding beacons by which the advancement of a nation may be accessed.

It is difficult to conduct empirical research on human rights and political restrictions in Africa because the governments have been unwilling either to admit restrictions of human rights or allow investigation of what is

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6 Ivo D. Ducachek. Rights and Liberties in the World Today: Constitutional Promise and Reality (ABC Inc Oxford/California, 1973) p.26.

generally regarded as sensitive or security matters[7]. Thus we have limited our assessment of the regimes of human rights promotion and protection in African States, mainly, to the examination of their respective constitutional provisions on human rights. Evidence of state practice shall be gleaned from significant judicial decisions on human rights. We consider constitutional and other domestic legislative provisions on human rights to be of primary importance in the implementation of human rights obligations.

In so far as human rights protection is concerned, African State constitutions may be broadly divided into five main categories, namely:-

i) Constitutions of Anglophone African States

ii) Constitutions of Francophone African States

iii) Constitutions of Anglo-Arab States

iv) Constitutions of African States (ex Portuguese colonies)

v) Constitutions without Human Rights protection

The foregoing compartmentalization is based broadly on the colonial heritage of the States concerned and is made without prejudice to the not infrequent differences between the Bills of Rights of States within the same category. These intra-group differences, though not insignificant in some cases, are deliberate attempts by some States to respond to peculiar local political, economic, social and cultural factors concerned.

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[7] For documented but controversial, compilation human rights abuses in Africa see Charles Humana. The Economist: World Human Rights Guide (Hodder and Stoughton: London 1986); See also Amnesty International Report 1987, (A.I. Publications, London 1987). See Country Reports on Human Practices for 1987 (United States: State Department Feb 1988)

(i) Anglophone African States

An analysis of the constitutional guarantees of Anglophone African States reveals that they contain the longest and most elaborate provisions on fundamental human rights on the continent. The currently enforceable constitutional bills of rights in this category are contained in the constitutions of the following countries:-

Country	Date of Independence	Date of Current/Last Constitution	Chapter of Constitution
Botswana	30 Sep 1966	3 Mar 1965	Chapter II, Protection of Fundamental Rights and Freedom of the Individual
Gambia, The	18 Feb 1965	24 Apr 1970	Chapter III, Protection of Fundamental Rights and Freedoms
Ghana	6 Mar 1957	24 Sep 1979	Chapter III on the Protection of Fundamental Rights and Freedoms formally abrogated by the Provisional National Defence Council Law of 1982
Kenya	12 Dec 1963	12 Dec 1963	Chapter V, Protection of Fundamental Rights and Freedom of the Individual.
Liberia	26 Jul 1847	20 Jul 1984	Chapter III, Fundamental Rights
Mauritius	12 Mar 1968	12 Mar 1968	Chapter II, Fundamental Rights and Freedoms of the Individual Rights.
Nigeria	1 Oct 1960	1 Oct 1979	Chapter V, Fundamental Rights.
Sierra Leone	27 Apr 1961	14 Jun 1978	Chapter II, Fundamental Rights and the Freedom of the Individual.
Seychelles	29 Jun 1976	5 Jun 1979	Preamble
Tanzania	9 Dec 1961	25 Apr 1977 (as amended through Act No.15 of 1984)	Section III, Rights and Obligations.
Uganda	9 Oct 1962	1981	Chapter III, Protection of Fundamental Rights and Freedom of the Individual.
Zambia	24 Oct 1964	25 Aug 1973	Part III, Protection of Fundamental Rights and the Freedom of the Individual.
Zimbabwe	18 Apr 1980	18 Apr 1980	Chapter III, Declaration of Rights.

With the singular exception of the Seychelles, the foregoing constitutions contain a detailed Bill of Rights with an average of 14 pages of institutional text. The length and descriptive detail of these chapters reflect the inspiration derived by their authors from the provisions of the Universal Declaration of Human Rights and the European Convention on Human Rights (Articles 2-11) which latter instrument the United Kingdom had earlier subscribed to on behalf of some of her former colonies[8]. The length and detail of some of the Bills of Rights may also be attributed to recent modifications and improvements based on the Bill of Rights of the 1960 Nigerian Constitution[9].

However the Anglophone Bill of Rights differ in certain respects. For instance unlike the Nigerian Bill of Rights, the Bill of Rights of Zambia, Uganda and Kenya contain a declaratory section which constitutes a sort of preamble to the substantive section protecting human rights and freedom. The preliminary declaratory section of the Zambian constitution states that:

> "Whereas every person in Zambia is entitled to the fundamental rights and freedoms of the individual that is to say the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely:-
>
> (a) Life, liberty, security of the person and the protection of the law;
> (b) Freedom of expression and of assembly and association; and,
> (c) Protection for the privacy of his home and other property and from deprivation of property without compensation.

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[8] The Extension Clause in the European Convention was used by the United Kingdom on 3 Oct 1953 to extend the application of the Convention and Protocol to forty-two of its overseas territories, the relevant African territories being Basutoland, Bechuanaland, The Gold Coast, Seychelles, Sierra Leone, Swaziland, Somaliland, Tanganyika, Uganda and Zanzibar.

[9] Articles 18-32 of the 1960 Nigerian Constitution reproduced in "Basic Documents on Human Rights" Ian Brownlie (ed) op cit p.56-67.

> "The provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others"[10].

The legal effect of such declaratory preambular recitals have been considered by several African courts. The legal effect of S.13 of the Zambian Constitution was considered in the case of Nkumbula v Attorney-General of Zambia[11] where the court held that "Section 13 is merely a general statement of principles embodied in the following sections"[12]. Although the Zambian High Court did not give any reasons for such an interpretation, in a similar case in Kenya, Shah Vershi v Transport Licensing Board[13], a detailed judicial interpretation of the declaration section of the Bill of Rights to the Kenyan Constitution was rendered. The applicant, in this case an Asian, sought to challenge the decision of the Transport Licensing Board which refused renewal of his transport licenses. He claimed that the board's decision was discriminatory since it was based on the fact that the company was owned by a non-Kenyan. The applicant based his claim on Section 70, the declaratory section, which prohibited "discriminatory treatment" of every individual, whether a citizen or a foreigner. The High Court of Kenya held that Section 70 of the Constitution created no justifiable rights on its own. In his judgement, Chanan Singh J. stated that "...although given a separate number, this section is quite clearly in the nature of a preamble...[The] section itself creates no rights: it merely gives a list of the rights and

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[10] S.13 Zambian Constitution.

[11] (1972) ZLR III.

[12] Per Doyle, C.J. Ibid p.115.

[13] (1971) EA289.

freedoms which are protected by other sections of the Chapter"[14].

It is thus submitted that declaratory recitals in the form of preambles to the substantiv provisions of Bills of Rights in Anglophone constitutions do not confer legal rights and obligations which can be enforced judicially.

The form and substance of the rights in the substantive text of Bills of Rights of Anglophone States are very similar. The specific protections guaranteed by these constitutions follow a similar sequence tailored on the general sequence of Articles 2-11 of the European Convention on Human Rights. The following rights and freedoms are protected:

(a) Right to life;
(b) Right to personal liberty;
(c) Protection against slavery and forced labour;
(d) Protection against inhuman treatment;
(e) Protection against deprivation of property;
(f) Protection against arbitrary search or entry;
(g) Protection of the law;
(h) Right to conscience;
(i) Right to expression;
(j) Freedom of assembly and association;
(k) Freedom of movement;
(l) Protection against discrimination.

From the foregoing list of rights and freedoms, it is evident that the Anglophone constitutions have adopted the style of the European Convention by laying emphasis on the protection of civil and political rights. However, the constitutional provisions are more detailed than the provision of the Convention, and they also contain precise definitions of the qualifications to the rights protected[15]. With regard to the economic rights, all the constitutions provide protection from the

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[14] Ibid at p.298.

[15] J. Read "Bill of Rights in the Third World: Some Commonwealth Experiences" op cit at pp.30-33.

deprivation of property[16]. For instance S.40(i) of the Nigerian Constitution provides that no movable property or interest in an immovable property shall be taken possession of compulsorily except under the authority of and for the purpose prescribed by a law; such a law must provide for the "prompt payment of compensation" and grant a right of access to the court of law or other tribunal for the determination of the extent of the interest of the owner or the amount of compensation payable. The provision of the Nigerian Constitution is similar to the provisions of the other Anglophone States and is consonant with the common law presumption of the interpretation of statutes, against the removal or proprietary rights without legal authority and the provision of adequate compensation.

The interpretation of S.40 of the Nigerian Constitution, has attracted several judicial decisions, notable amongst which is the case of Adewole and others v Alhaji Jakande and others[17]. In holding that the statutory abolition of private primary schools by the Lagos State Government, may violate amongst others, the constitutional injunction against compulsory acquisition of property without the payment of adequate compensation, Justice Omololu Thomas further stated that:

> "the effect of the provisions of Section 40 is mainly to require that there shall not be acquired compulsorily any property or interest in property...without the prompt payment of compensation. The provision also guarantees right of access to the courts for determining the amount of compensation"[18].

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16 S.18 Constitution of Gambia; S.8 Mauritius Constitution; S.11 Sierra Leone Constitution; S.75 Constitution of Kenya; S.24(i) Tanzanian Constitution; S.22 Liberian Constitution; and S.16 Constitution of Zimbabwe.

17 Nigerian Constitutional Law Reports 1 (1981) p.262.

18 Ibid.

The requirement of "prompt payment of adequate compensation" is now a common feature in the constitutions of Anglophone African States[19], however different formulas have been adopted. The Kenyan Constitution, for instance, provides for the "prompt payment of full compensation"[20], while the Constitution of Liberia requires the "prompt payment of just compensation"[21]. On the other hand, the Zambian constitution states that the compulsory acquisition of property can only be authorized by an Act of Parliament "which provides for payment of compensation"[22]. The Zambian formulae gives more power to the legislature to determine the mode and criteria for the development of compensation. The formulas adopted by the majority of the States, apparently gives the courts a wider scope on the issue. However, the Nigerian regime is an exception to this general trend.

In Nigeria, by virtue of the Land Use Act (1979)[23] ownership of State land is vested in the Governor of the State and held by him in trust for the citizens. By virtue of S.27(4) of the Constitution, compensation in respect of compulsorily acquired land is to be calculated and paid in accordance with S.29 of the Land Use Act. Disputes arising therefrom are to be referred to the Land Use and Allocation Committee and no

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[19] S.40(1)(a) Nigerian Constitution; S.8(1)(b)(i) Constitution of Botswana; S.16(1)(c) Constitution of Zimbabwe; S.11(1)(c)(i) Constitution of Sierra Leone.

[20] S.75(1)(c) Kenyan Constitution (underlines for emphasis only)

[21] S.24(a)(ii) Librian Constitution(underlines for emphasis only).

[22] S.18(1) Constitution of Zambia. See also the Zambian High Court decision in Patel v Attorney General in which the court held that so far as the Exchange Contract Act requires inter alia payment of compensation for compulsory possession of property and grants the applicant a right to apply to the High Court for determination of the amount of compensation, it is not contrary to the Zambian Constitution. M. Ndule and Kaye Turner, Civil Liberties Cases in Zambia (African Law Reports, Oxford 1984)pp.15-19.

[23] See J.A. Omotola (ed) 'Essays on the Land Use Act (Lagos University Press', 1980) p.30.

further appeal will lie from the decision of the Committee. Since all members of the Committee are appointed by the Governor, it would seem that the provision conflicts with the fundamental principles of natural justice which provides that a person shall not be a judge in his own cause. Furthermore since 274(5) of the Constitution states that nothing in the constitution shall invalidate the Land Use Act (1979) it cannot be argued that the Act is unconstitutional. There is thus, an urgent need for the review of this major anomaly in the Nigerian Constitution to allow for a just and equitable determination of land and compensation issues in the courts of law.

In addition to the fact that the right to property is not absolute in Anglophone African Constitutions, the State is also granted the right to control all mineral oils, resources and national gas within State boundaries[24]. Interests in mineral resources may also be acquired compulsorily by the State in the interest of promoting the "public benefit" or "the public welfare" of its citizens[25]. The rationale for the States incursion into the right to property is based on the need of the State to control land resources for egalitarian objectives. The economic and social development of African States depend upon the availability and proper management of land resources.

There exists a noticeable absence of provisions on socio-economic rights in Anglophone constitutions, such as the right to work, the right to medical services and the right to education. The absence of socio-economic rights is due to the fact that the incorporation of such rights in the constitution would impose a corresponding duty on States to provide the basis for their enjoyment. The present state of

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[24] For instance, S.40(3) Nigerian Constitution.

[25] S.11(1)(a) Sierra Leone Constitution; S.8(1)(a) Constitution of Mauritius; S.75(1) Kenyan Constitution.

underdevelopment in African States cannot support such demands. The inclusion of such rights in national constitutions would only invite a plethora of futile litigations based on the infringement of socio-economic rights. The Nigerian Constitutional Drafting Committee, responded to such demands by stating inter alia that:

> "...all fundamental rights are in the final analysis, rights which impose limitations on executive, legislative or judicial powers of the government and are accordingly easily justifiable. By contrast, economic and social "rights" are different, they do not impose any limitations on governmental powers. They impose obligations of a kind which are not justifiable. To insist that the right to freedom of expression is the same kind of "right" as the "right" to free medical facilities and can be treated alike in a constitutional document is, the majority of us feel, basically unsound"[26].

Thus the constitution of Nigeria like other Anglophone States, but unlike the African Francophone countries[27], remain generally silent on social and economic rights and the individuals duty to society. The absence of socio-economic rights in Anglophone African States has been attributed to the "laissez faire" tradition inspired by English jurisprudence[28]. Professor B.O. Nwabueze, however, contends that the absence of socio-economic rights in the constitutions of emergent states cannot amount to the establishment of any particular type of economic philosophy, be it

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[26] Report of the Constitutional Drafting Committee, Vol.1 (Lagos: Federal Ministry of Information, 1976) p.xv-xvi.

[27] For socio-economic rights in Francophone African Constitutions see The Algerian Constitution, Chapter 4; and The Constitution of the Republic of Benin, Chapter 8. See also Section 7 of the Constitution of Togo states that "All citizens according to their abilities shall contribute to collective responsibilities". See also Article 27 Constitution of Zaire, 1979.

[28] B. Onimode and E. Osagie "Economic Interpretatin of Nigerias Draft Constitution" (unpublished paper 1979) p.18. See also T.G. Verhelst and Z.B. Plate "Constitutional Guarantees of the Individual" in T.G. Verhelst (ed) Legal Process and the Individual: African Source Materials (Addis Ababa: The Centre for African Legal Development, Faculty of Law, Hoile Selassie I University; 1971) p.24.

capitalism, socialism or communism[29]. Although it is evident that the constitutions of most socialist states contain provisions for socio-economic rights which are seemingly justiceable[30], the absence of such rights in most African constitutions is more or less a reaction to the objective socio-economic conditions prevailing on the continent and not necessarily a reflection of a prevailing political ideology. Modern social rights are limited by the economic and social resources that governments can muster to disentangle their citizens from misery, sickness and illiteracy[31].

The Nigerian constitutional solution to the problem of socio-economic rights is reflected in the adoption of a Chapter on Fundamental Objectives and Directives Principles of State Policy[32]. The Nigerian Constitution imposes on all organs of government exercising legislative, executive and judicial powers, "the duty and responsibility...to conform to, observe and apply" the political, economic social, educational and foreign policy objectives. The economic objectives are meant to ensure the maximum welfare, freedom and happiness of every citizen in pursuit of national economic development. The social objectives are founded on ideals of Freedom, Equality and Justice and include equality of rights, obligations and opportunities before the law for every citizen; impartiality and integrity of the courts and easy access to them; equal

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[29] B.O. Nwabueze, Constitutionalism in The Emergent States: (London, C. Hurst & Co. 1973) p.49.

[30] See, Constitution of Albania 1946 (as revised through 1958) Articles 25,28,29 and 50; The Constitution of the German Democratic Republic of 7 Oct 1949 (as amended through 12 Sept 1960) Articles 15-18; The Constitution fo the Union of Soviet Socialist Republics 1936, Articles 118-121. Reprinted in A.J. Peaslee Constitutions of Nations Vol.III (The Hague: Martinuss Nijhoft 1968); and A.P. Blaustein and Flanz, Constitutions of the Countries of the World, (New York, Oceana Publications Inc. 1977) Vol. XIII.

[31] Ivo Ducachek op cit, p.44.

[32] Section 14-22 Nigerian Constitution; See also Section II of the Tanzanian Constitution entitled "Important Objectives and the Basic Structures of the Direction of Government Affairs".

employment opportunities, pay and conditions for equal work; the provision of adequate social facilities and amenities, the protection of children, young persons and the aged against exploitation, moral and material neglect; and the provision of social assistance in deserving cases. The Educational Objectives provide that the State shall direct its policy towards ensuring equal and adequate educational opportunities at all levels. Furthermore, the government is required to eradicate illiteracy and endeavour wherever practicable to provide for free education at all levels[33].

Despite the duty imposed on government organs to pursue these objectives, Section 6(6)(c) of the constitution divests courts of jurisdiction over any issue or question regarding "any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy..."[34]. In other words, the Fundamental Objectives and Directives Principles are non-justiceable and are thus basically "beacons to guide the government in steering the ship of state"[35]. Nevertheless, it may be argued that despite the non-justiceability of the Fundamental Objectives, they may be of legal value in establishing standards of legislative innovation and judicial review[36]. We submit that the Nigerian approach to the issue of socio-economic rights is a cautious but realistic method which appears to narrow the gap between constitutional fiction and fact; a gap which may otherwise widen by the full incorporation of the catalogue of social and economic rights in the constitution of emergent states.

33 Nigerian Constitution, Ibid.

34 Ibid.

35 B. Obinna Okere "Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution" in ICLQ Vol.32 (Jan 1983) p.221.

36 B.O. Nwabueze Judicialism in Commonwealth Africa (London, C. Hurst & Co. 1977) p.143.

It must however be observed that the outright exclusion of socio-economic rights by some Anglophone African Constitutions[37] and the restriction of socio-economic matters to Fundamental Objectives of States by others, amounts to a contradiction of the provision of the African Charter on Human and Peoples Rights (AFCHPR). The seventh preambular paragraph of the (AFCHPR) provides that OAU Member State Parties to the AFCHPR are "convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is adequate for the enjoyment of civil and political rights".

The AFCHPR also guarantees the individuals right to property[38], right to work[39], right to education[40]. Furthermore, African States are required to take "necessary measures to protect the health of their people and ensure that they receive medical attention when they are sick"[41]. It is an anomaly, that African States have emphasized socio-economic rights in the AFCHPR, yet in their respective constitutions little or no reference is made to economic and social rights. Amendments should therefore be made to incorporate socio-economic and cultural rights in national Constitutions. However the implementation of socio-economic rights should be tied to the economic capacity of the State

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37 The approach of most Francophone Sates to the issue of socio-economic rights has been by simply declaring adherence to the Universal Declaration in the preambles of the respective constitutions. See the Constitutions of the following States: Comores, Djibouti, Gabon, Guinea, Ivory Coast, Rwanda, Senegal and Togo.

38 Article 14, Ibid.

39 Article 15, Ibid.

40 Article 17, Ibid.

41 Article 16, Ibid.

which should in turn undertake to achieve social and economic objectives progressively. This latter suggestion is preferable to the current outright exclusion of socio-economic rights in most African constitutions. Furthermore, since most Anglophone African States have undertaken the obligation to protect socio-economic rights under the AFCHPR[42] they are required to adopt legislative or other measures to give effect to them[43].

Most Anglophone African Constitutions expressly provide for the enforcement of the rights guaranteed[44], a significant feature which is absent from the American Bill of Rights. For instance, the Constitution of Zambia provides that any person alleging that a fundamental right has been, is being or is likely to be contravened "in relation to him" may apply to the High Court for redress[45]. The Courts are thus under a duty to hear and determine the justiceable issues involved, and may in consequence thereof, make such orders, they may consider appropriate.

Furthermore, most Anglophone State Constitutions provide that the practice and procedure to be followed in the determination of fundamental rights cases arising under the special jurisdiction of the High Courts and or the Supreme Courts is to be prescribed by the persons or authorities having power to make rules of court with respect to practice and

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[42] The following Anglophone States have ratified the AFCHPR; Botswana (25.2.86), Gambia (13.6.83), Nigeria (22.7.83), Sierra Leone (27.1.84), Uganda (27.5.86), Zambia (2.2.84), Zimbabwe (12.6.86). Kenya, Mauritius and Seychelles as at 1 January 1988, have not signed or ratified the AFCHPR.

[43] Article 1, AFCHPR.

[44] See Section 18(1), 28, 84(1), 17, 42 and 29(1) of the Constitutions of Botswana, Gambia, Kenya, Mauritius, Sierra Leone, Nigeria and Zambia respectively. The Constitution of Nigeria goes further by authorizing the provision of legal aid to "indigent citizens" whose fundamental rights have been infringed - Section 42(4).

[45] Article 29(1) of the Zambian Constitution of 1973.

procedure[46]. It is noteworthy that procedural technicalities have not been allowed to create obstacles where issues of fundamental rights are concerned. In the Nigerian case of Cheranci v Cheranci[47], Bate J. observed that "the constitutional order gives no guidance as to procedure and no law such as is envisaged by Section 245(4) has yet been passed to regulate procedure. No objection has however been taken to procedure adopted by the applicant and "since the liberty of the subject is involved, I would not myself think it proper to raise a procedural objection"[48].

As regards the locus standi of applicants in human rights cases, most Anglophone African Constitutions guarantee the access to court of any person who alleges that any of the rights guaranteed by the constitution "has been, is being or is likely to be contravened in relation to him"[49]. In elucidating the principle of locus standi as regards persons alleging the violation of their rights, common law courts have held that: "the party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally"[50].

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[46] For instance, See Section 84(6) of the Kenyan Constitution which gives the Chief Justice power to make rules of practice and procedure relating to the High Courts jurisdiction on human rights matters.

[47] (1960) NRNLR 24 at pp.25-26.

[48] (Underlines for emphasis) Ibid.

[49] For instance see S.29(1) Constitution of Zambia.

[50] Per judgement in Massachussetts v Mellon (1923) 262 US.447 at 488.

This principle has been restated in several African decisions, notably in the Nigerian case of Olawoyin v Attorney-General of Northern Nigeria[51]. The applicant in this case brought an application challenging the validity of the Childrens and Young Persons Law 1958 (Northern Region). The Law banned political activities by juveniles as well as inducement of juveniles, by adults, to take part in political activities. Although the applicant had not induced any juveniles to engage in political activities, thus obviating any direct threat of prosecution, he nevertheless sought an order of court to declare that the law infringed the guarantee of private and family life, freedom of conscience and the freedom of expression in the Constitution of Nigeria (1954). The applicant deposed that as a father, he intended to instruct his children politically and was unable to do so for fear of violating the statute. The High Court dismissed his action on the ground that:

"no right of the applicant is alleged to have been infringed and that it would be contrary to principle to make a Declaration "in vacuo"".

The applicant thence appealed to the Supreme Court on the ground that the legislation created an offence of a right which a person is constitutionally entitled to and as such, he was an interested party. In the leading judgement of the Supreme Court, Unsworth C.J., held that:

> "The applicant did not in his claim allege any interest but his counsel said that the evidence would be that the applicant had children who he wished to educate politically. There was no suggestion that the applicant was in imminent danger of coming into conflict with the law or that there had been any real or direct interference with his normal business or other activities. In my view the applicant failed to show that there was an interest to sustain a claim.

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51 (1961) 1 All NLR.

> "It seems to me that to hold that there was an interest here would amount to saying that a private individual obtains an interest by the mere enactment of a law with which he may in future come in conflict. I would not support such a proposition"[52]

The decision of the Supreme Court failed to specify the acts of the applicant that would have granted him locus standi. It may, however be suggested that such acts which may attract locus standi, by virtue of the fact that they will infringe the statutes, would include the addressing of a political rally of juveniles or encouraging juveniles to join a political party[53].

The foregoing case exemplifies the extent to which some Anglophone African courts will go in determining locus standi by adopting the restrictive "a posteriori" interpretation of the phrase "has been, is being or is likely to be contravened in relation to him" (i.e. the applicant). In other cases, less restrictive interpretations have been adopted. In the case of Stephen Ncube v State[54] the appellant was found guilty of rape and sentenced by the Magistrate Court to 6 years imprisonment with hard labour and a whipping of six strokes. The sentence was imposed by the presiding magistrate under authority of Section 54(5)(c) and (8) of the Magistrates Court Act of Zimbabwe. On appeal to the Supreme Court of Zimbabwe, the appellant argued that the aspect of his sentence which imposed the punishment of whipping was in contravention of his fundamental human rights and that the relevant provisions of the Magistrates Court act which sanctioned the punishment were

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52 Ibid at p.274.

53 B.O. Nwabueze, Judicialism in Commonwealth Africa op cit p.63-64; See also David Grove "The Sentinels' of Liberty?" The Nigerian Judiciary and Fundamental Rights" JAL (1963) 152 at p.161.

54 S/C of Zimbabwe, Judgement No.S/C 156/67 Criminal Appeal No.202/87, of 6 Oct 1987. See also Brown Tshuma v The State, Criminal Appeal No.287/87 of 14 Dec 1987. (S/C of Zimbabwe)

unconstitutional. In upholding the appeal, the Supreme Court held that the sentence as well as the provisions of the statute which imposed the punishment of whipping were unconstitutional and of no effect since they contravened Article 15(1) of the Zimbabwean Constitution which guaranteed the freedom from inhuman and degrading punishment. The procedure for a "a priori" determination of constitutionality of an act or legislation does not generally exist in Anglophone African Constitutions. The only exception to this position is the Zambian constitution, Article 28(5) of which provides that:

> "No application shall be brought under subsection (1) of this section (i.e. S.28) on the grounds that the provisions of Sections 13-26 (inclusive) of this constitution are likely to be contravened by reason of proposals contained in any bill which, as the date of the application has not become law."

This provision was subject to judicial interpretation in Henry Nkumbula v the Attorney-General for Zambia[55]. The applicant sought a declaration of the court that the proposal by the Zambian government to introduce a legislation establishing a "one-party participating democracy" will infringe his rights under the constitution. The Court held that "the existence of Section 28(5) makes it clear that if the only step taken by the executive is the introduction of the bill in question, subsection (1) cannot be invoked..."[56].

The basis of the courts decision and indeed of the very existence of S.28(5) is that the Zambian Constitution expressly provides for a machinery for testing whether or not a bill infringes upon the Constitutional Bill of Rights, before it becomes law. Thus under Section 27 of the Zambian constitution, the Chief Justice is authorized to appoint

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55 (1972) ZLR III. See M. Ndulo and K. Turner op cit pp.52-55.

56 Ibid at p.54.

a Special Tribunal, at the instance of the National Assembly, to consider whether a bill, if enacted will be incompatible with the Bill of Rights contained in the constitution[57]. The Zambian constitution thus permits the "a priori" determination of constitutionality as well as the Anglophone norm of "a posteriori" judicial review. An appraisal of the relative advantages and disadvantages of both methods of determination of constitutionality will be undertaken shortly in our analysis of the predominant "a priori" practice of Francophone African States.

(a) Limitation to Human Rights Guarantees in Anglophone African State Constitutions

The complexity and detail of exceptions to the rights and freedoms under African Bills of Rights are vast in comparison to the European Convention[58]. Indeed Professor B. Nwabueze described the 1960 Nigerian Bill of Rights as "a Bill of exceptions not a Bill of Rights"[59]. However, only a few Anglophone constitutions retain this characteristic of the 1960 Nigerian Constitution.

It is difficult to provide constitutional guarantees for rights and freedoms in absolute terms because "the entrenchment of human rights is an attempt to strike a more or less permanent balance between the interests of the individual and those of the State"[60].

Exceptions or limitations to constitutional guarantees may be broadly divided into two groups. The first group of exceptions do not endow

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57 S.27(1)(b) The One Party Constitution of Zambia (1973).

58 James S. Read "Bill of Rights in the Third World: Some Commonwealth Experiences" in Verfassung und Recht in Ubersee (1973) Heft 1, pp.30-33.

59 B.O. Nwabueze, Constitutionalism in Emergent States op cit p.393.

60 Ibid p.408.

any authority on the legislature to derogate from the guaranteed rights in the interest of defence, public order, public safety, public morality and public health. The exceptions in this group do not have a common denominator upon which they are based, but each provision protecting or guaranteeing a particular right or freedom also defines its own exception. Consequently, the provision guaranteeing the right to life, personal liberty, freedom from inhuman treatment, slavery and forced labour, freedom from discrimination, and the right to the protection of law provide specific exceptions peculiar to each provision. For instance, the right to personal liberty is generally guaranteed but subject to qualifications or limitations that may be imposed by laws relating to the execution of a sentence or in the execution of court orders. Other restrictions to the right to personal liberty include laws passed in consideration of welfare of minors, vagrants or persons of unsound mind, the spread of infectious diseases, and entry into a country or restricted parts of it[61]. Thus when courts are asked to determine infractions of these rights they are rarely drawn into the area of State policy considerations such as attempts to balance the interest of the individual against that of the community as a whole[62].

Courts are however drawn into the controversial area of State policy when considering the effect of the second group of exceptions in Anglophone African Bills of Rights. Under this group, the legislature is empowered to implement measures to curtail certain rights and liberties such as the right to privacy of home and other property, freedom from deprivation of property, or conscience of expression, of assembly and

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61 See Sections 15, 5 and 32 of the Constitution of Zambia, Botswana and Nigeria respectively.

62 David Grove op cit p.156-7; However see the cases: Shugaba Darman v Minister of Internal Affairs ((1981) 1 NCLR 25); and Ibigira v Uganda (1966) E.A. 306; In the former case, the Court declared that the infringement of fundamental rights may attract exemplary damages.

association and of movement, provided that such measures are "reasonably justifiable in a democratic society" in the interest of defence, public safety, public order, public morality and public health. Under the second group of exceptions, government encroachment on guaranteed rights and freedoms is permitted as long as the measures are regarded to be "reasonably justifiable in a democratic society"[63].

African Courts have thus been called upon, in several cases to determine the means of the expressions "reasonably justifiable in a democratic society".

In Feliya Kachasu v The Attorney-General for Zambia[64] the applicant had been suspended from school because, being a Watchtower Jehovah's Witness, she refused to salute the national flag and sing the national anthem, as required by Ministerial regulations[65]. The school headmaster suspended her and refused to reinstate her, pursuant to the powers granted him by the said regulations[66]. The applicant thus brought an action claiming that the regulations were contrary to S.21 of the Zambian Constitution guaranteeing the freedom of conscience, thought and religion. The Court held that the law which was utilized to suspend the applicant was reasonably required in the interest of national safety or security. The Court ruled that:

> "Bearing in mind the compelling consideration, particularly at the present time, of national unity and national security, without which there can be no certainty of public safety nor

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63 For instance see Section 41(1) Constitution of Nigeria, S.12(2) Botswana Constitution, S.16(1) and (2) Sierra Leone Constitution; and S.21 of the Zambian Constitution.

64 SJ2, 1967/HP/273 Reported in M.Ndolo and K. Turner Civil Liberties Cases in Zambia (African Law Reports, Oxford, 1984) p.83.

65 Education (Primary & Secondary Schools) Regulation 1966 (Zambia).

66 Regulation 25(1)-(4), and Regulation 31(1)Ibid.

> guarantee of individual rights and freedoms, I think it is a reasonable requirement that pupils in... schools should sing the national anthem and salute the national flag"[67].

In his interpretation of the meaning of what is "reasonably justifiable in a democratic society", Blagden C.J. ruled that:

> "The criteria of what is reasonably justifiable in a democratic society might vary according to whether that society is long-established or newly-emergent. Zambia is a newly emergent state. It would be unrealistic to apply this criterion of a long established democratic society. We should look to the democratic society that exists in Zambia; and having found that these regulations are reasonably required in Zambia I have no hesitation in finding that they are reasonably justifiable in the democratic society that exists here"[68].

Nigerian Courts have also been called upon to interpret the meaning of "reasonably justifiable in the democratic society" in the Bill of Rights to the Nigerian Constitution[69]. In Cheranci v Cheranci; the court was of the opinion that where there has been an infringement of a fundamental rights, there is a presumption that the legislature acted constitutionally and that the laws which they have passed are necessary and reasonably justifiable. However, the court stated that "a restriction upon a fundamental right must before it may be considered reasonably justifiable

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67 Per Bladgen C.J. Ibid at p.100.

68 Ibid at p.101. In another Zambian case, Patel v Attorney-General ((1967) ZR.145) the High Court held that it was reasonably justifiable in a democratic society for customs officers to have the power to seize and open mail under exchange control laws "on the basis that the customs officer is duly authorized, that his reasonable suspicion is objective and not subjective..." In reaching this decision Magnus J. ruled that "it is necessary to adopt the objective test of what is reasonably justifiable, not in a particular democratic society, but in any democratic society". The court also held that although "some distinction should be made between a developed society and one which is still developing... there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society"p.160 Ibid. See further Chandra P. Gupta "The Patel Currency Case" Zambian Law Journal (1969) Vol.1 p.49.

69 Cheranci v Cheranci 1960 NRNLR (1960) 24; DPP v Obi (1961) I All NLR 186; Williams v Majekodumi (1962) I All NLR 324, 328, 413.

(a) be necessary in the interest public morals or public order and (b) must not be excessive or out of proportion to the object which is sought to achieve"[70].

In addition to the foregoing restrictions, on human rights, all Anglophone States have constitutional provisions which were evolved to preserve the security and safety of the State from either actual public emergency or some other threatened danger that may face a State[71]. It is universally acknowledged that constitutions should have this built in safety measure which hinges on the principle of "salus populi est supreme lex" (i.e. the safety of the nation is supreme law). There is a dire need in African States to preserve the security of the State. The relatively young States of Africa have to contend with fragile and underdeveloped socio-political and economic institutions which are vulnerable to the threats posed by competing claims made upon them. Consequently it is pertinent to reconcile and balance these competing claims with the prior requirement of preserving the State. The primacy of the security of the State is exemplified in statement of the Attorney-General of Zambia, that:

> "National security is thus, paramount not only in the interest of each individual member of the State; and measures designed to achieve and maintain that security must come first; and... must override if need be the interests of individuals and of minorities with which they conflict"[72].

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70 Ibid at pp.28-9.

71 For a detailed discussion of this issue, see Deny's Holland Emergency Legislations in the Commonwealth, CLP Vols 9,10,11, of 1956, 1958 and 1960 respectively; Personal Liberty in the Commonwealth (1958) CLP 151, B. Nwabueze, Presidentialism in Commonwealth Africa (London, C. Hurst & Co. 1979) Chapter 10; J.O. Akande Emergency Powers in Newly Independent African States within the Commonwealth (PhD. Thesis University of London 1975).

72 In Feliya Kachasu v Attorney-General for Zambia op cit.

Thus the majority of African Constitutions expressly provide for the derogation of fundamental rights during an emergency. African State in practice reveals the propensity of States to proclaim states of emergency. Human rights are invariably the first casualties of declarations of emergency. Justice Elias has suggested three main criteria that would have to be met before a State could curtail basic human rights: - first, there should be a breakdown in law and order within the State or a threat to its security and political independence arising from political insurrection or external aggression. Secondly, there should be an official declaration of emergency by the government prior to introducing measures drastically limiting the basic freedoms of the people. Thirdly, the situation must be such that no alternative measures other than the curtailment of individual fundamental liberties may be considered appropriate to contain the situation[73].

Justice Elias criteria does not prescribe the preservation of a certain class of rights from derogation during periods of emergency. However only a few Anglophone African Constitutions have adopted the neo-Nigerian constitutional device of preserving certain rights from encroachment during an emergency[74]. For instance Section 26 of the Zambian Constitution provides that:

> "Nothing shall be inconsistent with or in contravention of Articles 15, 18, 19, 21, 22, 23, 24 or 25 to the extent that it is shown that the Law in question authorizes the taking during any period when the Republic is at war or when a declaration under Article 30 (i.e. declaration relating to emergencies or threatened emergencies) is in force, of measures for the purpose of dealing with any person under

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73 T.O. Elias "Government Action, State Security and Human Rights" Report of the Proceedings of the Tenth African Conference on the Rule of Law, Lagos, Nigeria (3-7 Jan 1961) p.42.

74 See Sections 83, 265, 58, 29/30 and 68 of the Constitutions of Kenya, Nigeria, Senegal, Zambia and Zimbabwe respectively. See further A. Aihe "Neo-Nigerian Human Rights in Zambia" Zambian Law Journal Vols. 3 & 4 (1971 & 1972) pp.43-63.

> the authority of any such Law shall be held to be in contravention of any of the said provisions unless anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question".

The implications of the foregoing provision, which is similar to the provisions of the Constitution of Kenya, Nigeria, Senegal and Zimbabwe is that the following rights are guaranteed, although subject at all times to emergency measures:- the right to personal liberty, freedom from deprivation of property, right to privacy of home and other property, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement and freedom from discrimination.

The significance of the provision of Article 26 is in its omission of a class of rights contained in Articles 14, 16, 17 and 20 of the Zambian Constitution which protect the right to life, freedom from slavery and forced labour, freedom from inhuman treatment and the right to the protection of the law, respectively; thus these rights cannot be derogated from at any time.

The absence of the foregoing protective provision from many African constitutions provides a 'carte blanche' for the executive and legislature to derogate from all the human rights guaranteed under the constitution. The declaration of emergency is the first measure taken by all military regimes in Africa; similarly, multi-party States in Africa have utilized the device, as well as Public Security Acts, to violate human rights by proscribing opposition parties and detaining political leaders[75]. The general attitude of African courts towards the declaration of emergency

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[75] J.K. Ebiasah "Protecting the Human Rights of Political Detainees: The Contradictions and Paradoxes in the African Experience" Harvard Law Journal (1979) Vol.22 p.270.

is reflected in the Nigerian case of Williams v Majekodunmi[76] in which Supreme Court of Nigeria held that the existence or nonexistence of a state of public emergency is "a matter apparently within the bounds of Parliament, and not for this court to decide"[77]. Similarly, in the case of Kamara and Others v Director of Prisons[78], the Sierra Leone High Court was reluctant to impugn the declaration of a State of Emergency in the Country. The detention of individuals under various Emergency and Public Security Acts or Laws have also come under the judicial periscope[79]. In Zimbabwe, a continuous state of emergency has been in existence since independence in 1980. This situation has been justified by Dr. E. Zvogbo[80] as necessary for security purposes[81]. Nevertheless, Zimbabwean Courts have been courageous enough to upturn measures taken by the Government under the Emergency Powers Act[82]. For example in the case of Dabengwa and Anor v Minister of Home Affairs and Others[83], the wives of certain detainees held under the Emergency Powers Act brought a motion seeking an order that their husbands be granted access to legal representatives, since such access had been denied by the government. The Court held that the Regulation whereby an executive could prevent access by detainees to lawyers was unconstitutional; and an order for access was issued.

[76] 1962 All NLR 415.

[77] Ibid; See also Alhaji D.S. Adegbengro v Attorney-General of the Federation and Others (1962) WNLR 150 at p.160; Baffour Osei Akoto and Others v The Minister of Interior (re Akoto) (Ghana) Civil Appeal 42/61.

[78] (1972-73) A.L.R. (SL) 162 at 168.

[79] Sharma v Attorney-General (1978) ZR 163, Eleftheriadis v Attorney-General (1979) ZR 154. Uganda v Commissioner of Prisons (Ex Parte Matovu) (1966) EA.514. Grace Stuart Ibingira v Uganda (1966) EA.306 & 445.

[80] The Zimbabwean Minister for Legal and Parliamentary Affairs.

[81] E. Zvogbo "Zimbabwean Constitution After Four Years" Public Law (1984) Vol.29, p.448.

[82] Cap. 83, Laws of Zimbabwe.

[83] (1982) 4 SA (ZSC) 301. See also Minister of Home Affairs v York (1982) 4.SA (ZSC) 496.

Under the regime of Public Security Acts the courts have been willing in some cases, to examine the validity of detention regulations and orders and executive measures in execution thereof. For instance In Re Chiluba[84], the application was for the issue of a writ of 'habeas corpus ad subjuciendum'. The President of Zambia had in the exercise of the powers conferred on him by Regulation 33(1) of the Preservation of Public Security Regulations ordered that the applicant, be detained. The grounds upon which he was detained was that he addressed meetings at which he desired a change of Government. The High Court held that the need to detain under the provisions of the Regulations arises when the detaining authority comes to the conclusion or is satisfied on reasonable grounds that the activities of the detainee were prejudicial to public security and that there was genuine apprehension that the detainee, if left at large, would continue to persist in the commission of unlawful activities. The Court thus ordered the release of the applicant on the grounds inter alia - that an isolated incident in the circumstances of the case cannot necessarily amount to a threat to public safety.

The granting of habeas corpus orders by the courts is more of the exception than the rule, and virtually nonexistent in most military governed Anglophone African States.

It is pertinent to note that unlike the European Convention[85] on Human Rights and the American Convention[86], the AFCHPR does not contain a non-derogation clause protecting human rights during times of war or public emergency threatening the life of a nation. Consequently the majority of African States that have Constitutions without non-derogation

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84 Reported in Civil Liberties Cases in Zambia (Ndolo and Turner) op cit p.304.

85 Article 15, European Convention.

86 Article 27 American Convention.

clauses are not under any obligation to incorporate such provisions under the regime of the AFCHPR. However, African States that are parties to the International Covenant on Civil and Political Rights will be required to observe the standards of human rights observance prescribed therein, which standards include non-derogation from the right to life, freedom from torture and, inhuman or degrading treatment or punishment, freedom from slavery or servitude, freedom from imprisonment for failure to fulfil a contractual obligation, freedom from ex post facto laws, freedom of thought, conscience and religion and the right to recognition before the law[87].

In summation, therefore, it is evident that African governments are inclined to abuse the constitutional power to derogate from fundamental rights during periods of emergency as well as during peacetime in the guise of preserving public good. Additional safeguards should be incorporated in most constitutions to ensure that measures which are reasonably justifiable in a democratic society and/or for the purpose of dealing with emergency situations are not arbitrary, excessive or out of proportion. A few Anglophone African States have adopted non-derogation clauses in their constitutions to preserve the sanctity of a certain class of rights, while others are under international law obligations to do so. The presence of non-derogation clauses in all African Constitutions is necessary in the light of the frequency of declarations of emergency albeit perpetuated by extra-legal regimes disposed to the suspension and abrogation of constitutions. The susceptibility of African State Constitutions to such hazards informs us of the need for a non-derogation provision in the AFCHPR. In the absence of such a provision, African Courts must be prepared to rebut the presumption of constitutional validity of statutes and decrees where

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87 Artricle 4, International Covenant on Civil and Political Rights.

they appear prima facia to invade "absolute" rights guaranteed by the constitution. In the words of the Indian Supreme Court, "such meagre safeguards as the constitution has provided against the improper exercise of power must be jealously watched"[88]. The constitutions of Anglophone African States view the judiciary as the guardian of individual liberties. These constitutions confer on superior courts the jurisdiction to determine cases involving all human rights guaranteed under their respective constitutions.

The paucity of cases on fundamental human rights consecrated in Anglophone African Constitutions is due mainly to the militarization of African political structures and also paradoxically to the common law tradition of these states. The inclination of practising barristers is to seek remedies within the labyrinths of the common law and the rules of procedure and evidence. This method inevitably, albeit tacitly touching upon fundamental rights, obviates the need to primarily seek the invocations of rights protected in the constitution. The training of lawyers in these countries is based on the traditions of the English Bar which has hitherto been averse to Bills of Rights. Lately however, there has been evidence of an increasing awareness of the utility value of the Bill of Rights as an effective vehicle to restrain executive and legislative power[89]. The efficacy of Bills of Rights cannot be judged only by judicial activation. They also serve an educative function in enlightening citizens, both public officers and politicians, to the permitted limits of execution and legislative power, consequently, reducing the inclination, in some quarters, to regard judicial review of

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88 Pam Krishna v State of Delhi (1935) SCR (India) 318 at 329.

89 See generally, Ndulo, M. and Turner, K., Civil Liberties Cases in Zambia op cit, See also D.O. Aihe and P.A. Oluyede Cases and Materials on Constitutional Law in Nigeria (Oxford University Press) 1979.

constitutionality as judicial supremacy[90].

It is significant that amongst Anglophone African States, only Ghana, Kenya, Mauritius and Seychelles are yet to ratify the AFCHPR. In 1976 President J. Nyerere of Tanzania stated that "a bill of rights... provides little by way of protection for the individual and induces in the citizen a mood of cynicism about the whole process of government"[91]. The effect of this conviction was the absence of a Bill of Rights in the Tanzanian Constitution of 1977. It is hoped that all African Leaders will emulate Dr. Julius Nyerere's "u-turn", not only by ratifying the AFCHPR[92], the International Covenant on Civil and Political Rights[93], and the International Covenant on Economic, Social and Cultural Rights[94], but also ensure the incorporation of Bills of Rights in their respective constitutions[95].

(ii) Francophone African States

The constitutions of most former French African colonies contain declarations of human rights protection. The declarations refer either to the Universal Declaration of Human Rights (1948) or the Declaration of the Rights of Man and the Citizen (1789), or to both. Furthermore, some of the constitutional Chapters under reference, encapsulate detailed provisions on the protection of human rights.

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90 James. S. Read "Judicial Power and the Constitution of Ghana" Review of Ghana Law, Vol.III No.2 (1971) p.107.

91 Speech of President Nyerere given at the Opening of the University of Dar-es-Salaam College Campus" cited in G.F. Malwa "The Constitution of the United Republic of Tanzania: Proposed Changes" East African Law Review (1978-81) Vol.11-14 p.143.

92 Ratified by Tanzania on 18 February 1984.

93 Ratified by Tanzania on 11 June 1984.

94 Ratified by Tanzania on 11 June 1984.

95 Section Three: Rights and Obligations: Constitution of Tanzania (Fifth Amendment of the State Constitution of 1984).

Country	Date of Independence	Date of Current/Last Constitution	Chapter of Constitution
Benin	1 Aug 1960	26 Aug 1977 (as amended through 1981)	Chapter VII, Fundamental Rights and Duties of Citizens.
Cameroon	1 Jan 1960	12 Jun 1972	Preamble adheres to the Universal Declaration 1948 and earnestly guarantees rights and liberties.
Central African Republic (CAR)	13 Aug 1960	21 Nov 1986	Preamble and Title 1 - Fundamental Bases of Society
Comores	6 Jul 1975	1 Oct 1978	Preamble - guarantees the protection of human rights & proclaims adherence to the Universal Declaration of Human Rights.
Chad	11 Aug 1960	Constitution of 29 Aug 1978 abrogated and replaced by The Fundamental Act of the Republic Oct 1982	Fundamental Act of the Republic "guarantees the fundamental liberties and rights of the individual".
Congo Brazzaville	15 Aug 1960	8 Jul 1978	Title II.
Djibouti	27 Jun 1977	27 Jun 1977	Title II, which subscribes to the Universal Declaration of the Rights & Duties of Man.
Gabon	17 Aug 1960	21 Feb 1961 (as revised through 1976)	Preamble - reaffirms the rights and freedoms as defined in the Declaration of 1879 and the Universal Declaration of 1948; Also Preliminary Title - (Article 1).
Guinea	2 Oct 1958	Constitution of 14 May 1982 abrogated & superseded by Declaration of the Military Committee of National Recovery (MCNR) of 1984	Declaration of MCNR reaffirms the rights and liberties contained in the Universal Declaration of Human Rights (1948).

	Date of Independence	Date of Current/Last Constitution	Chapter of Constitution
Ivory Coast	7 Aug 1960	31 Oct 1960 (as revised through 1978)	The Preamble adheres to the principles of Democracy and the Declaration of the Rights of Man (1789) and the Universal Declaration of Human Rights (1948).
Mali	22 Sep 1960	Decree No. 3P/G RM of 1974.	Preamble reaffirms the principles of the Declaration of the Rights of Man (1789) and the Universal Declaration (1948). Also Title II - Fundamental Rights & Duties of Man and Citizen.
Rwanda	1 Jul 1962	20 Dec 1978 (as reviewed through 1980)	Preamble pledges adherence to the Universal Declaration of Human Rights (1948). Also Chapter II Civil Liberties
Senegal	20 Aug 1960	7 Mar 1963 (as reviewed through 1976)	Preamble - Declaration of the Rights of Man and the Citizen (1789) and the Universal Declaration (1948) Also Title II Public Liberties and Human Rights.
Togo	27 Apr 1960	13 Jan 1980	Preamble - adherence to the Universal Declaration (1948) and the UN Charter. Also Title II - Fundamental Rights and Duties of Citizens.
Zaire	30 Jun 1960	15 Feb 1978	Preamble - adherence to the Universal Declaration of Human Rights. Also Title II - Fundamental Rights and Duties of Citizens.

Three main trends are evident from the foregoing table of Francophone African Constitutions. First, several States reflect their French colonial heritage by reaffirming the rights and liberties contained in the Declaration of Man and the Citizen (i.e. Declaration des droits de l'homme et du citizen (1789)[96]. Secondly, most of the constitutions under reference, contain preambular provisions which reaffirm or pledge adherence to the Universal Declaration of Human Rights (1948) and/or to the Declaration of the Rights of Man (1789)[97]. Thirdly, in addition to preambular references to the Universal Declaration and/or to the Declaration of the Rights of Man, most of the Constitutions contain detailed Bills of Rights[98]. It is agreed that where human rights provisions are included in the substantive part of the constitution, as in most of the aforementioned constitutions, they are generally binding. Thus, the issue arises as to the juridical value of preambular references to international human rights instruments in national constitutions.

Under Common Law jurisprudence, where references to human rights are found in the preamble, they are considered not to confer rights and obligations and are thus non-justiceable[99]. However, the provision in

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[96] See The Constitution of Gabon, Ivory Coast and Mali.

[97] See the Constitution of C.A.R.; Comores, Gabon, Ivory Coast, Mali, Mauritius and Rwanda.

[98] See the Constitutions of Benin, CAR, Congo (Brazaville), Mali, Rwanda, Senegal, Togo and Zaire.

[99] In the Tanzanian case of H. Adamji v EAP&T the court held that "the preamble to a constitution does not in law constitute part of the constitution and so does not form part of the laws of the land". (1973) Law Reports of Tanzania (LRT) No.6, p.10. Similarly in the Nigerian case of Chief Victor Olabisi Onabanjo v Concord Press of Nigeria Ltd the court in finding that the preamble is not justiceable held inter alia that "The preamble is part of the constitution and may be used in order to ascertain the meaning but only when the preamble is clear and definite in comparison with obscure and indefinite enacting words. The preamble serves to portray the intention of its framers, and the mischiefs to be remedied but as a general rule the preamble is to be resorted to only in cases of ambiguity in the constitution"(1981)2 Nigerian Constitutional Law Reports, p.399.

relation to Francophone constitutions is not entirely as clear-cut. French jurisprudence as propounded by the Conseil d'Etats commissioner for government in 1950 states that French "public law does not regard the provision contained in the declaration of rights or the constitutional preambles as legal prescriptions of either constitutional or legislative nature"[100]. The Conseil observed that such provisions were intended to represent general principles of law which should inspire legislative and administrative actions and were not constitutional provisions. Consequently, one can say that this view is in consonance with common law jurisprudence.

On the other hand Professor Gonidec is of the opinion that:

> "In the absence of an express provision one must seek out the intention of the drafters of the constitutions. They have sometimes pronounced in favour of the constitutional value of the preamble. Thus, in Ivory Coast, Mr. Ph Yac, President of the National Assembly, declared that "the preamble is not a simple statement of philosophical and moral principles exempt from legal value, as one had previously imagined... It is the source of positive law with regard to the branches of government and the courts"[101].

Taking Gonidecs position therefore, where the provisions in the preamble and expressly and clearly stated, they may amount to legal rights[102]; however, where reference is made to one or more international instruments such as the Universal Declaration or the French Declaration

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100 See Conseil d'Etat, 25 January 1957, Syndicat federal des fonctionnaires melagaches et assimilies, quoted in "Constitutional Guarantees of the Individual" by T.G. Verhelst and Z.B. Plater in Legal Process and the Individual African Source Materials op cit, p.31-32.

101 Ibid.

102 For instance, the preambles to constitutions of Comores and the Republic of Cameroon proclaim adherence to the Universal Declatation (1948) and also expressly guarantee the equality of citizens, the liberty of the individual, freedom of expression and assembly, the right to education, freedom of religion and the inviolability of property. The Preambles also subject some of these rights and liberties to the restrictions of "legislative prescriptions" and "public order".

of 1789[103], such references could not aspire to more than "declarations of philosophical or moral principles". Consequently we submit that the preambular human rights clauses contained in the Constitution of the Comores and the Republic of Cameroon are of a more significant justiceable value than the preambular provisions of the Constitutions of the Ivory Coast and Guinea. This latter group of States should therefore take a leaf from the other Francophone nations, such as Rwanda, Senegal, Togo and Zaire, by incorporating the basic provisions on the protection of fundamental rights in the substantive texts of their respective constitutions.

Indeed, by ratifying the African Charter on Human and Peoples Rights (AFCHPR), the Comores and Guinea[104] have undertaken to "adopt legislative or other measures to give effect to [the] rights, duties and freedoms" enshrined in the Charter[105]. Thus in our consideration of Francophone constitutions we shall limit ourselves to those States which have provisions on human rights consecrated in the substantive text of the constitution.

A comparative analysis reveals that Francophone African Constitutions[106] embody provisions on civil and political rights and freedoms which are similar to those contained in Anglophone African Constitutions.

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[103] For instance, the Preambles to the constitutions of Guinea and Ivory Coast simply declare adherence to the principles of the Declaration of the Rights of Man (1789) and/or to the Universal Declaration 1948.

[104] Ratification of the AFCHPR has been effected by the Comores (1 June 1986)and Guinea (16 February 1982). However The Republics of Cameroon, Ivory Coast, Djibouti and Madagascar are yet to ratify the Charter.

[105] Article 1, AFCHPR.

[106] See Articles 4-6 - Togo Constitution; Article 1 - Constitution of Gabon; Articles 7-14 - Constitution of Congo and Articles 6-11 - Constitution of Senegal.

However, unlike Anglophone constitutions, the constitutions of ex-French colonies contain provisions which guarantee social, economic and welfare rights. Thus under Francophone African constitutions, the State is under a duty to create conditions which shall guarantee the education of all children[107], primary school education is compulsory and free of charge[108], and the State guarantees equal access for all children and adults to education, professional training and culture[109]. Francophone constitutions also provide for the protection of the family[110] and the right to marry and sanctity of marriage[111]. It is pertinent to note that some Francophone constitutions expressly bestow equal rights and obligations on children born in wedlock and those born outside wedlock[112]. The Constitution of Rwanda expressly recognises only monogamous marriages[113], thus it may be argued that the rights of Rwanda's Muslims, who constitute 10% of its population to contract polygamous marriages is not recognised. Consequently, although the Rwandan constitution protects the freedom of worship. (Article 18), the right to found a family in accordance with religious precepts is abridged.

By virtue of the provisions of some Francophone constitutions, the State guarantees to all, especially children, women and the aged, the

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107 Article 16, Constitution of Senegal; Article 130 Constitution of the Republic of Benin; and Article 12 Mali Constitution. However the Constitution of Zaire states that the care and education of children shall constitute a right and a duty for parents which shall be exercised under the authority and aid of the state - Article 19.

108 Article 27, Constitution of Rwanda.

109 Article 12, Constitution of Gabon.

110 Article 19, Constitution of Congo. See also the Preambles to the Malagasy Constitution.

111 Article 126, Benin Constitution.

112 Article 10, Constitution of Gabon, and Article 19, Constitution of Congo.

113 Article 25, Constitution of Rwanda.

protection of health, material security, rest and relaxation[114]. The Gabonese Constitution, for instance does not define the term "material-security", however it would seem to include the provision of housing and social security. Francophone constitutions guarantee the right to work[115] and the right of the worker to defend his rights through trade unions[116]. Consequently, in some constitutions, the right to strike is expressly guaranteed, albeit subject to the laws governing strikes and the right of the individual to work[117]. Thus in Rwanda for instance, a worker or trade union member cannot be compelled by his trade union to strike if he chooses not to. It is instructive to observe that these provisions are in consonance with Article 10 of the AFCHPR which states that no one may be compelled to join an organisation. The constitution of Rwanda however, expressly forbids public service employees from striking[118]. The incorporation of the right to work and other social and civil rights in most Francophone African Constitutions obviates the need for these States to provide further measures in compliance with the relevant provisions of the AFCHPR which latter provisions are less detailed than the constitutional provisions. Most Anglophone States, on the other hand, will have to review their constitutions and incorporate the social, economic rights consecrated in the AFCHPR.

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[114] Article 1(5) Constitution of Gabon and Article 147 Benin Constitution.

[115] Article 30, Constitution of Rwanda; Article 13 Mali Constitution-; Article 20 Constitution of Congo; Article 1(4) Constitution of Gabon, and Article 127 Benin Constitution.

[116] Article 31, Constitution of Gabon, Article 13 Mali Constitution and Article 22 Congo Constitution.

[117] Article 32, Constitution of Rwanda; Article 13, Mali Constitution.

[118] Article 32, Constitution of Rwanda.

Most Francophone African constitutions protect the individual as well as the collective right to property[119]. However, no deprivation of property is permitted except by reason of public necessity as prescribed by law and in such event, just compensation must be made[120]. It should however be noted that the political philosophy of some Francophone African governments has influenced their attitude to the right to property. For instance the constitutions of Benin and the Congo contain no provision for the individual's right to property.

The Congolese Constitution provides that:

> "Along the entire length of the Peoples Republic of the Congo, the land is the property of the people. All land claims and common rights are abolished. All use of these titles and rights is contrary to the Constitution and penalized by law.
>
> However, every citizen may freely dispose of the lands products, which are the fruits of his own labour"[121].

Although the African Charter on Human and Peoples Rights (AFCHPR) protects the right to property, it also expressly states that some rights may "only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws"[122].

It is thus arguable that African constitutions, such as the Congolese Constitution which reserve the rights of ownership of all land in the state as 'trustees' of the people, may not necessarily be discordant with the terms of the Charter.

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119 For instance, Article 14, Constitution of Mali; Article 1(6), Constitution of Gabon; Article 21, Constitution of Zaire and Article 6, Constitution of Togo.

120 Ibid.

121 Article 31, Constitution of Congo.

122 Article 14, AFCHPR.

We however submit that the abolishment of individual claims and common rights in land by the Congolese constitution is contrary to the spirit and provisions of the Charter. Although it however may be argued, to the contrary, that although the Congolese approach is in the interest of the community, such justifications are only plausible as exceptions to the general rule of the right to property. Secondly, a government's claim that the acquisition of land rights is in the interest of the community are sometimes subjective. According to M. Parenti:

> "Although the decisions of government are made in the name of the entire society, they rarely benefit everyone with equal effect. No government represents all its people. Some portion of the populace, frequently a majority, loses out on government decisions. What is considered national policy is usually the policy of dominant social groups and what is called public policy is not formulated by the public but by those sectors of the public that are most strategically located within the political system"[123].

Consequently, the attempt by some African nations to impose Marxist socialist based socio-economic systems on their peoples through constitutional abduction of proprietary interest in land is not only contrary to the fundamental rights and freedoms but also economically retrogressive in stifling individual enterprise.

(a) Limitations to Constitutional Guarantees of Human Rights in Francophone African Constitutions

As earlier discussed, the limitations to human rights provisions in commonwealth African Constitutions are detailed and are embodied in the substantive provisions of the respective constitutions. The provisions that guarantee human rights in Francophone African constitutions are either in the preamble or in the substantive text of the Bill of Rights. The exceptions or limitations to the constitutional rights protected,

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123 M. Parenti, Democracy for the Few (New York, St. Martins Press 1974) p.57.

whether located in the preamble or substantive text, are defined by the particular provision relating to the specific right granted. Most of the rights guaranteed by these constitutions are subject to such limitations as provided by ordinary law[124]. For instance, the Constitution of Senegal provides that:

> "All citizens shall have a right to freely constitute associations and groups, on the condition that they comply with the formalities set down by the laws and regulations. This right may be limited only by law"[125].

Furthermore, Article 6 of the Constitution of Togo provides that:

> "The Togolese Republic shall assure each citizen, in accordance with the law, respect for the rights and liberties of the human person, the family, and local organizations; political liberties; philosophic and religious liberties; labour-union liberty; the right to property, individual or collective; and economic and social rights."

In Francophone constitutions the following rights are also subject to the general limitations "of the law":

The freedom of speech and information and for privacy of correspondence[126], the right to strike, the freedom of settlement and of assembly and association[127], the right to work[128] and the inviolability of the home[129].

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[124] Article 1(1) Constitution of Gabon; Article 41 Constitution of Guinea; Article 5 Constitution of Ivory Coast; Articles 8-11 Senegal Constitution.

[125] Article 9, (Underlines for emphasis).

[126] Articles 10 and 11, Senegal Constitution; Article 23 Constitution of Zaire; and Article 1(3) Constitution of Gabon.

[127] Articles 15,17 and 18 Constitution of Congo; Article 1(8) Constitution of Gabon.

[128] Fourth preambular clause and Article 13 Constitution of Mali.

[129] Article 8 Constitution of Congo; Article 13 Mali Constitution.

Some Francophone constitutions, in addition to restricting rights by reference to conditions "determined" or "defined by law", also allow derogations from the rights protected where public interest or public order or public necessity so require[130]. Consideration of public good permit derogation from the following protected rights:- the freedom of speech[131], right to property[132], freedom of conscience and religion[133], the right of personal development[134] and the freedom of association[135].

The aforementioned platitudes of derogations, unlike the Anglophone constitutions, lack detail and measures to safeguard the protected rights from being rendered meaningless. Suffice it to say that most of the derogations permitted by both the Anglophone and Francophone constitutions are in accord with the provisions of the African Charter on Human and Peoples Rights (AFCHPR). For example, the Charter states that:

"Freedom of conscience, the profession and freedom of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedom"[136].

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[130] See the Constitutions of Zaire, Mali, Gabon, Senegal and Congo.

[131] Article 18, Constitution of Zaire.

[132] Article 14, Constitution of Mali and Article 21, Constitution of Zaire.

[133] Article 11, Constitution of Mali; Article 1(2), Constitution of Gabon; and Articles 17 and 19, Constitution of Zaire.

[134] Article 7, Constitution of Congo; Article 1(1), Constitution of Gabon; Article 14, Constitution of Zaire.

[135] Article 9, Constitution of Zaire.

[136] Arrticle 8, AFCHPR (Underlines for emphasis).

The AFCHPR also subjects the right to assemble to "necessary restrictions provided for by law in particular those enacted in the interest of national security, safety, health, ethics and rights and freedoms of others"[137].

While we do not challenge the rationale for such limitations, there is a need for the African Commission on Human and Peoples Rights to evolve standard rules for the determination of margins of appreciation to be accorded to State Perogatives.

Most Francophone African constitutions however provide some inbuilt protections against the abuse of State power. The maxim nulla poena sine praeter lege is recognised. Consequently, no individual may be arrested, convicted, detained, jailed, or exiled except as a consequence of a law in effect at the time the alleged act was committed[138]. The presumption of innocence until guilt has been legally established is preserved by the constitutional provisions of Rwanda and Zaire[139], while the majority of the constitutions in this category do not expressly consecrate this principle.

The freedom from arbitrary arrest and detention is generally protected by all Francophone constitutions, either in the chapters pertaining to human rights or the judiciary[140]. However, unlike most Anglophone constitutions, there are no prescribed minimum periods within which

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137 Article 11, Ibid (Underlines for emphasis).

138 Article 6, Constitution of Senegal; Article 15, Constitution of Zaire; Article 7, Constitution of Congo; Article 8, Constitution of Mali.

139 Article 12, Constitution of Rwanda; Articles 15 and 16, Constitution of Zaire.

140 Articles 15 and 16, Constitution of Zaire; Article 6, Constitution of Senegal; Article 135, Constitution of Benin; Article 7, Constitution of Mali; Article 7, Constitution of Congo; and Article 12 Constitution of Rwanda.

persons arrested or detained should be brought before a court. This omission may be due to the nonexistence of habeas corpus in French civil law tradition. Additional safeguards provided by most Francophone constitutions include the right to defence and counsel[141].

The judiciary, not unlike Anglophone constitutions, is generally regarded as the guardian of individual liberties, however, differences exist in the Francophone African approach to constitutionality. The determination of constitutionality is inextricably linked with the effective protection of fundamental rights. The principle of constitutional supremacy means that laws and regulations which are contrary to the substantive provisions of the constitution can be declared invalid. In Francophone African States, the determination of constitutionality is made by Supreme Courts or special tribunals[142]. The determination of constitutionality generally occurs before a law under consideration comes into effect, in other words, during the period between parliamentary approval and subsequent promulgation by the Heads of State or Government. Thus until the Head of State promulgates the law, the citizen cannot challenge its constitutionality according to the maxim "pas d'interest, pas d'action". The Francophone "a priori" review, estopps constitutional challenges after the law has been promulgated, whereas, the Anglophonic "a posteiori", method permits challenger any time after the law enters into force. The French approach therefore does not permit mistakes or omissions in legislation, which become obvious over time, to be challenged. The implications of this approach on human rights is apparent. In the Francophone "a priori" method, the constitutionality of a proposed legislation is determined through the initiative of executive or

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141 Article 6, Constitution of Senegal; Article 16, Constitution of Zaire, Article 14, Constitution of Rwanda.

142 For instance see Cameroon, Loi 69/CF/2 of 14 June 1969; Ivory Coast Loi No.61-107 of 19 July 1961 as amended by Loi No.62-091 of 1 October 1969; Senegal Ordinance 60-17 of 3 September 1969.

legislative organs rather than by individuals[143]. However very few Francophone States permit the "a posteiori" challenge of the constitutionality of a law, but not executive measures or "actes de gouvernement"[144].

In Anglophone States, the "a posteriori" method of determining the constitutionality of laws and executive measure is universal rule. However, Zambian Constitution is an exception to this general rule by its provision on "a priori" review[145] as a supplement to the constitutional "a posteriori" judicial review procedures. The Zambian system thus provides a double guarantee for persons whose rights and liberties may be threatened by legislation.

The Anglophone "a posteriori" determination of constitutionality provides a more efficient method of guaranteeing that fundamental rights are not infringed or abrogated by legislation and subsequent executive measures. Admittedly, the "a priori" determination of constitutionality puts legislation through a critical test of constitutional pre-qualifications by legislative and judicial organs, however, such an approach excludes the law from clinical tests of judicial proceedings since interested individuals are precluded from initiating action. Professor Gonidec has observed that "... the most satisfactory system is one which permits every interested party to raise the question of constitutionality, either directly, or by subjecting the measure to attack, during the course of a judicial proceeding"[146].

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143 See Article 8, Constitution of Ivory Coast.

144 Republic of Congo and Malagasy Republic - See T.G. Verhelst, "Constitutional Guarantees of the Individual" in T. Verhelst and Z. Plater (ed) Legal Process and the Individual op cit p.54.

145 Article 27 Zambian Constitution.

146 A. Gonidec, Droits Africanis, Evolution et sources, Vol.I. op cit, p.97.

Is is therefore submitted that there is a need for African States to review their respective constitutions to allow for both "a priori" and "a posteriori" determination of constitutionality, not unlike the Zambian model, in the interest of effective human rights protection. Furthermore, individuals with locus standi should be allowed to challenge the constitutionality of legislative acts and executive measures, a right denied individuals in most Francophone African States. It however, goes without saying, that the Francophone African States that have ratified the AFCHPR, will now have to ensure that domestic legislations pass the "a priori" test of conformity with the Charter.

(iii) Afro-Arab States

The constitutions of the Afro-Arab States contain guarantees on human rights in their substantive provisions. These provisions are consecrated in the specified chapters of the following State Constitutions:-

Country	Date of Independence	Date of Present/Last Constitution	Chapter of Constitution
Algeria	3 Jul 1962	1976 (amended in 1977 and 1980)	Chapter 4. Fundamental Liberties and the Rights of Man and of the Citizens
Egypt	28 Feb 1922	1980	Chapter I. Public Freedoms, Rights and Duties, and (Social, Moral & Economic Constituents of Society).
Libya[147]	24 Dec 1951	(1969)	Preamble - and Articles 5, 13, 14 and 15.
Mauritania	28 Nov 1960	Constitutional Charter of the Military Committee of National Salvation MCNS (1985)	Preamble adheres to the principles consecrated by the Universal Declaration of Human Rights (1948)
Morocco	2 Mar 1956	10 Mar 1972 (amended in 1980)	Chapter I. Fundamental Principles, Articles 5, 8, 9, 10 and 11-15.
Saharawi[148]	28 Feb 1976	Constitution of 26-30 1976 (amended in 1982)	Fundamental Rights
Somalia	1 Jul 1960	25 Aug 1979	Article 6...Equality of Citizens; Chapter II Fundamental Rights, Freedoms and Duties of the Citizens and Individuals.
The Sudan[149]	1 Jan 1956	1985	Part III: Fundamental Rights and Freedoms.
Tunisia	20 Mar 1956	1 Jun 1959 (as amended through 1976)	Chapter I: General Dispositions Articles 5-17.

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147 On 2 March 1977, the Socialist Peoples Libyan Arab Jamqhiriyya was formally proclaimed and a short document called "The Declaration of the Establishment of the Peoples Authority" was issued. The Declaration of 1977, specifically states that "The Holy Quran is the Constitution of the State". It is therefore evident that this declaration amounts to a rebuttal of the 1969 constitution.

148 The Polisario (Popular Front for the Liberation of Sagult el Hamra and Rio de Oro) declared Western Sahara the Saharan Arab Democratic Republic on 28 February 1976 and passed a Constitution on 26-30 August 1976 (amended in 1982). As at the beginning of 1988, over seventy States had recognized the Republic, the majority comprising of OAU Member States. The legitimacy of the Republic is still being challenged by Morocco. Saharawi is yet to become a member of the UN.

149 The Transitional Military Council adopted the Transitional Constitution of 10 Oct 1985. The drafting of a permanent Constitution was to be embarked upon after the April 1986 Assembly elections.

The classification of the foregoing States is based primarily on their common feature of being either of dominant Arab culture and/or of significant Islamic jurisprudential orientation[150]. An analysis of the concept of human rights in Islamic Law[151], though desirable, is beyond the scope of our thesis, thus we shall confine ourselves to the consideration of the provisions on human rights consecrated in the Constitutions of the aforementioned Afro-Arab States.

The Afro-Arab States' provide guarantees in their respective constitutions for the protection of the following rights:-

right to life[152];

right to personal liberty[153];

protection against inhuman treatment[154];

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150 In each of the States under consideration, Islam is the State religion (with the possible exception of Sudan). See Article 1, Tunisian Constitution; Article 6, Moroccan Constitution; Articles 4,19 and 195 Algerian Constitution; Preamble, Mauritanian Constitution; Libyas 1977 Declaration adopts the Holy Quran as its fundamental text. With regard to the Sudanese Transitional Constitution, no reference is made to a State religion, however, Section 4 refers to Islamic Sharia and custom as the main sources of legislation. See further A.M. Tier, Freedom of Religion under the Sudan Constitution and Laws, Journal of African Law (1982) No.2 p.148.

151 For an analysis of human rights in Islamic Law, see Abdul Aziz Said "Human Rights in Islamic Perspectives" in A. Pollis and P. Schwab (ed) Human Rights: Cultural and Ideological Perspectives (London Praeger) p.86; See also Report of the International Commission of Jurists Seminar on Human Rights in Islam (Kuwait, 1982, ICJ). See also Koen De Feyter "Unveiling a Hidden Painting - Islam and North African Constitutions" in Verfassung und Recht in Ubersee. I Quartal (1988) p.17.

152 Article 48, Constitution of Algeria; Article 25(1) Constitution of Somalia.

153 Article 39, Constitution of Algeria; Article 26(1), Constitution of Somalia; Article 41, Constitution of Egypt.

154 Article 29, Constitution of The Sudan; Article 27, Constitution of Somalia; Article 42, Constitution of Egypt.

Protection against deprivation of property[155];

protection against arbitrary search or entry[156];

protection of the law[157];

freedoms of conscience[158] and expression[159];

freedom of worship and religion[160];

freedom of assembly and association[161];

freedom of movement[162]; and

protection against discrimination[163].

It is evident that only a few States under review expressly guarantee the freedom of religion. Thus, where a State Constitution omits this guarantee and expressly declares the State religion to be Islam, this should imply that freedom of religion or worship is to be interpreted according to Islamic tradition. Under Islamic Law the Ahl Al Kitab, the People of the Book, mainly the Jews and Christians are accorded the right to worship.

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[155] Article 25, Constitution of The Sudan; Article 15, Constitution of Morrocco; Article 28(1), Constitution of Somalia; Article 14, Constitution of Tunisia; Article 34, Constitution of Egypt.

[156] Article 50, Constitution of Algeria; Article 30 (Sudan); Article 10 (Morrocco); Articles 26(2)(5) and 29 (Somalia); Article 9 (Tunisia); Article 44 (Egypt).

[157] Articles 45 and 46 Constitution of Algeria; Article 26 (Sudan); Article 10 (Morrocco); Articles 32-34 (Somalia); Article 7 (Tunisia); Article 57 (Egypt).

[158] Article 53, Constitution of Algeria; Article 9 (morrocco); Article 24(1) (Somalia); Article 5 (Tunisia).

[159] Article 55 (Algeria); Article 9 (Sudan); Article 9 (Morrocco); Article 24(2) (Somalia); Article 8 (Tunisia); Article 47 (Egypt).

[160] Articles 1 and 5 Tunisian Constitution; Article 6 (Morrocco).

[161] Article 56, Constitution of Algeria; Article 22 (Sudan); Article 9 (Morrocco); Article 24(1) (Somalia); Articles 54 and 55 (Egypt).

[162] Article 56, Constitution of Algeria; Article 23 (Sudan); Article 9 (Morrocco); Article 24 (Somalia); Article 10 (Tunisia); Article 50 (Egypt).

[163] Article 39, Constitution of Algeria; Article 17(2) (Sudan); Article 40 (Egypt).

One of the significant characteristics of most of the Afro-Arab constitutions is the provision for and emphasis laid on social and economic rights and moral duties. With the exception of Sudan, Tunisia and Morocco, all the States under consideration, provide a catalogue of socio-economic rights and duties including, the right to work; and protection of employment[164], the right to social security and free health services to all citizens[165], and the right to education[166].

The civil and political rights in these constitutions are subject to two main types of derogations. First, most of the guaranteed rights and freedoms such as the freedom of expression, assembly and movement, are subject "to limits prescribed by law"[167]. However under Article 53 of Algerian Constitution the "freedom of conscience and opinion are inviolable" and there are no inbuilt exceptions to this provision. The vulnerability of this provision to derogations is evidenced by Article 55 which provides that the freedoms of expression and assembly are "not to be used to undermine the basis of the Socialist Revolution". The thin distinction between the freedom of opinion and expression underlines the susceptibility of the former to the wide derogation permitted from the latter. The freedom of the Press and publication under the Egyptian Constitution is near-absolute, and may only be derogated from during a State of Emergency or during war[168].

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[164] Articles 13 and 14 of Algeria; Article 17(2) (Somalia); Article 59 (Algeria).

[165] Articles 64 and 67 Constitution of Algeria; Articles 16 and 17 (Egypt).

[166] Article 23 Constitution of Somalia; Article 66 (Algeria); Article 18 (Egypt).

[167] For example, Article 23 Constitution of Sudan; Article 10 (Tunisia).

[168] Article 43, Constitution of Egypt.

The second category of derogation authorized by some constitutions are contained in omnibus clauses designed to permit the limitation of all protected rights. For instance, Article 7 of the Constitution of Tunisia provides that:

"The citizens exercise the plenitude of their rights in the forms and conditions foreseen by the Law. The exercise of these rights cannot be limited except by a law enacted for the protection of others, the respect for the public order, the national defence, the development of the economy and social progress"[169].

Although the right to private property is assured by most of the Afro-Arab constitutions, it is subject to varying formulas of derogation. The Egyptian Constitution for instance protects the right to private property, provided that is may not conflict "in the ways of its use with the general welfare of the people"[170]. Under the Constitution of Somalia, the right to private ownership is subject to "the public interest and the objectives of the revolution" and to the "requirements of the planned economic growth and social development of the Nation"[171]. However, where expropriation of property is effected, it must be according to the procedures prescribed by law[172] and "equitable compensation" must be made in exchange[173]. The economic and social significance of land is emphasised by the Egyptian Constitution which provides for three types of land ownership; public ownership, cooperative ownership and private

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169 For similar omnibus derogation clauses, see Article 73, Algerian Constitution and Article 33 of the Sudanese Constitution.

170 Article 32, Egyptian Constitution.

171 Article 28(2) Somali Constitution.

172 Article 15, Constitution of Morrocco; Article 14 (Tunisia).

173 Article 28(3) Constitution of Somalia.

ownership[174]. Article 37 of the Constitution is unique in its protection of farmers, and agricultural labourers by authorizing the promulgation of a law to fix the maximum limit of land ownership.

The Saharawai Constitution states the achievement of socialism and the implementation of social justice is the main objective of the Republic. Thus the Constitution establishes two types of ownership: national and private, the former reserved for the people, but the latter is guaranteed subject to its being non-exploitative[175].

A review of the constitutional provisions of Afro-Arab States, on socio-economic and property rights reveals that most of these States, with the exception of Morocco, Tunisia and Sudan, have expressly adopted socialism as the State ideology. North African Statesmen have endeavoured to emphasize that socialism here refers to "Arab" or "Islamic" socialism in contradistinction to Marxism, which is generally regarded as atheist ideology[176]. The failure of the attempted fusion of Islam with foreign brands of socialism and other modern ideologies and the problems of authoritarianism and ethnicism have fueled the revival of Islamic fundamentalism[177]. In Islam rights and duties are intertwined, not unlike what obtains under traditional African concept of human and peoples rights. In Islam, "the individual is part of a parcel of society,

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174 Article 29, Egyptian Constitution.

175 Article 8, Saharawi Constitution.

176 See S. Johnson and M. Ottaway "Marxism-Leninism and Islamic Fundamentalism" Cultures of Development, (1984) No.1 p.53.

177 R. Dekmejian "The anatomy of Islamic revival: legitimacy crisis, ethnic conflict and the search of Islamic alternatives" Middle East Journal (Winter 1980) pp.11-12.

and fulfilment of his obligations and those of the other members of society constitutes the reservoir of social rights which are then shared by all"[178]

Several Afro-Arab constitutions provide safeguards for the protection of human rights entrenched in constitution. The citizen is given a right of litigation and access to court to protect his rights[179]. The Constitution of Sudan consecrates "a posteriori" determination of constitutionality by providing that "no act of State shall be immune from judicial review"[180]. In comparison with the Anglophone African States, the Bill of Rights of most Afro-Arab States are less detailed and lack adequate constitutional safeguards of due process to enhance the rights and freedoms of the individual. All Afro-Arab State Constitutions provide for the limitation and suspension of fundamental rights and freedoms during States of Emergency and do not confer upon certain rights, the non-derogable status as per the Neo-Nigerian Constitutions[181].

It is pertinent to note that all the aforementioned Afro-Arab States, with the only exception of Morocco, have ratified the AFCHPR. The entering into force of the Charter will impose greater obligations on several Afro-Arab States especially in the areas of constitutional protection of the due process of the law[182] and the rights of peoples to self-determination[183].

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[178] Quoted by C. Bassiouni "Sources of Islamic Law and the protection of human rights in the criminal justice system" in C. Bassiouni (ed) The Islamic Criminal Justice System (London Oceana 1982) pp.13-14.

[179] Article 26, Constitution of the Sudan; Article 57 (Egypt). This provision also prescribes the frang of a "fair compensation" by the State to the victim of any assault on the freedoms and rights guaranteed by the Constitution.

[180] Article 26, Constitution of Sudan.

[181] See S.265, Constitution of Nigeria.

[182] Article 7, AFCHPR.

[183] Article 20, Ibid.

With respect to due process of the law, we must highlight the fact that the Islamic Law of 'Sharia', on which the criminal law of most of these States is based upon, provides detailed and adequate safeguards for the protection of the individual in proceedings[184]. Thus, where the constitutions of some Afro-Arab States refer to the protection or limitation of individual rights "within the law", such references in relevant circumstances may refer either to the operation of 'Sharia Law' or to the international human rights obligations of the State; both regimes conferring even greater obligations on the State to protect individual rights.

(iv) Ex-Portuguese African States

The constitutions of the following African States which were former Portuguese territories contain substantive bills of rights, borne out of their common struggle against Portuguese colonial rule.

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184 See C. Bassiouni; op cit.

Country	Date of Independence	Date of current last Constitution	Chapter of Constitution
Angola	11 Nov 1975	11 Nov 1975 (as amended through 1980)	Part II: Fundamental Rights and Duties.
Cape Verde	5 Jul 1975	7 Sep 1980	Title II: Rights, Liberties, Guarantees and Fundamental Duties of Citizens.
Guinea Bissau	10 Sep 1974	16 May 1984	Chapter II, Fundamental Rights and Duties of Citizens.
Mozambique	25 Jun 1975	25 Jun 1975	Article 17; Section III; Fundamental Rights and Duties of Citizens.
Sao Tome and Principe	12 Jul 1975	12 Jul 1975 (as amended through 15 Dec 1982)	Article 1(4); Chapter III; Fundamental Rights, Freedoms and Duties of the Citizen.
Equatorial Guinea	12 Oct 1968	12 Oct 1982	Preamble: Declaration of the Rights of Man and Citizen (1789) and Universal Declaration (1948) Title III Rights and Duties of the Individual.

The foregoing African States have all experienced a protracted and bitter struggle to gain independence from the Portuguese Government. The constitutional provisions of these States are thus similar in several respects. The substantive provisions of the bills of rights of these constitutions guarantee the following rights:- respect for life, right to personal liberty, protection against slavery and forced labour, protection against arbitrary arrest, search or entry, protection of the law, freedom of expression, freedom of assembly or association, freedom of movement, protection against discrimination and freedom of religion.

One of the significant features of the Bills of Rights of ex-Portuguese African States is the collectivistic approach to human rights. Consequently group rights and peoples rights are more pronounced here, than in other African constitutions. For instance, the constitution of Equatorial Guinea guarantees the "freedom of conscience and religion, individual or collective, in public or in private"[185]. The emphasis on group rights in these African Constitutions is due primarily to the traditional African value of communal or collective rights and duties. However the susceptibility of such group rights and duties to ideological ideosyncracies may have also informed their incorporation by the mainly Marxist/socialist States belonging to this categry.

The Constitution of the Republic of Equatorial Guinea provides one of Africa's longest most comprehensive human rights Chapters containing forty-five articles. For instance Article 20 (1) guarantees the:-

> "Respect for life, personal integrity and the right to full material and moral development. Torture is prohibited, as are all inhuman and degrading procedures.
>
> The death penalty may only be imposed on a crime determined by law.

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185 Article 20(5) of the Equitorial Guinea Constitution.

The objective of the prison system is to achieve the reduction in number, rehabilitation and social re-incorporation of prisoners."

The Constitution of Equatorial Guinea is also one of the few African constitutions that expressly provide that "to the extent that they are applicable, the fundamental rights also apply to companies"[186]. Consequently, companies are entitled to rights and subject to duties as persons in law, where feasible.

Derogations from the fundamental rights protected under this category of constitutions broadly take two forms - firstly, many of the provisions each contain "en-suite-clauses" limiting their application; for instance. the right to religion and conscience is subject to "limits as prescribed by law to protect national security, public order, morality and fundamental human rights of the people"[187]. Secondly, the constitutions contain standard omnibus derogation clauses which are generally applicable to all rights. For example, The Constitution of the Democratic Republic of Sao Tome and Principe provides that:

"The State shall guarantee the exercise of individual rights and liberties in so far as they do not conflict with the interests of the people or with the demands of public order"[188].

However an exception to the aforementioned general classification of derogation clauses in the constitutions of ex-Portuguese administered African States, is the Constitution of Angola which provides additional avenues for derogation. Article 22 of the Angolan Constitution states

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186 Article 21, Ibid.

187 Article 1(5) Ibid.

188 Article 14, Constitution of Sao Tome and Principe.

that the context of the achievement of the basic objectives of the Peoples Republic of Angola, the Law shall "ensure freedom of expression, assembly and association".

The implication of this provision is that the guarantee of rights and freedoms may be subject to the aims and objectives of the "Marxist-Leninist, MPLA Workers Party which is the vanguard of the working class"[189].

An interesting but intriguing derogation provision appears in the Constitution of Sao Tome and Principe, which provides that: "Persons who, by their actions or conduct, act contrary to National Unity and Sovereignty or who aid neo-colonialism, imperialism, racism or regionalism, will be deprived of the exercise of their political rights and the fundamental rights of a citizen"[190].

The rationale of the first leg of this provision is obviously to stem the threat of divisive factors such as ethnicity, and also to preserve the security of the State. However, the second leg of the provision expressly authorises the deprivation of a citizen's fundamental rights if he should aid regionalism, among the other 'isms'. The Democratic Republic of Sao Tome and Principe is a member of the OAU, an organization which is dedicated to African regionalism. The State has also ratified the AFCHPR a regional machinery established for the promotion and protection of human rights. The apparent conflict between Article 17 and the regional obligations of the State and its citizens[191]

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189 Part I, Article 2, Angolan Constitution.

190 Article 17, Constitution of Sao Tome & Principe (underlines for emphasis).

191 Article 29(8) of the AFCHPR states that "the individual shall have the duty to contribute...to the promotion and achievement of African unity".

ought to be remedied by the obliteration of the term "regionalism" from Article 17 of the Constitution of Sao Tome and Principe.

It, therefore, appears that the derogation clauses in the constitutions of ex-Portuguese administered States allow substantial encroachment on fundamental rights and liberties of the individual. However, some safeguards are provided for preservation of human rights. For instance Article 38 of the Equatorial Guinea constitution expressly states that:

> "the right of habeas corpus or of personal presence is recognized.
>
> Every aggrieved person or anyone acting on his behalf, has the right to further it when he finds himself illegally jailed, detained, restrained in any way in the enjoyment of his personal freedoms or when during his arrest or lawful imprisonment he is subject to torments, tortures, oppression or any coercion, restriction, or unnecessary hardship for his personal safety or for the order of the detention centre.
>
> The courts, while declaring the appeal process to be in motion, must order the restoration of liberty, that the oppression be stopped, or to end the coercion to which he has been subjected".

Safeguards are also provided by Article 40 of the Constitution of Equatorial Guinea which provides that:

> "the unconstitutionality of the laws, decree-laws, rules and regulations can be declared because of defects in form or content, in accordance with the Fundamental Law".

The constitution does not provide the procedure to be followed in declaring such laws unconstitutional. However, it prescribes that a law should be passed to regulate the constitutionality of laws and decrees.

The constitutions of ex-Portuguese administered African States contain a comprehensive catalogue of social and economic rights and duties[192]. The right of private property is guaranteed subject to the general interest of the economic policy of the State[193]. The constitutions also generally guarantee the right to the protection of health, right to education, right to assistance in childhood and motherhood, old age and other forms of social assistance[194]. Work is recognised as a right as well as an obligation[195].

The comprehensive guarantees incorporated in the constitutions of the States under consideration reflects the determination of the States to prevent a repetition of the inhuman practices and other human rights violations experienced under the brutally oppressive Portuguese colonisers. It should however be noted that the derogations permitted by some of these constitutions may render the rights protected meaningless unless States provide adequate safeguards and restrain themselves from abusing the provisions permitting derogation in the interest of socialist/Marxist ideology.

Angola and Mozambique are the only States, under this classification, that are yet to sign or ratify the AFCHPR[196]. The preoccupation of

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[192] Title VI, Chapters I and II: Work, Social Security and Betterment of the Citizen, Articles 11,13,52-64, Constitution of Equitorial Guinea; Articles 10,26 and 27, Angolan Constitution; Article 4(4) and 10 Sao Tome & Principie Constitution.

[193] For instance, Article 4(4) Constitution of Sao Tome & Principe.

[194] Article 11, Constitution of Sao Tome & Principe; Article 27 (Angola); Article 59 (Equitorial Guinea).

[195] Article 10, Constitution of Sao Tome & Principe; Article 52 (Equitorial Guinea); Article 26 (Angola).

[196] The following States have signed or ratified the AFCHPR; Cape Verde (signed 31 March 1986); Equitorial Guinea (ratified 17 April 1986); Guinea Bissau (ratified 4 December 1985); Sao Tome & Principe (ratified 23 May 1986).

these two States with the sustained acts of aggression by rebel forces and South African forces should not detract them from ratifying the AFCHPR which is expressly dedicated to the "total liberation of Africa and the elimination of neo-colonialism and apartheid"[197].

(v) Constitutions without Human Rights Protection

The constitutions or "fundamental laws" of several African States do not provide guarantees for human rights. These states are Burundi, Ethiopia, Ghana, Malawi, Niger, Lesotho, Swaziland and Burkina Faso. It must however be emphasised that some of these countries possessed constitutional bills of rights which had been abrogated due to military coups d'etat.

(a) Burundi

The definitive Burundi constitution, promulgated on 16 October 1962 was modelled upon the Belgium constitution establishing a Constitutional Monarchy. However, since 1962, three constitutions have been passed[198], the latest being the Constitution of the Second Republic(20 November 1981). The 1981 Constitution provided for the protection of human rights in the Chapter on "Public Liberties and Duties of the Citizen". The military coup d'etat in October 1987 suspended the Constitution along with the Bill of Rights, with the consequence of exposing Burundians to human rights abuses[199]. Burundi is yet to sign and ratify the AFCHPR, consequently, possibility of bringing a communication before the African Commission on Human and Peoples Rights, by a State Party or individual(s) is nonexistent. The recurring frequency with which massive human rights violations occur in Burundi

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197 The eighth preambular paragraph AFCHPR.

198 Burundi Constitution of 11 July 1974 and 20 November 1976.

199 For instance, the recent massacre of over 5,000 Hutus by government forces. See The Independent, (London 23 August 1988, p.8.

should alert OAU Member States to evolve an urgent solution to the problem. The ratification of the AFCHPR by a majority of African States is a clear indication that they no longer regard matters of human rights to be within the exclusive domain of domestic jurisdiction of Member States. Consequently, diplomatic pressure should be brought upon the Burundi Government to refrain from massive violations of human rights and secondly to ratify the AFCHPR.

(b) Ethiopia

In March 1974, a committee of 30 experts were appointed to review the 1955 Constitution of Ethiopia. The Committee produced the 1974 Draft Constitution, the preamble of which "guarantees that basic rights and duties be respected". The Draft Constitution also contained a chapter on the Fundamental Freedoms, Rights and Duties of Citizens (Articles 36-59).

The 1974 Draft Constitution was never issued because, the army took over control of government in June 1974. The military government of Ethiopia issued the "Declaration of Socialism" of 20 December 1974 which established a new Ethiopian Socialist State with "national progressive unity" as its main objective. All major enterprises and private land holdings were nationalised, and state farms and co-operatives were established.

The basic constitutional document of Ethiopia is Proclamation No.108 of 1976. The Proclamation makes no reference to the protection of fundamental rights. It is also significant to note that Ethiopia is yet to sign or ratify the AFCHPR. It is indeed a paradox that the country which hosts the headquarters of the OAU and will most likely host the Secretariat of the African Commission of Human and Peoples Rights, has not ratified the AFCHPR. Consequently, the OAU may wish to consider locating the Commissions Secretariat elsewhere.

(c) Ghana

The 1979 Constitution of Ghana enshrined elaborate provisions protecting civil rights and liberties. The Constitution was initially suspended[200] and thence formally abrogated by the Provisional National Defence Council (Establishment Proclamation - Supplementary and Consequential Provisions) Law of 1982. The PNDC Law 1982 is in effect the current 'constitution' of Ghana.

The PNDC Law of 1982 makes broad references to human rights under the Chapter titles "Directive Principles of State Policy" which states inter alia... that:

> "respect to fundamental human rights and for the dignity of the human person are to be cultivated among all sections of the society and established as part of the basis of social justice"[201].

The language of this provision as well as its classifications as a "Directive Principle of State Policy" renders it a mere declaration of philosophical guidance with no justiceable value. It may indeed be regarded as a facade which has been progressively eroded by subsequent governmental measures.

This observation is underlined by the fact that the military government of Ghana has passed a series of laws which violate international norms of human rights. For instance, the Preventative Custody Law, 1982, (PNDC Law) permits the authorities to detain individuals indefinitely without trial "in the interest of national security or in the interest of the

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200 The PNDC Proclamation of 1981 issued by the military regime suspended the 1979 Constitution, but retained the institution of the Ombudsman.

201 Paragraph 1(1)(b), PNDC Law, 1982.

safety of the person"[202]. Consequently, the law of habeas corpus in Ghana was amended in August 1984 to specifically exclude people held under PNDC Law 4 and there is no known legal review procedure under this legislation. It may thus not come as a surprise that the Ghanaian military is yet to sign or ratify the AFCHPR.

(d) Niger

The independence Constitution of Niger (1960) was suspended by the proclamation of April 1974 issued by the military regime.

The 1960 Constitution made provision for the protection of human rights including "equality before the law without distinction as to origin, race, sex or religion"[203] and also that "suffrage shall be universal, equal and secret"[204].

In 1983, the military government appointed the Niger Commission for Reflection on the National Charter, which prepared a National Charter that was approved by a referendum held on 14 June 1987. The National Charter contains a bill of rights which is yet to come into effect.

The Niger Government acceded, in March 1986, to the International Covenant on Civil and Political Rights. The State has also ratified the AFCHPR[205]. The impression, therefore, is that despite being an authoritarian military regime[206], the government of Niger has undertaken international obligations to protect human rights. The government of

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202 Over 50 people are believed to have been held under the PNDC Law 4 throughout 1986 - See Amnesty International Report 1987 op cit p.53.

203 Article 6, (1960) Constitution of Niger.

204 Article 5 Ibid.

205 Niger ratified the AFCHPR on 15 July 1986.

206 See AI Report on Niger in 1987 Amnesty International, op cit p.84.

Niger is thus on the verge of translating its international human rights obligations into an enforceable domestic bill of rights as contained in its National Charter.

(e) Lesotho

The Independence Constitution of Lesotho (1966) contained provisions for the protection of human rights. These rights included the respect of family life, freedom of conscience and expression and freedom from discrimination.

The Independence Constitution was suspended on 14 February 1970 by Prime Minister Chief Leabua Jonathan. In 1983, the Prime Minister introduced a new Constitution of Lesotho[207] which made no references to human rights. The Prime Minister consistently used the Internal Security (General Act) 1982 to detain political opponents and to obstruct the electoral process. On 20 January 1968, a military coup d'etat ended twenty years of autocratic rule by Chief Leabua Jonathan. An examination of Lesotho judicial decisions during the "reign" of L. Jonathan reveals the difficulty of protecting human rights in the absence of an enforceable bill of rights, however the courts often ruled against the government[208]. The military government promulgated the Fundamental Law[209] which did not contain any provision on human rights. By virtue of Order No.2 of 1986, the military government granted a general amnesty to those who had been convicted or liable to criminal prosecution for acts which constituted offences of a political nature. The government, however, followed this humanitarian gesture

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207 Lesotho Constitution Act No.5 of 16 August 1983.

208 Stephen C. Neff 'Human Rights in Africa: Thoughts on the African Charter on Human and Peoples Rights in the Light of Case Law from Botswana, Lesotho and Swaziland' in ICLQ Vol.33 (1984) p.344.

209 Order No.1 of 1986.

by promulgating Order 4 of 1986 which suspended all political activities. Although, Lesotho signed the AFCHPR on 7 March 1984, it is yet to ratify the Charter. One of the major factors affecting human rights in Lesotho is the fact that the country is surrounded by the territory of South Africa and is often subject to political and economic pressures including raids by the military forces of that country in pursuit of members of the African National Congress (ANC) of South Africa.

(f) Swaziland

The Swaziland Constitution of 6 September 1968 contains no provision on the protection of human rights[210]. The State has not signed or ratified the AFCHPR. Consequently, the human rights record of the Swaziland Government has been quite dismal[211]. The proximity of the country to South Africa has further compounded its capacity to ensure political stability and economic viability. Due to pressure and threats from South Africa, many Swazi citizens and other suspected members of the ANC have been arbitrarily detained, arrested and deported to other African countries[212]. South Africa is also reported to be involved in the abduction and assassination of ANC members[213].

(g) Burkina Faso

Burkina Faso has had no operative constitutional human rights provision since the Constitution of 27 November 1977 was suspended by the military regime that took over power on 4 August 1983. Burkina Faso

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210 A.T. Aguda "Discriminating Statutory Provisions and Fundamental Rights in the Constitution sof Botswana, Lesotho and Swaziland" South African Law Journal Vol.87 (Sept 1972) p.299.

211 Weisfelder, Human Rights in Botswana, Lesotho, Swaziland and Malawi in 2 Botswana Journal of African Studies (1980) p.5.

212 AI Report on Swaziland; Amnesty International 1987 Report, op cit p.108.

213 Ibid.

ratified the AFCHPR on 6 July 1984 and is thus under an obligation to ensure the implementation of the Charters provisions within the state. The reports of international human rights organisation on the state of human rights in the country reveal that human rights violations are being perpetuated by the military regime[214]. Such practices include the illegal detentions without trial, and the torture and ill treatment of detainees[215].

The absence of constitutional provisions on the protection of human rights in Burkina invites derogations by the State from regional human rights law. Consequently, State Parties to the AFCHPR and concerned citizens and organisations have a duty to ensure compliance by Burkina to its obligations under the AFCHPR.

(h) Malawi

On gaining independence from the United Kingdom in 1964, Malawi emerged with a comprehensive Bill on Fundamental Rights and Freedoms incorporated into the Independence Constitution. However, two years later, a new Republican Constitution[216] was passed which excluded the Bill of Rights.

The Constitutional Committee which unanimously agreed to expunge the Bill of Rights from the Republican Constitution gave three main reasons for its recommendation. First, that Malawi being a full member of the United Nations had publicly guaranteed respect for the comprehensive account for personal liberties enshrined in the "UN Charter of Human Rights". Secondly, that formal guarantees as contained in Bills of

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214 Chales Humana, The Economist World Human Rights Guide op cit. p.45. See also Amnesty International 1987 Report, op cit pp.28-29.

215 AI Report Ibid.

216 The Republic of Malawi (Constitution) Act No.23 1966.

Rights tend to invite conflict between the Executive and the Judiciary which often results in the latter being discredited. Thirdly, that the laws of Malawi already provide an elaborate code for the protection of individual rights against public and private interference[217]. Thus, the fact that Malawi is yet to sign and ratify the AFCHPR may not be unconnected with the foregoing reasons.

We submit that the foregoing reasons do not suffice for scuttling a Bill of Rights from the Malawi Constitution or indeed any other constitutions. First, the Malawi Republican Constitution declares that:

> "The Government and the people of Malawi shall continue to recognize the sanctity of the personal liberties enshrined in the United Nations Universal Declaration of Human Rights and of adherence to the Law of Nations"[218].

The constitution, furthermore, contains what maybe described as abridged declarations of a Bill of Rights. For instance the constitution states that no person should be deprived of his property without payment of compensation. The constitution proceeds to state that "no law or action done under a law shall be held to be inconsistent with or in contravention of the declaration if the law is reasonably required in the interest of defence, public safety, public order or the national economy"[219].

Clearly, the language of the foregoing clause obscures its legal implications. It is both mandatory and admonitory in its import and purports to allow judicial review of legislation as well as executive action

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[217] P. Matipuriri, "The Absence of a Bill of Rights in the Republic of Malawi (Constitution) Act". UMA Students Law Journal Vol.13 (1981) p.51.

[218] S.1(iii) Republic of Malawi Constitution Act (1966).

[219] S1(IV) Ibid (Underlines for emphasis).

which the declaration, taken as a whole, vividly negates. Furthermore, the Republican constitution does not make provision for redress in case on infringement of fundamental rights and freedoms of the individual[220]. Thus, by guaranteeing respect for the personal liberties enshrined in the Universal Declaration of Human Rights without guaranteeing redress in the event of the breach of rights and liberties, the Republic Constitution does not effectively guarantee or ensure the individuals liberty. In such an event, constitutional references to the Universal Declaration may be regarded as aspirations or objectives to be achieved. The International Commission of Jurists (ICJ) has, indeed, declared that "it would be idle to pretend that in itself the Declaration has the force of positive law"[221].

Secondly, we do not subscribe to the argument that since constitutional guarantees of rights and freedoms invite conflicts between the Executive and the judiciary, the Bill of Rights should be omitted from the constitution. A survey of the attitude of the Executive to judicial determination of constitutionality and alleged infractions of human rights in African States reveals a tendency by the executive to resist judicial interference in politically sensitive issues. An apt illustration of this executive tendency was the dispute between President Kenneth Kaunda of Zambia and the Zambian Judiciary over the latters quashing of sentences imposed on two Portuguese soldiers for illegal entry into Zambia. President Kaunda queried and termed Chief Justice Evans decision as a "political judgement" that was apparently in conflict with the interest of

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220 The abrogated 1964 Independence Constitution of Malawi however, provided that "Any aggrieved person may apply to the High Court for redress". (S.25).

221 Bulletin of the International Commission of Jurists (ICJ) No.17, December 1973, p.4.

the Zambian People[222]. The Chief Justice responded by stating that members of the judiciary:

> "share the hopes and aspirations of the nation. However, this does not mean that judges should decide cases or impose sentences in such a way as to please public opinion or government. They must decide them in accordance with the facts before them and the law which is relevant. It is only in this manner that an accused person can be guaranteed a fair and impartial trial before an unbiased judge free from the domination of public opinion. The imposition of sentences is governed by the same principles. If it were otherwise, the decisions in truth would not be decisions of the court at all"[223].

Evidently, flashpoints do occur between the executive and the judiciary[224], however, this alone cannot justify the non-inclusion of a Bill of Rights in constitutions. The Doctrine of separation of powers is meant to ensure the independence of the judiciary as the sentinel of individual rights and freedoms[225]. However, a judiciary that is silent on constitutional issues is not likely to provide much needed guidance for any government, especially those of new and developing countries[226]. Any encroachment on the independence of the judiciary invariably affects the protection of fundamental human rights, however, where no enforceable Bill of Rights exists, the judiciary is handicapped in the performance of its primary role. Sir Louis Mbanefo, a Nigerian legal luminary and former judge of the International Court of Justice, states that "a constitutional democracy presupposes a balanced system of

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222 Afica Research Bulletin, July 1-31, Vol.6, No.7 (15 August 1969) pp.1478-9.

223 Ibid p.1480.

224 Parker Collins "Control of Executive Discretion in Zambia" Comparative and International Law Journal of South Africa (1980) p.159.

225 A.T. Aguda "Role of judges with special reference to civil liberties" East African Law Journal (1972) p.147.

226 C. Hayfron-Benjamin "Courts and the Vindications of Human Rights" Law and Justice Vol.21, (1982) p.42.

divided powers, for only with such a system could the citizen have to enjoy a measure of independence and freedom though a guarantee of civil liberties"[227].

Therefore, by adopting constitutions with enforceable bills of rights, the people not only place limitations on their executive and legislative but also empower the courts to review disputed legislation and protect their rights. Admittedly, the exigencies and peculiarities of African politics may continue to undermine the practical effect of such formal guarantees, however, the very existence of such provisions arms the judiciary with an arsenal to deter or redress violations of fundamental human rights. Legal history teaches us that the judicial suffers where judges are determined to avoid confrontation by avoiding constitutional issues. The legacy of judges such as Lord Coke, Chief Justices Marshall and Earl Warren of the United States and their uncompromising stand on constitutional rights have enriched the law and enhanced the prestige of power of the judiciary. There can be no justification for the courts to enhance or increase the powers of the executive or the legislature[228], especially whereae government is irremovable through elections.

Thirdly, we contest the validity of the argument that since the laws of a State, in this instance Malawi, already provide a comprehensive code for the protection of individual rights and freedoms, there is thus no need for an enforceable Bill of Rights in the Constitution. This argument is inspired by the view of the majority of English constitution lawyers such as Dicey who stated that the Habeas Corpus Acts "are for practical

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227 Sir Louis Mbanefo "The Role of the Judiciary in Nigeria: Now and in the Future" Public Lecture Paper under the auspices of the Nigerian Institute of International Affairs, Lagos, Lecture Series No.9 (1977) p.5.

228 See, Dissenting Judgement of Lord Aitken, in Liversidge v Anderson (1942) AC 206; (1941 3. AllER 338).

purposes, worth a hundred articles guaranteeing individual liberty"[229]. To this school of thought, also belongs Ivor Jennings who states that "in Britain...we merely have liberty according to law; and we think - truly I believe - that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man"[230]. This view is evidently based on the rationale that human rights are already well protected under English Law, therefore, the need for a Bill of Rights does not arise.

Although we appreciate that the English Common Law and rules of equity have provided guarantees for the individuals rights and freedoms, it is fallacious to attempt to draw a dichotomous distinction between statutory and constitutional provisions on the basis of their relative efficacy. We submit that, constitutional and statutory law are not mutually exclusive. The most desirable constitution would be one that incorporates as many human rights and related national issues as the citizens desire and a legal system though which to enforce them.

It is evident that many national and international human rights legal instruments were either influenced or prepared by British jurists, thereby underscoring the advantages of a Bill encapsulating the rights and liberties of the individual. The Magna Carta (1215) influenced the Bill of Rights of the Constitution of the United States of America. Furthermore, the constitution of most of the independent Commonwealth States had Bills of Rights drawn under the auspices of the Colonial Office. The preparation and adoption of the Universal Declaration of

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229 Dicey Law of the Constitutions (10th ed Macmillan, London 1959) p.199.

230 I. Jennings The Approach to Self-Government (Cambridge University Press 1956) p.20.

Human Rights was largely due to the efforts of the British[231]. In recent times, a growing number of British jurists have called for the adoption of a Bill of Rights for the United Kingdom. The argument of the pro-Bill of Rights lobby is articulated by Lord Scarman's statement that:

> "When times are normal and fear is stalking the land, English Law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the Common Law is at a disadvantage; it cannot resist the will, however frightened or prejudiced it may be of Parliament"[232].

To underscore this point, Sir Leslie Scarman (as he then was) expressed doubts whether the case of Liversidge v Anderson would have come to the conclusion it did, or indeed if there had been a Bill of Rights, the court would have shut its eyes to the dublous methods of police interrogation of suspects in Northern Ireland. Support for the adoption of a Bill of Rights in England also comes from Sir Norman Anderson, a former Professor of Oriental Laws and Director of the Institute of Advanced Legal Studies in the University of London. In disagreeing with the prevailing English view that the availability of remedies like Habeas Corpus dispenses with the need for a Bill of Rights[233], Sir Norman states that:

> "In the past years these specific remedies may indeed have given the individual citizen reasonably adequate protection against oppression by the executive; but they have given him no protection whatever, in recent years against an

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231 S.A. de Smith, The New Commonwealth and its Constitutions (London: Stevens 1964) p.169.

232 Sir Leslie Scarman, English Law: The New Dimensions (Stevens London 1974) p.15. Lord Scarman buttresses this argument by referring to the vulnerability of Courts in being unable to "correct" the retroactive effect of the Immigration Act (1971).

233 Sir Norman Anderson "Liberty, Law and Justices" Hamlyn Lectures 30th Series 1978 (Stevens) pp.34-59.

> oppressive or ill-considered Act of Parliament. Nor do they give wholly adequate protection today against wrongful, or clearly mistaken encroachments on individual liberties by official actions or by the exercise of some administrative discretion for we live in an era in which legislation is so profuse that much of it is inadequately examined, provides for a plethora of subsidiary regulations and often gives very wide discretionary powers to local authorities or to the Minister concerned"[234].

The necessity for a Bill of Rights in the U.K. is also emphasised by Sir Norman as a shield to protect the individual against the excessive powers of multinationals and trade unions which past governments have failed to check. The need to protect the increasing number of minority groups in British society has been rightly observed as a further justification for the enactment of a Bill of Rights in the UK[235].

The foregoing arguments for the adoption of a Bill of Rights in the UK are equally, if not more, applicable to African States. The advantages of a Bill of Rights as part of a national Constitution or Fundamental Law of a State are several.

First, a Bill of Rights provides a minimum standard of protection for every person within a State. It defines and guarantees a list of fundamental rights and liberties which a national deems necessary to protect itself from executive and legislative excesses. Secondly, a Bill of Rights is basically a political document, a solemn contract between a State and its people, through which the latter insures itself against the tyranny of the former. In the words of the Minorities Commission on Nigeria:

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234 Ibid p.51-52.

235 Sir Leslie Scarman "A Bill of Rights for the United Kingdom - where do we go now?" Lecture Paper delivered on 2 July 1979 at the Institute of Advanced Legal Studies, University of London.

> "a government determined to abandon democratic courses will find ways of violating them. But they (Bill of Rights) are of a great value in preventing a steady deterioration of standards of freedom and the unobtrusive encroachment of a government on individuals"[236].

The existence of a Bill of Rights ensures awareness of civil liberties by citizens. A comparison between the UK and the USA reveals that the latter possesses more public awareness of human rights and a better developed jurisprudence of human rights than the former[237].

Thirdly, African States being essentially multi-ethnic, require Bills of Rights to protect peoples rights and thus allay the fears of minority and other special interest groups from discriminatory policies of the majority groups. Fourthly, a Bill of Rights may be used as a sword as well as a shield. An enforceable Bill can be utilized by an individual to defend himself against excessive official rules or measures that encroach upon his protected rights. Bills of Rights also provide a course of action where none may be available under common law or the statutes. Indeed several cases exist where due to the nonexistence of a course of action under English Law, remedy was obtained under the European Convention on Human Rights[238]. Finally, the existence of international human rights conventions signifies the universal recognition of Bills of Rights as a preferable legal device towards the effective protection of human rights.

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236 Report of the Minorities Commission on Nigeria, (Government Press, Lagos, 1958) p.5.

237 Tom Mullen "Constitutional Protection of Human Rights" in T. Campbell and S. Maclean (eds) Human Rights: From Rhetoric to Reality (B. Blackwell, London, 1986) pp.17-19.

238 For instance in Campbell & Fell v United Kingdom, the European Court of Human Rights held that the inability of Campbell to obtain legal assistance or representation in connection with disciplinary proceedings before a prison Board of Visitors, and the Boards failure to publish its decision, violated certain provisions of Article 6 of the European Convention - See HRLJ Vol.6 No.2-4 (1985) p.255 at 257.

While we do appreciate that there are some obvious disadvantages in adopting Bills of Rights[239], these limitations are probably more pronounced when compared with the English Legal System. In addition to its labyrinthian provisions on human rights, English Law also adopts a piecemeal approach to human rights protection through the enactment of ordinary legislation and the development of judge made case law. However, in the African scenario, where the system of law inherited from colonial administrators have inherent flaws and where the socio-political and economic institutions are not fully developed and are prone to radical changes, the prescriptions for constitutional Bills of Rights rather than piecemeal legislations prove a more viable alternative.

The majority of African States that have ratified the AFCHPR have undertaken the obligation to respect, promote and protect human rights and to enact fundamental laws, where appropriate, to bring the Charter into force within their domestic domains[240]. A major rationale for enacting Bills of Rights is that it lessens the likelihood of conflict between a State's international obligations and its domestic laws.

(c) Measuring Human Rights Observance in Africa:
Objective, Subjective or Double Standards

The foregoing analysis of the constitution of African States reveals that the majority of African States have set comparatively high standards for themselves in the promotion of human rights. In the preceding chapter we examined the major obstacles created by colonialism, ethnicity and

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239 Several criticisms have been laid against the adoption of Bills of Rights, namely the vagueness of fundamental guarantees of human rights, problems of interpretation and judicial review methods, the far reaching qualifications and exceptions thereto, the inflexibility of such mechanisms and their supposedly undemocratic nature. See Lloyd of Hampstead "Do We Need a Bill of Rights?" Modern Law Review 39 (1976) p.121; and J.A.G. Griffith "The Political Constitution" Modern Law Review 42 (1979) p.1.

240 Article 1, AFCHPR.

racism in the protection of human rights in Africa. These latter factors have often led African rulers to use authoritarian measures to prevent social, economic and political disintegration of the State, despite restrictions imposed on excessive State measures by the Bills of Rights in many African State Constitutions. Given this impression, therefore, can one reasonably expect a high standard of respect for human rights in Africa? or to couch it in another form; Should African Governments be judged by a different criteria?[241]

The reply of the "realists" (or "apologists" as some describe them)[242] to the question is positive. The realists insist that rights and their observance are relative matters differing according to the national situation involved. It has been observed that the critics of African human rights performance pronounce judgement on the basis of the rights which are most important to western societies; civil and political rights. But in African states, economic and social rights take precedence to all other rights. To buttress this argument, it has been emphasized that the concept of the Rule of Law in the "traditionalist" western liberal democratic context differs from the African interpretation of the concept[243]. Narrowly construed, the Rule of Law means the subjecting of the states political apparatus to defined procedures and limits to prevent arbitrary actions and to guarantee respect for the

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241 Much as this question may appear rhetorical in the light of existing Bills of Rights and the AFCHPR now in force, the significance of the issue lies firstly, in the percieved dichotomy between civil and political rights on the one hand, and socio-economic rights on the other; and secondly in the existence and availability of derogation or "claw back" clauses in these instruments. (See Chapter 7 post for an analysis of "claw back" clauses.)

242 The distinction between "apologists" and "revisionists" on human rights in the Third World is from Conway W. Henderson, "Underdevelopment and Political Rights: a Revisionist Challenge", Government and Opposition 12, No.3 (Summer 1977).

243 A. Glenn Mower Jr., "Human Rights in Black Africa: A Double Standard?" Human Rights Journal (1976) p.45.

rights of individuals. However, the expansion of the concept of human rights to include economic and social rights has appealed to African States. These States in their interpretation of the concept of human rights have placed more emphasis on economic and social rights, and is succinctly expressed thus:

"Freedom of expression is meaningless to an illiterate; the right to vote may be perverted into an instrument of tyranny exercised by demagogues over an unenlightened electorate: freedom from governmental interference must not spell freedom to starve for the poor and the destitute"[244].

In the light of the above, the abridgement of certain civil and political rights in the quest for fulfilling the economic and social needs of the African peoples seems plausible especially when one considers the fact that civil and political rights violations are more visible than the transgression of economic and social rights; thus exposing African governments to charges of neglect for human rights.

In judging whether the observance of human rights by African States should be determined by a different criteria as compared with western countries, however, the views of Dr. Saeed el Mahdi are instructive. In his discussion of criminal justice in Africa, the former Dean of the Law Faculty at the University of Khartoum states that: "an act constituting an offence in Europe may not be so in Africa... we have our own natural laws and rules of natural justice which can cope with many factual situations that European modes of justice have failed to cope with."[245] It is further emphasised that Third World nations should "free themselves

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244 International Commission of Jurists, "The Rule of Law in a Free Society", Report of the International Commission of Jurists, New Delhi, India; 1959, Geneva p.vi.f.

245 S. el Mahdi "Criminal Justice in Africa and Asia", The Review of the International Commissin of Jurists, No.15 1975; p.59.

from the rigid adherence to the legal systems inherited from former colonial powers, and to develop their laws and procedures on lines more adapted to their traditions and cultures."[246]

The above pronouncement is graphically illustrated by the "Amulet Case"[247]. The dualist nature of the municipal legal systems of many African States also underlines this view[248]. It may thus be argued that African States expect to be judged by different standards and values from the western countries, especially as the former regard certain rights as more basic to other rights[249].

While a convincing case may have been advanced by the "realists" for the proposition that African governments cannot be expected to be judged on the same criteria as advanced countries, on the other hand, the "revisionists" proffer persuasive views to the contrary.

The "revisionists" maintain that Africa should not belong to a special group because they "no less than others are dedicated to respect for rights" and that "they are not different from other people"[250]. Indeed,

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246 Ibid.

247 The "Amulet Case" involved an individual "A" who had told everyone in his village that he was bullet and knife-proof because of amulets he wore. In a quarrel with another villager, "A" was attacked with a knife, which he took from his opponent and used to stab the other man to death, his plea of self-defence was denied by the Court on the grounds that, because of his belief in his amulet, he was "under no apprehension from a knife attack". Ibid, p.60.

248 The legal systems of most African States (for instance Sudan, Ghana and Nigeria) are dualist in nature; where a customary law system is operated along side the common law system.

249 The consensus of African states on the precedence of economic and social rights over civil and political rights is reflected the preambular paragraph 8 of the AFCHPR. See Appendix III below at post.

250 S.K.B. Asante, op cit at p.102; See also W. Arthur Lewis "Beyond African Dictatorship: The Crisis of the One Party State" in M. Doro and N. Stultz (eds) op cit at p.84; and Thomas L. Hodgkin, op cit at p.62.

fundamental human rights are not peculiar to any one legal system, country, race or community, and as K.A. Busia contends:

> "if (democracy) refers to the values of democracy such as the Rule of Law, respect for human dignity, freedom of speech, association, conscience and other ingredients of democracy, it can be seen from the evidence that Africans cherish democratic values and that there are leaders whose political policies are inspired by them. The values of democracy must be seen as ideals which have universal validity"[251].

Indeed, the individuals freedom to participate in political life implies freedom of expression and opinion and, consequently, the freedom to found constructive opposition parties. It is significant that some African delegates, to a UN Seminar on Human Rights endorsed the view that:

"[t]o sacrifice the liberties inherent in the human personality in the name of economic development was to reduce the individual to the role of producer and consumer of goods, which was far too high a price to pay for improving the material conditions of existence"[252].

The "revisionists" further maintain that the very poor economic performance of the sixties and seventies was accompanied by government programmes that were hardly tender in their regard for human rights. Both political and economic conditions in many African States are thus regarded to have actually regressed as a result. For the "revisionists", no further evidence of the folly of attempting to establish economic bliss through political misery arising from a denial of rights is required[253].

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[251] K. Busia, op cit at p.108.

[252] The Proceedings of the UN Regional Seminar on Human Rights in Developing Countries; Dakar, Senegal, (February 1966) UN DOC. ST/TAO/HR/25, 1966.

[253] C.W. Henderson, op cit at p.278; Peter J. Wiles, "Development and Democracy: The Chicken and the Egg", Journal of Constitutional and Parliamentary Studies, 4, No.1 (Jan-Mar 1970).

The argument that African nations can be expected to perform at the same level of human rights protection as advanced countries is based first, on the claim that the socio-political background of African nations gives them a good start in that direction. It is therefore stated that the respect for human rights is "far from alien to the traditional societies of Black Africa; most ethnic groups had elements of democratic choice in the selection of leadership and in resolving issues affecting the group as a whole"[254]. The exposure of Africans to the liberal political philosophy of Western democracies either through the slave trade [sic] or through study abroad is regarded as having had some influence on the men who later became leaders of African nationalist movements[255]. The fault with this argument is that it tends to minimise the negative influence of colonialism and regards it as an aberration.

The second reason advanced is that because of the high human rights standards they have set for themselves in their respective constitutions, African states can be expected to perform at the same level as western countries. As we have seen, the constitutions of many African States, especially the Anglophonic States, contain human rights protection clauses which have a strong western civil, political and democratic tone.

The proposition that African states can be expected to perform in the field of human rights, at the same level as advanced countries because their constitutions uphold similar principles, is weak on some points.

While most African states' constitutions have incorporated human rights provisions, the written word or provisions of the constitution do not by themselves ensure that the rights are protected. Indeed, Professor

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254 L. Hodgkin, op cit at p.64.

255 Ibid.

Brownlie has pointed out that many constitutions that speak of the 'rule of law", "civil liberties" or "fundamental rights" bear but an obscure relation to the actual state of affairs in political or legal life[256]. It is, therefore, mostly in those constitutions where the rights to be protected have been drafted in such a manner as to take into account the objective conditions imposed by underdevelopment, that rights may be more than empty declarations.

Furthermore, one of the final determinants of the actual implementation of these human rights objectives is whether the judges chosen to adjudicate in the violations of the human rights provisions are men of courage, transparent honest and integrity, and are able to carry out their functions without undue interference. It has been emphasised that "the independence of the judiciary is a sine qua non for a meaningful protection of human rights"[257]. The accessibility of people to courts is also a necessary prerequisite to the effective protection of human rights. But courts in African states can hardly be described as being open to all comers. This situation is due to the fact that many people are ignorant of their rights, too poor to afford legal services or because of executive interference with the judicial process[258].

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256 I. Brownlie, Basic Documents on African Affairs (Oxford University Press 1971) p.1.

257 O. Eze, "Prospects for International Protectin of Human Rights" The African Review Vol.4 no.1 (1974) p.84.

258 See A.M. Akiwumi, "Human Rights Cases and African Courts", Legal Process and the Individual African Source Materials; Addis Ababa, Centre for African Legal Development, Haile Sallassie I, University. Ed. T.G. Verhelst (1971); See A. Aguda and O. Aguda "Judicial Protection of Some Fundamental Rights in Nigeria and the Sudan Before and During Military Rule". Journal of African Law Vol.16 (1972), for a discussion in the way African Courts have been able to offer protection to citizens against the Executive encroachment upon their rights.

An instance of legislative manipulation by the executive to nullify a judicial decision which is found offensive is illustrated by the case of E.O. Lakanmi and Others v The Attorney-General (West) and Others[259]. Under the Nigerian Constitution of 1963 all legislative and executive actions of the Government had to be tested by the grundnorm of the Constitution. In 1966, the military regime that came into power in Nigeria suspended parts of the Constitution and decided to rule by Decrees which were made superior to the Constitution. Thus, in effect, there was nothing left against which to test the validity of Decrees promulgated by the rulers. Therefore the attempt by the Supreme Court of Nigeria in this case to hold the Constitution superior to Decrees issued by the Federal Military Government was resisted by the Government thus:

> "It is well known that the Federal Military Government came to power after a bloody revolution and therefore has unlimited power to rule this country...
>
> "The third branch which is permitted to continue, namely the Judiciary, owes its present existence to the military regime which has always the power to abolish it and if it had so wished, the whole of the constitution and rule this country by Decree"[260].

While the Supreme Court of Nigeria showed a great deal of independence and courage in this case[261], such is state of the Rule of Law in most military run Governments of Africa.

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[259] Suit No.S/C 58/60 of 24 April 1970; See A. Ojo "The Search for a Grundnorm in Nigeria - The Lakanmi Case" I.C.L.Q. Vol.20, No.I (1971) p.117.

[260] Official Statement by the Federal Military Government of Nigeria on the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.28 of 1970).

[261] In the Lakanmi case, the Supreme Court of Nigeria had declared null and void Decree No.45 of 1968 which had passed legislative judgement by confiscating the properties of Lakanmi. The Government replied swiftly by promulgating Decree No.28 of 1970 which in effect nullified the judgement and established the supremacy of military Decrees.

Another factor contributing to the argument that there should be a high level of expectation concerning human rights in Africa is that the concern for and commitment to rights is not limited to written or formal official statements. The participation of Africans in numerous international conferences and seminars beginning with the Lagos Conference on the Rule of Law (1961) right up to the Eighteenth Assembly of Heads of State and Government of the OAU which adopted the AFCHPR, indicate the will and aspiration of Africans to achieve a high level of human rights protection comparable to the European Convention and other international human rights instruments.

Furthermore, it is contended that the desire for national unity and political stability, which are the classic excuses for authoritarian rule, do not justify the abridgment of rights[262]. The argument, here, is that the consideration of stability actually requires a high regard for rights, not the suppression of them and that restrictions are counter productive. Repression in any form or in any area of socio-political experience seems to invite catastrophic results. Lewis, in discussing the approach of one party States towards the handling of public protests states that:

> "The (single) party cannot prevent tensions in an era and place of rapid change; all it can do is suppress open agitation. Discontent is then all directed inward upon the party, adding to the party's instability. This increases the effort to stamp out all resistance driving it underground whence it breaks out from time to time in violent demonstrations."[263]

The One-party system has been introduced in a number of African States and its practise reveals that it is no guarantor of stability. In Cowans

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262 Rupert Emerson, "The Fate of Human Rights in the Third World", World Politics No.2 (Jan.1975) p.223; see also C.W. Henderson supra, note 56 at p.278.

263 W.A. Lewis op cit at p.85.

analysis of the one-party state in Africa, he states that "as the opposition became more desperate in its attempts to secure a voice in government, there was a constantly growing danger of political explosion"[264].

We subscribe to the contention that repressive measures certainly breed instability but it shou-d be appreciated that the pressures that encourage repressive measures in African States are both internal as well as external. The history of Euro-American statecraft is replete with the hypocritical response of Western Governments, as they have confronted humanitarian issues. These Governments have not been prepared to speak out or take action where political costs would be entailed, where they might embarrass an ally, where protests might harm their relations with another sovereign, or where economic investments might be jeopardized[265]. Thus Richard Bilder notes that:

> "[t]he cases where governments have criticized the human rights policies of other countries seem only to buttress the argument that human rights concerns, in and of themselves, play little part in determining state policy... Government can attack their enemies for alleged human rights denials with considerable propaganda effect and at little cost. Thus the cold war has furnished some of the most notable international accusations of human rights denials - for example, racial discrimination in United States, and forced labour and the situation of Jews in the Soviet Union... Where political conflict lurks in the background, a certain scepticism as to the sincerity of the asserted rights motivations of the governments involved may well be in order. One may even suspect that such governments might prefer that their enemies continue human rights denials, thus exposing them to continued propaganda attack"[266].

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264 L.G. Cowan op cit at p.8.

265 See Laurie S. Wiseberg "Humanitarian Intervention: Lessons from the Nigerian Civil War". Human Rights Journal, Vol.VII No.I 1974 pp.61-98.

266 Richard B. Bilder "Rethinking International Human Rights: Some Basic Questions", Human Rights Journal, Vol.II, No.4 (1969) pp.573-4.

Since capitalism and socialism are the dominant modes by which high forms of economy are organized, African countries in seeking to follow one path or the other are realizing that oppression is a necessary corollary. Simone Weil argues, in her essay, that oppression is associated with the organization of any complex social order, both through its dependence on leadership and bureaucracy to administer an unequal division of labour and by its necessary sponsorship of a dynamic power by which only a privileged few exert control over the masses, and ultimately by reliance on armed might[267]. She notes further that the only instances of non-oppressive social orders are "primitive" forms of social organization that do not depend upon or level themselves easily to the co-ordination of effort and status differentiation. There is little support in African States for a restructuring of state power as to achieve non-oppressive social orders, as indeed some advocates of human rights regard oppression as an inevitable ingredient of modernism[268].

It is our contention that the concept of human rights is universal because, quite simply, human rights are concerned with asserting and protecting human dignity, and they are ultimately based on a regard for the intrinsic worth of the individual. However in upholding universal human rights, we ought to appreciate that these rights can only be protected to the extent of the prevailing circumstances and conditions of a locality. It is therefore important to recognise the enormity of the development task, the extreme vulnerability of African Governments in the face of both internal centrifugal forces (of ethnicity, factionalism etc.) and external manipulative forces (of international capitalism and communism), and the extent to which their priorities differ from those of the developed countries. Moreover, even the most highly developed

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267 Simone Weil "Analysis of Oppression" in George A. Panichas (ed) The Simone Weil Reader (David McKay Co. Inc. 1977) p.131.

268 See R. Falk op cit p.39.

programme for the international protection of human rights, the European Convention of Human Rights, operates on the principle of "margin or appreciation", which involves the recognition that governments are entitled to some leeway in determining whether a domestic situation is so serious as to warrant temporary departure from accepted standards of rights[269]. While not willing to be construed as attempting to establish an alibi for the disrespect for human rights or pleading a case for the permanent elasticization of the "margin of appreciation" to African human rights performance, it is submitted that in evolving universal and regional standards for the measurement of human rights compliance, we must observe objective margins for the underdeveloped states.

(d) Complementary Measures to Constitutional Protection of Human Rights

Attempts to rid Africa of underdevelopment must be accompanied by a progressive maximization of human rights protection in evolving effective structures for asserting and safeguarding human dignity in the larger African society. In the light of African State practice, what sort of structures can be evolved to complement the Constitution and the Judiciary in ensuring effective promoting and protection of human rights?

In responding to this question, we should first consider the prevailing situation in most African States. The foregoing analysis of African State constitutions reveals that many OAU Member States have set relatively high standards for the promotion and protection of human rights. A minority of States, have either set the tone for the protecting of human rights by making preambular references to international human rights instruments or have simply omitted human rights provisions in their

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269 See T.A. O'Donnell, "The Margins of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights". Human Rights Law Quarterly 1982.

respective constitutions. Human rights provisions in several African constitutions have had to endure the hazard of frequent suspension or outright abrogation by military governments[270]. One of the main reasons, proffered by perpetrators of military coups d'etat, for this phenomena, is that since an emergency situation exists in the State, strict adherence to legal norms serve to undermine State security and political stability[271]. Consequently, one of the major problems of human rights protection in Africa is the frequency of military coups d'etat and the ensuing repressive methods of governance.

The causes of military takeovers in Africa are numerous and should be deduced from the circumstances peculiar to each putsch[272]. However suffice it to say that they can be generally attributable, first, to underdeveloped political, social and economic institutions, and secondly, to domestic discontent and in some cases external interventions[273].

The legality of coups d'etat has been addressed elsewhere[274] however suffice it to say that it is a fundamental philosophical and juristic contradiction to refer to fundamental rights in a military era. The

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270 The Constitutions of the following countries have suffered suspensions consequent upon military takeovers:- Burundi (1976); Ghana (in 1966, 1972 and 1981); Ugnda (in 1971); Ethiopia (1974); Niger (1974); Burkina Faso (1983); Guinea (1984); Central African Republic (1966) and Nigerian (1966 and 1983).

271 Murtala Mohammed A Time for Action: Collected Speeches (Third Press International, Lagos, 1980) p.1-2.

272 Ruth First, Power in Africa (New York, Panthean Books) p.2-23.

273 Esko Antola "Roots of Domestic Military Intervention in Black Africa" Instant Research on Peace and Violence Vol.V (1975) pp.207-27. See also Ruth First, Power in Africa, Ibid.

274 Steffan Wiking Military Coups in Sub-Saharan Africa: How toJustify the Illegal Assumptions of Power (Uppsala Sweden: Scandinavian Institute of African Studies, 1983). See also Dr. Olu Onagoruwa Fundamental Human Rights Under the Military: Violation of Machinery for Enforcement. Paper delivered to the Human Rights Committee of the Nigeria Bar Association held at Ilorin, Kwara State, Nigeria, 23 May 1987.

reason is that military governments in all their ramifications are the very antithesis of fundamental Human Rights. Military Government by its very essence and characteristic is a denial of the right of the majority of the polity to govern themselves according to a constitution promulgated by their collective will. The Universal Declaration of Human Rights consecrates the rights of peoples to control their destinies through self-government. The AFCHPR, ratified by most African States imposes a legal obligation on States to practise democratic government. Article 13(1) of the Charter states that "Every citizen shall have the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law"[275].

Thus any form of government or political arrangement which makes it impossible for the majority of the polity to positively express their will to vindicate their national sovereignty is a violation of one of the most basic fundamental rights - the right to national independence and self-government according to the will of the people.

However by gaining both de facto and subsequent de jure control of the machinery of the State, military forces are effectively recognized as legitimate rulers. Some States have attempted to adopt constitutional provisions which declare coups d'etat as illegal; but such solutions have proved futile[276].

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275 See also Articles 20(1) and (2) which refer to the inalienable right to self-determination.

276 Section 1(2) of the Nigerian Constitution of Nigeria (1979) states that: "The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria, or any part thereof, except in accordance with the provisions of the Constitution". Despite this provision, the democratically elected civilian government of Nigeria was overthrown by the military in December 1983. The military government is still in power and proposes to remain in power until October 1992.

The effective protection of human rights in military governed African States is therefore dependent on three main factors. Firstly, the extent to which the government is prepared to accommodate individual rights and freedoms; secondly, the courage and independence of the judiciary, and thirdly, the initiative, resource and courage of the public and the press.

Most military regimes in Africa jettison all or most constitutional provisions on human rights on assuming power. For instance, in Nigeria when the military first took over power in 1966, it suspended and modified the provisions of the 1963 Republican Constitution, including parts of the Chapter on Human Rights and Fundamental Freedoms[277]. The military remain in power in Nigeria till October 1979 when a new constitution was adopted and a democratically elected government assumed power. However in December 1983, the military once again took control of the government, suspended and modified some of the provisions of the Constitution of 1979 including parts of the Chapter on Human Rights and Fundamental Freedoms[278]. As earlier shown in the case of E.O. Lakanmi and others v Attorney-General (West) and Others[279], the retention of human rights provisions in the constitution, is not necessarily an efficacious barometer with which we should measure human rights stance of military regimes[280], but it does reflect the apparent inclination of the military government to preserve individual rights and freedoms.

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277 Constitution (Suspension and Modifications) Decree 1960 See also A. Aguda and O. Aguda "Judicial Protection of Some Fundamental Rights in Nigeria and the Sudan Before and During Military Rule". Journal of African Law Vol.16, 1972, p.131.

278 Constitutions (Supervision & Modification) Decree 1984 and Constitution (Supervision & Modification) (Amendment) Decree 1985.

279 S/C (58/1969).

280 A.O. Aihe "Fundamental Human Rights and the Military Regime inNigeria" Journal of African Law (1971) Vol.15, No.2, p.219.

The apparent disposition of some military governments to subscribe to national and international human rights instruments can only be tested by a courageous and independent judiciary, especially in the light of military decrees which have the effect of abridging personal freedoms. For instance, the right to personal liberty as specifically guaranteed by Section 32(5) of the 1979 Constitution of Nigeria which stipulates the maximum number of hours under which a person can be legally detained, has been suspended. Thus by virtue of the State Security (Detention of persons) Decree 1984 and the State (Detention of Persons) (Amendment) Decree 1986 the Chief of General Staff or Inspector General of Police can incarcerate any person if either of them is satisfied that such a person is "or has been concerned in acts prejudicial to State Security or has contributed to the economic adversity of the nation". Consequently, since the detention decree does not define "State Security" or "economic adversity" the authorities seem to have a wide and arbitrary power to curtail the personal liberty of the individual.

In the light of the curtailment of individual rights in authoritarian military regimes in African States, which ostensibly retain Constitutional Bills of Rights, the judiciary should be courageous enough to ensure individual rights and freedoms. Admittedly, the jurisdiction of the courts are invariably ousted by certain military decrees[281] and edicts, however courts can justifiably assume jurisdiction even in such cases. This submission substantiated by the opinion of Kayode Esho JSC in Governor of Lagos State v Chief Emeka Ojukwu[282]:

> "By virtue of the Constitution (Suspension and Modifications) Decree 1984 (No.1), a good number of provisions of the Constitution were suspended. Indeed what was left was what had been permitted by the Federal Military Government to

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281 State Security (Detention of Persons) Decree No.2 (1984).

282 (1986) 1 Nigeria Weekly Law Reports 55 at p.634.

exist. All the provisions relating to the Judiciary were saved. Section 6 of the Constitution, the most important provisions in so far as the institution known as the Judiciary is concerned, which rests courts the judicial powers of the Federation was left extant. The military Government had the power and still has to put an end to the existence of that provision. It has not done so, and that must have been advisedly for it does intend that the Rule of Law should pervade. It is the clearest indication against rule by Tyranny, by sheer force of arms against a presumption subjecting the nation to the rule of might as against rule of right".

A similar opinion was rendered by Oputa J.S.C. who added that:

> "here in Nigeria even under a military Government, the Law is no respecter of persons, principalities, governments or powers and that the courts stand between the citizens and the government alert to see that the state or government is bound by law and respects the law"[283].

Much as these judicial opinions reflect the determination of some members of the judiciary to ensure individual freedoms many judges are unable to uphold the rule of law and fundamental human rights because of the threatening posture of the military, exemplified by draconian decrees which declare themselves unchallengeable. For instance, the Nigerian Court of Appeal delivered one of the worst blows against the protection of human rights in the recent case of Wang Ching-Yao v Chief of Staff[284]. The Court affirmed as lawful, the detention of five Chinese businessmen and further held that "detention orders are in their true nature subsidiary legislation enacted under the State Security (Detention of Persons) Decree (No.2) 1984". The Court also held that courts should take judicial notice of detention orders by virtue of Section 73(1)(a) of the Evidence Act. This decision has discouraged many Nigerian lawyers from taking detention cases to court, and has laid precedent for other courts to follow.

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283 Ibid at P.640.

284 Suit No. CA/L/25/85 dated 1 April 1985 (unreported).

In view of the clearly ineffective and limited scope within which the judiciary can operate under military regimes, the press and the public can evolve structures of the protection and promotion of human rights in Africa.

The public can enhance the protection of human rights by forming pressure groups for the purpose of promoting and protecting human rights. Such pressure groups may be formed by religious societies, professional associations in collaboration with the press to effectively disseminate information to the largely semi-illiterate peoples regarding their fundamental rights. These groups should also ensure the protection of rights by evolving mechanisms to respond to human rights violations and seek redress when infringements occur.

The need to evolve such local organisations is underlined by the AFCHPR which imposes an obligation on State Parties "to promote and ensure through teaching, education and publication, the rights and freedoms contained in the... Charter"[285]. The AFCHPR also provides inter alia that states "...shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protecting of the rights and freedoms guaranteed by the... Charter"[286].

As regards the enforcement of human rights provisions by human rights pressure groups, the AFCHPR permits the African Commission on Human and Peoples Rights to receive communications from groups of individuals[287]. The Commission is also authorised to "interpret all the provisions of the... Charter at the request of a State Party, an

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285 Article 25, AFCHPR.

286 Article 26 Ibid.

287 Article 55 Ibid.

institution of the OAU or an African organisation"[288].

As a direct result of this writers initial research into human rights in Africa[289] and in response to the atrocities perpetrated against human rights by the military regime of General Buhari (December 1983 - August 1985) in Nigeria, we presented a blueprint[290] for the establishment of a human rights council in Nigeria to a select group of eminent Nigerian jurists and scholars. The response to our blueprint was encouraging and this led to the formation of the Planning Committee of the Nigerian Council For Human Rights (NCHR) in December 1985[291]. The Constitution of the NCHR was formally approved on 19 February 1987. The public response to the establishment of the NCHR is exemplified by the growth of the membership of the Council from nine in 1985 to four hundred subscribed members as at 31 December 1987.

The main object of the NCHR is to secure throughout Nigeria, the observance of Human Rights generally and as guaranteed in the Nigerian Constitution, the AFCHPR and in the Universal Declaration of Human Rights by various methods[292]. These methods include providing legal

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288 Article 45(3) Ibid. (Underlines for emphasis)

289 M. Abdul-Razaq The OAU and the Protection of Human Rights in Africa - LL.M Dissertation of the University of Hull (1983).

290 For the objectives of the Nigerian Council for Human Rights, See Appendix IX.

291 The original founding members of the NCHR are Alhaji G.F. Abdul-Razaq S.A.N. (Chairman of the Nigerian Body of Benchers); Dr. A. Aguda (Director of the Nigerian Institute of Advanced Legal Studies and Former Chief Justice of Botswana); Dr. G.O. Olusanya (Director-General, Nigerian Institute of International Affairs); Dr. Simi Johnson (Vice President, Nigerian National Council for Womens Societies); Professor M. Ogundipe-Leslie (Vice President Women in Nigeria Organization); Professor Osita Eze (Imo State University, Nigeria); Professor Agbede (Faculty of Law, University of Lagos); Dr. T.M. Salisu (Librarian, University of Lagos) and the present writer.

292 Article 2 Constitution of the Nigerian Council for Human Rights. See Appendix IX.

advice on Human Rights[293], making representations on Human Rights to governments and other relevant authorities[294] and educating and disseminating publicly individual entitlement to Human Rights enjoyment[295].

Since its formation in 1985, the NCHR has made public pronouncements[296] and formal representations to the Nigerian Government on human rights issues. The response of the present Nigerian Government to the existence of the Council has been favourable. This may not be unconnected with the deliberate policy of the NCHR to adopt the method of formal representation to the government rather than public condemnation of government measures which appear to violate human rights.

On the continental level, the Inaugural Congress of the African Association for Human and Peoples Rights in Development (AAHPRID)[297] was held in Harare, Zimbabwe, 29 August to 3 September 1987. The main objectives of the Association are:

> (a) to eliminate apartheid and achieve peace in Africe;
> (b) to act in solidarity with all those in Africa struggling for Peoples Rights and to give every support and assistance to more sacrifice in the cause of human rights throughout Africa;

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293 Article 2(b) Ibid.

294 Article 2(c) Ibid.

295 Article 2(f) Ibid.

296 The Guardian (Lagos, Nigeria) 15 July 1986; See also, "The Nigerian Council for Human Rights" in Rights & Humanity Vol.1 No.2 (Summer 1987) p.43.

297 At the Inaugural Congress of the AAHPRID the following were elected; President - Professor Leonard Ngcongcom, University of Botswana; Secretary-General - Professor Kwesi Prah. Institute of Southern African Studies, University of Lesotho; Treasurer - Professor P. Takirambudde, Department of Law, University of Botswana. See also E. Khiddu-Makubuya "Africa Rises to the Challenge" in Commonwealth Judicial Journal, Vol.7 No.3 (June 1988) pp.6-9.

(c) to monitor and encourage the respect for and promotion of human and peoples rights in Africa at all stages of the development process.

Full membership of the Association is open to all Africans and African human rights related organisations whereas associate membership is open to interested non-Africans as well as to non-African human rights-related organisations.

In summation, therefore, we submit that the enforceable constitutional human rights provisions as contained in the constitutions of many African States are the foundation for effective protection of human rights and liberties. However, constitutional guarantees alone cannot enhance human rights. Authoritarian African regimes, both civilian and especially the military, have exhibited a propensity to abridge and indeed abrogate fundamental rights through executive measures and Draconian decrees. Consequently there is a need for the formation of human rights pressure groups in African States to complement the efforts of the judiciary and the Bar in upholding the rule of law and fundamental rights and freedoms.

Chapter Six

Regional Promotion & Protection of Human Rights

(a) Introduction

Our analysis of the evolution of the OAU reveals that the concerted struggle for independence by African statesmen was essentially a struggle for individual liberties in reaction against the injustices inherent in colonialism. These struggles for self-determination and human dignity were waged on three levels, international, regional and national. On achieving independence many African countries through their respective constitutions subscribed to the obligations under the various international instruments which established universal human rights standards.

Post independence of pursuits of regional promotion and protection of human rights were eclipsed by the imperative task of the newly independent African States to consolidate their sovereignty. Consequently, while many independence constitutions loosely subscribed to international human rights instruments such as the Universal Declaration on Human Rights, the scope and degree of enforcement of such internationalised rights were severely limited by domestic laws and the OAU Charter. The constitutional provisions emphasised absolute sovereignty of the State over all matters especially those trading upon human rights and the administration of justice. African States sought to balance, firstly, the rights and duties of individual and secondly, those of the individual vis-a-vis his society and the State. The OAU Charter in addition to upholding the sovereignty of Member States, emphasises the principle of non-interference in the internal affairs of states[1]. These principles and policies formed a formidable barrier against international and regional supervision and enforcement of human rights in Africa. It is pertinent to stress that these principles and policies were

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[1] Article III(1)(2) and (3) OAU Charter.

informed by the apparent absence of confidence in the western oriented global system in which African States had limited influence; a system which had earlier condoned colonialism. A leading African legal luminary and President of the ICJ, Keba Mbaye categorically states that "a fact that no-one would attempt to deny is that human rights were not a major concern of African States after each had gained independence nor of the OAU at the time it was set up"[2].

Notwithstanding the reluctance of African States to subscribe to international supervision and enforcement of human rights, African jurists were more receptive to the idea of a regional system of human rights protection. Consequently, a confluence of several factors evolved over two decades led to the establishment of an African Charter on Human and Peoples Rights and an African Commission for Human Rights.

(b) The African Conference on the Rule of Law (1961)

The idea of establishing a regional machinery for Africa was launched at the African Conference on the Rule of Law organised by the International Commission of Jurists and held in Lagos between 3-7 January 1961. The Conference was declared open by Dr. Nnamdi Azikime (President of the Republic of Nigeria) who coincidentally had earlier advocated the adoption of an African Convention of Human Rights as far back as 1943 in his memorandum on "The Atlantic Charter & British West Africa"[3].

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[2] Keba Mbaye "Keynote Address on the African Charter on Human and Peoples Rights" in Report of ICJ Conference on Human and Peoples Rights in Africa and the African Charter; Nairobi 2-4 Dec 1985; ICJ Cherie-Bougeries/Geneva, p.19.

[3] See Maurice Glele Ahanhanzo "Introduction à la Charte africaine des Droits de l'homme et des peuples" in "Droit et Libertés à la fin du XXe siède, influence des données économique et technologiques" (Studies offered to Claude-Albert Lolliard, Pedone, 1984) p.313.

The Conference involved 194 jurists from 23 African and 9 non-African countries. The theme of the Conference, the Rule of Law, was chosen in response to the mounting threats and violations of individual rights and liberties by new governments. Indeed, the Conference was described as a response to "the realisation of the deep rooted level of justice inherent in African tradition; the intention was to measure against this tradition the legal systems which are the legacy of the colonial powers, and to assess the colonial situation in the newly independent states in the light of the guiding principles of the Rule of Law"[4].

The Conference adopted a resolution, titled, The Law of Lagos which declared inter alia:-

> "that fundamental human rights especially the right to personal liberty, should be written and entrenched in the constitutions of all countries and that such personal liberty should not in peacetime be restricted without trial in a Court of Law;
>
> "that in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention on 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"[5].

The Conference also evolved comprehensive safeguards on individual rights and defined the powers and competence of the executive, legislature and judiciary[6]. The jurists unanimously agreed on the principles of justice considered minimal for the protection of human

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[4] Jean-Flaven Lavite in Foreward to "African Conference on the Rule of Law": A Report on the Proceedings of the Conference, Lagos, Nigeria, 3-7 January, International Commission of Jurists, Geneva, 1961 p.5.

[5] African Conference on The Rule of Law... Ibid p.11. See Appendix I, post, for the text of the Law of Lagos.

[6] See Conclusions of Committee I on Human Rights and Government Security - The Legislative, Executive & Judiciary Ibid.

rights in the criminal and administrative law systems[7]. Finally, the Conference emphasised the responsibility of the judiciary and of the Bar for the protection of the rights of the individual in the society[8]. Some of these conclusions were more comprehensive in protecting human rights than the provisions of the African Charter on Human & Peoples Rights. The conclusions and resolutions of the Conference set the tone for the adoption of a regional machinery for the protection of human rights on the continent, however they failed to propel African nations to act accordingly, probably because the Conference did not have formal affirmation of African States.

Immediately after the Conference, President of Nigeria, Dr. Azikiwe in a speech in London, appealed to African States to enact an African human rights convention as a pledge of their faith in the supremacy of the law[9]; his was a lone voice in a wilderness in which African Statesmen were preoccupied with the problems of their fragile independence.

(c) Human Rights and the Establishment of the OAU (1963)

The OAU was established in 1963. The 30 founding Member States were signatories to the OAU Charter which reaffirmed the adherence of African States to the principles of the Universal Declaration of Human Rights[10].

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[7] See Conclusions of Committee II on Human Rights and Aspects of Criminal & Administrative Law: Ibid.

[8] See Conclusions of Committee III on the Responsibility of the Judiciary and the Bar, Ibid.

[9] Karel Vasak "Les Droits de l'Homme el l'Afrique", Revue Juridique et Politique (1967) at p.282., cited in del Russo, International Protection of Human Rights (Lerner Law Books Co., Washington DC, 1971) p.248.

[10] 9th Preambular paragraph and Article II of the OAU Charter.

The Heads of African States and Governments that met in Addis Ababa in 1963 were convinced that it is the inalienable right of all peoples to control their own destiny and were conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of African peoples. However, the African statesmen placed a higher premium on the need to safeguard and consolidate the hard won independence as well as the sovereignty and territorial integrity of their States to fight against neo-colonialism in all its forms. Consequently, the recommendations of the 1961 Lagos Conference for the adoption of regional machinery on human rights could not be adopted by the OAU.

The 1963 Addis Ababa Conference did approve the formation of an African Commission of Jurists as a specialised commission of the OAU[11] consequent upon the recommendations of the OAU Council of Ministers.

Preparatory meetings for the creation of the Commission commenced with a Conference of African Jurists which took place in Lagos in August 1963. The inaugural Conference of the Commission was held in Lagos in 1966[12].

The functions of the Commission included the promotion of the development of the concept of justice, the encouragement of study of African Law and international law, and the promotion of understanding and cooperation among African jurists[13].

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[11] Under Article XX of the OAU Charter, the Assembly of Heads of State and Government has a facilitative power to create Specialised Commissions.

[12] For the approved Statute of the Commission see L.B. John (ed) Basic Documents on African Regional Organisations: Constitutional Foundations Vol.1 (Dobbs Ferry: Oceana Publications 1971-72) p.98-104.

[13] Article I, Charter of the African Commission of Jurists, Ibid.

According to Dr. Elias the Commission had a mandate "to study African political constitutions and legal ideas with particular reference to the promotion of the rule of law and the observance and protection of fundamental human rights through the continent"[14].

The Charter of the Commission of Jurists did not develop or define the scope of the "concept of justice" alluded to in Article I. In any event, the Commission failed to function due to the lack of quorum and was eventually dissolved in November 1966. The relatively short existence of the African Commission of Jurists may be regarded as attributable to the lack of will of African Statesmen to pursue the establishment of a regional machinery for the protection of human rights on the continent.

Notwithstanding the lethargic attitude of the majority of African States towards the establishment of a regional system, some States continued to campaign for a regional approach. At the UN General Assembly's debate in 1963 on "Measures of Implementation of the Covenants", Nigeria, Ghana and Somalia submitted observations common in their appeal for the establishment of regional human rights machinery for Africa. The Somalian observation encapsulates their common view:

> "So far as human rights are concerned, differences between regions are often more pronounced than differences within regions, and it could be much easier for states within a region to come to an understanding regarding the guarantee of human rights than with all members of the United Nations. Regional Organisations, like the Council of Europe and the Organisation of American States have set up their own organs for the purpose of ensuring human rights, thereby contributing greatly towards the implementation of the human rights programme of the Untied Nations... This Government

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[14] T.O. Elias "Background paper for the UN Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to AFrica; Monrovia, Liberia, 10-21 September 1979,p.8.

> considers it desirable that a similar system should be established for Africa, as part of the Organisation of African States"[15].

The significance of the regional system was also emphasised by Senegal. At the World Veterans Federation meeting held in Paris in 1904, the Senegalese Ambassador to France stated that the entire range of African values of civilisation would be better defined in a regional charter of human rights. He appealed for a charter which would portray the combination of universal humanism and African humanism - "a charter which would provide a veritable system of references in which the African would be able to discover his modern personality, basically attached to his country but wide open to the world"[16]. These appeals received little response from African States. The United Nations however responded and seized the initiative in leading the movement towards the establishment of a regional machinery for human rights in Africa.

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[15] Proceedings of the UN General Assembly Debate on item 48 dealing with Measures of Implementation of the Covenants. Doc A/5411/Add2 of 25 Oct 1966.

[16] Quoted in 'Institutions for the Protection of Human Rights', Report of the 21st Council Meeting, World Veterans Federation, Paris 1964 p.68-69. See also del 'Russo op cit at p.248.

(d) <u>The UN efforts towards the Evolution of a Regional Human Rights Protection Machinery for Africa.</u>

The UN's influence on the evolution and development of regional organisations in the world has not been confined to Europe[17], the Americas[18] and Arabia[19].

In realisation of human rights for all, without discrimination to race, sex, language or religion as laid down by Article 13(2) of the United Nations Charter, the UN has achieved noteworthy results in Africa. It is desirable to undertake an examination of the UN contributions to the evolution of a regional machinery in Africa, in a bid to appraise these efforts.

The establishment of a regional commission for human rights in Africa, outside the UN Human Rights protection system is consistent with Articles 52 and 53 of the UN Charter[20]. With these articles as a basis and pursuant to General Assembly Resolution 926(X) and ECOSOC

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[17] The European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force on 3 September 1953 was largely influenced by the Universal Declaration of Human Rights. See T. Higgins "The European Convention on Human Rights in T. Meron (ed) <u>Human Rights in International Law Legal & Policy Issues</u> (1985 Clarendon Press Oxford) p.496-7.

[18] The American Convention on Human Rights, entered into force on 8 July 1978 and was largely influenced by both the Universal Declaration of Human Rights and the European Convention. See T. Buergenthal and ors; <u>Protecting Human Rights in the Americas: Selected Problems</u>, (1986, N.P. Engel, Strausbourg) p.13.

[19] The Permanent Commission on Human Rights of the Arab League (1968). See Arab League Council Resolution 2443 of 3 September 1968. The Arab League was encouraged to establish this Commission by the UN's efforts under ECOSOC Resolution 1159(V) of 1 Nov 1950 and UN Recommendation 6(XXIII) of 23 March 1967. See further S.I. Marks "La Commission Permanente Arabe Des Drois de l'Homme" <u>Human Rights Journal</u> Vol.III 1970.

[20] See D.W. Barrett, <u>The Law of International Institutions</u>, (2nd ed London 1970) pp.280-3; See also A.H. Robertson, "<u>The International Protection of Human Rights by Regional Organisations</u>", Selected Readings in International and Comparative Law of Human Rights, (Strausbourg, International Institute of Human Rights, 1974).

Resolution 605(XXI) the Secretary General of the UN organised in Dakar, Senegal, a Regional Seminar on Human Rights in Developing Countries, from 8-22 February 1966[21]. The Seminar deliberated on the desirability of establishing an African Convention on human rights within the framework of the OAU. The seminar prescribed a 3-stage approach towards a regional system. First, the encouragement of national systems of promotion and protection of human rights; secondly, the adoption of bilateral and/or multilateral agreements on human rights by States. Finally, the formation of a regional system in the long term[22]. This staggered approach to regionalism was informed by the obvious obstacle created by the principle of sovereignty and non-intervention in the internal affairs of states. The seminar also resolved that it was essential to remould and redefine certain human rights principles and standards to accord with the realities of the African regional, a factor not fully reflected in the Universal Declaration and the subsequent International Covenants[23].

Thus the 1966 UN Seminar in Dakar kept the subject alive in the minds of various interested groups in African especially the African Jurists. It probably encouraged the International Commission of Jurists to sponsor another conference in Dakar in January 1967 to examine the Function of Law in the Development of Human Communities with special reference to Africa[24]. The Conference was restricted to jurists from

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[21] All Member States of the Economic Commission for Africa of the UN, were invited to participate. Seminar on Human Rights in Developing Countries, UN Doc ST/TAO/HR/25; 1966.

[22] Ibid Paragraph 241.

[23] The Seminar cited the Convention on the Elimination of All Forms of Racial Discrimination as an example of UN practice in adopting and adapting special instruments on particular rights or groups of rights. Ibid paras 237-238.

[24] Conference of French Speaking African Jurists, Bulletin of the International Commission of Jurists (1967) Vol.28 p.1.

French-speaking Africa, and about 80 jurists from 15 countries were in attendance. The Conference adopted many resolutions out of which two were of significance to human rights in Africa:

- African States were urged to enhance the respect for human rights in practice by ratifying the International Covenants and the Convention on the Elimination of all forms of Racial Discrimination.

- The Conference requested the International Commission of Jurists in cooperation with competent African Organisations to study the feasibility of creating a regional system for the protection of human rights in Africa; an Inter African Commission on Human Rights, with consultative jurisdiction and power to make recommendations should be the primary factor in such a regional body[25].

It has been observed that the 1967 ICJ Dakar Conference was restricted to Francophone jurists because of "tactical reasons" and not a reflection of divisions between Francophone and Anglophone jurists on methods towards evolving a regional machinery for human rights[26].

Indeed during the twenty-third Session of the United Nations Commission on Human Rights in March 1967, the Nigerian delegation introduced a resolution, co-sponsored by Congo (Zaire), Dahomey (Benin), the Philippines, Senegal and Tanzania, asking the United Nations to consider establishing regional human rights commissions for regions without such

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25 Ibid p.11.

26 See K. Mbaye "Keynote Address on the Charter on Human & Peoples Rights". op cit p.21.

systems[27]. The UN Commission by its resolution 6(XXIII) adopted the proposal and established an Ad Hoc Study Group of eleven members to consider the proposal[28].

It is noteworthy that during its deliberations, the Study Group received memoranda from the Council of Europe and the Organisation of American States. The OAU and other intergovernmental organisations did not submit any documents, despite invitations from the Study Group.

The Ad Hoc Study Group established at the twenty-third session of the UN Commission submitted its report to the Commission on Human Rights at its twenty-fourth session in 1968[29]. The views of the members of the Ad Hoc Study Group were sharply divided but they agreed on some issues. It was generally agreed that if further regional commissions were to be established, this should be done on the initiative of states in the region and not to be imposed by the UN or some other external organisations. After dwelling on the report, the Commission in its resolution 7(XXIV) of 1 March 1968 requested the UN Secretary-General to transmit the report to Member States and to regional inter-governmental organisations for their comments. The UN Secretary-General was further requested to consider the possibility of arranging suitable regional seminars under the programme of advisory services in the field of human rights in those regions without commissions for the purpose of discussing the usefulness and advisability of the

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[27] UN Doc/E/CN.4/L.940, Draft Recommendation II, Report of the twenty-third Session of the UN Commission on Human Rights (E/4322; p.109-125) 1967.

[28] The Ad Hoc Study Group was composed of representatives of Chile, the Congo, Iran, Jamaica, Nigeria, the Philippines, Poland, Sweden, the United Arab Republic (Egypt), the USSR, and the United States.

[29] UN Doc/E/CN.4/4.66 and addendum 1 (Report of the UN Ad Hoc Study Group established under Resolution 6(XXIII) of the Commission on Human Rights).

establishment of such commissions[30].

During the intervening period between the UN Commissions twenty-fourth session and its twenty-fifth session in March 1967, some factors convened to brighten the prospects for the establishment of a regional Commission in Africa. Firstly, the Permanent Arab Commission on Human Rights had just been established under the aegis of the League of Arab States; secondly, the Government of the United Arab Republic had invited the UN to hold a Seminar in Cairo under the framework of advisory services to discuss the questions of the establishment of a regional commission for Africa.

The Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa[31] was held from 2-15 September 1969 in Cairo and participants were invited from forty-one African States, the specialized agencies and regional intergovernmental organisations.

The agenda of the seminar was to investigate:-

(a) the usefulness and advisability of establishing regional commissions in the field of human rights and the main functions such regional commissions may perform[32].

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[30] Commission Resolution 7(XXIV) of 1 March 1968.

[31] UN Doc ST/TAO/HR38 1969.

[32] Towards this end, the UN Secretariat suggested the following possible functions:-
(i) Education and information activities,
(ii) Undertaking research and studies,
(iii) Performance of advisory services,
(iv) Holding seminars and awarding fellowships,
(v) Fact-finding and conciliation,
(vi) Consideration of communications from states, individuals and groups of individuals and the kind of action to be taken.

(b) The geographical scope of such a regional commission, the method for its establishment and its membership.

(c) The desirable forms of relationship of the regional commission with the UN, the specialised agencies active in the field of human rights and other intergovernmental organisations and commissions[33].

There was a high degree of unanimity on the desirability of establishing a regional Commission on Human Rights for Africa. This "turn around" can be attributed to the desire by the participating African States to achieve a greater respect for human rights throughout the African Continent. A.H. Robertson, however, attributed this new attitude to the fact that human rights had become an accepted basis in the UN for attacking ones political opponents whether as regards the Israeli-occupied territories, the practice of apartheid, the situations in Namibia or elsewhere[34]. The fact that the conference was held at the instance of the United Arab Republic and that she took particular interest in those proceedings is probably instructive of the contention.

During the Conference however, differences of opinion occurred on two issues, namely:

- fact-finding and conciliation, and
- the consideration of communications from States, individuals or groups of individuals and the kind of action to be taken thereon.

Some participants emphasised that the Commission could not achieve its goal unless the two foregoing functions were performed by it. On the

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33 Ibid p.4-7.

34 A.H. Robertson Human Rights in the World: An Introductin to the Study of the International Protection of Human Rights (Manchester University Press, 1982) pp.151-7.

other hand, others believed that because sovereignty and non-intervention were very important principles in most African countries, efforts should be made to avoid creating situations which may make States fearful of intervention in what they considered their reserved domain. The solution proffered was to endow the contentious provisions with an optional character thereby allowing states to subscribe to them whenever they were prepared so to do[35].

The seminar envisaged an African Commission on Human Rights that would greatly enhance Africa's international and moral image, thus a practical demonstration by African countries that they were concerned with the promotion and protection of human rights on the continent[36].

As regards the geographical scope of the proposed Commission, the seminar agreed that it should include all African States, members of OAU which were committed to the unity of the African Continent but to the exclusion of Governments practising the apartheid and racial discrimination[37]. It was also agreed that the African Commission should be created by a resolution of the OAU rather than by the conclusion of a Convention[38].

The seminar ended its deliberation by unanimously adopting six conclusions[39], the most significant ones being:-

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35 UN Doc ST/TAO/HR/38 1969 p.8-10.

36 Ibid p.10.

37 Ibid p.11-12.

38 Ibid p.13.

39 Ibid p.18.

(a) To request the Secretary-General of the UN to communicate the report of the seminar to the Secretary-General of the OAU and the governments of Member States so that the OAU might consider the appropriate steps including the convening of a preparatory committee representative of OAU Membership with a view to establishing a regional commission for Africa.

(b) To appeal to all Governments of Member States of the OAU to give their support and cooperation in establishing a regional commission on human rights for Africa.

(c) To request the Secretary-General of the UN to offer all assistance under the programme of advisory services in the field of human rights established by General Assembly Resolution 926(X) in any effort towards establishing a regional commission on human rights for Africa such as by providing experts and fellowships.

(d) To request the Secretary-General to arrange for full consultation and exchange of information between the Commission on Human Rights and the OAU concerning the establishment of a regional commission on human rights for Africa[40].

It was also unanimously agreed that the proposed regional commission should undertake essentially promotional functions in the area of human rights. These activities were to include "(a) educational and information activities; (b) research and studies; (c) performance of advisory services; (d) holding seminars and awarding scholarships"[41].

The rationale for the decision opting for a commission with essentially promotional functions was that a commission with judicial functions might not be generally acceptable to African States which jealously guarded their sovereignty. The impact of the report of the Ad Hoc Study Group to the twenty-fourth session of the Commission on Human Rights is

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[40] Ibid p.18, Para.65. It is worth noting that despite being invited to this seminar, the OAU was not represented. The OAU's indifference to efforts towards the establishment of a regional human rights system in Africa is also reflected in the fact that the OAU did not attend the 24th Session of the UN Commission on Human Rights which deliberated upon the report of the Ad Hoc Study Group, despite being invited.

[41] Ibid p.7.

reflected in the Seminars decision that regarded the OAU as the suitable authority to initiate and establish a Commission on Human Rights for Africa[42]. At its twenty-sixth session in 1970, the UN Commission considered the report of the Cairo Seminar and passed a resolution reiterating the conclusions of the Cairo Seminar[43].

The UN organised a Seminar on the Realisation of Economic and Social Rights, with Particular Reference to Developing Countries in Lusaka, Zambia from 23 June - 4 July 1970.

Previous Human Rights Seminars and Conferences on Africa and the Developing World had relied heavily on the classical civil and political rights for the substance of their proposals. The conclusion reached at the Lusaka Seminar stressed that the enjoyment of economic, social and cultural rights is as important as civil and political rights. The Seminar also regarded both sets of rights as interdependent and interrelated. The Lusaka Seminar emphasised the need for regional programmes for the promotion of human rights to highlight the economic, social and cultural rights[44].

Following the Cairo and Lusaka Seminars, the baton of the crusade for the establishment of an African Human Rights Commission was picked up next at the Addis Ababa Conference of African Jurists on African Legal Process and the Individual, held under the auspices of the Economic Commission for Africa of the United Nations (ECA) from 19-23 April 1971.

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42 Ibid p.12-13.

43 Res. 6(XXVI) of the UN Commission on Human Rights 26th Session, (1970).

44 UN Doc ST/TAO/HR/40.

Although the ECA is not conceived as an institution for the protection of human rights, its mandate, Resolution 671(XXV), could be translated to include promotional activities in the field of human rights as long as they correspond to national policies and objectives of States[45]. Since the constitution of most African States subscribe to the promotion and protection of human rights in one form or the other, it would seem that the ECA's sponsorship of the Conference of African Jurists is in order.

An analysis of the papers presented at this conference reveals that the issues debated were more related to the protection of human rights within African countries rather than the establishment of a regional commission[46]. However, it its conclusions the Conference adopted Resolution No.3 in which they supported the recommendations of the Cairo Seminar of 1969 and made the following specific recommendations:

> (i) that an African Commission on Human Rights be established and charged with the responsibility of collecting and circulating information relating to legislation and decisions concerning human rights in annual reports devoted to the question of civil rights in Africa;
>
> (ii) that an African Convention on Human Rights be concluded;
>
> (iii) that every effort be made to harmonise legislation in the different African countries in this regard;
>
> (iv) that an Advisory Body be established to which recourse may be had for the interpretation of the terms of the African Convention on Human Rights;
>
> (v) that the various African States be urged to take speedy measures to accede (sic) to or ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all forms of Racial Discrimination and the OAU Convention governing Specific Aspects of Problems in Africa;

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[45] ECOSOC Res.671(XXV) of 29 April 1958. For an analysis of the relationship between the OAU and the ECA, see Chapter 3, above.

[46] Thierry G. Verhelst (ed) Legal Process and the Individual: African Source Materials, op cit.

(vi) that the OAU should hasten the implementation of the recommendations of the UN Cairo Seminar of 1969 taking account of existing international instruments that have been drafted by the UN in this connection[47]

It is pertinent to note that the Conference departed from the recommendations of previous UN Seminars by proposing for the first time that an African Convention on Human Rights be established.

Despite these purposeful and well defined objectives, nothing practical was achieved to concretize these aspirations, unless perhaps one considers the subsequent seminars and conferences on the issue as accelerating procedures towards the goal of establishing an African Commission on Human Rights.

The next seminar in this accelerating process was the UN Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa held in Dar-es Salaam, Tanzania from 23 October - 5 November 1973[48]. The Seminar accepted, in principle, the need for the establishment of an African Commission to promote and protect human rights, and agreed with the recommendations of the Cairo Seminar that the OAU might consider appropriate steps, including the convening of a preparatory committee representative of the OAU Membership with the object of establishing such a commission.

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[47] The Conference noted that as at April 1971, no effort had been made by the OAU with respect to the recommendations of the Cairo Seminar, and that, in fact, no Member State of the OAU (including those States represented at the Cairo Seminar) had placed recommendations of the Seminar on the Agenda of the OAU's Conference of the Council of Ministers. Ibid p.372-373.

[48] See Report in UN Doc/ST/TAO/HR/48; 1973.

As regards the scope and definition of the rights to be protected by the regional commission, it was suggested during the debate that the functions of the regional commission should encompass the promotion and protection of the whole scope of human rights, whether economic, social, cultural, political or civil, their handling of questions relating to the right of self-determination and to economic development, assistance in the spread of education in the field of human rights, the conduct of research and training programmes, and the award of fellowships[49].

The Seminar also emphasised the need for the proposed Convention to reflect Africa's peculiar problems of which economic underdevelopment was the most important. It was also recommended that the Convention should clearly set down the conditions under which State Parties may legitimately impose limitations on human rights. The Seminar suggested that the drafting of the Convention, be initially entrusted to an OAU ad hoc body of experts for Africa to be assisted, if need be, by experts drawn from the UN and other specialised agencies[50].

During the course of the debates reasons for the lethargy of the OAU and its Member States towards the setting up of the Regional System emerged. It was suggested that the lack of response to the calls such as those made at the Cairo Conference were due to the obsession with national and parochial problems, fragile political institutions, and divergence in legal systems and political philosophies which had prevented the development of meaningful economic cooperation at the sub-regional level with the notable exception of the East African Community[51].

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[49] Ibid Para 108.

[50] Ibid Para.90.

[51] Ibid Para.91.

Although the conclusions reached at UN Dar-es Salaam Seminar basically reiterated the recommendations of the Cairo Seminar, it however went further by raising pertinent, but unresolved, issues concerning the competence of the Commission to review and consider individual and state communications, and whether the Commission should have 'advisory' or 'compulsory' powers[52]. More importantly, the Seminar intensified the awareness of the need to establish the regional system in Africa.

The complement the efforts of the UN towards the creation of an African Commission on Human Rights, non-governmental organisations, the African Bar Associations and other interested groups organised seminars and conferences on regional protection of human rights in Africa[53]. For instance, the International Commission of Jurists played a leading role in the campaign to establish a regional system of human rights in Africa.

In addition to having arranged the 1961 Lagos Conference and the Dakar Conference of 1967, the International Commission of Jurists in conjunction with the Association Senegalaise d'Etudes et Recherches Juridiques held the Dakar Colloquium on "Development and Human Rights" in September 1978. The Colloquium in its conclusions called for:

> "(a) The establishment at the Pan-African level of a Convention on human rights.
>
> (b) The creation of sub-regional institutes of human rights for their promotion by information, documentation, research, and the awakening of public opinion.
>
> (c) The creation of one or several inter-African Commissions on human rights composed of independent judges authorized to examine complaints concerning violations of human rights.

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52 Ibid.

53 For a chronological list of Human Rights Conferences and Seminars in Africa leading up to the adoption of the African Charter on Human & Peoples Rights in June 1981, See Appendix VII post.

(d) The creation within African States of mass organisations capable of effectively defending human rights"[54].

The Dakar Colloquium concluded its deliberations by requesting the Organisation of African Unity and all African States to do everything possible to establish a system of guarantees and verifications of human rights in Africa"[55].

The Dakar Colloquium reverted to the formulae of previous Seminars by couching its conclusions as urgent requests to the OAU. However, unlike the previous seminars, the Colloquium was exceptional in forming a "follow-up" committee, composed of four eminent Africans to ensure the implementation of its conclusions and recommendations. The committee embarked on shuttle of strategically chosen African capitals to impress upon Heads of State the importance and urgent need, for a regional human rights commission. Judge Keba Mbaye[56] states that it was as a result of the "follow-up" committees efforts that the President L.S. Senghor of Senegal agreed to present a resolution for the establishment of an African human rights commission to the next session of the OAU and he also mandated the President of the Supreme Court of Senegal, as President of the Committee responsible for preparing the draft text[57].

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[54] See Y. Kushalani "Human Rights in Asia and Africa" in Human Rights Law Journal Vol.4, No.4 1983, p.433.

[55] Ibid.

[56] President of the ICJ and former President of the Supreme Court of Senegal.

[57] Keba Mbaye "Keynote Address: Introduction to the African Charter on Human & Peoples Rights op cit p.22. It is pertinent to note that the Senghor draft, as amended by the addition of "peoples rights", formed the basis of Resolution 115(XVI) (July 1979) of the Assembly of Heads of State and Government of the OAU which instructed the Secretary-General of the OAU to form a Committee of African Legal Experts to be responsible for the preliminary draft of an African Charter on Human & Peoples Rights.

An examination of the foregoing seminars reveals that the overwhelming majority of participants, at the UN and ICJ conferences on the enhancement of human rights were mostly academics, diplomats and judges; there was a noticeable absence of practising barristers[58]. It is indeed surprising that legal practitioners who are at the vanguard of the clinical aspects of the defence of human rights in Africa were not prominent in the call for the establishment of a regional commission for Africa. A number of reasons could be proffered for this state of affairs; the most significant being that the age old dichotomy between international law and municipal law discouraged the practitioners of the latter from reaching beyond the frontiers to the former.

However at the Third Biennial Conference of the African Bar Association[59] at Freetown, Sierra Leone, in August 1978, practitioners debated the issue of human rights in Africa and resolved to call on national governments and the OAU to seek a more effective way for the promotion of human rights in Africa. They reiterated the recommendations of previous UN Seminars by calling for the establishment of an African machinery for the promotion and protection of human rights.

In February 1978, the UN Commission on Human Rights adopted a Nigerian resolution that the UN Secretary-General "take appropriate steps to give the Organisation of African Unity, if it so requests, such

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58 A possible exception was the 1st ICJ Lagos Rule of Law Conference in 1961 which was organised in conjunction with "Liberty" (the now defunct Nigerian Chapter of the ICJ) a body composed mostly of barristers.

59 See Amnesty International Newsletter Vol.8 No.10 (1978).

assistance as it may required in facilitating the establishing of a regional commission on human rights for Africa"[60].

This resolution laid the foundation for probably the most important UN Seminar on human rights to take place in Africa[61]. The UN Seminar on The Establishment of Regional Commissions on Human Rights with Special Reference to Africa, unlike previous seminars, was held under a very congenial atmosphere; this was due to the fact that barely a month preceding the seminar, the OAU Assembly of the Heads of State and Government of the OAU had also met in Monrovia from 17-20 July 1979. The Assembly had adopted a "Decision on Human Rights and Peoples Rights in Africa"[62].

During the deliberations of the Assembly leading the adoption of the Decision, references were made to obstacles[63] in the OAU Charter which prevented the efficient promotion and protection of human rights in Africa. Alluding to the failure of the OAU to comment on widely publicised human rights violations in Uganda and her failure to intervene

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60 It is significant that 10 years earlier, Nigeria had introduced a similar resolution in the Commission on Human Rights (passed 28-0-3) establishing an 'ad hoc' group to "study in all its aspects the proposal to establish regional commissions on human rights within the United Nations family". 26 January 1968. UN Doc E/CN 4/966.

61 The UN Seminar on "The Establishment of Regional Commissions on Human Rights with Special Reference to Africa" Monrovia, Liberia 10-21 Sept 1979, UN Doc ST/HR/SER.A/4. Attended by participants from 30 African States as well as observers from specialized agencies, regional organisations and NGO's. It is of interest to observe that this was the very first UN Seminar to be attended by the OAU, represented by the OAU Secretary-General, Mr. Edem Kodjo, and the OAU Chief Legal Adviser, Mr. C.O. Egbunike.

62 Decision on Human Rights and Peoples Rights in Africa: Decision 115(XVI) Rev.I OAU Doc AHG/115 XVI.

63 The major obstacle being the OAU principle of non-intervention in the domestic affairs of Member States. For an analysis of this principle see Chapter 2, above.

in the Tanzanian/Uganda war early in 1979[64], President Tolbert remarked that:

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[64] Wani I.J. "Humanitarian Intervention and the Tanzania Uganda War" Horn of Africa Vol.3, No.2 (1980) p.18-27.

> "All of us are convinced that the Charter of the OAU needs to be examined and sense made so that matters such as this (Uganda/Tanzania issue) can be handled appropriately in future"[65].

In the final analysis, the Assembly took the Decision on Human Rights and Peoples Rights in Africa which inter alia called on the OAU Secretary-General to:

> "(a) draw attention of Member States to certain international conventions whose ratification would help to strengthen Africa's struggle against certain scourges, especially apartheid and racial discrimination, trade imbalances and mercenarism.
>
> (b) organise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an "African Charter on Human and Peoples Right" providing, inter alia for the establishment of bodies to promote and protect human and peoples rights"[66].

Encouraged by this "historic decision"[67], the UN Dakar Seminar proceeded on an incisive analysis of the problems of promoting and protecting human rights in Africa, and emerged with the "Monrovia Proposal for the setting up of an African Commission on Human Rights"[68].

In his opening address to the UN Dakar Seminar, T. Van Boven in his capacity as the Director of UN Division on Human Rights, emphasised the need for a "grass roots" approach to human rights whereby African peoples should adopt measures best suited to their respective needs in

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65 Keesings Contemporary Archives (Bath) p.19463A.

66 Decision 115(XVI) Rev.1 OAU Doc AMG/115.XVI. Article 2 Para.(b).

67 The OAU Secretary-General described this decision as "historic" because it was the first time that the OAU had taken a concrete step on human rights. See Keesings Contemporary Archives op cit p.29842.

68 UN Doc ST/HR/SER A/4.

enhancing the promotion and protection of human rights[69]. The seminar noted that the OAU Member States did not show the political homogeneity which characterized the members of certain other regional organisations. It was also observed that the African States were mainly concerned with improving the living conditions and basic education of their peoples. It was decided that the recommendations should be undertaken within the framework of the OAU Decision adopted by the Assembly of Heads of State and Government in July 1979[70].

Whilst the UN Seminar agreed that the function of an African Commission on Human Rights should be primarily promotional, it also insisted that the principle of non-interference in the internal affairs of a sovereign state should not exclude international action when human rights are violated in a particular African State[71].

As regards the procedural, fact finding and investigative functions, the participants were divided in their opinions. Doubts were expressed over whether the proposed Commission should consider individual petitions. Some participants considered that the petition procedure was the heart of any protective system; while others believed that to deal with individual complaints would be premature, because it was necessary to initially educate and enlighten people of their individual rights[72].

There was, however, general agreement that the OAU Council of Minister or the Assembly of Heads of State and Government of the OAU might wish to ask the commission to undertake fact-finding in cases involving

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69 Theo Van Boven, People Matter: Views on International Human Rights Policy (1982 Meulenhoff, Nederland bv) p.165.

70 Ibid Para.63.

71 Ibid Para.70.

72 Ibid Para.58.

reports of serious violations of human rights, and that this function should be provided for when setting up the African Commission[73].

Bearing in mind the plight of previous UN Seminars, the working group decided to prepare concrete proposals for the establishment of an African Commission. It saw the advantage of the proposals being useful to the OAU Meeting of Experts which was scheduled to be convened in accordance with the Decision of the OAU Assembly of Heads of State and Government.

Thus a comprehensive "blueprint" for the proposed Commission was drafted and labelled the "Monrovia Proposal" by the UN Seminar. The Monrovia Proposal contained 15 draft articles in six parts viz: (i) the functions of the Commission; (ii) applicable standards; (iii) membership and elections; (iv) the Secretariat; (v) matters of procedure; and (vi) annual report.

The Monrovia Proposal states that the function of the African Commission shall be "to promote and protect human rights in Africa" by undertaking studies and research in the field of human rights, promoting education seminars, disseminating information, encouraging national and local human rights organisations and rendering advice to Governments[74].

The applicable standards by which the Commission shall be guided are the provisions of specific African instruments on human rights which may be concluded, such as a declaration, a charter or convention, the provisions of the UN Charter, the Charter of the OAU, the Universal Declaration of Human Rights and the provisions of other UN and African

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73 Ibid.

74 Article 1, Monrovia Proposal UN Doc ST/HR/SER.A/4 Annex I.

instruments in the field of human rights[75].

The Monrovia Proposal also provided that membership of the African Commission on Human Rights shall consist of sixteen experts chosen from among "persons of high moral character and integrity and recognized competence in the field of human rights"[76].

On the method of establishing the Commission, the majority of participants were in favour of a commission to be established within the institutional structure of the OAU, but functioning independently. It was agreed that the Commission should be established by a decision of the OAU Assembly of Heads of State and Government under Article 20 of the OAU Charter or by treaty[77].

Thus the Monrovia Proposal states that "the Secretary-General of the OAU shall designate a Secretary of the Commission and provide the necessary staff and facilities for the effective performance of the functions of the Commission. The cost of providing such staff and facilities shall be born by the OAU"[78].

As regards the Procedure and Reports of the Commission, the Monrovia Proposal charges the Commission with the responsibility of adopting its own Rules of Procedure[79] and states that an annual report shall be

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[75] Ibid Article 2; Article 60 of the African Charter on Human & Peoples Rights is a restatement of Article 2, Monrovia Proposal.

[76] Ibid Article 4; cf Article 31 of the African Charter on Human & Peoples Rights which states that the Commission shall consist of eleven Members.

[77] UN Doc ST/HR/SER.A/4 Para.63.

[78] Monrovia Proposal, Article 10 Ibid. It is interesting to note that Article 41 of the African Charter on Human & Peoples Rights is almost an exact reproduction of Article 10 of the Monrovia Proposal.

[79] Ibid Article 14.

submitted by the Commission through the Secretary-General to the Assembly of Heads of State and Government of the OAU[80].

A comparative analysis of the Monrovia Proposal and the African Charter on Human & Peoples Rights reveals that most of the proposals of the former are reflected in the latter. In an interview with this writer, Professor Osita Eze[81], stated that the UN Monrovia draft "provided a useful precedent" by which the OAU Meeting of Legal Experts were guided in their task of drafting an African Charter[82].

The intention of the UN Seminar was to transmit the 'Monrovia Proposal' to the Chairman of the OAU, President Tolbert of Liberia, for consideration by the OAU Meeting of Experts on the African Charter on Human and Peoples Rights. However this plan was pre-empted by a military coup d'etat which overthrew his government. Despite this temporary setback the Monrovia Proposal was eventually submitted to the OAU Secretariat which duly incorporated it as one of the working papers for the OAU Committee of African Legal Experts to Draft the African Charter. The Ministerial Conference of the OAU, as its meeting in Banjul, Gambia, in June 1980, was presented with the draft African Charter on Human and Peoples Rights. We shall consider the progress of the Draft Charter under the auspices of the OAU in the next chapter.

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80 Ibid Article 15; cf Article 54 of the African Charter on Human & Peoples Rights which requires the Commission to submit a report to each ordinary Session of the Assembly which meets annually.

81 Professor of Law, Imo State University, Nigeria and a member of the Group of 20 Experts appointed by the OAU to prepare a preliminary draft of an African Charter.

82 See also, O.C. Eze Human Rights in Africa: Some Selected Problems op cit p.211.

From the foregoing, the invaluable contribution of the UN towards the evolution of a regional organ for the protection of human rights in Africa is manifest. In the light of the fact that the pace towards this metamorphosis was slow, it is pertinent to inquire into factors responsible for this delay.

(e) Obstacles to the Establishment of a Regional Machinery for the Protection of Human Rights in Africa

The twenty-year process[83] seems a very long time in evolving a regional human rights protection machinery for Africa. Several reasons can be proferred for this slow evolution.

One of the main reasons for the delay in achieving this objective, probably lies in the nature and organization of the seminars. The conferences and seminars on human rights in Africa were not sponsored by the OAU and they lacked effective participation by African States, consequently there was an absence of political will to ensure follow-up action. This conclusion is derived from the fact that despite the express invitations extended to the OAU Secretariat to attend the 1969 and 1973 UN Seminars, the OAU was not represented. Furthermore, a perusal of the status of member-states delegates at the Seminars reveals that about one-half were members of the diplomatic corps. One would have expected a higher cadre of political officers, who wield more political influence, to have been the representatives of African Governments at these Seminars.

The fact that the other delegates were mainly academics lends credence to the contention that the academic tone in which the UN Seminar recommendations were drafted posed an obstacle to the establishment of

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83 From the 1961 Rule of Law Conference in Lagos to the 1981 adoption of the AFCHPR.

an African Commission because they were not drafted in sufficiently action-oriented terms to facilitate the process of decision making.

Secondly, the difference in the methods of protecting human rights in legal systems of African States have created obstacles despite the fact that most African constitutions have a common Judaeo-Graeco orientation. These differences have also been amplified by the various political ideologies adopted. Thus there was an absence of effective African consensus on the form that fundamental rights in a regional charter on human rights should take. Much as the majority of African States proclaim the policy of nonalignment in foreign relations, the political reality differs. The western liberal capitalist ideology, and the socialist/Marxist ideology have influenced and continue to influence the domestic laws and policies of African States. The dichotomy of political ideologies has invariably influenced the evolution of the African Charter of Human and Peoples Rights. For instance, during the deliberations of the OAU Council of Ministers 37th Ordinary Session, on the draft AFCHPR, the debate on the provisions on property rights unduly prolonged the meeting[84]. The compromise arrived at is couched in Article 14 of the AFCHPR. We shall examine the drafting history of the provisions of the AFCHPR in the following chapter.

Thirdly, the strong aversion of African States to interference in their internal affairs has contributed to the delay in evolving a regional Charter on human rights. African States have hitherto regarded questions of human rights as matters of domestic jurisdiction. The attitude of the OAU towards massive violations of human rights in Africa underlines this view. For instance, during Idi Amin's massive violations

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84 Report of the Secretary-General on the Draft African Charter on Human and Peoples Rights (37th Ordinary Session of the OAU Council of Ministers June, 1981); OAU Doc.C/M/1149(XXXVII) 19811, p.12, para.57.

of human rights in Uganda, the organization failed to react or condemn the practices.

The fragility of African States occasioned by internal destabilization forces of ethnicity[85] and military intervention amongst others, have been obstacles to the evolution of a regional human rights machine. Military intervention in African politics has resulted in the brutalization of African societies and the degradation of human dignity, manifested by the suffering of the mass of African populace[86]. Thus, where human rights practices of States have been dismal, there exists a vivid reluctance to subject these practices to a regional or international periscope. African States have, thus, hitherto been unwilling to lift the vent of sovereignty for human rights considerations. Whether these States will raise the defence of "domestic domain" to regional perusal of human rights violations under the AFCHPR remains to be seen.

The prevailing economic underdevelopment of Africa has been a major stumbling block to the evolution of a regional machinery for human rights in Africa. At least twenty out of the thirty "least developed" and poor countries of the world are in Africa[87]. Professor Osita Eze's contention, that the very existence of rich and poor nations is by itself a negation of the very concept of human rights[88] is indicative of the need for the developed nations to reappraise their attitude to the establishment of a New World Economic Order. In the absence of a determined international effort to redress the world economic imbalance,

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85 For a discussion on ethnicity in Africa, See Chapter 4.

86 Zdenek Cervenka "The Effects of Militarization of African on Human Rights" Africa Today 1st/2nd Quarter 1987, p.77.

87 UNCTAD Press Release TAD/INF/1120, 26 Nov 1979.

88 O. Eze "Prospects for International Protection of Human Rights in Africa", op cit p.88.

African States have been and will be prepared to sacrifice the observance of civil and political rights for the purpose of achieving economic progress[89].

It is therefore suggested that the prerequisites for an effective regional machinery for the protection of human rights in Africa are:

(a) the reappraisal of African constitutional provisions and domestic laws, relating to human rights in alignment with the AFCHPR;

(b) the democratization of the political processes in African States through periodic elections[90];

(c) the establishment of a New World Economic Order and the pursuance of the policy of self-reliance by African States.

These factors should to a large extent enhance the regional protection of human rights in Africa.

In his appraisal of human rights and the rule of law in Africa, Professor E. Bello contends that "a Charter on Human Rights acceptable to 50 Members of the OAU is illusory and unworkable"[91]. Much as that illusion has been dispelled to an extent by the adoption and entering into force of the AFCHPR, we submit that the practicability or enforceability of the Charter may yet succumb to some of the obstacles enumerated above.

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89 For a discussion of Socio-Economic Self-Determination in Africa, see Chapter 3, above.

90 cf Professor O. Eze however contends that periodic elections are not necessarily more democratic than military regimes, nor are multiparty states more in consonance with the aspirations of the people than one-party states - O. Eze; Human Rights in Africa - Some Selected Problems op cit p.207.

91 E.C. Bello "Human Rights: The Rule of Law in Africa" Vol.30 ICLQ July 1980.

(f) African Response to UN Programmes and Procedures for the Protection of Human Rights

African States have shown a great deal of interest in human rights and their promotion through the United Nations. Since their independence in the early 1960's African countries have used their voting power to influence the General Assembly debates towards a greater consideration of human rights issues.

The UN Commission of Human Rights was created by virtue of Untied Nations Charter's Article 68, as the central UN organ for dealing with human rights violations. It was established in 1946 by the Economic and Social Council (ECOSOC)[92]. At its Second Session in May 1946, the Commission was empowered to create a sub-commission on the Prevention of Discrimination and the Protection of Minorities, which has come to play an important role in attempts to create effective machinery for implementing the protection of human rights. Unfortunately, the Commission decided at the onset that neither itself nor the Sub-Commission had "power to take any action in regard to complaints concerning human rights"[93]. This self-restraining role approved by the ECOSOC, was to remain in effect until 1967. The effect therefore was that complaints sent to the UN concerning violations of human rights were shut out by the Commission on the basis of its 1947 decision that it was not competent to investigate or take any action on these complaints[94].

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92 Sir Samuel Hoare, "The UN Commission on Human Rights" in Evan Luard (ed) The International Protection of Human Rights: (New York: Praeger, 1967) p.59.

93 Ibid at p.63.

94 William Korey, "The Key to Human Rights Implementation" International Conciliation, No.570 (November 1968) p.18.

However, the situation was changed in 1966 as a result of the growing African vote at the UN and an intensification of the interest in apartheid on the African continent.

In March 1967, the Commission requested that ECOSOC authorise it and its Sub-Commission "to examine communications received by the United Nations for information relevant to 'gross violations' of human rights and fundamental freedoms"[95]. ECOSOC acceded to the request by adopting Resolution 1235(XLII) on 6 June 1967. The Commission also requested for authorisation to undertake a thorough study and investigation of situations that reveal a consistent pattern of violations of human rights and to report with accompanying recommendations concerning them to ECOSOC. ECOSOC Resolution 1235 approved this request[96].

In October 1967, the Sub-Commission acted under the new powers granted to the Commission to study information and report on cases which might indicate "situations which reveal a consistent pattern of violations of human rights as exemplified by the policy of apartheid... and racial discrimination"[97]. The Sub-Commission relied on the reports supplied to the UN by Amnesty International, dealing with human rights violation in Greece and Haiti. The Sub-Commission recommended to the Commission that it consider both cases[98].

As its February 1968 Session, the Commission heard Haiti's representative argue that his country was cited in an attempt to divert the Commission's attention from the consideration of apartheid. The

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95 Commission on Human Rights, Res.8 (XXIII) 16 March 1967.

96 W. Korey, op cit p.18.

97 ECOSOC Res.1235(XLII), 16 March 1967.

98 W. Korey, op cit, p.21.

Nigerian delegate raised the issue of domestic jurisdiction while Tanzania expressed anger over the Sub-Commissions decision to review violations outside Southern Africa. Tanzanias reservation was that the Sub-Commission had transgressed the resolution passed at the 1968 Session of the Commission which requested the Commission to consider "all situations, which it has a reasonable cause to believe reveal a consistent pattern of gross violations of human rights and fundamental freedoms" as limited to those cases "as exemplified by the policy of apartheid in South Africa and social discrimination in Southern Rhodesia"[99]. The Tanzanian delegate also successfully proposed that the Sub-Commission which consists of independent experts, be expanded from eighteen twenty-six experts[100]. The additions were mostly from Afro-Asian States. Although critics expressed doubts as to whether the Sub-Commission would consider violations other than those in South Africa, the Sub-Commission did discuss cases outside South Africa, albeit rarely in open session.

From the foregoing it is evident that violations in Southern Africa was one of the main factors that geared a greater interest in human rights at the UN. This development was not unconnected with the impact of the presence of African States at the UN. Some critics[101] have accused African States of a selective approach to the protection of human rights at the UN. While African States have, on the one hand, called for

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99 Ibid at p.23.

100 The Sub-Commission is composed of 7 nationals from Africa, 5 from Asia, 5 from Latin America, 3 from Eastern Europe and 6 from Western Europe.

101 Warren Weinstein "Africa's Approach to Human Rights at the UN". Issue Vol.VI No.4 (Winter 1976) p.16.

investigation of human rights violations in South Africa, on the other hand, they have resisted public debate of violations in other areas with the exception of Israeli Occupied Territories[102].

While we accept that plausible grounds do exist for such criticism, it is contended that the inherent procedural restrictions on the UN's human rights protection systems are largely responsible. Nevertheless, African States have been instrumental to the redefinition of the protection systems to ensure a greater protection of human rights.

A significant development in this wise was the authorization to the Commission of Human Rights by ECOSOC in 1970 to establish procedures for investigating gross violations of human rights[103]. Two of the most important items on the agenda of the Commission and Sub-Commission are entitled respectively "violation of human rights" (a public procedure) and "examination of communications" (a confidential procedure). The public procedure may be divided into a "country oriented" and a "thematic" method. The latter relates to a particular type of human rights violation; the former gives special attention to human rights violations in a particular country[104]. Since these procedures were established, the Sub-Commission has drawn the attention of the Commission to cases other than violations in Southern Africa.

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[102] Ibid; cf. Eddison J.M. Zvogbo "The Abuse of Executive Prerogative: A Purposive Difference Between Detention in Black Africa and Detention in White Racist Africa", 'Issue' Vol.VI No.4 Winter 1976. E. Zvogbo argues that there are striking differences between human rights violations in Black Africa and South Africa.

[103] ECOSOC Res.1503 XLVIII 27 May 1970. See further; Jakob Th.Moller "Petitioning the United Nations". Universal Human Rights Vol.1 No.4 1979 p.62. See also Maxime Tardu "United Nations Response to Gross Violations of Human Rights: the 1503 Procedure, Santa Clara Law Journal (1980) p.559.

[104] See Marc J. Bossuyt "The Development of Special Procedures of the United Nations Commission on Human Rights" HRLJ Vol.8 No.2-4 (1985) pp.179-210.

Between 1978 and 1985 the Commission has dealt with the situation of human rights in 29 countries within the framework of the 1503 confidential procedure. Despite the confidential nature of the procedure, the following African Countries were declared as subjects of the decisions of the Commission: Equitorial Guinea (1978); Ethiopia (in 1978, 1979, 1980 and 1981); Malawi (1978 and 1979); Uganda (1978, 1979, 1980 and 1981); Central African Republic (1980, 1981); Benin (1984) and Zaire (1985).

One of the main criticisms against the 1503 Procedure is the "veil" of confidentiality that surrounds the substance of the Commissions decisions. It should however be emphasized that despite the confidentiality that veils the 1503 procedure, its effectiveness is enhanced by the fact that State subjects of the procedure are known not only to the 26 independent experts of the Sub-Commission but also to the 43 Governments which comprise the constantly renewed Commission. Thus all the relevant UN and State Members of the UN human rights organs are aware of the human rights situation in the countries concerned; a significant factor which should prove embarrasing to the governments concerned.

Under the regime of the public procedure ("violation of human rights") which is based on ECOSOC Resolution 1235(XLII) of 6 June 1967, the members of the Commission and Sub-Commission can, during a debate in public session, mention violations of human rights in any part of the world. This procedure has led to the adoption of resolutions and in special cases to the establishment of special procedures[105]. In addition

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105 For instance, under this procedure, the Commission established a "Special Working Group of experts in Southern Africa" with a mandate on human rights issues in Namibia and South Africa (Res.2(XXIII) of 6 March 1967). See M. Tardu, Human Rights: The International Petition System (Dobbs Ferry, Oceana, 1980) Vol.II part Six, XII, 24.

to the foregoing, the "country oriented" approach has also been adopted under the public procedural regime. The only African State subjected to this regime was Equitorial Guinea. The cumulative effect of the Commissions resolutions[106] under this procedure led to the improvement of human rights in Equatorial Guinea and the modification of its Constitution through the adoption of 25 out of the 37 recommendations proposed by the Commission.

Under the regime of the public procedure, the "thematic" approach was developed through the establishment of a Special Working Group on missing persons (since 1980), and Special Rapporteurs on mass exoduses (1981), on summary executions (1982) and on torture (1985). While the issue of missing persons has not been raised in connection with any independent African State, it is significant that the Special Rapporteurs on mass exoduses and summary executions have collected data on these phenomena in Africa[107]. With regard to summary executions, the Special Rapporteur collects data which are used for a general survey of the phenomenon. Recently, however, the Rapporteur has adopted a more action oriented method which includes the dispatching of urgent appeals by telegram. The Third Report[108], of the Special Rapporteur, reveals that no replies had been received from Iran, Libya and Malawi; and that

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[106] Res.33(XXXVI) of 11 March 1980; Res.31(XXXVII) of 11 March 1981; Res.1982/34 of 11 March 1982; Res.1983/32 of 8 March 1983 and Res.1985/30 of 11 March 1985. See R. Fegley "The UN Human Rights Commission: The Equatorial Case" 3 Human Rights Quarterly (1981) pp.34-47.

[107] The report of Prince Sadruddin Aga Khan, the Special Rapporteur on Mass Exoduses laid particular emphasis on the amplitude of Mass Exoduses in Afghanistan, Ethiopia, Indo China and Mexico. (UN Doc.E/CN 4/1503, Annex II). See also Lee, L. "The UN Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees" American Journal of International Law Vol.1 78 (1984) pp.480-484.

[108] UN Doc E/CN.4/1985/17.

urgent telexes were sent to 13 States including 6 African States[109].

The evolving procedures of the UN Commission on Human Rights have significant advantages. The "thematic" approach, though laying particular emphasis on categories of violations of human rights, encapsulates a larger number of States than the case of the "country oriented" approach. The "thematic" approach also reduces the hazard of politically engineered approaches.

From the foregoing it is evident that while the announcement of 'decisions' may sufficiently embarrass many States to mend their ways, some may need publication[110], while others, the 'big stick'[111].

We share Professor Zvogbo's contention that "all evidence suggests that people can usefully combine to denounce human rights violations in Black Africa because African Governments are sensitive to such denunciation... They can be shamed into modifying or even abandoning their present lapses... As for South Africa... the white regimes will not - cannot - be shamed into abandoning terror, torture and detention"[112].

The sensitivity of African States to such denunciations and their propensity to preserve State sovereignty is probably instructive in their relatively poor response to ratifying international human rights

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[109] The African States are: Angola, Cameroon, Liberia, Nigeria, Somalia and Sudan - Ibid para 18 (only Somalia sent a reply).

[110] For instance, in the case of Equatorial Guinea, the Commission has adopted the public procedure under Commission Resolution 8(XXIII) and Council Resolution 1235 XLVII; see UN Doc. E/DEC/1979/35.

[111] See UN General Assembly Resolution 3411 D(XXX) of 1975 by which the UN Security Council unanimously imposed an embargo against South Africa.

[112] E. Zvogbo, op cit p.42.

instruments. Out of some 50 such instruments[113] African States have concertedly responded only to human rights instruments relating to apartheid, racial discrimination and the Status of Refugees; not surprisingly, these are matters that are of immediate concern to most African States.

However, just beneath the UN Charter and the Universal Declaration in importance are the two international Covenants[114]. An examination of the list of ratifications of the two Covenants reveals that the African response has been dismal.

As of 31 December 1987 out of 51 African Member States of the UN only 22 States had ratified the International Covenant on Civil and Political Rights while 24 States ratified the International Covenant on Economic, Social & Political Rights[115]. In comparison, the Convention relating to the Status of Refugees and Protocol thereto has been ratified by 44 African States, while the International Convention on the Elimination of All Forms of Racial Discrimination has been signed by 42 African States[116]. It is instructive here to note that as at 12 May 1987, 33 African countries had ratified the African Charter on Human & Peoples Rights.

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113 United Nations, Human Rights: A Compilatin of International Instruments UN Doc ST/HR/1/Rev.2 (1978).

114 International Covenant on Economic & Social Cultural Rights, and The International Covenant on Civil & Political Rights General Assembly Resolution 2200 UN AGR, Supp (No.16) 49, 52 UN Doc A/6316 (1966). The Economic Covenant entered into force 3 January 1976 and the Political Covenant entered into force 23 March 1976, both having been opened for signature ten years earlier.

115 For the Table on the Pattern of Ratification of Regional and Selected International Instruments on Human Rights by African States, see Appendix X at post.

116 Ibid.

The failure of the majority of African States to ratify the two Covenants at least in tandem with their positive response to the African Charter on Human & Peoples Rights raises some issues.

Firstly, the concordance of the substantive provisions of the African Charter with the provisions of the Covenants; secondly, the obligations undertaken by States on ratifying the Covenants.

An examination of these two issues should reveal the reasons for the apparent reluctance of the majority of African nations to ratify the Covenants.

The International Covenants on Civil and Political Rights (hereinafter referred to as the "Political Covenant") and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the "Economic Covenant") are essentially composed of the rights enumerated in the Universal Declaration of Human Rights[117].

The Political Covenant (and the Universal Declaration) include the following civil and political rights: the right "to take part in the conduct of public affairs, directly or though freely chosen representatives" with "genuine periodic elections" by universal suffrage; the freedoms of expression, religion, assembly, and association which include (as in the Economic Covenant) the right to form and join trade unions, freedom of movement, provisions for the protection of family life and the right of privacy, the right to life, liberty, and security of the person; the prohibition of slavery, torture and cruel, inhuman or degrading treatment or punishment, the right to a fair trial in both

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117 The African Charter expressly includes the "Universal Declaration of Human Rights and other international human rights instruments" as some of the "applicable principles" from which the African Commission on Human & Peoples Rights" shall draw inspiration" Article 60.

criminal and civil matters; the presumption of innocence and the prohibition of retroactive laws and penalties in criminal matters; and as in the Economic Covenant, the exercise of rights without discrimination.

The Economic Covenant, inter alia recognises the following substantive rights: the right to an adequate standard of living; the right to the enjoyment of the highest attainable standard of physical and mental health; the right of everyone to education; the right to freely chosen work; the right to form and join trade unions; the right to social security, including social insurance; the protection of the family, mother, children, and young persons; the right to take part in cultural life; and the exercising of rights without discrimination.

Our analysis of the concordance of the foregoing Covenant of rights and freedoms with those contained in the African Charter on Human & Peoples Rights reveals that the latter contains corresponding provisions[118] albeit subject to some modifications and style of drafting[119].

Consequently, the nature of the substantive rights protected by the Covenants cannot be plausibly advanced as a reason for the reluctance of African States to ratify the Covenants. Even if this were so, such an argument cannot stand against the fact that States are permitted to enter reservations to the provisions of the Covenants that do not meet

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[118] See the Comparative Table of the Provisions of the African Charter with corresponding provisions in Selected International Human Rights Instruments, Appendix V, post.

[119] One significant exception is that the African Charter does not have a provision comparable to Article 4 of the Political Covenant which absolutely forbids derogations from certain rights; these include right to life, freedom from torture, or cruel inhuman or degrading treatment as punishment; freedom from slavery; freedom of thought, conscience and religion.

with their approval[120].

This brings us to the question of the legal obligations of governments which ratify the UN Covenants.

The two Covenants impose different legal obligations on States which ratify them. The Political Covenant imposes obligations on, which may be divided into National and International Measures of Implementation and Supervision. As regards National Measures, the Political Covenant, immediately imposes several obligations on a State Party. First, if a State Party does not already have sufficient legislative or other measures for the implementation of the Political Covenant in its municipal law, it must take necessary steps to adapt such measures with a view to give effect to the rights recognised therein. Secondly, a State Party has the duty to ensure that any individual whose rights or freedoms are violated shall have an effective remedy. Thirdly, where a State Party has the choice to make those remedies available through judicial, administrative, legislative, or other competent authorities, it shall provide a judicial remedy as soon as possible. Finally, a State Party is under an obligation to ensure that the competent authorities shall enforce such remedies when granted.

With reference to international measures of implementation, the Political Covenant requires State Parties to submit "reports on the measures they

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120 For instance, the Congo, on ratification of the Political Covenant, entered a reservation to Article 11, which states that "No one shall be imprisoned merely on the grounds of inability to fulfil a contractual obligation". Congo's reservation was based on the fact that the article was incompatible with the provisions of the Congolese Code of Civil, Commercial, Administrative and Financial Procedures (Act 51/83 of 21 April 1983) which allows imprisonment for civil debts in excess of 20,000 CFA and when other means of enforcement have failed. However see the objection of Belgium to the Congolese reservations - in UN Multilateral Treaties Deposited with the UN Secretary-General as at 31 December 1986, p.137.

have adopted which give effect to the rights recognized (therein) and on the progress made in the enjoyment of those rights"[121]. These reports are considered by a special Human Rights Committee which may make comments thereon to the State Parties and can transmit them also to the Economic and Social Council[122].

Furthermore, the Political Covenant includes an optional provision permitting a party to declare that it recognises the competence of the Human Rights Committee, established by the Political Covenant, to receive and consider communications to the effect that the State Party is not fulfilling its obligations under the Political Covenant[123].

The reluctance of the African States may be appreciated in the context of obligations required of State Parties to the Political Covenant. A significant proportion of African States are governed by military regimes few of which are benevolent. Consequently, ratification of the Political Covenant may be interpreted firstly as surrendering aspects of State sovereignty to international perusal. Secondly, ratification by many an African government, being military, implies an admission that its existence is illegal, since it is not composed of "freely chosen representatives elected... at genuine elections"[124].

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[121] Political Covenant, Article 40(1).

[122] Ibid Article 40(2). See Dana Fisher, "Reporting under the Covenant on Civil and Political Rights: the first five years of the Human Rights Committee" American Journal of International Law (1982) p.142; Jhabuala Faurkh, "The Practice of the Covenants Human Rights Committee 1976-1982: review of state party reports" Human Rights Quarterly (1984) Vol.6 p.81.

[123] Political Covenant, Article 41(1). The same article states that the Committee shall not accept a communication if it has been made by a State Party which has not made a similar declaration recognising the competence of the Committee in regard to itself.

[124] Article 25, Political Covenant.

We submit that since most military regimes in Africa describe themselves as "temporary" and "corrective" in order to prepare grounds for return to democracy, they ought to ratify the Political Covenant as a symbol of their commitment to their perceived goals.

The Optional Protocol to International Covenant on Civil and Political Rights[125] has been ratified by only 9 African States[126]. The very dismal response of African States to the Optional Protocol may be due to the fact that individuals who are subject to the jurisdiction of a State Party and who claim to be victims of a violation by that State of any of the rights set forth in the Political Covenant may send direct communications to the Human Rights Committee[127]. However the Optional Protocol, not unlike other international human rights instruments that allow individual communications, requires the exhaustion of local remedies before communications can be submitted to the Human Rights Committee[128].

African Nations may be encouraged by Louis Sohn's conviction that "the procedure under the Political Covenant and the Optional Protocol is less likely to involve gross violations of human rights, and is probably destined to deal primarily with the difficulties caused by the imperfect

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[125] General Assembly Resolution 2200 UN GAOR, Supp (No.16) 59, UN Doc A/63166 (1966).

[126] The following African States are parties to the Optional Protocol; Cameroon, Central African Republic, Congo, Madagascar, Mauritius, Niger, Senegal, Zaire and Zambia. (Guinea has signed the Optional Protocol.) as at 15 January 1988.

[127] Optional Protocol, Article 1.

[128] Optional Protocol, Article 5(2); For a discussion on the Exhaustion of Local Remedies, see Report of the International Law Commission, 32 UN GAOR, Supp (No.10) 67-116, UN Doc A/32/10 (1977) reprinted in 1977 2(2) Yearbook of the International Law Commission 67-116 UN Doc A/CN.4/Ser.A.1977/Add.1 Part 2. See also Y. Adede; a Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies 18 Harvard International Law Journal (1977).

introduction of international human rights provisions into domestic legal systems"[129].

Furthermore, obligations assumed by State Parties to the Political Covenant do not prevent them. "from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them"[130]. With regard to communications from individuals, the Optional Protocol prohibits the Human Rights Committee from considering such communications when 'the same matter' is being examined by another 'procedure of international investigation or settlement'[131].

Consequently, we may safely assume that where a matter is under the consideration of a regional commission such as African Commission of Human & Peoples Rights, the UN Human Rights Committee is unlikely to examine the same matter. Whether the same matter can be examined, as in exhaustion of local remedies, by the UN Human Rights Committee after being unsatisfactorily resolved at the regional level is not clear. What is clear is that the African Charter on Human & Peoples Rights does not adopt the exclusive approach of the European Convention on Human Rights under which State Parties undertake that "they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting by way of petition, a dispute arising out

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129 Louis B. Sohn, "Human Rights: Their Implementation and Supervision by the United Nations" in T. Meron (ed) Human Rights in International Law: Legal Policy Issues, op cit p.392.

130 Political Covenant, Article 44.

131 Optional Protocol, Article 5(2)(a).

of the interpretation or application" of the Convention to "a means of settlement, other than those provided in the European Convention"[132].

Consequently, whether by accident or design, the African Charter has placed its Commission on Human & Peoples Rights in the position whereby its recommendations and indeed the decision of the Assembly of Heads of State and Government on a communication deemed unsatisfactory by a party may be subject to review by UN procedures.

We submit that there is a need for the General Assembly of the UN to clarify the relationship between the parallel procedures of the specialised agencies and regional organisations.

The obligations assumed by a State Party to the Economic Covenant, differs from those assumed under the Political Covenant. The Economic Covenant obliges a State Party to "take steps... to the maximum of its available resources with a view to achieving progressively the full realisation of the rights recognised in the Covenant by all appropriate means..."[133].

Although the provisions of the Economic Covenant are to be exercised without discrimination[134], the Covenant permits flexibility to developing

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[132] European Convention of Human Rights, Article 62. However parties to the European Convention are free to use the procedure of the Political Covenant with respect to rights not covered by the European Convention - See generally Committee of Ministers Resolution (70)17, reprinted in A. Eissen "The European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights: Problems of Coexistence", in 22 Buffalo Law Review 181, 205-05 (1972); See also Directorate of Human Rights, Council of Europe, Proceedings of the Colloquy about the European Convention on Human Rights in Relation to other International Instruments for the Protection of Human Rights, Athens, 21-22 Sept 1978 (Strausbourg 1979).

[133] Economic Covenant, Article 2.

[134] Ibid Article 2(2).

countries. The Covenant thus states that "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals"[135].

Furthermore, African countries should be attracted to the Economic Covenant by virtue of Article 2(1) thereof which calls upon each State Party to achieve "progressively" the "full realization" of rights in the Economic Covenant "to the maximum of its available resources"[136].

The implementation procedures of the Economic Covenant rely on persuasion of State Parties and to a large extent on their disposition to provide factual information. There are no provisions concerning complaints. State Parties to the Economic Covenant undertake to submit to the Economic and Social Council "reports of the measures which they have adopted and the progress made in achieving the observance of the rights recognized" in that Covenant[137].

We submit that due to the lack of immediacy of the obligations undertaken under the Economic Covenant and the presence of an inbuilt margin of economic appreciation therein, African States should be more

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[135] Ibid Article 2(3).

[136] However, by virtue of Article 4 of the Economic Covenant, "in the enjoyment of those rights provided by the State in conformity with the Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society" (Underlines for emphasis.)

[137] Ibid Article 16; Under Article 17 thereof, these reports "may indicate factors and difficulties affecting the degree of fulfilment of obligations" undertaken.

amenable to it[138]. An examination of the pattern of ratifications of the two Covenants reveals that an equal number of African States have ratified both instruments[139]. Two main deductions may be made from this status quo:

Firstly, the equable ratification by African States of the two Covenants undermines what Jack Donnelly refers to as the predominant view at the UN, which is that the exercise of all economic and social rights is a prerequisite for the exercise of civil and political rights[140].

The limited but equal response of African States to both Covenants underscores the thesis for the interdependence of basic rights[141].

Secondly, the failure of many African States to ratify the Covenants cannot be viewed in the context of primacy of economic and social rights over civil and political rights. If so, the number of African States acceding to the Economic Covenant would have overwhelmed the number of ratifications of the Political Covenant. The comparatively dismal response of African States should be viewed in the context of the

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138 For an analysis of the compliance Tanzania and Kenya to the International Covenants - See Allen McChesney, "The Promotion of Economic and Political Rights: Two African Approaches" in (1980) Journal of African Law Vol.24 No.2 p.163-205.

139 As at 1 January 1988, 22 African States had ratified the Political Covenant while 4 States had signed it. The Economic Covenant has been ratified by 24 African States and signed by 2 States. See Appendix X post, for the Table on the Pattern of Ratification of Regional and Selected international instruments on human rights by African States.

140 J. Donnelly "Recent Trends in UN Human Rights Activity: Description and Polemic, in International Organisations Vol.35 (1981) No.4, p.640. See also Philip Alston, "The Alleged Demise of Political Human Rights at the UN: A Reply to Donnelly" International Organisation Vol.37 (1983) No.3.

141 The Preambles of both the Political Covenant and the Economic Covenant recognize that human rights ideals "can be only achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights". - 3rd Preambular Paragraph (Political Covenant and the Economic Covenant).

prevailing wind of military interregnums on the continent. This contention is underlined by the fact that most of the African State Parties to the Covenants are either single or multi-party democracies.

Consequently, there is a need to enlighten Africans on the implications and benefits of the Covenants. In the absence of an "exclusion clause" in the AFCHPR, African States should regard the ratification of the Covenants as pertinent measure toward enhancing the human rights provisions and measures prescribed by the AFCHPR. The AFCHPR refers to the provisions of the Covenants as subsidiary measures which the African Commission on Human & Peoples Rights shall take into consideration to determine principles of law in so far as they lay down "rules expressly recognized by Member States of the OAU"[142]. By virtue of Article 60 of the AFCHPR, the African Commission wis empowered to "draw inspiration" inter alia from the UN Charter and, by implication, the Covenants being "instruments adopted by the United Nations and by African countries in the field of human and peoples rights". The implications of these provisions shall be examined in the next chapter, but suffice it to say that, even for non-parties, the content of the Covenants represent authoritative evidence of the content of the concept of human rights as it appears in the UN Charter[143].

The UN Human Rights Committee may very well not receive further communications from citizens of African State Parties to the Optional Protocol, provided the new African regional system lives up to

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142 Article 61, AFCHPR.

143 Ian Brownlie (ed) Basic Documents in International Law (OUP, 1981) p.150.

expectations[144]. Nevertheless, the existence and availability of an alternative human rights complaints procedure under the Optional Protocol should prove reassuring to the citizens and peoples of African State Parties thereto, in the event of a resurgence of the regional obstacles earlier alluded to.

(g) Relevance of Other Regional Approaches to Human Rights

The United Nations has been the main spur to the development of human rights institutions at the regional levels. In addition to identifying themselves as, the local champions of the universal cause, regional organisations have encouraged the cross-fertilization of efficient human rights promotion and protection methods. The existing regional human rights institutions have evolved in response to local circumstances peculiar to each region.

There are four notable regional institutions for the protection of human rights; these are the European Convention on Human Rights[145], the American Convention on Human Rights[146], the Permanent Arab

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144 The UN Human Rights Committee (UNHR Committee) has received several communications from individuals in some African States under the Optional Protocol to the International Covenant on Civil and Political Rights. For instance, see Communications No.R.28/132 submitted by Monja Jaona against the Government of Madagascar. In its decision of 1 April 1985, the UNHR Committee was of the view that M. Jaona's communication revealed violations of the Covenant (Articles 9(1) and (2) and 19(2) by Madagascar - [HRLJ Vol.6 Nos.2-4 (1985) p.233]. See also the Decision of the UNHR Committee on Measures against Former Zairean parlimentarians, and the Decision on Candidacy for presidential elections in Zaire (Communications No.138/1985 and No.157/1983 respectively) - in HRLJ Vol.7 No.2-4 (1986) p.277, 280.

145 The European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov 1950, 213 UNRS, 1953, Gr. Britain TS No.7 (Cond.8969) (entered into force 3 Sept 1953) (hereinafter referred to as the "European Convention").

146 The American Convention on Human Rights, No.22 1969, OAT TS No.36 at 1 OAS Doc OEA/Ser.L/V11.23 Doc. 21 Rev.6 (entered into force 8 July 1978), reprinted in 9 ILM (1970) hereinafter referred to as the "American Convention".

Commission on Human Rights[147] and the African Charter on Human & Peoples Rights.

(i) The European Convention on Human Rights

The European Convention is regarded as the "best established" and "most advanced", human rights system within the framework of the classical Western human rights concept[148].

The European Convention represents a common ideology and value system, which evolved in reaction to several factors; the atrocities and obscenities of Nazi Europe, communist expansionism and most significantly, the need for the integration of Western Europe[149]. K. Vasak states that:

> "whenever anyone tries to grasp the political significance of the European Convention on Human Rights and to replace it in the context of European unification for that purpose, he realises that the Convention feeds on European integration and at the same time nourishes it. The supranational elements it contains (particularly the rights to individual appeal and the decision making powers of the Court) would certainly not stand up for long in an organic structure of a

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147 The Permanent Commission of Human Rights of the Arab League (1968). See Arab League Council Resolution 2443 of 3 Sept 1968.

148 R. Higgins "The European Convention on Human Rights' in T. Meron (ed) 'Human Rights in International Law: Legal & Policy Issues op cit p.495; - see also L.Sohn & T. Buergenthal International Protection of Human Rights, Chapter 7 op cit.

149 The idea of the integration of Europe had its genesis in more ancient times but the first deliberate step was taken in 1638 by Sully, Chief advisor to Henry IV of France who in his Grand Design proposed a permanent Council of 15 leading Christian States of Europe whose function would include the discussion of matters of common concern, mediation of disputes and the direction of all civil, political and religious affairs of Europe. See - European Movement and Council of Europe (European Movement Publications, Hutchinson & Co. Ltd. 1950) pp.20-30.

> purely intergovernmental nature, or one which did not contain the seeds of its own redundancy thanks to a process of legal and even constitutional integration"[150].

The European Convention not only translates the Universal Declaration into a European one, it guarantees rights as well as states them. However, not all the rights contained in the Universal Declaration are found in the European Convention.

Economic and social rights were not included in the Convention because they were "too controversial and difficult to enforce even in the changing state of social and economic development of Europe... and their inclusion involved jeopardising the acceptance of the Conventions"[151]. However on 18 October 1961, a European Social Charter was signed which proclaims 19 rights including the right to work, fair remuneration and the right to benefit from social welfare services. The rights proclaimed in the Social Charter can be regarded as mere statements of social policy and goals than obligations or restraints on state policy[152].

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[150] K. Vasak "Problems Concerning the Setting Up of Regional Commissions on Human Rights with Special Relevance to Africa", background paper for United Nations Seminar on the Establishment of a Reginal Commission on Human Rights with Special Reference to Africa, Cairo, 2-15 Sept 1969 p.18-19.

[151] Gordon Weil, The European Convention on Human Rights (The Hague: Nijhoff) (1966) p.28. See also A.H. Robertson Human Rights in Europe, op cit p.149.

[152] The Social Charter is a separate legal instrument and thus lacks the enforcement machinery essential to the Conventions. The rights proclaimed in the Social Charter are not justiceable and establish a minimum standard of state behaviour while recognizing the varying levels of social and economic development of the Member States. The Social Charter ensures a measure of control through a complex system of reports from governments, employer groups and trade union organisations. See further Jacobs "The Extension of the European Convention on Human Rights to include Economic, Social & Cultural Rights" 3 Human Rights Review (1978) p.163.

The Convention places emphasis on the promotion and protection of civil and political rights and on the rights of individuals to present petitions to European Commission[153].

The European Convention essentially covers the following rights; the right to life[154]; prohibition against torture and inhuman or degrading treatment or punishment[155]; prohibition against slavery, servitude, and forced or compulsory labour[156]; liberty and security of the person[157]; fair trial and public hearings by an independent and impartial tribunal in the determination of civil rights and obligations or criminal charges[158]; prohibition of retrospective criminal liability[159]; respect for private life and family life, home and correspondence[160]; freedom of thought, conscience, and religion[161]; freedom of expression[162]; freedom of peaceful assembly and association[163]; and the right to marry and found a family[164]. Although these rights are limited in scope the potential for their effective enforcement is enhanced by other

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[153] Article 25 of the European Convention provides that the parties may recognise the competence of the European Commission to receive petitions "from any person, non governmental organisation or group of individuals claiming to be a victim of a violation of one of the High Contracting Parties of the rights set forth in this Convention". The majority of parties to the Convention have agreed to the operation of Article 25.

[154] Article 2, European Convention.

[155] Article 3, Ibid.

[156] Article 4, Ibid.

[157] Article 5, Ibid.

[158] Article 6, Ibid.

[159] Article 7, Ibid.

[160] Article 8, Ibid.

[161] Article 9, Ibid.

[162] Article 10, Ibid.

[163] Article 11, Ibid.

[164] Article 12, Ibid.

provisions[165]. It has been observed that although the European Convention protects civil and political rights "necessary in a democratic society", and it does not include rights "one might wish to see guaranteed in an ideal commonwealth"[166]. The European Convention also contains qualifying clauses that are attached to most of the foregoing substantive rights. Furthermore, Article 15 of the Convention allows certain rights to be derogated from in periods of war or other major emergency but the measures of derogation must be limited to those strictly necessary to meet the situation[167].

One of the essential features of the European Convention is found in the machinery for the enforcement of rights.

In addition to the defined scope of the guaranteed rights, the European Convention established both the European Commission of Human

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[165] For instance, Article 13 states that everyone whose rights and freedoms as set forth in the Convention "shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". This may be taken to mean that legal actions based on the violation of the European Convention shall be available within the legal systems of State Parties - See Tyrer v United Kingdom (1978) Yearbook of European Convention on Human Rights (European Court on Human Rights) 612. See also - Goslong, The European Convention before Domestic Courts, 38 BYIL (1962) p.445.

[166] A.H. Robertson, Human Rights in the World, (New York, St. Martins Press, 1982) p.83.

[167] See the 'Lawless' Case (1961) Y.B. European Convention on Human Rights 430, 432 (European Convention of Human Rights) and Ireland v United Kingdom (1978) Y.B. European Convention on Human Rights 602, 608 (European Convention of Human Rights). See further T. Higgins Derogations Under Human Rights Treaties, 48 British Yearbook of International Law (1976-1977) p.281. See also - Jacobs "The Restrictions and Limitations on the Exercise of Rights and Freedoms Guaranteed by the European Convention on Human Rights, 4 International Colloquy on the European Convention on Human Rights; Council of Europe Doc M/Coll (75) (1975) 5.

Rights[168] and the European Court of Human Rights[169] as the machinery for ensuring the observation of these rights.

The European Convention[170] itself, including its Commission, its Court, and its body of case law and procedures constitute a formidable legal system[171]. Several European states have incorporated the European Convention into their domestic laws[172]. However in the States that have not done so, the Convention is usually cited as a persuasive source of law in domestic courts[173].

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[168] Articles 20-37 of the European Convention set out the provisions for the Commission. Article 24 provides that any party to the Convention can refer any alleged breach of the Convention to the Commission. Article 25 permits any individual or non-governmental organisation to petition the Commission, provided the party against which the complaint is lodged recognises the competence of the Commission to receive such petitions.

[169] Parties to the European Convention are: Austria, Belgium, Cyprus, Denmark, Greece, Federal Republic of Germany, Iceland, Italy, Luxembourg, Malta, the Netherlands, Norway, Sweden, Turkey, United Kingdom, Spain and Portugal.

[170] Articles 38-56 of the European Convention set out the provisions for the Court. Article 44 provides that only parties to the Convention shall have the right to bring a case before the Court. Article 52 states that the decision of the Court is final, and Article 54 provides that the Committee of Ministers shall suprvise its execution of the Courts judgements.

[171] For an analysis of the practise and procedure of the Commission on the advisability of applications see Sohn & Buergenthal The International Protection of Human Rights, op cit p.1008-1238. See also Schimels "On the Operation of the European Convention of Human Rights", 18 International Organisations, (1964) p.558.

[172] See Drzenczewski "The Domestic Application of the European Human Rights Convention as European Community Law" 30 Int'l & Comp L.Q. (1981) 118.

[173] With regard to the UK for instance, Lord Denning M.R. states that "if there is any ambiguity in our statutes or uncertainty in our law, then courts can look to the Convention as an aid to clear up the ambiguity or uncertainty, seeking always to bring them into harmony with it". (1976) 3 AllER 843, 847 ff. (1976) 1 WLR 979, 989. Se also Duffy "English Law and the Convention of Human Rights" ICLQ, Vol.29 (1980)p.585.

It is pertinent to briefly examine the procedure of the Commission. The Commission receives all applications made by individuals and has a final say on admissibility. On receipt of an application found admissible, the Commission acts as the fact finder[174] and mediator seeking a friendly settlement between the state and the applicant[175].

If settlement is not reached, the Commission must draw up a report and make a finding as to whether a violation of the European Convention has occurred[176]. This report is submitted to the Committee of Ministers and the States concerned, but is not published at this stage[177]. During the following three months, an appeal to the Court can be made by either the Commission of the States[178] provided the State either consents or has accepted the Courts compulsory jurisdiction[179].

If the case is not brought before the Court, by the State or the Commission, the Committee of Ministers can make a final determination[180]. Where the Committee of Ministers finds that a violation has occurred, it expressly states the corrective measures which the

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[174] The Commission also has wide powers of investigation. European Convention, Article 28.

[175] Where settlement is reached, the Commission must present a report confined to a brief statement of the facts and the solution. This is sent to the States involved and the Committee of Ministers, and to the Secretary-General of the Council of Europe for publication. European Convention, Article 30.

[176] Article 31, Ibid.

[177] Article 32, Ibid.

[178] Article 48, Ibid.

[179] It must be emphasised that the court proceedings constitute an entirely new hearing and not simply an appeal on a point of law. See Rules 37-42 - The Rules of Procedure of the European Court of Human Rights.

[180] Article 32(1), European Convention.

offending State must take within a prescribed time[181]. If these measures are not complied with, the Committee may determine what effect shall be given to the original decision of the Commission and then publish its final report[182].

The protection of human rights under the European Convention has been expanded and enhanced by the Protocols. The First Protocol of the European Convention[183] provides for the following additional freedoms; the peaceful enjoyment of individual possessions[184], the right to education[185] and the right to free elections[186]. The Second Protocol confers upon the Court, competence to give advisory opinions[187]. The Fourth Protocol[188] further expands the scope of protected rights and freedoms to include the right to liberty despite inability to fulfil a contract[189], liberty of movement and choice of residence[190], and freedom

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181 Article 32(2) Ibid.

182 Article 32(3) Ibid.

183 Protocol 1 to the Conventin for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952 213 U.N.T.S.262.

184 Protocol 1, Article 1, Ibid.

185 Article 2, Ibid.

186 Article 3, Ibid.

187 Protocol 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 6 May 1963, Europ.T.S. No.44. Under Article 1, the Court is permitted, at the request of the Committee of Ministers, to give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols but not on the content or scope of the protected rights and freedoms.

188 Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 16 September 1963, Europ T.S. No.46.

189 Ibid Article 1.

190 Ibid Article 2.

from expulsion for nationals[191] as well as from the collective expulsion for aliens[192].

One of the most significant aspects of the European Convention is the right of individual petitions notwithstanding the fact that this right is restricted by the admissibility criteria of the Convention[193]. This procedure has enhanced the prospect for mitigating the exposure of the individual in the face of the State. Other existing human rights organisations have been guided, to a large extent, by the procedural framework of the European Convention.

(ii) The American Convention on Human Rights

The American Convention evolved from an integration process that can be traced to the 1826 Congress of Panama where Simon Bolivar urged Latin American States to consider forming a confederation. The Latin American States to an extend shared a common ideology and culture with North America, in that the elites of Latin America were emigres from Europe in common with the predominant settlers in North America.

The Organisation of American States (OAS) was established at Bogota in 1948. The nucleus of the OAS was "The International Union of American Republics" which convoked some six decades earlier in 1890 as a commercial information organ.

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191 Ibid Article 3.

192 Ibid Article 4.

193 The Convention requires, inter alia, the exhaustion of local remedies and the submission of a petition within six months of the final domestic decision; European Convention Articles 26-27. See further, Cancado Trinidade, "Exhaustion of Local Remedies in the Jurisprudence of the European Court of Human Rights: An Appraisal" 10 Revue des Droits de l'Homme (1977) 141.

The OAS was created mainly for the purpose of enhancing peace and security, ensuring peaceful settlement of disputes, providing a common action in event of aggression, and promoting economic, social and cultural development of the region. Thus, the 1948 OAS Charter contained very few provisions relating to human rights and whereso they were phrased in very general terms[194].

The 1948 Bogota Conference that produced the OAU Charter, also adopted the American Declaration on the Rights and Duties of Man[195], however the latter did not form part of the OAS Charter itself.

It was within the framework of the OAS that the Inter-American Commission on Human Rights was created in 1960[196]. The 1960 Statute established the Commission as an "autonomous entity" of the OAS having the functions "to provide respect for human rights"[197]. The Statute defined human rights as "those set forth in the American declaration of the Rights and Duties of Man". Consequently, the "non-binding" nature of the American Declaration became the basic normative instrument of the Commission.

Originally, the competence of the Commission was very limited. Its powers included the following:-

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194 See Article 5(j) of the OAS Charter 1948 (now Article 3(j) in the revised OAS Charter).

195 Resolution XXX. Final Act of the Ninth International Conference of American States, Bogota, Colombia, 3 March - 2 May 1948 at p.48 (PAU 1948).

196 The 1960 Statue of the American Commission on Human Rights - 1960 Annual Report of the OAS Secretary-General, OEA/Ser.D./III.12 (English) 1961 pp.19-20.

197 Article 1, Ibid.

"(a) To develop an awareness of human rights among the people of America.

(b) To make recommendations to the governments of the Member States in general, if it considers such action advisable, for the adoption of progressive measures in favour of human rights within the framework of their domestic legislation and in accordance with their constitutional precepts, appropriate measures to further the faithful observance of those rights.

(c) To urge the Governments of the Member States to supply it with information on the measures adopted by them in matters of human rights.

(d) To serve the Organisation of American States as an advisory body in respect of human rights[198]."

These limited powers were enlarged in 1965 to enable the Commission to receive individual petitions[199].

The hitherto haphazard human rights system of the OAS based on a shaky constitutional foundation was significantly bolstered by the "Pact of San Jose, Costa Rica" more popularly referred to as the American Convention on Human Rights adopted in 1969 at an intergovernmental

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198 Article 9, Ibid.

199 Resolution XXII Second Special Inter-American Conference, Rio de Janero, Brazil, 17-30 November 1965. Final Act OEA/Sec.C.1.13 (English) at 32-34 (1965).

conference convened by the OAS[200]. The American Convention entered into force in July 1978, after the eleventh instrument of ratification had been deposited[201].

The Convention contains 82 Articles, which guarantee and protect over a score of distinct rights including the following:- the right to judicial personality[202], to life[203], to humane treatment[204], to personal liberty[205], to a fair trial[206], to privacy[207], to a name[208], to nationality[209], to participate in government[210], to equal protection of the law[211], and to judicial protection[212]. In addition, the convention guarantees freedom of conscience, religion , thought and expression[213],

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200 See American Convention Article 74(2). For the American Convention see L. Sohn & T. Buergenthal, Basic Documents on International Protection of Human Rights (1973) op cit. On the American Convention generally, see "Symposium (on) the American Convention on Human Rights, 30 American University Law Review 1-187 1980, see also T. Buergenthal, R. Norris & D. Shelton Protecting Human Rights in the Americas: Selected Problems (N.P. Engel, Kohl. 1986). Se also, PP. Camarago "The American Convention on Human Rights" Human Rights Journal 3:2 (1970) 333-356; see also A.H. Robertson "The American Convention on Human Rights" in Robertson (ed) Human Rights in the World 2nd Ed. New York (St. Martins Press 1982) 132-160.

201 American Convention, Article 74(2).

202 Article 3, Ibid.

203 Article 4, Ibid.

204 Article 5, Ibid.

205 Article 7, Ibid.

206 Article 8, Ibid.

207 Article 11, Ibid.

208 Article 18, Ibid.

209 Article 20, Ibid.

210 Article 23, Ibid.

211 Article 24, Ibid.

212 Article 25, Ibid.

213 Article 13, Ibid.

freedom of association[214], movement and residence[215], as well as prohibition of slavery[216], and the application of ex post facto laws and penalties[217].

The State Parties to the American Convention[218] have an obligation "to respect" the rights guaranteed in the Convention as well as "to ensure" the free and full exercise of those rights[219].

In addition to the foregoing civil and political rights enshrined in the American Convention, the Charter of the OAS promotes economic, social and cultural rights[220].

The rights proclaimed under the American Convention establish more advanced guarantees than the European Convention and the UN Political Covenant[221]. However, in his treatise, Buergenthal doubts the potential of any OAS State to fully comply with the provisions of the Convention[222].

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[214] Article 16, Ibid.

[215] Article 22, Ibid.

[216] Article 6, Ibid.

[217] Article 9, Ibid.

[218] Parties to the American Convention on Human Rights are: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatamala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay and Venezuela.

[219] Article 1(1), Ibid.

[220] Charter of the OAS, Article 31

[221] For instance Articles 4,5,17(5),23 and 25, American Convention.

[222] T. Buergenthal "Inter-American System for the Protection of Human Rights" in T. Meron (ed) Human Rights in International Law: Legal & Policy Issues, op cit p.442.

The Convention allows derogations from certain rights in time of war, public danger or other emergency that threatens the independence or security of a State Party[223]. However, the following rights cannot be suspended: right to life, to humane treatment, right to participate in government, rights of the child and freedom from ex post facto laws[224].

The derogation clauses in the American Convention are not as stringent as those of the European Convention and the UN Political Covenant. However derogations from the provisions of the American Convention must comply with Articles 29 and 30 thereof[225].

The American Convention sets up two organs to ensure its implementation: the Inter-American Commission on Human Rights[226] and the Inter-American Court of Human Rights[227]. The American Convention stipulates that a State Party is automatically subject to the jurisdiction of the Commission to deal with private complaints deposited against that State[228]. However, as regards interstate complaints, the Inter-American Commission may only consider such complaints if both parties in addition to ratifying the American Convention, have submitted a further

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223 American Convention Article 27(1).

224 Article 27(2), Ibid.

225 Articles 29 & 30 of the American Convention set up values and criteria that must be observed in the interpretation of all the provisions of the Convention. For instance Article 30 states that "(t)he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights and freedoms recognised herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which restrictions have been established".

226 American Convention, Chapter VII; See further R. Norris "The New Statue of the Inter-American Commission on Human Rights" Human Rights Law Journal 1 (1980), Parts 1-4, pp.379-383.

227 American Convention, Chapter VIII. See further T. Buergenthal "The Inter-American Court of Human Rights", AJIL 76:2 (April 1982) pp.231-35.

228 American Convention Article 44.

declaration recognizing the interstate jurisdiction of the Commission[229].

With regard to locus standi, unlike the European Convention where only the victims of a violation may file private petitions, the American Convention allows "[a]ny person or group of persons or any non-governmental entity legally recognized in one or more Member States of the Organisation" to lodge petitions with the Commission against a State Party[230].

The jurisdiction of the Inter-American Court of Human Rights is both adjudicatory and advisory. In the former sense it decides on disputes involving charges that a Member State Party has violated the human rights protected by the Convention[231]. In its advisory jurisdiction, Article 64 empowers the Court to interpret the American Convention and other human rights instruments at the request of OAS Member States and other OAS organs.

The Inter-American System for the protection of human rights is thus unique by its dual institutional structure. The first one having evolved from the Charter of the OAS and the other established by the coming into force of the American Convention. Consequently an OAS Member State that has not ratified the American Convention is nevertheless subject to the human rights regime which has its juridical basis in the OAS Charter.

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229 Ibid Article 45. This approach is a reversal of the traditional procedure of the European Convention where the right of individual petitions is optional - See European Convention, Article 25(1).

230 American Convention, Article 44.

231 Article 61 Ibid. This provision indicates that a State Party does not subject itself to the contentious jurisdiction of the Inter-American Court by merely ratifying the American Convention; it must file a declaration or conclude a special agreement.

The main activities of the Inter-American Commission as an OAS Charter organ involve onsite investigations[232], the compilation of country studies[233] and the processing of individual complaints as well as wide promotional functions. As regards individual complaints, the Commission, under its new statute, may act on all communications lodged against a non-state party provided only that the petitioner alleges the infringement of a rights that is protected by the American Declaration[234].

A State which has not ratified the American Convention is not subject to the jurisdiction of the Inter-American Court of Human Rights. However, by virtue of the Courts advisory capacity, it may receive requests and grant advisory opinions to any OAS Member State or OAS organ in matters concerning the interpretation of the Convention of other treaties concerning the protection of human rights.

From the foregoing, it is evident that the Inter-American System for the promotion and protection of human rights is unique in certain aspects. However, the impact of both the Universal Declaration and the European Convention is conspicuous.

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232 For example, IACHR, Report on the Situation of Human Rights in the Republic of Nicaragua: Findings of the "on site" Observations, 3-12 Oct 1978, OAS Doc. OEA Sec.L/V/11.45, doc 16, Rev.1 1978.

233 For Country Studies on Cuba, Haiti and the Dominican Republic see Sohn & Buergenthal, International Protection of Human Rights, op cit at 1293-1339.

234 Regulations of the Inter-American Commissin on Human Rights (as amended by Res.508 of Nov 1980) Article 70; reproduced in T. Buergenthal and Others, Protecting Human Rights in the Americas: Selected Problems op cit Appendix 5 p.351.

(iii) The Permanent Arab Commission on Human Rights

The Permanent Arab Commission on Human Rights[235] was created in 1968 mainly from the cooperation between the League of Arab States and the UN in the field of human rights, borne primarily out of the determination of Member States to protect the interests of the Arabs in territories occupied by Israel. In this respect, in 1969 the Arab Commission established a programme of activities to deal with Arabs in occupied territories and also to promote respect for human rights in the Arab World generally.

With a view to achieving its programmes, the Commission invited State Members of the League to establish national commissions of human rights to cooperate with the regional Commissions. The Commission also proposed the coordination of the activities of the national commission at the regional level and invited the Secretary-General of the Arab League to establish a Special Department of Human Rights. At the international level, the Commission is generally empowered to deal with Arab relations with Israel and to ensure the application of humanitarian law to Arab-Israel conflicts[236].

The Commission adopted an Arab Convention on Human Rights that closely reflects the provisions of the Universal Declaration of Human Rights[237] .

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235 S.P. Marks 'La Commision Permanente arabe des droits de l'homme" op cit p.101-108, see also B. Boutros Ghali 'La Ligue des Etats Arabes', in Les dimensions internationales des droits de l'homme, K. Vasak (ed) op cit pp.636 et sq.

236 B. Boutros-Ghali Ibid p.367.

237 The League of Arab States Special "Committee of Experts" adopted the Convention in 1971.

At the Symposium on "Human Rights and Fundamental Freedoms in the Arab Homeland" held at Baghdad, Iraq from 15-20 May 1979, the Draft Arab Covenant on Human Rights[238] was deliberated upon. The Covenant which is to come into force on being approved by nine Arab States[239] provides for a standing committee entrusted with following up the implementation of its provisions. The Committee is also responsible for the examination of periodic reports which States are obliged to deliver to the Committee[240].

It would seem, therefore, that the implementation of the provision of the convention will rely mainly on the States themselves.

The text of the Draft Arab Covenant reveals that the Committee's jurisdiction will not include the receipt of individual complaints nor the hearing of disputes between parties.

However, if the League of Arab States accept the recommendations of the Baghdad Seminar, the Committee's jurisdiction would thus be extended to include the receiving of complaints from individuals and groups concerning violations of rights and freedoms and the sending of missions to inquire into such violations.

The delay in the operation of the Arab Convention on Human Rights is not unconnected with the intractable political problems of the Middle East.

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238 For the text of the Draft Arab Covenant on Human Rights, see Human Rights Internet Newsletter, Vol.5, Nos.2 & 3 pp.76-78.

239 Draft Arab Covenant on Human Rights, Article 31.

240 Article 29, Ibid.

(h) An Overview

The foregoing review of regional Conventions, serves as a useful backdrop to the analysis, in the following chapter, on the African Charter on Human and Peoples Rights. It is evident that the regional organisations evolved in reaction to the prevailing socio-political events in their respective regions and consequently the institutions and provisions were devised to suit the consensus of members of the relevant regions. Thus, it would be inappropriate to recommend a wholesale adoption of the European or the Latin American experiments by Africa. Professor Brownlie's observation in this wise, is particularly apt: "[T]he social conditions in Africa and indeed Latin America entail inequalities and deprivations on such a scale that recourse to guarantees of classical Western political and civil rights is manifestly inadequate..."[241]. Nevertheless, the impact of these regional conventions have been felt in Africa. On analysis of the constitutions of African States[242] reveals that the constitutions of Anglophone African States provide for human rights along the lines of the European Convention. Some of these rights have been filtered and adapted to suit the African consensus as reflected in the AFCHPR.

The main advantage of regional institutions on human rights, viz a viz a universal system is that the former characterized by States sharing common historical, and cultural traditions, as well as political experiences and geographic proximity possess a greater capacity to broach human rights problems peculiar to their region. The UN system of human rights is handicapped by its highly politicized environment where the prerequisites of sovereign statehood overwhelm democratic values and undermine universal human rights protection. It has been

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241 I. Brownlie (ed) Basic Documents on Human Rights, (Oxford), Clarendon Press 1971) pp.387-388.

242 See Chapter 5, above.

observed that despite the efforts of the UN Commission of Human Rights to overcome these problems, the UN system is still bedevilled "with numerous procedural obstacles and legal pitfalls, all designed to protect governmental interests and to effectively impede the ability of individuals and private groups to enforce governmental respect for human rights"[243]. We submit that these obstacles have been scaled with some success, especially with the introduction of new procedures such as the "Thematic" approach and the Optional Protocol.

Despite some operational weaknesses of the European Convention and the American Convention, these regional systems present a quallitative and quantitative advance over the UN system and provide useful beacons for the guidance of future development of both global and regional systems of human rights. Our examination of the African Charter will reveal the main impact of the American and European Conventions thereon.

The relevance of the Regional systems (the European Convention and the American Convention) to the evolution and adoption of the African Charter on Human & Peoples Rights is threefold. Firstly, the organs established by the African Charter for protection of human rights in Africa bear a notable semblance to the organs of the European Convention[244]. Secondly the rules of procedure of the African Commission on Human and Peoples Rights regarding communications and admissibility thereof are similar in many respects to those contained in

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243 T. Buergenthal & J.V. Thorney, International Human Rights and International Education (UN National Commission for UNESCO: Washington DC. 1976) p.50.

244 To ensure the observance of the provisions of the European Convention, a European Commission of Human Rights and a European Court of Human Rights was established (Article 19 European Convention). The AFCHPR similarly established an African Commission on Human and Peoples Rights (Article 30), but does not provide for a court.

the European Conventions[245], thirdly, the AFCHPR appears to have taken the cue from the American Convention and OAS Charter by laying emphasis on socio-economic rights in addition to protecting political and civil liberties as well as the UN/ECOSOC resolution 1503 procedure.

The impact and relevance of the regional Conventions on the AFCHPR are in the main confined to the aforementioned areas. It was prudent to allow these exogenous influences on the AFCHPR since they invariably represent, firstly international human rights procedures of proven viability and secondly they encompass human rights norms solemnly adopted in various international instruments by States including a fair number of African countries.

In contradistinction to the other regional Conventions[246], the AFCHPR expands upon the classical concept of human rights by providing for collective or peoples rights, individual duties to the State, and by couching social and economic rights in legally enforceable terms, thus imposing corresponding and immediate obligations on States.

In the following Chapter, we propose to analyse the AFCHPR with a view to appraising the efficacy of its provisions and proffering suggestions, where appropriate, for enhancing human rights promotion and protection on the continent.

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245 See the provisions pertaining to the European Commission of Human Rights (Articles 24-37, European Convention) and the AFCHPR provisions relating to the African Commission on Human and Peoples Rights (Articles 46-59).

246 In the course of the following Chapter, the essential differences between the AFCHPR and the existing regional human rights Convention shall be highlighted.

Chapter Seven

The African Charter on Human and Peoples Rights (AFCHPR):

A Legal Analysis

(a) Introduction

Although the history of the evolution of the AFCHPR is spread over twenty years, the actual drafting took two years. We propose to examine the drafting history of the Charter and undertake a legal analysis of AFCHPR adopted by the OAU Assembly of Heads of State and Government on 17 June 1981. In the course of our discourse, we shall highlight the significant aspects of the AFCHPR that coincide or depart from the regimes of other existing regional human rights conventions.

In the foregoing chapter we analysed the UN "Monrovia Proposal" for the Establishment of a Regional Commission on Human Rights. The adoption of the Monrovia Proposal by the UN Seminar[1] was inspired by OAU Assembly Resolution 115 of September 1979[2]. The OAU Resolution instructed the OAU Secretary-General to convene a meeting of leading African legal experts to be responsible for the preparation of "a preliminary draft on an African Charter on Human and Peoples Rights providing inter alia for the establishment of organs for the promotion and protection of human and peoples rights". It is significant that the OAU Assembly had at the same session addressed the Uganda/Tanzania conflict and endorsed the Guinean Presidents statement that the OAU was "not a tribunal which could sit in judgement on any Member States internal affairs"[3]. Thus the subsequent adoption of Resolution 115 may be

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[1] UN Seminar on the Establishment of a Regional Commissin on Human Rights held at Monrovia, Liberia in September 1979.

[2] OAU Resolution 115(XVI) Rev.1 adopted by the 16th Ordinary Session of the OAU Assembly of Heads of State and Government, Monrovia, Liberia, September 1979.

[3] African Research Bulletin (Political, Social & Cultural Series) (1979) p.5329B.

regarded as a tacit confirmation by the Assembly that the OAU does not perceive any conflict between the establishment of a regional system for the protection of human rights and the OAU principle of non-interference in the internal affairs of Member States[4].

In compliance with Resolution 115, the OAU Secretary-General convened a "Meeting of African Experts for the Preparation of a Draft Charter of Human and Peoples Rights", at Dakar, Senegal from 28 November to 8 December 1979. The working documents of the Meeting of Legal Experts included the UN 'Monrovia Proposal' and a draft African Charter on Human and Peoples Rights prepared by three eminent Senegalese jurists[5], labelled the "OAU Draft AFCHPR". The OAU Draft working paper was largely drawn from the provisions of the UN International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights[6]. The justification for incorporating substantial parts of these two resource papers was based on the conviction that they could be applied to the peoples of Africa[7].

The need to incorporate African values and traditions in the Charter was emphasised by the President of Senegal, Leopold Senghor, in his Opening Address to the Meeting of Experts. The President stated that:

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[4] Several African States notably, Sudan, Liberia and Nigeria were highly critical of Tanzanias invasion of Uganda and the consequent overthrow of the Idi Amin regime. Prosident J. Nyerere of Tanzania invoked the right of self-defence to justify his action. Tanzanias apparent omission to invoke the more plausible justification of humanitarian itnervention may be hinged on her awareness that such a justification may have invited international perusal of Tanzanias human rights record. See Ibrahim I. Wani "Humanitarian Intervention and the Tanzania/Uganda War" Horn of Africa Vol.3 No.2 p.18.

[5] Judges Keba Mbaye and Mohammadou Mbacke, and Professor Ibrahim Fall.

[6] OAU Doc. CAB/LEG/67.1.

[7] Ibid p.1.

> "In Africa, the individual and his rights are wrapped in the protection the family and other communities ensure everyone..., ... should be made for this African tradition in our Charter on Human and Peoples Rights, while bathing in our philosophy which consists in not alienating the subordination of the individual to the community, in coexistence in giving everyone a certain number of rights and duties..."[8].

The Meeting of Experts recognised the necessity to evolve a Charter that will serve African needs, thus the following guiding principles were evolved:

- to be inspired by the traditions of African society and the principles upon which such traditions are based;
- to respect the political options of States and consequently to ensure a balance between the various doctrinal systems current in Africa;
- to avoid favouring in one way or another individual or collective rights, civil and political or economic, social and cultural rights;
- to give a content acceptable to all the peoples' rights to which express reference was made in Resolution 115 of the OAU;
- to ensure the protection and promotion of the human rights declared and accepted as such through the activities of a commission, although reserving the powers of the Assembly of Heads of State and Government which must be associated with the final decision;
- not to exceed that which African States were ready to accept in the field of the protection of human rights[9].

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[8] Opening Address of the President of Senegal to the Meeting of African Experts for the Preparation of the Draft African Charter on Human and Peoples Rights, 28 November 1979; OAU Doc CAB/LEG/67/5 p.6.

[9] OAU Doc CAB/LEG/67/5, p.10.

The Meeting of Legal Experts thereafter issued a preliminary Draft of the Charter (hereinafter referred to as the "Dakar Draft")[10]. The text of the Dakar Draft comprised of two main parts namely: "Rights & Duties", and "Measures of Safeguard". The text also contained the following features:

(i) It gave importance to the principle of non-discrimination;

(ii) It emphasised the principles and objectives of the OAU as defined in Article 2 of the Charter of the OAU with particular reference to respect for the sovereignty and territorial integrity of each State; and to the absolute dedication to the total emancipation of African territories which are still dependent;

(iii) It placed "peoples rights" alongside individual rights.

(iv) It included the duties of each person towards the community and more particularly towards the family and State.

(v) It reflected the significance of African values and morals.

(vi) It incorporated economic, social and cultural rights as well as the rights to development, peace and the protection of the environment.

It is significant that the foregoing features are maintained in the adopted AFCHPR since they basically distinguish the AFCHPR from existing international and regional human rights instruments. The AFCHPR is thus the first legal instrument to encapsulate three generations of rights, namely civil and political rights; economic, social and cultural

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[10] The "Dakar Draft" is so called because the Meetings of Legal Expert were held in Dakar, Senegal.

rights, the right to development[11] and peoples rights.

The Dakar Draft of the AFCHPR was submitted to the First Session of the OAU Ministerial Conference on the Draft African Charter on Human and Peoples Rights held at Banjul, The Gambia from 9-15 June 1980. The Meeting was attended by 39 Member States of the OAU, represented mainly by their respective Ministers of Justice and Legal Affairs. The first session was only able to deliberate on the Preamble and Articles 1 to 11 of the Dakar Draft. Thus at its 35th Session held in Sierra Leone[12], the OAU Council of Ministers requested that a second session of the Ministerial Conference be held to complete the draft AFCHPR[13]. The OAU Assembly confirmed the resolution of the Council of Ministers and urged the Ministerial Conference to complete its examination of the draft and ensure that the final text is submitted to the 18th Session of the OAU Assembly[14].

The Second Session of the OAU Ministerial Conference on the AFCHPR was held at Banjul, from 7-11 January 1981. Forty out of the fifty OAU Member States attended this conference and the cordial atmosphere that

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11 K. Vasak as head of the Division of Human Rights, UNESCO, proposed the "third generation of human rights", (otherwise referred to as "solidarity rights") which include the rights to development, to the common heritage of mankind, to peace and to a healthy environment. - K. Vasak "For the Third Generation of Human Rights: Rights of Solidarity" Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, Strausburg, 1979. See also "Pour les droits de l'homme de la troissieme generation: les droits solidarite" - Revue des Droits de'Homme 12 (1979) p.3; See Marko "Emerging Human Rights: a New Generation for the 1980's" 33 Rutgers Law Review (1980-81) p.435. See also Hecto Gros Espiell "The Right to Development As a Human Right" 16 Texas International Law Journal (1981) p.189.

12 18-20 June 1980.

13 OAU Doc CM/Res.792(XXV).

14 Proceedings of the 17th Session of the OAU Assembly of Heads of State and Government, Freetown, Sierra Leone, 1-4 July 1980, OAU Doc. ACAB/LEG/AHG/17.

pervaded the meeting ensured that the conference completed its task of approving the draft Charter[15].

The Ministerial Conference thus submitted the completed Draft Charter to the 37th Ordinary Session of the Council of Ministers. The Council of Ministers took note of the Draft Charter and decided to submit it with no amendments to the 18th Summit Meeting of the OAU Assembly of Heads of State and Government for its final approval and adoption. On 17 June 1981, the 18th OAU Assembly adopted the Charter.

According to Article 63(3) of the AFCHPR, the Charter shall enter into force three months after the OAU Secretary-General receives notice that a simple majority of OAU Member States (i.e. 26 Member States) have become party to the treaty[16].

On 24 July 1986 the OAU Secretary-General received notice that Niger had become the 26th State to deposit its instrument of ratification. Thus, the Charter entered into force on 21 October 1986.

(b) <u>The Draft Charter: Legal Efficacy or Imperatives for Political Consensus</u>

Before we proceed to analyse the Charter, it is pertinent to highlight the basic differences between the Dakar Draft Charter and the adopted text of the AFCHPR. The essence of this exercise is to spotlight the basic changes undertaken by the African Ministers of Justice on the

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[15] Report of the OAU Secretary-General on the Draft AFCHPR, OAU Doc CM/1149(XXXVII) 1981, p.2.

[16] Although some States unsuccessfully attempted to introduce the two-thirds majority requirement, the simple majority procedure is still a difficult hurdle to scale as the Covenant on Civil and Political Rights has shown. (The Covenant required only thirty five states out of one hundred and thirty five, yet it took ten years to come into force.) Similarly, the American Convention came into force nine yers after its first signature at San Jose, Costa Rica.

Dakar Draft, the latter document having been the product of academics (and judges) and ostensibly devoid of political compromise.

Two Sessions of the Ministerial Meeting of OAU Member States were convened in Banjul, Gambia, the first, from 9 to 15 June 1980 and the second, from 7 to 19 January 1981. The purpose of the Meeting was "to consider the preliminary draft of the African Charter on Human and Peoples Rights (Dakar Draft) prepared by the Meeting of African Experts held in Dakar, Senegal from 28 November to 8 December 1979"[17].

The main characteristic of the Dakar Draft was the concise and general formulations adopted by the experts especially in relation to the second generation of rights being the economic, social and cultural rights. The concise approach was meant to spare the young African States too many, albeit important, obligations[18]. Basically, the rights of second generation entail benefits from the state to citizens and since African States were not economically buoyant enough to provide all such rights, the experts were constrained not to impose burdensome obligations. Nevertheless, the Ministerial Meeting proceeded to amend and water down some of the clauses in the Preamble concerning the economic, social and cultural rights. For instance, in the preamble to the Dakar Draft, the relevant clause states that:

> "Considering the importance that African peoples have always attached to the respect for human dignity and fundamental human rights, bearing in mind that human and peoples rights are not confined to civil and political rights but cover economic, social and cultural rights"[19].

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[17] Rapporteurs Report on the 1st Session of the OAU Ministerial Meeting on the Draft African Charter on Human and Peoples Rights, Banjul, The Gambia 9-15 June 1980. CAB/LEG/67/Draft Rapporteurs Report (II) Rev.4 p.1.

[18] See Statement of Keba Mbaye, Chairman of the Committee of Experts to the 1st Session of the OAU Ministerial Meeting, Ibid p.4.

[19] 2nd Preambular Paragraph, Dakar Draft OAU Doc CAB/LEG/67/1.

The above attempts by the legal experts to equate the first and second generation rights was rejected by the OAU Ministerial Meeting which redrafted the relevant paragraph as follows:

> "Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be disassociated 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"[20].

Much as this redrafted paragraph stresses the importance of three generations of rights, primacy is given to social and cultural rights as against civil and political rights. An authoritative interpretation of this paragraph may have to await a pronouncement by the African Commission on Human and Peoples Rights[21].

The African Commission's capacity to interpret provisions of the Charter informs the deliberate briefness and simplicity of the Dakar Draft. The Chairman of the Committee of Experts acknowledges "the relative simple form in which some of the articles were drafted so as to enable the future users of the legal instrument to apply and interpret them with some flexibility. It is left to the protective organs of Human Rights to complete the Charter"[22]. Furthermore it is not unlikely that the Experts had taken heed of Justice Elias's advice that the African 'Convention' "should... be like a lady's skirt, long enough to cover the subject

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[20] See 7th Preambular Paragraph AFCHPR, Appendix III.

[21] Article 45(3) of the AFCHPR gives the African Commission on Human and Peoples Rights the power to interpret all the provisions of the Charter.

[22] Report by the Secretary-General on the African Charter of Human and Peoples Rights OAU Doc CL/Plen Rapt(XXXII) p.59 para.210 and Rapporteurs Report OAU Doc. CM/1149(XXXVII) Annex 1, p.4 para.13.

matter, but short enough to be fascinating"[23].

With a view to emphasizing the regional character of the Charter, the provisions of the preamble to the Dakar Draft which referred to the cooperation with non-African States in the field of human rights, was rejected by the Ministers. However the Ministerial Meeting fully adopted the Dakar Draft preambular paragraph which reaffirmed the pledge of OAU States "to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa, and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights"[24]. Although the AFCHPR reveals no preference for the applicable standards, namely African or UN instruments[25] we submit that by virtue of the Ministerial Meetings rejection of the provisions on cooperation with non-African States, and the general regional bias of the language of the AFCHPR, the African Commission will be constrained to draw inspiration primarily from the provisions of the AFCHPR and the OAU Charter[26].

This conclusion is underlined by the fact that the regional character of the AFCHPR was reinforced by the Ministerial Meeting's introduction of

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[23] T.O. Elias, Background paper delivered at the UN Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Monrovia, Liberia, 1979, Doc HR/LIBERIA/1979/EP.1 at p.4. para.13.

[24] 3rd preambular paragraph, AFCHPR.

[25] See Article 60 Ibid.

[26] With regard to the OAU Charter it is pertinent to note Dr. Cervenka's view that although one of the main purposes of the OAU Charter is "to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights" (Article II(1)(e)), this does not necessarily reflect the adherence of the Member States to the principles of the UN Charter nor their need to realise the goal of international cooperation in practical terms, since "there is no legal provision in the OAU Charter which indicates the kind of relationship that is to exist between the OAU and UN". Z. Cervenka The Organization of African Unity and its Charter op cit p.110.

the preambular paragraph that extols the virtues of the historical traditions and values of African civilization[27].

The Dakar Draft's 9th Preambular clause on the elimination of colonialism, neo-colonialism, apartheid, Zionism[28] was adopted by the Ministerial Meeting but only after the addition of the provision which imposes a duty on States to dismantle aggressive foreign military bases[29]. In our comparative analysis of the main articles of the adopted AFCHPR and those of the Dakar Draft we shall not refer to those amendments which have a limited impact on the import or substance of the relevant provisions[30].

The opening article of the Dakar Draft obliges States to "recognise and guarantee" the rights and freedoms in the present Convention... and to adopt in accordance with their constitutional provisions, legislative and other measures to ensure their respect[31].

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[27] See 4th preampular paragraph AFCHPR.

[28] It is interesting to note that the word "zionism" was placed in square brackets both in the Dakar Draft and also the final Draft presented to the Assembly of Heads of State and Government. During this writers discussions with Mr. Akinleye, a Nigerian delegate to the Ministerial Meeting it was revealed that the Ministerial Meeting resolved that the Assembly should take the appropriate decision whether or not the brackets should be left. The controversy generated by the inclusion of "zionism" was mainly between Libya which introduced the term and Botswana which objected thereto on the grounds that Zionism was not an African problem. In the final analysis the fact that the term "zionism" is maintained in the final text of the AFCHPR is not merely a concession to the North African States but also a reflection of the fact that the majority of African States do not have diplomatic relations with Israel. While it may be viewed as evidence of the success of Arab diplomacy it is, in the main, a reaction of African States to the continuing economic and militarylinks between Israel and South Africa.

[29] 8th preambular paragraph AFCHPR.

[30] For instance the phrase "Human beings are sacred" (Dakar Draft) was amended to read "Human beings are invoilable (Article 4, AFCHPR).

[31] Article 1 Dakar Draft (underlines for emphasis).

The strength and force of this provision was sapped by the Ministerial Meetings amendment which removed the words "guarantee" and "ensure" therefrom. Thus Article 1 of the AFCHPR provides that State Parties "shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them"[32]. This amendment gives the initial impression that the AFCHPR is basically a promotional Charter. However, this impression is dispelled when the Charter is viewed as a whole. Firstly, State Parties to the AFCHPR "undertake to adopt legislative and other measures to give effect to the rights and freedoms provided". Secondly, the African Commission on Human and Peoples Rights is established to "ensure the protection of human and peoples rights under conditions laid down by the Charter". Thus, these provisions among others, re-emphasize the nature of the AFCHPR as an instrument that imposes legal obligations on State Parties not to infringe the protected rights.

The Dakar Draft, Article 2 reads as follows:

> "Every person and every people shall be entitled to the enjoyment of the rights and freedoms recognized in the present Convention without distinction as to race, ethnic group, colour, sex, language, political or any other opinion, national and social origin, fortune, birth or any other status"[33].

Firstly, it is instructive to note that the Dakar Draft refers to the "Convention" rather than the "Charter". Secondly, the clause "every

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[32] In comparison, Article 1 of the American Convention provides that State Parties "undertake to respect the rights and freedoms recognized under the Convention and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without any discrimination". In this regard Article 1, European Conventin states that "The... Parties shall secure to everyone within their jurisdictin the rights and freedoms defined in Section I of this Convention". - See Ian Brownlie (ed) Basic Documents in International Law op cit p.206.

[33] (Underlines for emphasis).

person and every people" was changed to "every individual". Much as the intention of the Ministerial Meeting was to clarify the meaning of the provision, this amendment may be viewed as undermining the significance of peoples rights. This suspicion is however dispelled by the fact that peoples rights are specifically and expressly guaranteed in Articles 20-26 of the AFCHPR. Furthermore, in the context of the provision the phrase "every individual" is more appropriate.

It is worth noting that the Ministerial Meeting replaced the word 'person' in favour of "individual" as the referent of the right whenever the former appeared in the Dakar Draft. This uniform amendment may be viewed as a deliberate act to avoid the situation whereby evolving African jurisprudence might regard the business corporation or Limited liability Company as an artificial person with attendant public law rights[34]. While the amendment may have been influenced by the drafters cold disposition to multinationals, they have inadvertently deprived non-governmental organisations (NGO's) and other non-profit oriented bodies dedicated to human rights, protected status under the emerging human rights jurisprudence[35].

With reference to Article 5 of the Dakar Draft which prohibits all forms of slavery, slave trade, torture cruel, inhuman or degrading punishment and treatment; the Ministerial Meeting adopted the provision and expanded the prohibition to cover "all forms of exploitation".

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[34] In comparison,, the European Conventin adopts the term "everyone" while the American Convention uses the terms "everyone" and "person" interchangeably.

[35] Harry Scoble; "Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospect in the Wake of the Banjul Charter" in C.E. Welch & R. Meltzer (ed) Human Rights & Development in Africa, op cit p.192.

A further increase in the level of protection provided by the Ministerial Meeting amendments is reflected in Article 14 of the AFCHPR which states that:

> "the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".

The Dakar Draft provision was negative and more restrictive in that it allowed States to determine whether or not their local laws should guarantee basic rights to property[36].

As regards the 'due process' provisions, Article 7 of the Dakar Draft, provided inter alia for the "right to defence" simpliciter. The Ministerial Meeting however strengthened the provision to include the "right to be defended by a Counsel of ones choice"[37].

The provisions concerning the freedom of information and expression and the freedom of movement in the Dakar Draft were strengthened by the Ministerial amendments. Article 9 of the Dakar Draft states that:

> "[1] Every person shall have the right to objective information".

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[36] Article 14 of the Dakar Draft states that "Where the right to property is guaranteed by State legislation, it mayonly be encroached upon in the interest of public need or in the general interest of the community".

[37] Article 7 AFCHPR c.f. Article 14 of the International Conventin on Civil and Political Rights, Article 8(2) (d) and (f) of the American Convention and Article 6(3)(c) of the European Conventin, which all provide minimum rights for persons charged with a criminal offence including free legal assistance by the State. In contrast, although the AFCHPR does not provide comprehensive minimum standards for persons charged with criminal offences, it nevertheless is unique in providing for the right to defence and choice of counsel to individuals in all causes.

> [2] Subject to the respect of others' honour and reputation, every person shall have the right to express and disseminate his opinions within the law"[38].

The Ministerial Meeting refused to qualify the right to information by deleting the word "objective".

Similarly, with regard to the freedom of expression provision (Article 9(2) Dakar Draft) the Ministers deleted the words "subject to the respect of others honour and reputation". Thus Article 9(2) of the AFCHPR states that: "Every individual shall have the right to express and disseminate his opinions within the law"[39].

It would seem that the Legal Experts were unnecessarily verbose and restrictive by expressly providing safeguards for the "honour and reputation" of others, the basic rationale for the Municipal Laws of libel and slander and a factor accommodated by the words "within the law".

The Ministerial Meeting also amended the highly restrictive provision of Article 12(2) of the Dakar Draft which generally subjected the right to leave or return to ones home countryto:

> "restrictions enacted in law essential for the protection of national security, law and order public health or morality, or other peoples rights and freedoms which are compatible with the other rights recognised in the present convention (sic)".

The inexhaustive and general nature of these restrictions imposed by the Dakar Draft is evident. Thus the Ministerial amendment confined the restrictions to the specified reasons by the insertion of the word "only"; consequently, the right to leave or return to ones home country "...may

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[38] Underlines for emphasis.

[39] Underlines for emphasis.

only be subject to restrictions provided by law for the protection of national security, law and order, public health or morality"[40].

The inexhaustive drafting style of the Dakar Draft is also reflected in its Article 12(5) which provides that: "The mass expulsion of non nationals shall be prohibited. No economic, political or other reasons would justify such a measure". The Ministerial Meeting amended the second sentence of this provision by providing a precise list defining the scope of prohibited 'mass expulsions'.

Thus Article 12(5) of the AFCHPR states inter alia that "...: Mass expulsion shall be that which is aimed at national, racial ethnic or religious groups".

The necessity for a comprehensive provision on mass expulsion is enforced by the spate of reciprocal expulsions of aliens especially among West African States over the past two decades[41]. The phenomenon of mass expulsions is symptomatic of the lack of sensitivity of African rulers to the human rights implications of such acts. While most of these expulsions have been justified on the domestic legal rights of a nation to expel illegal aliens, the mass nature of expulsions constitutes a violation of international law.

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[40] Article 12(2) AFCHPR (underlines for emphasis).

[41] Ghana expelled Nigerians in 1964, and 1974, and the Voltaics in 1961; Niger expelled its entire Dahomean (now Beninoise) community in 1964 and the Senegalese in 1967; and Nigeria expelled all illegal aliens, mostly of West African origin in April 1983. In the name of economic nationalization, Idi Amin expelled 20,000 British Asians from Uganda in 1971. See Richard Plende "The Exodus of Asians from East and Central AFrica: Some Comparative and International Law Aspects" AJIL, Vol.19 pp.287-324. See also Homer Jack, "The UN and the Expulsion of Asians from Uganda: A Case Study in Insufficiency" WCRP Report, World Conference in Religion for Peace (1972) p.6.

Furthermore, the nature of these expulsions reveals that they were aimed at national, ethnic or religious groups. More significant is the fact that some mass expulsions have been justified on the grounds of economic nationalism[42]. A comparison of the Dakar Draft and the AFCHPR provisions relating to mass expulsions reveals that mass expulsions based on economic grounds is expressly prohibited by the former but not by the amended Article 12(5) of the latter. To this extent therefore Article 12(5) of the AFCHPR is defective.

A major flaw in the Dakar Draft was corrected by the Ministerial Conference in relation to the provision on the "peoples right" to "freely dispose of their wealth and natural resources"[43]. The relevant provision of the Dakar Draft was silent on the issue of compensation in the event of spoliation of those resources. Thus the relevant article was redrafted to read as follows:

"In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation"[44].

With reference to the provisions on the procedure of the Commission concerning State Communications, both the Dakar Draft and the AFCHPR provide that a State Party which has good reasons to believe another State Party has violated the Charter provisions, may by written communication draw the attention of the accused State to the matter[45].

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[42] For instance, the Ugandan expulsion of British Asians in 1971. See Don Nanjira; The Status of Asians in East Africa (New York/Preager 1976).

[43] Article 21 Dakar Draft.

[44] Article 21(2) AFCHPR.

[45] Article 47 Dakar Draft; Article 47 AFCHPR.

The Ministerial Meeting however went a step further by introducing a new provision which prescribes that in similar circumstances, a State Party may refer the matter directly to the Commission without first presenting a complaint to the other State[46]. In this context therefore, the Ministerial Meeting enhanced the admissibility procedures of the Commission by providing a second but direct channel to the Commission by State Parties.

The exceptions to the requirement of exhaustion of local remedies before the Commission may deal with a matter were effectively broadened by the Ministerial Meeting. Under the Dakar Draft the exhaustion of local remedies may only be dispensed with where the local remedies are obviously ineffective or on proof of abuse of procedure[47]. However under the AFCHPR, it will be sufficient to scale the hurdle of exhausting local remedies where "it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged"[48].

Furthermore, whereas the Dakar Draft prohibits the acceptance by the Commission of communications made other than by Member States where they are based "predominantly" on mass media reports[49], the AFCHPR is less restrictive, by barring such communications only when they are based "exclusively on news disseminated through the mass media"[50].

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[46] Article 49 AFCHPR. This provision is similar to the Article 24 procedure of the European Convention. See also Article 45 of the American Convention.

[47] Article 49 Dakar Draft.

[48] Article 50 AFCHPR. See also Article 56(5).

[49] Article 55(4) Dakar Draft (underlines for emphasis).

[50] Article 56(4) AFCHPR (underlines for emphasis).

The mandate of the African Commission on Human and Peoples Rights under the Dakar Draft does not include the interpretation of the Charter. Although this may have been a deliberate omission, the legal experts, however provided an escape valve whereby the African Commission may perform interpretive tasks when they "carry out other tasks which may be entrusted to it by the Assembly of Heads of State and Government"[51].

In contrast, the AFCHPR specifically grants the African Commission the mandate to interpret all the provisions of the Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU[52].

The general approach of the Dakar Draft to the procedure of the African Commission on Human and Peoples Rights was based strictly on adverserial concepts[53]. The revised procedural provisions in the AFCHPR were ameliorated by the subjugation of the Commissions basic adverserial procedure rules to the primary consideration of exhausting all appropriate means of amicable solution in considering matters submitted to it[54].

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51 Article 45(5) Dakar Draft.

52 Article 45(3) ARCHPR. The grant of this power of interpretation to the Commission was not without controversy. Several States preferred the mandate of the Commission to be limited to where two States were involved and in that event differences should be resolved by recourse to the OAU Charter. Thus in effect implying that differences between Member States would be resolved on the basis of the provisions of the OAU Charter which emphasizes diplomatic and political settlement. (See OAU Doc CM/1149(CCCVII) at p.28 paras. 121-123. The Rapporteurs Report of the Ministerial Meeting states that the delegates of Tanzania, Burundi and Kenya expressed reservations on the Article 45(3) - OAU Doc CAB/LEG/67/Draft Report (11) Rev.4 p.28. As of 12 May 1987, only Tanzania (on 9.3.84) of the these States, had ratified the Charter.

53 The relevant Articles (48 and 52) of the Dakar Draft do not mention the need for the Commission to adopt a peaceful procedure or to initially seek amicable solutions to matters referred to it.

54 Article 48 and 52 AFCHPR.

The foregoing analysis reveals the main areas where the regional, nay international, protection of human rights has been enhanced or increased by the AFCHPR. Against this trend are several areas where some reductions have occurred in the AFCHPR provisions vis-a-vis the human rights protections offered by the Dakar Draft.

One of the primary areas where such reductions have occurred concern the provisions relating to freedom of association. The Dakar Draft provision on the freedom of association provides in absolute and unconditional, albeit negative, terms that: "No one may be compelled to join an association"[55].

The AFCHPR however, subjects the negative freedom of association (Article 10(2))[56] to the operation of Article 29 which latter article imposes several duties on the individual. For instance Article 29(4) in effect allows the compulsory membership of associations which promote national or social solidarity. It would seem therefore that although political considerations may apparently be the primary motivation of such a clause, we should not loose sight of the fact that the jurisprudence of traditional African Law sees the individual privately as a member of his community[57]. The African Commission would thus be well advised to construe the provision of the freedom of association in the latter context to check the abuse of the freedom of association by States. For instance, the provision as it stands would justify the existence of one party States in Africa and membership thereof, and may thus encourage the perpetuation of the trend in the region. Furthermore, the provision

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55 Article 10(2) Dakar Draft.

56 Article 10(2) AFCHPR provides that: "Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association".

57 See Chapter One, generally, above.

stands to legitimize structures against the evolution of the concept of loyal opposition.

The right of every citizen to participate freely in the government either directly or through freely chosen representatives is absolute in the Dakar Draft[58]. This provision is diluted in the AFCHPR; Article 13(1) of the AFCHPR allows the exercise of this right only "in accordance with the provisions of the law"[59]. Despite the fact that this right, more than any other, is subject to vulnerability the AFCHPR provision does not specify the areas that such laws may regulate[60]. The effect of this provision is that political rights may be encroached upon by domestic laws drafted by repressive regimes.

The effect of the AFCHPR is also reduced vis a vis the Dakar Draft in relation to the requirement of publicity regarding reports on violations of human rights. The Dakar Draft provides for the agreement of one third of the Members of the Assembly of Heads of State and Government before the report on violations on human rights can be made public[61]. The AFCHPR now requires a majority decision of the Assembly in such a case[62].

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[58] Article 13(1) Dakar Draft.

[59] Article 13(1) AFCHPR.

[60] The relevant provision in Article 23 of the American Convention preserves the individuals right to participate in government and allows laws to regulate the exercise of the right "only on the basis of age, nationality, residence, language, education civil and mental capacity, or sentencing by a competent court in criminal proceedings" (underlines for emphasis).

[61] Article 57(2) Dakar Draft.

[62] Article 59(2) and (3) AFCHPR. It is noteworthy that the requirement of the OAU Charter on procedural questions is also simple majority. Article 10(3) OAU Charter.

With regard to the rights of women and children, the AFCHPR enhanced the protection of the rights of the former[63] but weakened the protection of the latter[64]. In the final analysis however, the rights of women and children are adequately catered for in the AFCHPR when compared to other regional conventions[65].

One of the major areas where reductions were perpetuated by the Ministerial Meeting was in regard to the autonomy of the African Commission.

Firstly; with a view to enhancing the autonomy and independence of the Members of the African Commission, the Dakar Draft provides that "the members of the Commission shall serve in their individual capacity"[66], and that "the office of a member of the Commission shall be incompatible with that of a Government member or a member of the diplomatic corps"[67]. Although the former provision was adopted by the Ministerial Meeting, the latter provision was the subject of a two-day debate and

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[63] The Dakar Draft provided inter alia for "the elimination of every discrimination against women" (Article 18(3)). The AFCHPR in this wise, went further to expressly provide that "the State shall... ensure the protection of the rights of the woman and child as stipulated in international declarations and conventions" (Article 18(3)). The Dakar Draft provides that "The State shall ensure protection of the rights of the child as stipulated in international declarations and convention" (underlines for emphasis)

[64] The protection for the child is weakened in the sense that the AFCHPR deleted the Dakar Draft provision protecting the right of the child to "special measures of protection in accordance with the requirements of their physical and intellectual well being" - Article 18(4) Dakar Draft.

[65] See Articles 8 and 12 European Convention and Articles 17 and 19 American Convention.

[66] Article 31(2) Dakar Draft.

[67] Article 32 Ibid.

was eventually deleted after votes were taken[68]. The non-adoption of this clause may be regarded as an erosion of the autonomous nature of the Commission as projected by the Dakar Draft.

Secondly; in relation to the jurisprudential and legislative functions of the African Commission, Dakar Draft provided that Commission "shall... [2] Formulate and lay down principles and rules aimed at the solution of legal problems relating to human rights and fundamental freedoms upon which African governments shall base legislation"[69]. This provision obligates States to enact domestic legislation tailored upon "principles and rules" evolved by the African Commission. The Ministers however, removed this obligation by adopting a liberal phrase: "...upon which African Governments may base their legislations"[70]. The weakening of this provision by the Ministerial Meeting reduces the potential of the African Commission to perform an effective legislative role.

Thirdly; the independence of the Commission was further reduced by the Ministerial amendments to the Commissions rules of procedure. The Dakar Draft states that: "The Commission may resort to all methods of investigation"[71]. Barring any disagreement from Commission Members, this provision vests in the Commission, the power to adopt investigatory methods utilized by existing regional and international human rights Commissions, including fact-finding, on site inquiries and, where its resources are limited, the utilization of the data banks of existing human rights organizations. The Ministers however weakened the provisions of

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68 The inclusion of Article 32 (Dakar Draft) in the AFCHPR was defeated by fifteen votes to twenty during one of the only votes taken during the Ministerial Meeting on the provisions of the Dakar Draft. See OAU Doc CAB/LEG/67/3/Rev.5 p.12.

69 Article 45(2) Dakar Draft (underlines for emphasis).

70 Article 45(1)(b) AFCHPR (underlines for emphasis).

71 Article 46 Dakar Draft.

the AFCHPR by adopting the phrase "any appropriate method"[72] in place of "all methods".

The foregoing analysis informs us that much as political considerations were a major factor in evolving a Charter, the Ministerial Meeting of African Justice Ministers provided a Charter that was more technically and legally precise than the Dakar Draft. The African Legal Experts that produced the Dakar Draft succeeded in producing a document that comfortably accommodated the Ministerial amendments without creating any significant political disaffection. With regard to the substantive provisions, the Ministerial amendments enhanced the protection of property, the freedom of information and expression, the rights of women, the freedom of movement relating to inter-State mobility, but weakened the autonomy of the African Commission and the provisions on mass expulsions and the right of association. The procedural provisions of the African Commission on Human Rights were enhanced by the African Ministers of Justice through the enlarment of admissibility procedures and the emphasis on the exhaustion of peaceful and amicable avenues rather than quasi-judicial or adverserial methods.

The Ministerial Meeting of African Justice Ministers maintained the major features of the Dakar Draft by reconsecrating African values and traditions, and the first, second and third generation rights in the AFCHPR. However, several provisions of the Dakar Draft were affected by primary political considerations, thus undermining the legal efficacy, of provisions especially those concerning the freedom of association and the autonomy of the African Commission. The legal efficacy of the AFCHPR will invariably depend upon the African State practice and capacity of the African Commission to resist political pressures.

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[72] Article 46, AFCHPR.

(c) The Basic Philosophy of the AFCHPR

The basic philosophy of the AFCHPR is reflected in the following features of its preamble:-

- Reaffirmation of the principles and aspirations of the OAU as stated in the OAU Charter especially those regarding freedom, equality, justice and dignity, non-discrimination, elimination of colonialism, neo-colonialism, apartheid and Zionism.
- The importance of the historical traditions and values of African civilizations which attach significance to human and peoples rights.
- The basic recognition that fundamental human rights stem from the attributes of human beings thus justifying their international protection and guarantee.
- The emphasis of the fact that the corollary enjoyment of rights and freedoms is the performance of duties on the part of everyone.
- The significance attached to the right to development and that civil and political rights cannot be disassociated from economic, social and cultural rights in their conceptions 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.
- The reaffirmation of the principles of human and peoples rights and freedoms as contained in international instruments adopted by the OAU and the Movement of Non-Aligned Countries and the UN, with special emphasis on the UN Charter and Universal Declaration of Human Rights.

The preamble thus reveals a unique approach by its emphasis on African values and traditions without prejudice to international human rights norms. The authors of the AFCHPR were inspired by African legal philosophy and were urged to evolve a Charter that was responsive to African socio-economic needs[73].

(i) <u>African Philosophy of Law and Human Rights</u>

The African concept of law allows the general interests of the community to override individual claims. This does not necessarily mean that individual rights are not protected. African philosophy of law assumes harmony, not divergence of interests, and stresses the significance of the individuals duties both to the community and other members of the society rather than individual claims against them[74]. Keba Mbaye underscores this point by stating that: "In Africa, laws and duties are regarded as being two facets of the same reality: the inseparable reality"[75].

In the West, the law is seen primarily as an opposition between the individual and the State, the latter representing the community. The legal right, in the West, is a claim which the individual may make against the State or other members of society; the corollary of this is that there is an obligation on the part of the State to uphold his claim.

The western phenomenon of the legal subject being the individual possessing a bundle of rights which can be asserted against 'the world' has limited application within the African concept of law. Although

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[73] Report of the Secretary-General on the Draft African Charter on Human and Peoples Rights OAU Doc. CM/1149/XXXVII (1981) p.1.

[74] Clause Ake "The African Context of Human Rights" in '<u>Africa Today</u>' Vol.34 (1987) p.5.

[75] K. Mbaye "<u>Keynote Address on the African Charter on Human and Peoples Rights</u>" ICJ Conference Paper <u>op cit</u> p.27

individual in the African context also possesses these bundle of rights he asserts then within the framework of his duties to the community[76]. The community provides support for the individual and demands allegiance. The interrelation of allegiance and support is a significant factors in most African communities[77]. Hence, the Charters recognition "that fundamental human rights stems from the attributes of human beings, which justifies their international protection and... that the reality and respect of peoples rights should necessarily guarantee human rights"[78].

The desire to safeguard traditional African values is also reflected in the importance attached to the protection of the family[79], moral and traditional values[80], and the definition not only of rights but also of the duties of man both towards his fellow man and towards his State[81]. In this latter respect the AFCHPR differs from the European and American Conventions.

The AFCHPR is the first treaty of its type to contain a comprehensive list of duties of the individual towards his community[82]. While the AFCHPR provides that every "individual shall have duties towards his family and society, the State and other legally recognized communities

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[76] Anthropological evidence upholds the concept that "personhood" in Africa is enhanced by ones belonging to and fulfilling ones duty or role in the community. - See Ifeanyi Menkiti, "Person and Community in African Traditional Thought" in Richard A. Wright (ed) African Philosophy: An Introduction 2nd ed (Washington DC University Press of America 1979) pp.157-168.

[77] Iba Der Thiam "Human Rights in African Cultural Traditions" Human Rights Teaching UNESCO 3 (1982) p.4.

[78] ARCHPR 5th preambular paragraph (underlines for emphasis).

[79] AFCHPR, Article 12.

[80] Ibid Article 17.

[81] Ibid Preambular paragraph 6.

[82] AFCHPR Articles 27-29.

and the international community"[83], in the other Conventions, the notion of "duties" implies obligations of a State towards its citizens or towards foreign nationals within its jurisdiction[84]. Although the American Convention refers to the individuals duties to his family community and mankind, it is arguable that "community" in this context, refers to the State[85].

The approach of the AFCHPR which tends to find a balance between individual rights and collective rights is founded upon the fact that in Africa the existence of the individual is inconceivable outside the community. The individual neither exists nor lives outside "the group"[86]. The socio-economy of most of Africa is devoid of social atomizations and individualism since the majority of its people are inevitably attached to the traditional ritual of subsistence economies managed on communal bases. Consequently, in Africa, the community in its various forms[87], is a privileged subject of law.

The adverserial mode of judicial proceedings is alien to the African conception of law. Disputes are resolved through reconciliation and non-contentious procedures. This characteristic may have informed the

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[83] Ibid Article 27(1). The AFCHPR also states that "[t]he enjoyment of rights and freedoms also implies the performance of duties on the part of everyone" - preambular paragraph 6.

[84] E. Daes "Study of the Individuals Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights" UN Doc E/CN.4/Sub.2/432.Rev.1 Add 1-6 (1979).

[85] See the American Convention, Article 32. Similarly the Universal Déclaration of Human Rights provides that "[e]very one has duties to his community in which alone the free and full development of his personality is possible" - Article 29(1).

[86] Rapporteurs Report CM/1149(XXVII) Annese II OAU Council of Ministers 37th Session at Nairobi (June 1984) p.3.

[87] The community in Africa may take the form of clan, lineage, ethnic group, tribe etc.

emphasis of amicable and reconciliatory procedures adopted by the AFCHPR regarding complaints brought before the African Commission[88]. The African aversion to judicial procedures in also reflected in the OAU Convention Covering the Specific Aspects of Refugee Problems in Africa (1969)[89]. Whereas, the 1951 UN Convention relating to the Status of Refugees and the 1967 UN Refugee Protocol[90] provides for judicial solutions to problems, arising from application thereof, the OAU Convention on the other hand confines itself to conciliatory procedures[91].

(ii) The AFCHPR: A Response to African Socio-Economic Conditions

Due to the acute nature of underdevelopment in Africa, particular attention is given to economic, social and cultural rights[92]. Although the preambular paragraph 7, ostensibly equates civil and political rights with economic, social and cultural rights, nevertheless, the phraseology betrays deference to economic, social and cultural rights where they come into contention with civil and political rights. The exigencies of economic growth thus serves a justification for the subordination of civil and political rights in preference for socio-economic rights. President Nyerere of Tanzania succinctly states the position thus:

> "what freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes but these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is

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88 AFCHPR Articles 48 and 52.

89 OAU Doc CM/267/Rev.1, February 1969.

90 UN Doc HCR/IP/10/ENG.

91 Article IX, OAU Convention on Refugees op cit.

92 AFCHPR preambular paragraph 7, See also Articles 15,16 and 18.

> reduced will his existing political freedom become meaningful and his right to human dignity become a fact of human dignity"[93].

The foregoing pronouncement from a leading African statesman has been echoed by other political leaders[94] seeking to justify the postponement of political liberties until economic development is achieved. However there is no guarantee that the one will follow the other. The arguments based on the exigencies of economic growth are likely to serve as justification for the subordination (albeit temporary) of the rights of the individual to the interests of the State. We endorse Rhoda Howards view that the proponents of subsistence or economic rights priority over civil/political rights are rhetorics seeking the perpetual political monopoly of a self-serving elite[95].

We submit that, although economic subsistence ought to be a right[96], economic and social rights ought not to be a prerequisite for the enjoyment of civil and political rights[97]. Consequently we endorse the thesis of the interdependence of basic rights. The protection of civil and political rights are needed for the achievement of basic needs, economic subsistence and social and cultural rights.

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93 Julius K. Nyerere "Stability and Changes in Africa" (an Address to the University of Toronto, 1969) printed in African Contemporary Record 2 (1969-70) C.30-31.

94 Col. Ignatius Achaempong proclaimed that "One man, one vote, is meaningless unless accompanied by the principle of one man one bread" See Amnesty International, "Background Paper on Ghana" (London: mimeo 1974) p.9.

95 Rhode Howard: The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa. Human Rights Quarterly p.469.

96 Henry Shue, Basic Rights: Subsistence, Affluence, and US Foreign Policy (Princeton, NJ. Princeton University Press 1980) Chapter 1.

97 An apt but extreme scenario is painted by R.J. Vincent who doubts whether any suggestion that remuneration for public holidays, as an economic and social rights, is a prerequisite for the enjoyment of the civil and political right not to be subjected to arbitrary arrest or detention, would be taken seriously. R.J. Vincent, Human Rights and International Relations (Cambridge University Press 1986) p.89.

Since the AFCHPR reposes in the African Commission the power of interpreting clauses of the Charter, it is pertinent that the African Commission interpretes Clause 7 of the Preamble[98], in a manner cognisant of the interdependence of basic rights. The movement to separate the two groups of rights or indeed establish a hierarchical structure of rights is a response to ideological and political pressures which the African Commission should resist. The spirit of the AFCHPR invites the Commission to maintain distance from both the East and West and their conceptions of the ideological function of human rights.

The response of the AFCHPR to socio-economic needs is reflected in provisions made for economic, social and cultural rights. Member States are required to make provision for the achievement of this category of rights[99] with particular emphasis on the right to development[100].

We can discern, therefore, from the foregoing that the preamble of the Charter gives us a spectoral vision of the major themes that traverse the Charter. Firstly, the AFCHPR derives its inspiration mainly from the African historical, legal and cultural sources without sacrificing the external influences of Judeao-Greco jurisprudence presented by existing international human rights instruments. Secondly, while individuals are entitled to certain rights under the Charter, they are also bound to fulfil duties towards the community and State. Finally, although the preamble seems to lay more emphasis on economic, social and cultural rights, over civil and political rights, the degree of priority of the former over the latter will have to be determined by the African Commission.

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98 AFCHPR states inter alia "... that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights" - preambular Clause 7.

99 Article 1, AFCHPR.

100 Article 22 Ibid.

Whether or not the preambles unique articulation of the African approach to human rights in response to African needs finds support in the main provisions of the Charter remains to be demonstrated. We propose to examine, in the following discourse, the substantive provisions of the AFCHPR that reflect these major themes. We shall also consider, where appropriate, relevant provisions of other international and regional human rights conventions with a view first, to test the efficacy of the provisions of the AFCHPR and secondly, to determine whether the AFCHPR has omitted pertinent provisions which ought to have been incorporated. Thus our criteria for evaluating the AFCHPR is based primarily on the existing international standards of human rights protection with a reasonable margin of appreciation in respect to African values, needs and problems.

(d) The Basic Structure of the Charter

The AFCHPR is divided into three parts. Part I is subdivided into Chapters I and II. Chapter I sets out the human and peoples rights to be protected under the Charter[101], while Chapter II delineates the individuals duties towards "his family and society, recognised communities and the international community"[102].

Part II of the Charter comprises four chapters which set out detailed measures to safeguard and protect rights enshrined in Part I. Chapter I thereof provides for the establishment of the African Commission on Human and Peoples Rights[103]. Chapter II deals with the functions of

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[101] Ibid. Articles 1-18 set out the rights of the individual; Articles 1-14 concern civil and political rights; Articles 15-18 relate to economic, social and cultural rights. Articles 19-26 deal with "peoples" rights.

[102] Ibid, Article 27.

[103] Ibid, Article 30.

the Commission[104] while Chapter III provides for the procedure of the Commission[105]. Chapter IV enumerates the applicable principles by which the Commission will ensure the protection of human rights in Africa[106].

Finally, Part III enshrines the general provisions relating to the commencement of the African Charter on Human and Peoples Rights[107].

It is pertinent to state that there is no specific text in the Charter that serves as a declaration of Rights[108]. The AFCHPR adopts a unified approach to the declaration, promotion and protection of rights, be they, individual or peoples' rights, political or economic rights.

We shall now embark on an analysis of the substantive principles of the Charter.

(e) Non-Discrimination

The Charter consecrates the principle of non-discrimination. Article 2 of the AFCHPR provides that:

> "every individual is entitled to the protection of the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status".

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104 Ibid, Article 45.

105 Ibid, Article 47-54 concern communications from States, and Articles 55-59 deal with communicatins from other sources such as individuals and non-governmental organisations.

106 Ibid, Articles 60-63.

107 Ibid Articles 64-68.

108 Unlike the "American Declaration of the Rights and Duties of Man" which is the cornerstone of the inter-American system for the protection of human rights. See OAS Res.XXX adopted by the Ninth International Conference of American States, Bogota 1948.

This provision is unique in the sense that although the American Convention and the Universal Declaration of Human Rights contain similar clauses[109], neither includes "ethnic group" within the categories protected from discrimination.

The Charters non-discrimination provision has finally provided an answer to the critics who accuse African States of applying the Universal Declarations non-discrimination principles only to the racist regimes of Southern Africa, and not to themselves[110]. The inclusion of an express prohibition against discrimination along ethnic lines is a major attempt at scaling the hurdle of tribalism in Africa. Tribalism or ethnic favouratism is a phenomenon that has effectively denied politically disadvantaged groups from exercising their rights[111]. The AFCHPR, by including "ethnic group[s]", has thus manifestly complemented the principle of the OAU Charter "to promote understanding among our peoples and cooperation among our States... in a larger unity transcending ethnic and natural differences"[112].

(f) The Rights of the Individual

The rights of the individual under the AFCHPR can be classified as personal security rights, civil and political rights, and economic, social and cultural rights.

(i) Personal Security Rights

Article 3 of the AFCHPR protects the individuals right to equality before the law, and equal protection of the law.

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109 See, Article 14, European Convention; Article 1 American Convention and Article 2, Universal Declaration of Human Rights.

110 See Glenn Mower JR, "Human Rights in Black Africa: A Double Standard?" Human Rights Journal (1976) p.51.

111 See Chapter 4 generally above.

112 Preambular paragraph 4, OAU Charter. See Appendix II, post.

Article 4 provides for the inviolability of the "human being", respect for life and the integrity of his person and that "[n]o one may be arbitrarily deprived of this right". The drafting of this clause caused some controversy resulting in several socialist/Marxist African States making reservations thereto[113]. The reasons for the reservations are not unconnected with the violent methods utilized by these States to eliminate 'Lassaire faire' capitalism and organised opposition movements with a view to installing repressive and doctrinal Marxist methods of rule.

The provision that "no one may be arbitrarily deprived of this right" implies that derogations will be permissible where municipal laws so provide. Most African States operate laws that allow capital punishment not only for crimes but also for political offences and other miscellaneous offences, sometimes euphemistically referred to as "economic sabotage"[114] In several States, summary executions are prevalent[115] Quasi-judicial organs which are politically motivated are formed outside the established judicial system to dispatch death sentences which are often executed in public.

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[113] These countries were Angola, Cape Verde, Guinea Bissau and Mozambique. Rapporteurs Report, OAU Doc CM/1149(XXXXVII) Annex 11, p.8 para.38.

[114] Under the provisions of the Nigerian Counterfeit Currency (Special Provisions) Decree No.22 of 1984 and the Supreme Military Council Decree 20, Special Tribunal (Miscellaneous Offences) Decree of 1984, the death penalty is prescribed for, counterfeiting, drug trafficking and illegal oil sales. However in response to international criticism, the Government in July 1986 decreed the abolition of death sentences regarding the aforementioned issues but retained the death penalty for armed robbery. See also, Article 38 of the Dangerous Drugs Act 1986 (entered into force 12 Sept 1986) of Mauritius which imposes a mandatory death sentence for any person convicted of importing "dangerous drugs".

[115] See "Third Report of the UN Commission on Human Rights, Special Rapporteur on "Summary Executions" UN Doc.E/CN.4/1985/17.

The majority of African States retain the death penalty for one form of offence or the other[116]. Furthermore the spate of extrajudicial killings has not abated[117]. In the light of the foregoing, it is submitted that derogation permissible under Article 4 of the AFCHPR leaves room for States to continue practices that violate human life as long as they prove that municipal laws and decrees authorize these actions. The Charter ought to have placed a ban on the death penalty or at least subscribed to the gradual abolition of the death penalty[118].

Furthermore, in contrast to the American Convention, the AFCHPR omits the controversial sentence of the American Convention which states: "This right [to life] shall be protected by law and in general <u>from the moment of conception</u>"[119]. The AFCHPR, by omitting this phrase thus leaves to individual OAU Member State Parties to the Charter, the regulation of abortion and the definition of the term "abortion".

Article 5 of the AFCHPR is closely linked with the preceding article in so far as it protects the individuals dignity and legal status. Article 5 also prohibits the degrading treatment of the individual as well as torture, cruel and inhuman punishment of the individual. Although, Article 5 does not contain a clause prohibiting "involuntary servitude"[120], in

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[116] See Report of Amnesty International 1987, Amnesty International Publications, London p.21 ff.

[117] Ibid.

[118] The following international human rights instruments place restrictions on the death penalty to varying degrees: Article 2 European Convention; Article 6 The UN Convention Civil and Political Rights; and Article 4 American Convention (which has exceptionally detailed restrictions on the death penalty).

[119] Article 4(1) American Convention.

[120] During this writers discussions with Mr. Akinleye, a member of Nigerias delegation to the Ministerial Conference on the Draft Charter, it was revealed that the curious omission of "involuntary servitude" was at the instance of two socialist countries, Ethiopia and Mozambique who were insistent on the exclusion of the term.

comparison the American Convention[121], the European Convention[122] and the International Covenant[123] expressly forbid servitude. However, the AFCHPR expressly prohibits slavery and slave trade[124]. The exclusion of the term "involuntary servitude" is unfortunate, although its inclusion would almost certainly have conflicted with the liberal interpretation of the Charters provisions regarding the duties of the individual to his national community[125].

The application of Article 5, is significant and apt, especially in relation to torture, inhuman and degrading punishment as perpetuated by government organs against persons in police custody and prisons[126]. A purposeful application of the Charters provision in this regard may reduce the occurence of such practices, including summary executions, the corporal punishment of adult and juvenile offenders, and lately, customs search of body cavities.

Article 6 of the AFCHPR provides for the right of the individual to liberty and to the security of his person including freedom from arbitrary arrest or detention. Due to the existence of authoritarian governments in Africa, the majority of Africans live in a perpetual state of siege. Authoritarian governments impose legislative restrictions on the personal security rights in the form of detention laws, deportation acts and other internal security legislation. Ruling elites believe that

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[121] The American Convention, Article 6(1).

[122] The European Convention, Article 4(1).

[123] The International Covenant on Civil and Political Rights, Article 8(2).

[124] Article 5, AFCHPR.

[125] Article 29(2) Ibid.

[126] Isabella E. Okagbue "The Law and Human Dignity: Some Aspects of Inhuman and Degrading Treatment" Nigerian Current Law Review (1985) p.213.

certain types of personal security rights jeopardize national unity and political stability[127]. Most authoritarian governments believe that freedom from arbitrary arrest and detention together with the freedom of movement may facilitate the overthrow of the status quo by organized political opposition groups. The political and legal tool most frequently used by African leaders to silence political dissent has been preventive detention Acts[128]. Thus while detention laws are used by authoritarian regimes to disintegrate the opposition[129], they are also utilized by ostensibly "benevolent" or democratic governments as a "damocles sword" to conscript members of the opposition. We recognise the genuine need for State security however it should not be used as an excuse, at every turn, for depriving the citizen of his liberty and personal security. An independent judiciary is a sine-qua non for the effective enforcement of the provisions of Article 6, and thus challenge the unwarranted exercise of power by governments. The judiciary should be prepared to grant habeas corpus, mandamus and ceteriorari orders as effective modes of contesting the legality of detention orders. In cases where the courts have been prepared to grant such orders, they have in certain cases been precluded from presiding over such matters by Decrees ousting their jurisdiction. Notwithstanding the fact that most African

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127 M. Haile, "Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality" in Virginia Journal of International Law (1984) Vol.24 p.602.

128 John K. Ebiasah "Protecting the Human Rights of Political Detainess: The Contradictions and Paradoxes in the African Experience", in Harvard Law Journal, Vol.22 (1979) p.262.

129 For instance, in Malawi, the Preservation Public Security Regulations, 1965 allows detention without trial if the President deems it necessary "for the preservation of public order". Detention is allowed for up to 28 days on the authority of an "authorized officer", subsequently the detainee may be held indefinitely on the orders of the President. More remarkable is the fact that the Public Security Regulations make it an offence to publish anything likely "to undermine the authority of, or public confidence in the government". See also Togo: Political Imprisonment and Torture. Amnesty International Publications, London, (1986) pp.4-33.

Constitutions provide guarantees for personal security rights[130], these violations continue to occur. In some cases the relevant provisions of the constitution are suspended while in others they are simply ignored. For instance in Ghana where the constitution is presently suspended, the Preventative Custody Law 1982[131] empowers the ruling Provisional National Defence Council (PNDC) to authorize the indefinite detention without trial of anyone "in the interest of national security or in the interest of the safety of the person". The African Commission will thus be expected to apply the provision of Article 6 to infringements emanating from the foregoing scenario.

Article 7 of the AFCHPR contains the essential pre-requisites for the Rule of Law. By virtue of Article 7, an individual is endowed with the right to have his cause heard[132], the right to appeal[133], to be presumed innocent until proven guilty[134], to defence (including the right to be defended by counsel of choice)[135], and to be tried within a reasonable time by an impartial court or tribunal[136]. Article 7 further prohibits the prosecution of, or imposition of fines on individuals under ex post facto laws[137].

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130 See Chapter 6 (above).

131 Provisional Natinal Defence Council (PNDC) Law No.4, (1982).

132 AFCHPR, Article 7(1).

133 Ibid; Article 7(1)(a).

134 Ibid; Article 7(1)(b).

135 Ibid; Article 7(1)(c).

136 Ibid; Article 7(1)(d).

137 Ibid; Article 7(2).

The final sentence of Article 7(2) has no parallel in other existing human rights documents as it provides that "Punishment is personal and can be imposed only on the offender". This legend is axiomatic of Western human rights jurisprudence but an option in traditional African law. As earlier discussed, punishment in traditional Africa invites both personal liability or collective liability of the family or clan[138], the latter being a legitimate method of social coercion. Thus, the express inclusion of the "personal punishment" clause in the Charter, though not uncommon in African legal instruments[139], is pertinent for interpretative and jurisprudential clarity.

Article 7, however, does not include certain safeguards which are vital to the protection of the individual. These safeguards can be found in the European and American Conventions, viz. the right of the accused to aid where language is a problem[140], detailed notification of the charges against the accused[141], the obligation of the State to provide Counsel if the accused does not defend himself or is unable to pay for Counsel[142], and the right to request witnesses[143]. It is therefore suggested that these omitted rights be included in the AFCHPR through amendment[144], or by their inclusion in the working rules of the African Commission[145].

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138 See our discussion on human rights in Pre-Colonial traditional Africa, Chapter 1 above.

139 For instance see Article 14 of the Constitution of Uganda.

140 The European Convention, Article 6(3)(e); The American Convention, Article 8(2)(a).

141 The European Convention, Article 6(3)(a); The American Convention, Article 8(2)(b).

142 The European Convention, Article 6(3)(c); The American Convention, Article 8(2)(e).

143 The European Convention, Article 6(e)(d); The American Convention, Article 8(2)(f).

144 By virtue of Article 68 of the AFCHPR.

145 Ibid Article 45(1)(b).

Furthermore, Article 7 of the AFCHPR reveals a loophole which may encourage trials in camera or secret trials before ad-hoc tribunals, since the Charter does not expressly grant the individual the right to a "fair and public hearing"[146]. Furthermore the legal principle of 'nemo judex in sua causa' is regularly infringed by African Government organs through the practice of having civilians appear before secret military tribunals[147], a practice which the Charter apparently does not prohibit. The AFCHPR also omits the provision of the American Convention which guarantees the right to financial compensation in the event of miscarriage of justice[148]. This omission is remarkable especially as such a provision is not alien to African constitutional law[149].

The right to privacy and family life as guaranteed under Articles 17, 8, and 5 of the International Covenant on Civil and Political Rights, the European Convention and the American Convention, respectively is absent from the AFCHPR. This provision contemplates the absence of interference by means of secret surveillance and other methods. It may however, be argued that rather than impose a negative duty, the AFCHPR imposes a positive duty on the State "to assist the family which is the custodian of morals and traditional values recognized by the

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146 See Article 6, European Convention (underlines for emphasis). The European Convention provides specific instances when the public may be excluded from all or part of a trial; these instances include considerations of morals, public order, national security or where publicity may prejudice the interest of justice.

147 For instance, in Angola, during 1986, some 30 political prisoners received unfair trials before military tribunals and at least 17 people were sentenced to death - Amnesty International Report 1987; op cit p.21.

148 Article 10, American Convention. It is pertinent to note that the constitutions of several African Countries, notably, Nigeria, Kenya and Zambia, provide guarantees for personal security rights which are more detailed than the AFCHPR. See Chapter 5 above.

149 For instance see Section 32 Nigerian Constitution 1979.

Community"[150].

The provisions of Article 7 will, despite it shortcomings, have a reasonable impact on the legal institutions of African States which are devoid of such protections. The feasibility of the omitted provisions is however, questionable because of the substantial costs that would accompany the provision of adequate judicial institutions and legal personnel[151]. In the light of the diminishing resources of African States, these factors may explain the AFCHPR authors restraint from incorporating such desirable provisions in the Charter.

The Charter reflects some appreciation of the political as well as financial problems of the African judiciary, by imposing an obligation on State Parties to:

> "guarantee the independence of the Courts and... allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the ... Charter"[152].

In summation, we submit that the protection of personal security rights as provided by Articles 3 to 7 of the AFCHPR is a significant achievement considering the competing claims of different political ideologies and legal systems such as the Islamic Shari'a[153], Common Law, and the Napoleonic Code. However, it is pertinent to state that the

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150 Article 18(2) AFCHPR.

151 H. Hannum The Butare Colloquium on Human Rights and Economic Development in Francophone Africa 1 Universal Human Rights 63 (1979) p.77.

152 Article 26, AFCHPR.

153 For an analysis of human rights in Islam - I Coulson "The State, and the Individual in Islamic Law", International and Comparative Law Quarterly 6 (1957) p.49. See also P. Dudley "Human Rights Practices in the Arab States: The Modern Impact of Shari'a Values" Georgia Journal of International and Comparative Law 12 (1982) p.55.

constitutions of several African States notably, Nigeria, Kenya, Zambia and Zimbabwe provide guarantees for personal security rights which are more comprehensive than the AFCHPR provisions. The deficiencies of the relevant provisions of the Charter may be corrected by virtue of the power of the African Commission on Human and Peoples Rights "to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples rights..."[154].

Finally, while financial constraints may affect the proper administration of justice especially with regard to some of the foregoing personal security rights, we submit that guarantees against torture, inhuman treatment and the observance thereof, should not extract more than a widows mite from State Treasuries.

(ii) Civil and Political Rights

The African Charter on Human and Peoples Rights (AFCHPR) contains provisions that guarantee the following civil and political rights: freedom of conscience and religion[155], freedom of information and opinion[156], the right of association[157], the right of assembly[158], the right to freedom of movement and asylum[159], the right to free participation in the government including equal access to the public service and the use of public property and services[160], and the right to property[161].

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[154] Article 45(1) AFCHPR.

[155] AFCHPR, Article 8.

[156] Ibid, Article 9.

[157] Ibid, Article 10.

[158] Ibid, Article 11.

[159] Ibid, Article 12.

[160] Ibid, Article 13.

[161] Ibid, Article 14.

The foregoing rights are already guaranteed in the constitutions of many African States to varying degrees[162].

Article 8 of the AFCHPR guarantees the "freedom of conscience, the profession and free practice of religion shall be guaranteed...".

The relevance and applicability of this provision is apt in considering the wave of religious unrest and persecution in several African States. In Malawi, for instance, the Government has since the late 1960's persecuted Jehovah's Witnesses whose religious conviction prevents them from joining political groupings and who refused to subscribe to the membership of the Malawi Congress Party (MCP), the country's sole party[163]. Thus the Malawi Penal Code which prohibits "unlawful societies" has been utilized to imprison Jehovah's Witnesses. Religious clashes have also been reported in northern Nigeria between Islamic fundamentalists and Christians[164]. The African Commission on Human and Peoples Rights will have to ensure that the freedom of religion is not infringed by

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162 See Chapter 5, above.

163 Amnesty International Report 1987 op cit p.70-71.

164 See This Week; Lagos Vol.8 No.4 4 April 1988, p.14.

States[165].

In traditional Africa, where consensus ensured effective societal cohesion especially in acephalous societies, freedom of expression is a fundamental right[166]. Thus the right to receive information and to express and disseminate ones opinion as guaranteed in Article 9 of the AFCHPR is a reflection of the African conception of human rights. The "right to express and disseminate ones opinion" must be exercised "within the law"[167]. Consequently, this right may be regulated by domestic legislation, presumably those of libel and slander and sedition where they exist. This is however without prejudice to the application of Articles 60 and 61 of the AFCHPR by the African Commission[168]. African

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[165] The approach of the Inter-American Commission on Human Rights (IACHR) is relevant inthis regard. In "The Case of the Jehovah's Witnesses", (Case 2137 of 9 Sept 1976) the IACHR received a complaint from some Jehovahs Witnesses in Argentina, specifially denouncing Decree No.1867 issued by the Argentine Government on 31 August 1976 which "prohibits in all the territory of the nation, the activities of the religious association known as "The Jehovah's Witnesses"".
The Argentine Constitution provides in Article 14, the right of every inhabitant of the Country "to freely profess his religion"; and Article 20 thereof guarantees the civil rights of citizens including "the free exercise of religion".
The IACHR undertook an on-site observation and passed Resolution 02/79 which inter alia declared that the Government of Argentina had violated the right to freedom of religion (Article V of the American Declaration of the Rights and Duties of Man) and recommended to the Government of Argentina that it re-establish the observance of religious freedom, and repeal Decree 1867 of 31 August 1976 and put an end to the persecution of the Jehovah's Witnesses.
The General Assembly of the Organisation of American States at its 9th Regular Session on 22-32 Oct 1979 considered the Report of the IACHR and passed a resolution which appealed "to the Member States not to present any impediment to the exercise of the right to freedom of religion and of worship withintheir respective judicial provisions. Concerning Jehovah's Witnesses... to urge the re-establishment of their right to freedom of religion and worship based on the American Declaration of the Rights and Duties of Man"
- IACHR, Report on the Situation of Human Rights in Argentina, OAS Doc, OEA/Ser.L/V/II.49.doc 19 corr.1, 11 April 1980, 251-54.

[166] See Chapter One, above.

[167] AFCHPR Article 9(2).

[168] Articles 60 and 61 of the AFCHPR in effect empower the African Commission to consider inter alia, international human rights instruments and conventions as subsidiary means to determine principles of law.

Governments, especially the authoritarian military dictatorships and one-party States, have put this freedom in jeopardy because they are hypersensitive to criticism and apprehensive of their political stability. Some of these Governments exercise both formal and informal censorship institutions and laws[169]. The American Convention provides detailed provisions governing the freedom of expression, Article 13(2) of which expressly prohibits prior censorship. The American Convention also guarantees a detailed right of reply, thus protecting "anyone injured by inaccurate of offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication"[170]. Both the AFCHPR and the European Convention are devoid of such elaborate safeguards.

Articles 10, 11 and 13 of the AFCHPR are interrelated as they guarantee respectively the right to free association; the right of assembly; the right to free participation in government including equal access to the public service and the use of public property and services.

We consider the general effect of these articles as unsatisfactory on three grounds.

Firstly, since they are the basic prerequisites for democracy, the provisions ought to have been endowed with greater detail. The vagueness of Article 13(1) for instance is evident:

> "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".

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169 For instance The Malawi Preservation of Public Security Regulations 1965.

170 American Convention Article 14. This provision alsoprovides a right to reply or to make a correction using the same communications outlet, under such conditions established by law. A corrolary to Article 14 is Article 18 which provides for a right to a name.

The foregoing provision does not provide for regular and genuine elections by universal and equal suffrage nor does it provide for a government accountable to the people[171]. The liberal interpretation of this provision, may be undertaken by the Commission under Articles 60 and 61 of the AFCHPR. Thus, for instance, only the African State Parties to the International Covenant on Civil and Political Rights may be required to conform to the wider obligations imposed therein. We submit that the literal, albeit restrictive, interpretation of Article 13(1) of the AFCHPR will legitimize the existence of authoritarian one-Party States, encourage the tenacity to power and validate the institution of life Presidency in Africa.

Secondly, the limitation attached to these rights by the operation of law, to varying degrees, leaves much to be desired. We shall discuss this issue shortly under the sub-chapter on Limitations.

Thirdly, Article 10 which guarantees the right to free association, despite being curtailed by the operation of the law and "the obligation of solidarity"[172], does not expressly provide for the rights to form trade unions. Indeed, the opposite may occur under Article 10(2) whereby, under Article 10(2) individuals may be compelled to join state-controlled trade union organisations not unlike the practice in Communist Countries. In comparison, both the American Convention and the International Covenant on Civil and Political Rights expressly guarantee the "right to

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[171] Article 25 Covenant on Civil and Political Rights expressly provides that "Every citizen shall have the right and the opportunity, without any of the distinctions in Article 2 (non-discriination) and without unreasonable restriction:...
...(b) To vote and be elected at genuine periodic elections which shall be by universal and equal sufferage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".
See also American Convention, Article 23.

[172] AFCHPR, Articles 10(1) and (2).

form and join trade unions"[173]. It is indeed surprising, that despite OAU efforts towards protecting the interest of trade unions in Africa[174], such a pertinent clause was omitted. It may be argued that the rationale for the comparatively restrictive AFCHPR provision on the right to participate in government is in accord with the traditional African value of political rule by consensus, thereby justifying one party States. We submit that, although this traditional value existed in Africa, it operated only within culturally homogenous groups. However, in present day Africa, most States embody several distinct ethnic groups. The interests of these different groups cannot be and has not been effectively sustained in single party States; thus the need for multi party politics and genuine and periodic elections.

Article 12 of the African Charter on Human and Peoples Rights guarantees the right to freedom of movement and residence[175], the right to leave and return to ones country[176], the right to asylum[177], and the prohibition of mass expulsion of non-nationals[178]. The traditional

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[173] Article 22(1) International Covenant on Civil and Political Rights. See Article Article 16 of the American Convention which guarantees the "right to associate freely for...labour...purposes". See also Article 8 of the International Convention on Economic, Social and Political Rights.

[174] In the field of social affairs, the General Secretariat of the OAU has since 1963, serviced the Conference of African Labour Ministers, a permanent institutin within the framework of the OAU charged with the formulation of the overall policies for African Labour. Under the auspices of the OAU, independent trade union organisations met in Addis Ababa from 20-24 Nov 1972 to study a draft Charter and to prepare a constituent Congress of Pan-African trade union organisations. The meeting of the Constituent Congress led to the establishment of the AU African Trade Unity (AATUU) with its headquarters in Accra - See further U.G. Damachi The Role of Trade Unions in the Development Process: with a case study of Ghana (New York, Praeger Publishers) 1974.

[175] AFCHPR, Article 12(1).

[176] Ibid, Article 12(2).

[177] Ibid, Article 12(3).

[178] Ibid, Article 12(5).

African custom of granting safety seekers protection and assistance even at the greatest sacrifice, is a significant African contribution to international standards of humanitarianism[179].

Under Article 12(3) of the AFCHPR the right to asylum is guaranteed but subject to the laws of Member State Parties and international conventions. General international law reserves to States, the right to grant or not to grant asylum. Similarly, under the Conventions on refugees it is the State which must decide whether or not it will grant asylum[180]. Some 22 African States[181] have municipal laws governing the right to asylum and refugee status[182]. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa permits Member States encountering difficulties in granting asylum to refugees to appeal directly to another Member State, whereupon that other State "shall in the spirit of African Solidarity and international cooperation take appropriate measures to lighten the burden..."[183]. This provision implies that the OAU Convention aims to provide for a duty to receive asylum seekers on State Parties.

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[179] Peter Nobel "Refugees, Law and Development in Africa" in Michigan Yearbook of International Legal Studies (1982) p.265. See G. Oguntomisin and Toyin Falola "Refugees in Yoruba-land in the Nineteenth Century" op cit p.165.

[180] See the Articles I and II of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. OAU Doc.CAB/LEG/24.3./26. See also The 1951 UN Convention relating to the Status of Refugees and the 1967 Protocol thereto: 189 UNTS 137 and 606 UNTS 267. Göran Melander and Peter Nobel (eds) International Legal Instruments on Refugees in Africa (Scandinavian Institute of Human Rights/Upsalla, 1970).

[181] These countries are Algeria, Djibouti, Egypt, Gabon, Ghana, Kenya, Lesotho, Morocco, Nigeria, Senegal, Somalia, The Sudan, Swaziland, Tanzania, Tunisia, Uganda, Zaire and Zambia.

[182] For instance, the Regulations of Asylum Act 1974, Sudan Gazette No.1162, Legisl.Supp.(1974). See also the Refugees (Declaration) Order, 1968, [1968] Subsidiary Legislation (Tanzania) Govt.Notice No.433.

[183] OAU Convention, Ibid, Article II(2). The Convention also provides a stipulation for temporary asylum to refugees pending arrangements for their resettlement in another State - Article II(5).

A State Party to the AFCHPR granting the right of asylum is required, in the interest of strengthening peace, solidarity and friendly relations, to ensure that those granted asylum shall not engage in subversive activities against their countries of origin or any other State Party to the AFCHPR, nor shall their territory be used as bases for subversive or terrorist activities against the people of any other Party to the Charter[184]. The AFCHPR thus reflects the existing rules of customary conventional law[185].

Article 12(4) of the AFCHPR provides that a non-national legally admitted into a territory or a state may only be expelled by virtue of a decision taken in accordance with law. The cumulative effect of Article 12(3) & (4) of the AFCHPR seems to be the incorporation of the principle of non-refoulement (the prohibition against expulsion or return) of a refugee in any manner whatsoever, to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, or political opinion[186]. State Parties to the AFCHPR and the OAU Convention would thus be estopped from expelling refugees.

It is pertinent to highlight the fact that the AFCHPR provides a wider protection for the refugee than the American Convention. For example, the American Convention restricts the right of the individual to seek and obtain asylum in a foreign country to situation where he is "being

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[184] AFCHPR Article 23.

[185] Article III(1) & (2) of the OAU Convention Governing the Specific Aspects of Refugee Problems provide that refugees shall abstain from subversive activities against any OAU Member State and that signatory States to be Convention undertake to prohibit refugees residing in their respective territories from attacking any OAU Member State. It is significant to note that 32 out of 57 OAU Member States have ratified the OAU Convention (as at 31 Dec 1987).

[186] Article 33 UN Convention relating to the Status of Refugees (1951). See also Article II(3) OAU Convention.

pursued for political offences or related common crimes"[187]. On the other hand, the AFCHPR is less restrictive in providing that an individual shall have the right to seek and obtain asylum "when persecuted"[188].

Nevertheless, both the African and American human rights instruments represent a significant departure from the hitherto restrictive approach of international norms which failed to give due recognition to the legal right of the individual to seek and obtain asylum[189].

The AFCHPR expressly prohibits the mass expulsion of non-nationals under Article 12(5) of the AFCHPR. Mass expulsion is defined to mean that directed against national, racial, ethnic, or religious groups. This provision is aimed at curtailing the phenomenon of mass expulsion of aliens frequently experienced in Africa. The creation of sub-regional economic cooperation agreements such as the ECOWAS (Economic Community of West African States) and the Protocol on Freedom of Movement are expected to ameliorate inter-state movement of persons through the removal of the legal obstacles that occasion the mass-expulsion of non-nationals[190]. The Nigerian Government in 1983 expelled over a million illegal aliens in response to the strains on the local employment market, social services and the resultant high crime rate. Nigeria's action was deemed not to be in breach of the ECOWAS Protocol

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187 American Convention, Article 227.

188 AFCHPR Article 12(3).

189 S.P. Sinha Asylum & International Law (Martinus/Nijhoff: The Hague) 1971 p.91.

190 Osita C. Eze "ECOWAS and Freedom of Movement: What Prospects for Nigeria" Nigerian Forum April 1981 p.12; See H.A. Amankwah "The Alien, Freedom of Movement and the Law: A Transnational and Comparative Re-appraisal", Zambia Law Journal Vol.14 (1982) pp.1-20.

on the Free Movement of Persons[191], nor would it in our opinion, have fallen foul of Article 12(5) of the AFCHPR. We submit therefore that AFCHPR should be amended to ensure that mass expulsion is prohibited on any grounds[192]. African States may be able to continue mass expulsion on economic grounds, if Article 12(5) remains unchanged.

It is relevant here to note that, unlike the American Convention, the African Charter on Human and Peoples Rights (AFCHPR) does not include the right to a nationality and the prohibition of arbitrary deprivation of nationality[193]. The significance of these provisions is reflected in the fact that their inclusion in the AFCHPR would have reinforced the confidence of ethnically distinct minorities of European and Asian origins in the security of African State naturalization processes[194]. The importance of such provisions to the countries of East and Southern Africa is particularly relevant in the light of the policy of Africanization of the socio-economic institutions in these regions. However, the African Commission may by reference to international conventions ensure this additional protection[195].

(iii) Economic, Social and Cultural Rights

The AFCHPR does not particularly reflect the zeal with which developing States promoted the incorporation of second generation of rights in the

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[191] Dr. Abubaker Quatara (Executive Secretary of ECOWAS) announced that the Nigerian "quit order did not in any way conflict with any provision of ECOWAS Protocol of free movement of persons within the community" Nigerian Chronicle 29 Jan 1983 at p.16.

[192] See for instance, Article 22(9) of the American Declaration which states that; "The collective expulsion of aliens is prohibited".

[193] See the American Convention, Article 20; and The Universal Declaration of Human Rights, Article 15.

[194] For a discussion of the legal problem of aliens in Africa see D. Dan Nanjira The Status of Aliens in East Africa: Asians and Europeans in Tanzania, Uganda & Kenya (Praeger/New York 1976) p.221-229.

[195] See AFCHPR Articles 60 & 61.

International Convention for Economic, Social and Cultural Rights. The rationale for this may be gleaned from the statement of the Chairman of the Meeting of Legal Experts which drafted the AFCHPR: "The concise and general formulation adopted... is in line with the concern to spare our young States too many but important obligations. In effect these rights of the second generation are rights which entail benefits from the State"[196].

The AFCHPR thus provides guarantees for the following rights:- the right to property[197], the right to work and equal remuneration[198], the right to physical and mental health including medical attention for the sick[199], the right to education including the free participation in the cultural life of ones community[200], and the protection of the family, the aged and disabled[201].

The right to property is guaranteed by Article 14. The incorporation of this right is a significant departure from the traditional African concept of ownership of property which is mainly communal[202]. The right to property may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws[203]. No provision is made for compensation in the event of acquisition of property.

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[196] Statement of Keba Mbaye to the OAU Ministerial Meeting on the Draft African Charter on Human and Peoples Rights 7-19 January 1981, Rapporteurs Report OAU Doc CM/1149(XXXVII) Annex 1 p.4.

[197] AFCHPR, Article 14.

[198] Ibid, Article 15.

[199] Ibid, Article 16.

[200] Ibid, Article 17.

[201] Ibid, Article 18.

[202] See Chapter One above.

[203] AFCHPR, Article 14.

The constitutional provisions of several African States provide for the payment of compensation in the event of appropriation[204]. It would seem that the AFCHPR does not confirm the controversial traditional international law rule on expropriation and nationalization[205]. The classic western standpoint is that compensation shall be "prompt, effective and adequate"[206]. While the UN consensus is that it should be "appropriate"[207] or reasonable.

It is pertinent to highlight the imbalance between the provisions of Article 14 and Article 21of the AFCHPR. The latter provision provides for the peoples right to dispose of their wealth and natural resources and the right of dispossessed peoples to the lawful recovery of its property as well as to compensation[208]. A reconciliation of these two provisions is necessary.

The American Convention guarantees the right to the use and enjoyment of property, and deprivation thereof must be upon payment of just compensation[209]. The absence of a provision on compensation including this quantum for its measurement in event of encroachment on the right to property under the AFCHPR is a lacuna which may be exploited by

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[204] For instance, Article 40(1) of the Nigerian Constitution 1979, Article 18(1) Zambian Constitution, Article 16(1) Zimbabwe Constitution.

[205] Osita C. Eze The Legal Status of Foreign Investments in East African Common Market: (Sijthoff, Leiden), 1975 pp.296-304.

[206] Note of 3 August 1938, reproduced in US Department of State, Compensation for American-owned Lands Expropriated in Mexico (Inter-American Series No.16 1939).

[207] See United Nations General Assembly Resolution 1803(XVII) of 14 December 1962.

[208] AFCHPR, Article 21(2).

[209] Americal Declaration, Article 21; Although the European Convention did not initially provide for this right, the First Protocol thereof provides in Article 1, that each person is entitled "to the peaceful enjoyment of his possessions".

States to the detriment of individuals. Furthermore, Article 14 of the AFCHPR allows each State a reasonable margin to adopt domestic legislations on private property, which will inevitably reflect the States ideology.

The AFCHPR guarantees the right to work under equitable and satisfactory conditions, and the right to receive equal pay for equal work[210]. The AFCHPR is the only regional human rights instrument that guarantees the right to work[211], thus placing an obligation on governments to provide jobs. On the other hand the Covenant on Economic, Social and Cultural Rights in recognizing the right to work, urges State Parties to take steps towards the "full realization" of the right. The obligations created by Article 15 of the AFCHPR have led some academics to conclude that the provision is likely to be honoured more in breach than in observance[212]. The lack of adequate financial resources, unbridled population explosion in Africa[213] coupled with the unfair international trading system informs the pessimism surrounding the feasibility of this provision. However, it would not detract from the spirit of the Charter if States strive to give effect to the right to work.

The provision of the AFCHPR consecrating "equal pay for equal work" should not necessarily be undermined by the inadequacy of economic resources. What matters here, is that once work is provided, the principle to be observed is that workers be given their fair share.

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210 AFCHPR, Article 15.

211 The Convention on Economic, Social and Cultural Rights (Articles 6 and 7) and the Universal Declaration on Human Rights (Articles 23 & 24) provide for the right to work.

212 U.O. Umozerike "The African Charter on Human & Peoples Rights" in AJIL Vol.77 (1983) p.906.

213 See Population and Human Rights, Proceedings of the UN Symposium on Population and Human Rights, Vienna, 29 June-3 July 1981 UN Doc ST/ESA/SER.R/51.

African socialists have re-echoed the socialist ideal that to achieve relative, not absolute wealth, the inequalities of wealth should be demolished[214]. Christian Bay argues that: "the general issue of equality of incomes is not as important as it has been supposed to be... First there must be a right to a minimum income... enough to achieve security for everyone... Second, there must be a right to equal pay for equal work... [But] (w)hat matters concerning equality is equal respect and equal dignity, not the dollars and cents value of equal pay... ...What matters is not equal treatment... what matters is treatment as equals"[215].

The right to physical and mental health including medical care for the sick as provided by the AFCHPR[216] is a unique provision in the regional human rights regime[217]. The enforceability of this provision is doubtful, in the light of the prevailing climate of economic underdevelopment and natural disasters in Africa. Its practical significance will, at least for the time being, be limited to a standard of achievement.

The AFCHPR guarantees the right to education including the free participation in cultural life of ones community[218]. Article 17 also states that the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

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[214] Christian Bay "Self Respect as a Human Right: Thoughts on the Dialectics of Wants and Needs in the Struggle for Human Community" "Human Rights Quarterly" 4 (Spring 1982) pp.70-71.

[215] Ibid p.74.

[216] AFCHPR, Article 16.

[217] Neither the European nor the American Conventions provide for the right to medical care. This right, however, is provided for in Article 12 of the International Covenant on Economic, Social and Cultural Rights.

[218] AFCHPR, Article 17.

We submit that the rights to work, medical care and education impose obligations on States, which the African Commission will find it difficult to enforce. It is doubtful that the provisions on socio-economic rights can be regarded as creating legal rights stricto-sensu, otherwise the AFCHPR will not be in force today. Socio-economic rights are "State-sensitive" since they touch on the public policies of States. Several African States have incorporated socio economic provisions in their constitutions but in a manner that does not lend itself to adjudication[219].

The rationale for the absence of socio-economic rights in some African Constitutions was succinctly stated by Nigerias Constitution Drafting Committee while defending the non-justiceability of the Fundamental Objectives under the Nigerian Constitution:

> "By their nature, they are rights which can only come into existence after the government has provided facilities for them. Thus if there are facilities for education or medical services, one can speak of the 'right' to such facilities. On the other hand it would be ludicrous to refer the 'right' to education or health where no facilities exist"[220].

Consequently, in enforcing socio-economic rights the African Commission may utilize the procedures under Articles 1 and 62 which require State Parties to undertake to adopt legislative and other measures to give effect to the rights and freedoms guaranteed in the AFCHPR and to submit every two years a report on the measures taken with a view to giving effect to the rights and freedoms enshrined in the AFCHPR.

Progressive achievement, of the economic and social rights may thus be

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219 Ostensibly justiceable socio-economic rights are already guaranteed in the Constitutions of a few African States, notably, Algeria and Republic of Benin. However in other States like Nigeria, socio economic rights are couched in non-justiceable terms as contained in the Chapter on Fundamental Objectives as Directive Principles of State Policy" of the Nigerian Constitution (1979) - (Articles 13-22).

220 Report of the Nigerian Constitution Drafting Committee, (Lagos: Federal Government Printer 1978).

tested by the Reports which may reveal the good faith of States towards implementing the relevant measures. Failure by a State Party to submit a Report should certainly be regarded as bad faith, and apathy, thus corroborating any allegation of the violation of socio-economic rights.

Article 18 of the AFCHPR regards the family as the "natural unit and basis of society and imposes a positive duty on the State to protect and "to assist the family which is the custodian of morals and traditional values recognized by the community"[221].

In this context the AFCHPR does not have a provision analogous to Article 17(5) of the American Convention which recognizes equal rights for children born out of wedlock and those born in wedlock. The non-incorporation of such a clause in the AFCHPR may be attributed to the fact that express recognition of the rights of illegitimate children may be disagreeable to Islamic[222] and Christian conceptions of morality. Although the rights of the illegitimate child are not expressly protected in the AFCHPR, the African Commission may take cognisance of the approach adopted in the case of Marckx v Belgium[223]. Despite the fact that the European Convention contains no clause similar to Article 17(5) of the American Convention, the European Court of Human Rights held that there was no objective and reasonable justification for treatment in which the illegitimate child had no entitlement on intestacy in the estate of members of her mothers family.

The implication of this decision, therefore is that any law that creates distinction between the legitimate and the illegitimate child will be

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221 Article 18(2) AFCHPR.

222 Under Islamic Law of Succession, an illegitimate child is not entitled to any part of his deceased putative fathers estate.

223 Series A, No.31, Judgement of 13 June 1979.

contravening Article 14 of the European Convention[224]. Mutatis Mutandis, the corresponding Article 2 of the AFCHPR may be interpreted likewise[225], thus granting equal status to children irrespective of circumstances of birth.

By virtue of Article 18(3) of the AFCHPR, the State Parties undertake to ensure the elimination of any discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in International Declarations and Conventions[226]. Although the legal effect of the UN Charter is not in doubt, it will be futile to invoke the provisions of international Conventions against African States that have not acceded to these instruments. It may however be argued that the International Covenant on Civil and Political Rights[227] as well as the International Covenant on Economic, Social and Cultural Rights[228] have elevated to the level of legal norms, womens rights that are

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[224] Article 14 of the European Convention provides that the rights and freedoms guaranteed therein "shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (underlines for emphasis).

[225] Article 2 of the AFCHPR guarantees the enjoyment of the rights and freedoms in the Charter without distinction of any kind, "such as race, sex...language,...birth or other status" (Underlines for emphasis).

[226] The relevant international instruments dealing with the rights of women and their implementation include the UN Charter (Article 1(3),8,55 and 56), the Universal Declaration of Human Rights (Articles 2,7,16,21,22,23,25 and 26); Convention on the Political Rights of Women, 1952; the Convention on the Nationality of Married Women, 1957; the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962; Declaration on the Elimination of Discrimination Against Women, 1967. Others include the Equal Remuneration Convention, 1951 of the ILO; the Discrimination (Occupation and Employment) Convention, 1958 of the ILO; the Convention against Discrimination in Education, 1960, of UNESCO; the Recommendation concerning the Employment of Women with Family Responsibilities, 1965, of the ILO; the Recommendation Concerning the Status of Teachers, 1966, of UNESCO; the Proclamation of Tehran, 1968, and the Declaration on Social Progress and Development, 1969.

[227] Articles 2(2), 24 and 26.

[228] Articles 2(2), 3,7 and 10.

generally absent from African legislative instruments. We submit that the protection accorded womens rights in the AFCHPR is grossly inadequate, especially in the light of the discrimination and prejudices perpetuated against women in Africa[229]. The AFCHPR does not provide for the free choice of marriage partners[230], the right to marry and found a family[231]. Although most constitutions of African States guarantee equal opportunities to every citizen[232], very few have special provisions protecting womens rights, and where these provisions exist they reflect the ideology or religious inclination of the State[233]. It therefore appears that the need to ensure African regional consensus and the viability of the Charter informs the relative weakness of the provision on womens rights.

We submit that besides the constitutional handicap of African States, the Charters haphazard "draw-bridge" method of linking its concise clauses to the relative clarity and detail of international instruments, will allow African States that are not signatories to these instruments, to escape the desired toll. The imperatives for political consensus thus explains why the protection of womens rights in the AFCHPR is severely

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229 For discussions on the Status of Women in Africa, see Rhoda Howard "Womens Rights in English Speaking Africa" in C.E. Welch and R. Meltzer (eds) Human Rights and Development in Africa op cit pp.46-74; D. Paulume (ed) Women in Tropical Africa (London: Rutledge & Kegan Paul/Berkeley University of California Press, 1963). See also "Women: the Neglected Human Resource for African Development". Paper prepared by the Human Resources Development Division, United Nations Economic Commission for Africa, Addis Ababa, July 1972 in Canadian Journal of African Studies Vol.II 1972.

230 See Article 17(3) American Convention.

231 See Article 17(2) Ibid; and Article 12 European Convention.

232 For instance see the Constitution of Liberia, Section 18; Constitution of Burundi, Section 11.

233 For instance the Constitution of Egypt states that "the State shall guarantee the proper coordination between the duties of woman towards the family and her work in the society, considering her equal with man in the fields of political, social, cultural and economic life without violation of the rules of Islamic jurisprudence" - Article 11.

restricted in comparison to the OAU's comprehensive recommendation on women as incorporated in the Lagos Plan of Action[234]. A comprehensive catalogue of justiceable womens rights, probably in the form of a Protocol to the AFCHPR[235] is required to counteract the discrimination experienced by African women.

From the foregoing discussion, it is evident that the AFCHPR endeavours to guarantee individual rights in the form of personal security rights, civil and political rights and social economic and cultural rights. The deficiency of these provisions vis-a-vis those of other international human rights instruments may be attributed to two main factors. Firstly, the general desire of the authors of the Charter not to alienate African States by imposing too stringent a regional human rights Charter. Secondly, consideration of the depressed regional economic condition informs the lack of detail attached to individual rights. This factor is underlined by the Charters' preambular clause which states that "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".

In addition to these practical restrictive influences on the AFCHPR, the effectiveness of the protection of individual rights is also hindered by stipulations specified therein, which allow limitations of individual rights; to those limitations we now propose to turn.

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234 Lagos Plan of Action, Chapter III, paras. 295-325. Resolution ECM/ECO/9(XIV) Rev.2 of April 1980 Doc E/CN.14/698 Add.2. See Jane L. Parpart "Womens Rights and the Lagos Plan of Action" Human Rights Quarterly (1986) Vol.8 p.180.

235 Article 66 of the AFCHPR states that: "Special protocols or agreements may, if necessary, supplement the provisions of the... Charter".

(g) Limitations on Individual Rights

The effect of an international legal instrument, such as the African Charter on Human and Peoples Rights, on States Parties is that they are estopped from disallowing the regional, nay the international, community to inquire into the alleged breaches of the instrument. State sovereignty is no longer inviolable in this context. By virtue of the principle of pacta sunt servanda, a State is bound by its treaty obligations[236].

The effect of an international human rights instrument is more or less based on the obligations imposed on the ratifying States. However, these obligations are eroded by derogation clauses and limitation clauses (otherwise referred to as "claw-back"[237] clauses) which consequently determine the effectiveness of an international human rights instrument.

Derogation clauses stipulate the circumstances in which derogation may occur and also define the rights that are non-derogable.

The AFCHPR has no provision entitling a State to derogate from its obligations and/or temporarily suspend a right guaranteed under the Charter. The absence of a derogation clause in the AFCHPR is in marked contrast to the provisions of the American and European Conventions which not only deal with the suspension of rights in time of war or state of emergency but also provide for non-derogation from certain rights.

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236 The principle of pacta sunt servanda is a rule of customary international law codified in the Vienna Convention on the Law of Treaties, Article 26. UN Doc A/Conf.39/37 at 289 (1969) entered into force 27 January 1980, See 8 ILM 679 (1969).

237 Rosalyn Higgins coined the term "claw-back" to refer to a clause "that permits, in normal circumstances, breach of an obligation for a specified number of public reasons". See "Derogations Under Human Rights Treaties" 48 BYIL (1978) p.281.

Thus in several international human rights instruments, State Parties thereto are permitted to suspend and restrict certain rights in time of war or public emergency which threatens the life of the nation occurs[238].

In defining the rights that are non-derogable, the American Convention contains the most comprehensive list of non-derogable rights[239].

With a view to checking the abuse of derogation provisions, the American and European Conventions provide several safeguards. Firstly, it is required that derogations must be within the period strictly required by the exigencies of the situation. Secondly, the measures taken must not be discriminatory or inconsistent with the State Party's other international obligations under international law[240]. Thirdly the State Party availing itself of the right of suspension must immediately inform the other State Parties through the Secretary-General of the provisions suspended, their reasons and the date set for the termination of such

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238 See Article 4, International Covenant on Civil and Political Rights; Article 15, European Convention; Article 27, American Convention.

239 The American Convention provides for the following non-derogable rights:- the Right to Judicial Personality; right to life; right to Humane Treatment; freedom from Slavery; freedom from ex post facto Laws; freedom of conscience and religion; rights of the family; right to a name; rights of the child; right to nationality; right to participate in government; and the judicial guarantees essential for the protection of such rights - Article 27(2).
The European Convention provides for only four non-derogable rights: namely, the right to life, the right to human treatment, freedom from slavery or servitude, and freedom from ex post facto laws - Article 15(2).
Article 4 of the International Covenant on Civil and Political Rights expressly prohibits derogations from the guarantees of Article 6 (including arbitrary deprivation of life), Article 2 (freedom from torture and inhuman treatment), Article 8 (prohibition of slavery), Article 11 (freedom from imprisonment for breach of contract), Article 15 (guarantees against ex post facto criminal laws), Article 16 (the right to personhood), and Article 18 (freedom of thought conscience and religion).

240 American Convention Article 27(1), European Convention Article 15(1).

suspension[241]. Furthermore, as an additional safeguard the American and European Conventions expressly prohibit the restrictive interpretation on the rights provided for in their respective Conventions[242].

Although Article 4 of the International Convention on Civil and Political Rights has not evolved its own case law, the derogation provisions of both the American[243] and European Conventions[244] have been invoked by States. The procedural rules governing the review of derogations by the respective commissions differ. The European Commission cannot inquire into a derogation unless it arises as an issue of an individual

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241 American Convention, Article 27(3); and European Convention, Article 15(3).

242 American Convention Articles 27-30; and European Convention, Articles 17-18.

243 For instance, El Salvador - (9 May 1980) and Nicaragua - (23 Jan 1980) notified the Secretary General of the OAS of their invokations of Article 27 of the American Convention. On 17 July 1980, Bolivia was queried by the IACHR for failure to notify the Secretary-General of the OAS of the suspension of human rights. Similarly in response to an individual petition against Colombia, the IACHR requested Colombia to comply with Article 27 of the American Convention. See also T. Buergenthal et al, Human Rights in the Americas: Selected Problems, op cit pp.217-237.

244 For instance, in the Greek Case 12 Y.B. European Convention on Human Rights 72 (1969) (European Convention on Human Rights) the European Court enumerated four factors that constitute a "public emergency threatening the life of a nation" under the European Convention; these are (1) Actual or imminent emergency; (2) involving a whole nation; (3) threatening the continuance of the organized life of the community; (4) for which the normal measures and restrictions permitted by the Convention for the maintenance of public safety, health or order are plainly inadequate - (p.72 Ibid.) The European Court in Ireland v United Kindgom interpreted the derogation provisions of the European Convention thus:-
"It falls in the first place to each Contracting State, with its responsibility for "the life of the nation", to determine whether that life is threatened by a "public emergency" and, if so, how far is it necessary to go in attempting to overcome the emergency... In this matter Article 15(1) leaves those authorities a wide margin of appreciation...Nevertheless, the States do not enjoy an unlimited power in this respect... The domestic margin of appreciation is thus accompanied by a European supervision" - (1978) European Convention on Human Rights Ser.A No.25 Judgement of 18 Jan 1978 p.78-7a (underlines for emphasis).

petition or inter-state application. On the other hand, the Inter-American Commission can review suspected derogations 'sua sponte' thus endowing it with the capability of spontaneous response to human rights violation[245].

The failure of the AFCHPR to provide for the suspension of rights and to define non-derogable rights will invariably create problems for the African Commission.

The AFCHPR, however, contains "claw-back" clauses, which do not give the individual the same degree of protection provided by derogation clauses contained on other international human rights instruments[246]. Derogation clauses define the limits of State behaviour towards citizens during national emergencies, and permit the suspension of granted rights. Cclaw back clauses, on the other hand, restrict rights as initio.

The "claw-back" clauses in the AFCHPR, though generally vague, permit encroachment on individual rights by reference to rules of law (both domestic and international), public order or public interest, and other formulations thereof as more particularly described hereunder.

(a) The Right to Liberty: (Article 6) AFCHPR

The "claw-back" clause restricting the right to liberty states that:

> "...No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".

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245 T. Buergenthal, R. Norris & D. Shelton "Protecting Human Rights in the Americas: Selected Problems op cit p.217-218.

246 Some academics believe that the distinction between the two clauses is one of degree. Hartman interprets derogation clauses as a restrictive form of "claw-back"clause. See Hartman, Derogations from Human Rights Treaties in Public Emergencies 22 Harvard Journal of International Law (1981) p.5-6.

Article 6 of the AFCHPR reveals a significant omission when compared to the European and American Conventions. Although the AFCHPR grants every person "the right to liberty and to the security of the person", yet it restricts this guarantee with the claw-back provision that; "No one may be deprived of his freedom except for reasons and conditions previously laid down by Law"[247]. The AFCHPR does not prescribe specific guidelines as to what reasons and conditions should obtain. In contrast, the American Convention provides minimum procedural requirements to be observed when a person is being deprived of his personal liberty, namely:-

(i) That deprivation of liberty cannot be effected by ex post facto laws[248].

(ii) That there shall be no arbitrary arrest or imprisonment[249].

(iii) That anyone detained must be informed of the reasons for his detention, and promptly notified of the charge(s) against him[250].

(iv) That the detained person must be brought promptly before a judge and shall be entitled to trial within a reasonable time or be released without prejudice to the continuation of the proceedings. Such release may be subject to guarantees to assure his appearance for trial[251].

(v) That anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful[252].

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247 AFCHPR, Article 6.

248 American Convention, Artricle 7(2).

249 Ibid Article 7(3).

250 Ibid Article 7(4).

251 Ibid Article 7(5).

252 Ibid Article 7(6).

(vi) That in the countries which permit a person threatened with arrest or detention, to have recourse to a competent court for a ruling on the legality of such threat, such a right cannot be restricted or abolished[253].

(vii) That an interested party or another person on his behalf is entitled to seek the foregoing remedies[254].

(viii) That no one shall be detained for debt[255].

Similarly, the European Convention sets out detailed procedural safeguards for the protection of the individuals liberty[256].

The significance of providing these comprehensive procedural safeguards seems to have been lost on the authors of the AFCHPR. Under the AFCHPR, the right to liberty is subject to national law, thus depriving the AFCHPR of any effective external safeguard on domestic laws which may encroach upon the right. The main rationale for adopting comprehensive procedural requirements is that they provide external restraints on governmental actions, both by subjecting the issue to an extra-governmental forum and secondly they ensure State conformity with the minimum conditions set out. We cannot overemphasise our conviction that the absence of procedural safeguards in Article 6 of the AFCHPR especially undermines the effectiveness of the AFCHPR.

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253 Ibid.

254 Ibid.

255 Ibid Article 7(7).

256 European Convention, Article 5.

(b) Freedom of Religion and Conscience (Article 8) AFCHPR

The freedom of religion is restricted in the AFCHPR by virtue of the "claw-back" clause which states that:

> "...No one may, subject to law and order be submitted to measures restricting the exercise of these freedoms".

The AFCHPR thus, subjects the freedom of religion and conscience to the general regime of domestic law and order. No guidelines are provided regarding the specific circumstances that the laws limiting these freedoms may be applied.

In contrast, under the American Convention the freedom of conscience and religion is subject "only to the limitations prescribed by law that are necessary to protect public safety, order, health or morals, or the rights and freedoms of others"[257]. Consequently under the American Convention the limitation of the freedom of conscience and religion cannot be restricted other than for the specific reasons given. As an added protection, the American Convention expressly grants parents or guardians the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

The exercise of the freedom of religion under the AFCHPR may thus be subject to erosion by local laws outside the influence of the AFCHPR.

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257 Ibid Article 12(3). See also the European Convention Article 9(2) which states that: "Freedom to manifest ones religion on beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals or for the protection fo the rights and freedoms of others".

(c) The Right to Receive Express and Disseminate Information

(Article 9(2); AFCHPR)

The "claw-back" clause restricting the right to receive and disseminate information statement states that:

> "...Every individual shall have the right to express and disseminate his opinion within the law".

Under Article 9(1) of the AFCHPR, the right to receive information is absolute and unqualified. However by virtue of Article 9(2) the right to express and disseminate information is qualified as it must be exercised "within the law".

The American and European Conventions on the other hand, provide a more comprehensive definition of this right. For instance, the American Convention states that the freedom of thought and expression will "not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established to the extent necessary to ensure: (a) respect for the rights or reputation of others; or (b) the protection of national security, public order or public health or morals"[258].

Under the European Convention, the freedom of expression may be subject to such formalities, conditions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary"[259].

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[258] American Conventin, Article 13(2).

[259] European Convention, Article 10(2) (underlines for emphasis).

From the foregoing, although the European Convention subjects freedom of expression to conditions "prescribed by law", such a limitation must be necessary in a democratic society for the stated interests. A comparison of the AFCHPR with the Conventions reveal that the freedom of expression in the former is certainly more restricted than in the latter. The African Commission will therefore find it difficult to restrain the promulgation of restrictive laws in certain African States which do not possess, domestic constitutional guarantees that accord greater safeguards for the freedom of expression.

(d) Freedom of Association (Article 10(1) & (2)) AFCHPR

Under the AFCHPR, the freedom of association is curtailed by the following "claw-back" clauses[260]:

> (1) Every individual shall have the right to free association provided that he abides by the law".
>
> (2) "Subject to the obligations of solidarity provided for in Article 29 no one may be compelled to join an association".

The freedom of association provision in the AFCHPR has one of the most restrictive clauses in the Charter. The right to free association may be limited or withdrawn by State Regislation. Under the American and European Conventions the freedom of association can be subject to restrictions established by law as may be necessary in a democratic society in the interest of national security, public safety or morals and the rights and freedoms of others[261]. Thus the arbitrary deprivation of the freedom of association is forbidden and the limitations on the exercise

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260 European Convention Article 19(2) (underlines for emphasis).

261 American Convention, Article 16(2); European Convention, Article 11(a). Under the American Convention, legal restriction may be imposed on members of armed forces and the police depriving them of the exercise of the freedom of association, without conforming to the safeguards of Article 16 - Article 16(3), American Convention.

of this freedom under both Conventions must conform to the prescribed guidelines.

The omission of these guidelines in the AFCHPR, may lead to the unfettered use of domestic laws to suppress freedom of association including the right to form trade unions[262].

The second limitation on the freedom of association in the AFCHPR is provided by the obligation of solidarity in Article 29[263]. Consequently, it is possible for the State to compel individuals to join groups formed for any of the purposes under Article 29. Furthermore, in a one-Party State, the provision of Article 10, protecting the freedom of association, will not avail the individual who is compelled by State Legislation to be a party member.

(e) <u>The Freedom of Assembly (Article II) AFCHPR</u>

The AFCHPR subjects the freedom of assembly to the "claw-back" clause which provides that:

> "The exercise of his right (to assembly) <u>shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others</u>".

The claw back clause restricting the freedom of assembly is more specific than other claw-back clause in the AFCHPR because it delimits the scope of permissible State restrictions.

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262 Both the Conventions expressly grant the right to form labour unions - See American Conventin Article 16(1); European Convention, Article 11(1).

263 Under Article 29 (AFCHPR) the individuals duties include, the duty to serve his natinal community by placing his physical and intellectual abilities at its service, and the duty to preserve and strengthen social and national solidarity.

The effect of Article 11 is wider when compared with the corresponding provisions of the American and European Conventions. The Conventions provide that the restrictions placed on the exercise of the right of assembly must be "in conformity with the law and necessary in a democratic society in the interest of national security, public safety and public order, or to protect public health or morals or the rights or freedoms of others"[264].

It has been submitted that the phrase, "in conformity with a democratic society" imposes a qualifying and narrowing influence on open-ended criteria such as national security, public order; factors which would otherwise permit repression[265]. Thus freedom of assembly under the AFCHPR may, despite its relatively detailed claw-back clause, be subjected to encroachment by local laws passed ostensibly in the interest of national security. Nevertheless, the standards applicable to African States, with constitutional provisions on the freedom of assembly[266] which are similar to those of the Conventions, will be higher than those applicable to AFCHPR State Parties without such provisions.

(f) Freedom of Movement (Article 12) AFCHPR

The relevant "claw-back" clauses of Article 12 are as follows:

- "Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law[267].

- "This right (to leave and return to ones country) may only be subject to restrictions provided for by law for

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264 American Convention, Article 15; European Convention, Article 11.

265 Hartman "Derogations from Human Rights Treaties in Public Emergencies" op cit p.6.

266 For instance, the Constitutions of Nigeria, Kenya, Zimbabwe. See Chapter Five above.

267 AFCHPR, Article 12(1).

the protection of national security, law and order, public health or morality"[268].

- "Every individual shall have the right of asylum... in accordance with the laws of those countries and international conventions[269].

- "A non national legally admitted in a territory of a State Party...may only be expelled from it by virtue of a decision taken in accordance with the law"[270].

It is evident from the foregoing that the freedom of movement and residence within the borders of a State are restricted by the application of domestic law, whereas the right to leave and return to ones country may only be curtailed by local laws on grounds of national security, law and order, public health or morality. Thus the right to leave and return to ones country, unlike the freedom of movement, is not subject to the unrestricted scope of domestic legislations. Nevertheless, the remarkable effect of Article 12(2) is that a citizen of a State can be denied the right to return to his own country on the grounds of national security, law and order or public morality. We submit that the right of citizen to return to his own country should be an absolute right[271]. The general public purposes through which the right may be restricted are susceptible to abuse. Consequently, in formulating new guidelines, the African Commission may be willing to draw inspiration from the recently concluded Strasbourg Declaration on the Right to Leave and Return[272]. The significance of ensuring adequate safeguards for the

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[268] Ibid Article 12(2).

[269] Ibid Article 12(3).

[270] Ibid Article 12(4).

[271] For instance the American Convention expressly states that "No one can be expelled from the territory of the State of which he is a national or deprived of the right to enter" - Article 22(5). See also Article 2(2) of the Fourth Additional Protocol to the European Convention.

[272] Strasbourg Declaration on the Right to Leave and Return adopted on 26 November 1986; reprinted in Human Rights Law Journal Vol.8 No.2-4 (1987) p.481.

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right to leave and return to ones own country is underpinned by the practice among developing States which impose restrictions on this right for political and economic reasons such as stemming the "brain drain".

The right to seek and obtain asylum is recognised by the AFCHPR but is subject to the regimes of domestic law and international conventions. Although a significant proportion of African States have domestic laws governing the grant of asylum, the restrictions therein would presumably, be of primary significance when such a matter is considered by the African Commission. The primacy of local legislation in matters of asylum is recognised by Article II(1) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[273]. Nevertheless, in view of the fact that the OAU Convention has been ratified by an overwhelming majority of African States, one would expect the African Commission to apply the standards prescribed by the Convention to the ratifying States[274].

Under Article 21(4) of the AFCHPR a non-national legally admitted into a country may also be expelled from it, by virtue of a decision taken in accordance with the law. Although one may envisage that Art. 21(4) would also legally admit refugees to the exercise of domestic law, we submit that with respect to refugees Article 21(4) ought to be read in conjunction with the provisions of the OAU Convention. Despite the fact that the OAU Convention provides extensive protection for the refugee,

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[273] Article II(1) of the Convention states that "Member States of the OAU shall use their best endeavors consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well founded reasons, are unable or unwilling to return to their country of origin or nationality"

[274] The obligations imposed on signatories to the OAU Convention include the condition that - "No person shall by subjected to a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to remain in a territory where his life, physical integrity or liberty would be threatened for the reasons [of being a refugee]..." Article II(3).

it also recognises the duties of every refugee "to the country in which he finds himself in particular that he conforms with its laws and regulations as well as the measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member of the OAU"[275].

Consequently, the cumulative effect of the provisions of the AFCHPR and OAU Convention on the rights of a (non-national) or refugee legally admitted in a territory of a State Party is that they may be expelled for contravening the domestic laws of the host country especially those rules or measures affecting the maintenance of public order of the host state or for undermining the security of any Member of the OAU.

(g) The Right to Participate Freely in Government (Article 13) AFCHPR

The right to participate freely in Government is restricted by the "claw-back" clause which states that:

> "Every individual shall have the right to participate in the government of his country, in accordance with the provisions of the law".

The phrase "in accordance with the provisions of the law" grants States the latitude to pass legislation restricting the right to participate in government without necessarily conforming to any defined standards[276] save domestic laws.

(h) The Right to Property (Article 14) AFCHPR

The AFCHPR provides that the "right to property... may only be encroached upon in the interest of the community or in the general

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275 Article III, OAU Convention.

276 See Article 25 of the Covenant on Civil and Political Rights.

interest of the community and in accordance with the provisions of the appropriate laws"[277].

The right to property is thus subjected to a "claw-back" clause restricting its application in the interest of public need or in the general interest of the community, and in accordance with the provisions of the appropriate laws. An OAU Member State could thus severely delimit the application of the right to property by adopting relevant measures declared necessary in the general interest of the community or for public need. The limitation placed on the right to property is further exacerbated first by, the absence of a provision on compensation and secondly by the non-inclusion of specific guidelines through which a State may utilize its powers of acquisition.

The foregoing analysis of the "claw-back" clauses in the AFCHPR reveals that they establish vague standards which are exemplified by phrases such as "in accordance with the law", "by the law" and "provided he abides by the law". These clauses do not provide the necessary external control over State behaviour that is a sine qua non for effective human rights protection. The vagueness of these clauses create a lacuna whereby severe limitations could be imposed on the rights guaranteed in the Charter. The question that ought to be asked therefore is:

How do we interpret these "claw-back" clauses to achieve maximum protection, under the circumstances, for the individual?

Before we address this issue, it is pertinent to highlight the additional limitations placed on the rights protected in the AFCHPR. Article 27(2) thereof, provides a general limitation to the rights and freedom of each

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277 AFCHPR, Article 14 (underlines for emphasis).

individual by stating that "The rights and freedom of each individual shall be exercised with due regard to the rights of others collective security, morality and common interest".

A similar clause can be found in Article 32(2) of the American Convention which states that "the rights of each person are limited by the rights of others by the security of all and the just demands of the general welfare, in a democratic society".

We submit that because of the general nature of the restrictions of the AFCHPR, a provision should have been incorporated therein expressly giving the African Commission the power to examine the limitations placed by Member States on the rights protected, to ensure that they are within the permissible ambits and conform with the spirit of the Charter. Such a provision would check the arbitrary use of "claw-back" clauses by States especially in the light of the absence of a clause securing the validity and non-derogability of certain basic rights. The "claw-back" clauses as they stand, provide an opportunity for States to justify measures severely restricting the application of these rights.

<u>The Interpretation of Claw-back Clauses in the AFCHPR</u>

We submit that it is possible to adopt either a narrow or a wide interpretation of such phrases as "in accordance with the law" and "by the law"[278].

By adopting a narrow interpretation, the African Commission will have to confine itself to the consideration of only domestic law, thus subjecting the rights consecrated in the Charter to the vagaries and restrictions of local laws.

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278 See AFCHPR, Articles 6,9(2),19(2),11,12(4) and 13(1).

On the other hand, the Commission could undertake a wider interpretation of the Charter. This method entails the interpretation of "claw-back" clauses in the light of international law.

The inadequacy of using domestic law as guidelines for the interpretation of "claw-back" clauses is exemplified firstly, by restrictive local laws such as the various detention and Public Safety laws[279] and secondly by the suspension and derogation provisions of the Constitution of many African States[280]. For instance, the Constitution of Zaire provides that "if serious circumstances imminently threaten the Nations independence or integrity... or jeopardise vital State interests... the President of the Republic may proclaim a state of emergency, with the consent of the Political Bureau"[281]. In such circumstances, the President is empowered "to take all measures required by the circumstances" and "restrict the existence of individual liberties and certain fundamental rights"[282]. The Constitution does not define the phrase "serious circumstances imminently threaten(ing) the Nations independence" thus allowing the executive latitude to abuse the power with obvious implications for individuals rights. The ostensible safeguard provided by requiring consent of the Political Bureau is very weak since the members of the Political Bureau are appointed and dismissed by the President[283]. This fact is further underlined by the International Commission of Jurists statement that in Zaire "power is over-centralised at the level of the Head of State and one may without hesitation speak of an absolute monarchy in which the

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279 See for instance, Preservation of Public Security Act Cap.57, Laws of Kenya.

280 See Chapter 5, above.

281 Zaire Constitution, Article 48.

282 Ibid, Article 49.

283 Ibid, Article 40.

rulers will is practically without limits"[284].

The need for the adoption of a wider interpretation of the "claw-back" clause in the AFCHPR is imperative in the light of the ICJ's conclusion on the State of Emergency in Zaire which states that:

> "these violations of human rights may have been worse during the periods of tension which have led to states of emergency of one kind or another, but they are due not so much to an abuse of emergency powers as to the normal powers of a dictatorial regime which is not subject to any effective check by an independent legislature or judiciary"[285].

As earlier discussed, despite the provision of constitutional guarantees for human rights in many African countries, the vulnerability of the judiciary to the excesses of the executive in Africa underlines the need to adopt a wider interpretation of the "claw-back" clause in the AFCHPR.

The adoption of a wider interpretation of the Charter would entail the interpretation of the Charter in the light of principles of international law. By virtue of Article 60 of the AFCHPR, the Commission is empowered to "draw inspiration" from international human rights principles, including the provisions of the UN Charter, and other instruments adopted by African Countries in the field of human and peoples rights as well as provisions of various instruments adopted within the specialised agencies of the UN of which the parties to the AFCHPR are members[286].

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284 "State of Emergency in Zaire" International Commission of Jurists, Research Report in 'States of Emergency: Their Impact on Human Rights - ICJ 1983 Geneva p.384.

285 Ibid p.385.

286 AFCHPR, Article 60.

We therefore suggest that when the Commission is considering whether an act or measure is "within the law" or "in accordance with the law", it should refer to the instruments and principles, outside the African Charter, that restrict government action to a greater degree than the Charter itself. For instance, Article 6 of the AFCHPR states that "no one may be arbitrarily arrested" but an individual may be deprived of his freedom "...for reasons and conditions previously laid down by law". The equivalent provisions in the International Covenant on Civil and Political Rights goes further than the AFCHPR provision by comprehensively describing the limits within which domestic law must remain, thereby guaranteeing the continuance of certain rights[287]. The African Commission can thus use its powers of interpretation under the Charter by adopting Article 9 [International Covenant] as an interpretation of Article 6 [AFCHPR].

In addition to interpreting the Charter by reference to international instruments, the Commission could also directly apply the provisions of the International Covenant for example, as long as the State Party has an obligation thereunder - pacta sunt servanda. For instance, under Article 6 of the AFCHPR which allows the arrest of an individual only for "reasons and conditions previously laid down by law", the Commission

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[287] The International Covenant on Civil and Political Rights, Article 9. Article 9 of the International Covenant provides inter alia...
(2)"Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
(3)Anyone arrested or detained on a criminal charge shall be entitled to a trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should circumstances arise, for execution of the judgement.
(4)Anyone who is deprived of his liberty by arrest of detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
(5)Anyone who has been a victim of unlawful arrest of detention shall have an enforceable right to compensation".

could apply the provisions of Article 9 of the Covenant as constituting "conditions previously laid down by law".

The foregoing broad interpretative module could similarly be applied to other provisions of the AFCHPR[288], thus achieving a greater overall substantive and procedural protection for the individual.

(i) Overview

In summation, it is evident that the AFCHPR guarantees without qualifications, the following civil and political rights: the right to equality, a fair hearing and personal dignity. However, the following rights are qualified: the right to life, liberty, freedom of conscience, freedom of expression, freedom of association, assembly and movement. These rights may be restricted or derogated from by law. The extent to which the limitation imposed on the rights by "claw-back" clauses will depend upon the mode of interpretation adopted by the African Commission.

The economic, social and cultural rights are couched in relatively non-derogative terms. The only exception is of the right to property which may be encroached upon in the interest of public need or in the general interest of the community. The right to work, the right to education, the right to enjoy the best attainable state of physical and mental health, and the right to participation in cultural life, impose onerous obligations on States. Consequently, it will not be unreasonable to expect a general acceptance of the broader mode of interpreting the obligations created by these socio-economic rights. Such an interpretation would suggest that

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288 The relevant provisions of the AFCHPR that may be modified by the wider interpretative mode include the right to liberty (Article 6), the right to express and disseminate opinions (Article 9), the right to assembly (Article 11), the freedom of movement (Article 12), the right to participate in government (Article 13), the right to property (Article 14).

these rights should be achieved as per the regime of the International Covenant on Economic, Social and Cultural Rights. The International Covenant requires each State Party to take steps "to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the... Covenant by all appropriate means including particularly the adoption of legislative measures".

We submit that where the African Commission subjects the provisions of the AFCHPR on social, economic and cultural rights to the wider interpretive regime of the International Covenant on Economic, Social and Cultural Rights, mutatis mutandis, the same mode of interpretation should be applied to the Charters provisions on personal security, and civil and political rights by the application of the regime of the International Covenant on Civil and Political Rights.

Furthermore, in the absence of a derogation clause in the AFCHPR, we suggest that the African Commission may be able to secure the rights of the individual in a state of emergency, by applying the derogation provision of the International Covenant on Civil and Political Rights[289]. This approach would in effect check the excess of governmental measures during a state of emergency. It is pertinent to acknowledge the difficulty in applying this standard to States that are not parties to the Covenants. However, R. Gittleman states that in the interest of consistent judicial determination, the Commission should apply the same "reviewable standards" to those States not party to the Covenants[290]. We submit that while the uniform method is desirable, its legal efficacy is doubtful. However as regards State Parties to the Covenant as well as

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289 Article 4 of the International Covenant on Civil and Political Rights.

290 R. Gittleman. "The African Charter on Human and Peoples Rights: A Legal Analysis" Virginia Journal of International Law Vol.22:4 1982 p.707.

non-state Parties thereto, which have Constitutional derogation provisions similar to the Covenant[291], the Commission will be able to enforce the standard of compliance subscribed to by these States.

The essence of seeking guidelines in local laws and international instruments to interpret the AFCHPR is to ensure that adequate safeguards are erected to protect individual rights particularly during a state of emergency. However, these solutions should be viewed as interim or ad hoc measures. The most desirable scenario would be the incorporation of a comprehensive derogation provision in the AFCHPR either by amendment or the adoption of protocol thereto. Such a protocol (or amendment) should also review the current "claw-back" clauses and clarify their general vagueness.

In the unlikely event of an immediate adoption of such a protocol, we will have to await the evolution of the jurisprudence of the African Commission which should clarify the limits of the permissible incursions into individual rights by State measures. Finally, it is pertinent to highlight the positive aspect of "claw-back" clauses. The restrictions or

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[291] For instance see Art 4(2)-(3) of the Constitution of Nigeria; Nigeria is not a State Party to the International Covenant on Civil and Political Rights. The derogation provision of the Nigerian Constitution provides:-
"An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of Section 30 (right to life) or 32 (right to personal liberty) of the Constitution; but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:
Provided that nothing in this section shall authorise any derogation from the provisions of Section 30 of this Constitution, except in respect of the death resulting from acts of war or authorise any derogation from the provisions of Section 33(8) (freedom from ex post facto laws) of this Constitution.
(3) In this section "period of emergency means any period during which there is in force a Proclamation of a state of emergency declared by the President...".
See also Article 48 of the Constitution of Zaire which contains a similar provision. Zaire, however, is a State Party to the International Covenants.

limitations imposed by such clauses may reinforce individual rights because such restrictions may be used to invalidate State action taken, for instance, without the necessary legislation[292]. In this regard, it is apt to refer to the Advisory Opinion of the Inter-American Court of Human Rights on the word "laws" in Article 30 of the American Convention[293]. The Court stated that Article 30 cannot be regarded as a general authorisation to establish new restrictions to the rights protected by the Convention. The Court, thus opined that "the word "laws"... means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the State Parties for that purpose"[294]. We submit that it will be legally imprecise to adopt this definition to interpret the phrases such as "in accordance with law", "by the law" and "within the law" in the AFCHPR. However, the Inter-American Courts opinion may serve a useful guideline in determining the legality of restrictions placed on the rights and freedoms established in the AFCHPR, especially where such restrictions are required to be in conformity with the law and necessary in a democratic society in the interest of public good[295].

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[292] For example, under Article 12(4) of the AFCHPR, "a non-national legally admitted in a territory of a State Party ... may only be expelled from it by virtue of a decision taken in accordance with the law".

[293] Article 30 of the American Convention states that "The restrictions that pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established". (Underlines for emphasis)

[294] Inter-American Court of Human Rights, San Jose, Advisory Opinion of 9 May 1986 No.-OC-6/86; See Decisions and Reports, Vol.7 No.2-4 (1986) HRLJ p.231.

[295] For instance, See Articles 11, 12(2) and 14 AFCHPR.

(h) Peoples Rights

The African Charter on Human and Peoples Rights (AFCHPR) represents the first international human rights instrument to provide a comprehensive protection for peoples' rights. The significance of peoples' rights is emphasized by incorporation of the term in the title of the Charter. The philosophical rationale for the incorporation of the concept of peoples rights is reflected in the Rapporteurs Report:

> "Noting that in Africa, Man is part and parcel of the group, some delegations concluded that individual rights could be explained and justified only by the rights of the community. Consequently, they wished that the Draft Charter made room for the Peoples' Rights and adopt a more balanced approach to economic, social and cultural rights on the one hand and political and civil rights on the other"[296].

African customary law emphasises the importance of the group or the community within which the individual derives his identity, and exclusion therefrom is regarded as a very severe punishment[297].

The Preamble of the AFCHPR further spotlights the rationale by "recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights"[298].

The AFCHPR thus lists a catalogue of "all peoples' rights"; namely: the equality of all peoples and the principles of non-domination[299], the rights to self-determination including the right to free themselves from

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296 Rapporteurs Report, op cit p.3 para.10.

297 D.K.C. Mumba "Prospects for Regional Protection of Human Rights" (1982) Holdsworth Law Review p.105-106.

298 AFCHPR, 5th preambular paragraph.

299 AFCHPR, Article 19.

colonial and other oppression[300], the right to dispose of their wealth and natural resources, which right shall be exercised in the exclusive interest of the people[301], the right to economic, social and cultural development[302], the right to national and international peace and security[303], and the rights to a general satisfactory environment favourable to their development[304].

Is is therefore evident that the AFCHPR breaks new ground by going beyond the traditional areas of peoples rights to self-determination and permanent sovereignty over natural resources[305]. Within the regime of the UN human rights instruments the concept of peoples rights is not unfamiliar, especially as regards the right of self-determination and the right of all peoples to freely dispose of their natural wealth and resources[306].

Although the presence of "peoples' rights" in the AFCHPR derives its philosophical inspiration from the emphasis placed on the group or community in African Customary Law, the articulation and awareness of the concept in universal terms was projected by the Universal Declaration

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300 Ibid Article 20.

301 Ibid Article 21.

302 Ibid Article 22.

303 Ibid Article 23.

304 Ibid Article 24.

305 L. Henkin, R.C. Pugh, O. Schacter, H. Smith, International Law: Cases and Materials, (St. Paul, Minnesota) 1980 p.209.

306 Articles 1(1) and 1(2) of both the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Political Rights. In the Charter of the United Nations, the rights of self-determinatin of peoples is mentioned in two places; viz; in Article 1(2) as one of the purposes of the UN, and in Article 55 relating to the specific purposes of the UN in the promotion of economic and social cooperation.

on the Rights of Peoples, Algiers 1976[307]. The Declaration provides for twenty one Universal Rights of Peoples under six chapters: the Right to Existence; the Right to Political Self-Determination; Economic Rights of Peoples; Right to a Culture; Right to Environment and International Resources; and Rights of Minorities. The Declaration also provides guarantees and sanctions. The Declaration has had limited impart on existing human rights regimes, however the authors of the AFCHPR seem to have taken cognisance of the Declaration by incorporating some of its provisions in the Charter.

(i) Political Self Determination and the AFCHPR

The AFCHPR states that "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another"[308].

The principle of equality of peoples also appears in the Charter of the UN[309] but without the additional clause that - "Nothing shall justify the domination of a people by another".

The AFCHPR affirms the "unquestionable and inalienable" right of all peoples to self-determination, including the free determination of political status and the freedom to pursue economic and social development.

Article 20 of the AFCHPR provides that:

> (1) "... all peoples... shall have the unquestionable and inalienable right to self-determination. They shall freely pursue their economic and social development according to the policy they have freely chosen".

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307 See A. Cassease and E. Jouve, Pour un Droit des Peoples: Essais sur la Declarationd'Alger (Paris: Edition Berger-Levraut, 1978).

308 AFCHPR, Article 19.

309 UN Charter, Article 1(2).

> (2) "Colonized and oppressed peoples have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community".

The foregoing provisions represent a major departure from the phraseology of international human rights instruments on the issue of self-determination. Furthermore, it raises interesting issues especially in the light of the absence of a clause defining the term "peoples" to whom the rights attach. In our analysis of the concept of self-determination we arrived at the conclusion that although the Charter does not define the term "all peoples", a contextual approach indicates that the term refers to the collection of individuals who constitute distinct communities in Africa and to whom the collective rights stated in the Charter apply. This conclusion is inescapable especially in the light of the provision of Article 20 wherein the term "peoples" is a general category of which "colonised or oppressed peoples" constitute a unit thereof.

Consequently, in the context of the AFCHPR "all peoples" especially the "colonised and oppressed" have a right to self-determination, thus underlining the conclusion that the Charter recognises the right of peoples to political self-determination in the post-colonial context[310]. This view finds support in the statement of Dr. Peter Onu, former deputy Secretary-General of the OAU, on peoples rights:

> "a liberal interpretation cannot be avoided and it would seem to me that the concept (of peoples rights) applies both externally and internally... Applied internally, this concept rejects the treatment of Africans as sub-humans as is the case in apartheid South Africa and it rejects the domination of a people by another on whatever grounds, be it that of race, colour, or ethnic origin. Since African States, given their heterogeneity, are made up of peoples, applied

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310 S.K.N. Blay "Changing African Perspectives on the Right of Self-Determination in the wake of the Banjul Chater on Human and Peoples Rights" Journal of African Law (1985) Vol.29 No.2 p.158-9.

> internally, the concept ipso facto rejects domination on the basis of ethnicity. The reference to "oppressed peoples" would necessarily have wider application, for oppression of peoples is not a monopoly of colonial or colonial-type regimes"[311].

Furthermore, it is pertinent to note that although the OAU Charter and several OAU Resolutions affirm the principle of "non-interference" and "territorial integrity"[312], the AFCHPR make no express reference to these principles, thereby underlining the possibility that Article 20 AFCHPR may be interpreted liberally to apply to "oppressed" ethnic groups within African States. Admittedly, such an interpretation may encourage the adopting of Article 20 as the secessionist Charter. The implication of this conclusion was not lost on State representatives to the OAU Council of Ministers Meeting on the Draft AFCHPR[313]. Despite the objection of some representatives on the likely misinterpretation that Article 20 may attract, the Assembly of Heads of State and Government adopted the provision unamended. The apparent ambivalence of the Assembly to the implications of Article 20 may not be unconnected with several concrete factors. Firstly, the Heads of State can use the OAU Charter principles on non-interference and territorial integrity, as a shield against attempted liberal interpretations of Article 20. Secondly, by virtue of Article 23(1) AFCHPR which reaffirms the principle of solidarity and friendly relations as affirmed by the UN Charter and reaffirmed by the OAU Charter, and Article 23(2) AFCHPR, which prohibits subversive activities by an individual against his country or origin and prohibits the use of State territories as basis for such

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311 Peter Onu "The Concept of Peoples Rights in the 'Banjul' Charter". Paper presented to the Conference on Human Rights in Rural Areas in Africa (UNESCO/Institute of Advanced Legal Studies, Lagos, Nigeria) 11 November 1985 pp.5-6.

312 For example, OAU Res. AHG/16I July 1964 on African State Boundaries.

313 OAU Doc CM Plan. Draft Rapporteurs Report (XXVI) 1981, p.60.

activities, it may be submitted that oppressed peoples do have a right to free themselves from domination only as far as it does not amount to a breach of the State Sovereignty. Consequently, only the peoples of Namibia and South Africa will be recognized as being entitled to the right of self-determination on the continent. The effect of such a conclusion is that distinct ethnic groups constituting states like Nigeria or Ghana will not be recognized as "peoples" permitted to exercise the right of political self-determination, if they were oppressed.

We submit that given the arbitrary and haphazard delimitations of boundaries of African States coupled with the hazard of ethnicism in Africa, too much emphasis on the liberal interpretation of "peoples" rights in Article 20 may become an unruly horse that will bolt the stable gates of the hitherto fragile political status quo of African States. Consequently, much as we support the right of oppressed peoples to self-determination in the post-independence context, such peoples must eschew secession and seek the grant of internal autonomy. We believe that the decentralization of political and economic structures toward granting autonomy to oppressed peoples should serve to reconcile the claims of oppressed peoples and the need to maintain the territorial integrity of the State[314].

(ii) Economic Self-Determination and the AFCHPR

The principle of economic self-determination in the post independence context enjoys overwhelming regional acclamation as represented in Article 21 of the AFCHPR which provides for peoples right to exercise sovereignty over national resources in the exclusive interest of the people. In case spoliation, the dispossessed peoples have the right to

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314 Articles 1 and 27 of the International Covenant on Civil and Political Rights imposes an obligation on States to grant relative autonomy to minorities. For a discussion on Political Self Determination in Africa, See Chapter 3 abova.

the lawful recovery of its property as well as to an adequate compensation[315].

The concept of economic self-determination has been addressed[316] however, suffice it to say that the provision of Article 21 of the AFCHPR on permanent sovereignty over natural resources reinforces the African trend towards eliminating "all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources"[317].

The AFCHPR departs from the provision of the International Covenants in several ways. Article 21(3) of the AFCHPR states that:

> "The free disposal of wealth and natural resources shall be exercised without prejudice to the obligations of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law".

The International Covenants on the other hand provide that:

> "All Peoples may... freely dispose of their natural wealth and resources without prejudice to any obligations <u>arising out of</u> international economic cooperation, based on the principle of mutual benefit and international law..."[318].

It is therefore evident that whereas the AFCHPR limits the obligations to the promotion of international economic cooperation, under the International Covenants the right is qualified by those obligations.

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315 AFCHPR, Article 21(2).

316 Chapter 3, <u>above</u>.

317 AFCHPR, Article 21(5).

318 Article 1(2) of both International Covenants. (Underlines for emphasis)

Furthermore, Article 21(2) of the AFCHPR provides that "in case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation". In comparison, the International Covenants simply state that "[i]n no case may a people be deprived of its own means to subsistence"[319], without any reference to recovery of property or compensation. This significant advance by the AFCHPR over the provision of the International Covenants underlines the effort of African States to protect the continent from foreign economic domination.

It is safe to predict that the provisions of Article 21 will be one of the most patronized clauses of the Charter in the light of recent regional and sub-regional resolutions on self-reliance and Africanization[320]. Article 21 will also be particularly apt to the issue of Namibia where the wealth and natural resources of the Namibian peoples are being pillaged by South Africa and international capitalist monopolies, notwithstanding the fact that the United Nations Council for Namibia, under Decree 1 for the Protection of the Natural Resources of Namibia, established its authority on Namibia to protect the rights of the Namibian people to their natural resources[321].

The provision of Article 21 may only be invoked by African States on behalf of their peoples and for their exclusive benefit since it is stated the right to free disposal of wealth and natural resources cannot be

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[319] Ibid.

[320] See, for instance, the OAU Lagos Plan of Action for the Economic Development of Africa adopted by the 2nd Extra Ordinary Assembly of OAU Heads of States and Governments 28-29 April 1980, Lagos, Nigeria. OAU Doc ECM/ECO 9(XIV) Rev.2 (UN Doc A/S.11/14, Annex 1).

[321] Decreee No.1 for the Protection of the National Resources of Namibia, adopted by the UN Council for Namibia on 27 September 1974 and approved by the UN General Assembly at its 29th Session on 13 December 1974.

exercised by the people[322]. Consequently Article 21(4) of the AFCHPR provides that "State Parties shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view of strengthening African Unity". This provision takes into cognisance the main strategy for the realisation of the guidelines and measures in OAU Lagos Plan of Action which includes State exercise of meaningful and permanent sovereignty over natural resources through "national and collective self-reliance in economic and social development for the establishment of a new international economic order"[323].

The AFCHPR states that "in the case of spoliation the dispossessed people shall have the right to lawful recovery of its property as well as to an adequate compensation"[324].

This article may be construed as excluding multinational companies from claiming compensation for property lost during armed uprisings because of the term "people" used therein. However, foreign investors may seek solace in Article 14 of the Charter. Although Article 14 "guarantees" the right to property, it may be "encroached upon in the interest of the community and in accordance with the provisions of appropriate laws". The Charters recognition of the "obligations of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law"[325] enhances the proprietary rights of foreign multinationals in African States albeit to a lesser extent than the rights of the International Covenants. The rights of the foreign investor

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[322] Under the UN regime, the right of permanent sovereignty over natural resources was attributed "nations and peoples" (General Assembly Resolution 1803 XVII), whereas, the Charter of Economic Rights and Duties subsequently applied it only to States.

[323] OAU Lagos Plan of Action, op cit, para.76.

[324] AFCHPR, Article 21(2).

[325] AFCHPR, Article 21(3).

will however depend on the interpretation given to Article 21(3) since it does not state which principles of international law are relevant. The Commission will also have to reconcile the apparent conflict between Article 14 and Article 21 of the AFCHPR. The current unsettled state of affairs in the arena of international commercial transactions renders inadvisable, a formulation that could be interpreted to include customary international law, let alone general principles of law, recognized by civilized nations in so far as they purpose to deal specifically with such transactions[326]. In any case, there has been a remarkable shift by African States from the notion of economic sovereignty to the original idea of international cooperation in the sphere of foreign investment. Notwithstanding the efforts of African States as reflected in the Lagos Plan of Action, and examination of bilateral agreements on specific investment projects reveals this departure[327].

(i) The Rights of Solidarity and the AFCHPR

The AFCHPR represents the first international human rights instrument to consecrate the three generations of human rights. We have reviewed the Charters provisions regarding the first generation of rights which are civil and political rights based on the principle of liberty; and the second generation of rights being economic, social and cultural rights derived from the principle of equality.

The third generation of rights also referred to as "solidarity rights" are basically the right to development[328], the right to the ownership of the

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326 O. Eze "Legal Structures for the Resolution of International Problems in the Domain of Private Foreign Investments: A Third World Perspective Now and in Future. Georgia Journal of International and Comparative Law, Vol.9, 1979 p.544.

327 Rudolf Dolzer "Permanent Sovereignty over Natural Resources and Economic Decolonization in HRLJ 1986 Vol.7 p.228-230.

328 Article 22(1) AFCHPR.

common heritage of mankind[329], right to peace[330], and the right to a healthy and ecologically balanced environment[331]. In the context of North/South political forum, the emergence of solidarity rights is regarded by some scholars as the culmination of the southern doctrine of human rights which recognizes and protects the priority of economic and social rights, the collective rights of a people to independence of colonial rule, the collective right of a people to ethnic autonomy and the right of individuals and groups to such economic and social advancement as might make the enjoyment of civil and political rights possible[332].

We submit that the essence of the third generation of rights or "solidarity rights" can be better appreciated from the standpoint of natural progression in the evolution towards an efficient universal human rights regime. The first generation of rights (civil and political) were supplemented by the second generation of rights (economic and social) to enhance and protect human dignity through the principle of equality and by requiring States to provide social and economic goods, services and opportunities. Therefore, to ensure the effective implementation of the first and second generation of rights, it is necessary to ensure the protection and enforcement of the third generation of rights (solidarity rights) based on the principle of fraternity at both national and international levels, especially in view of the international economic imbalance which has handicapped the implementation of the first two generations of human rights. The consecration of the three generations

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329 Ibid. The concept of common heritage of mankind evolved in relation to the resources of the seabed of the high seas outside the limits of the territoria waters and Exclusive Economic Zones of States - See The UN Convention on the Law of the Sea, Doc.A/CONF.62/122 of 7 October 1982.

330 Article 23(1) AFCHPR.

331 Article 24 Ibid.

332 See R.J. Vincent, Human Rights and International Relations (Cambridge University Press: 1986) p.83.

of rights in the AFCHPR may be regarded as the first step, albeit regional, towards a universal legal framework to enhance human dignity, the essence of which is encapsulated in the right to development.

(i) The Right to Development

Article 22(1) of the AFCHPR consecrates the right to development:

> "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind.
>
> States shall have the duty to individually or collectively, ensure the exercise of the right to development".

The AFCHPR, thus represents the first legal instrument to provide for the right to development.

What is the right to development?

In his address to the Meeting of African Legal Experts convened to draft the AFCHPR, President Leopold Senghar observed that:

> "Our overall conception of Human Rights is marked by the Right to Development since it integrates all economic, social and cultural rights, and, also civil and political rights. Development is first and foremost a change of the quality of life and not only an economic growth required at all cost, particularly in the blind repression of individuals and peoples. It means the full development of every man in his community"[333].

The Right to Development means the progressive attainment of conditions in which every individual can enjoy, exercise and utilize all his human rights, whether economic, social, cultural, civil or political. The right to development embodies all human rights.

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[333] Opening Address of President Leopold Senghor: OAU Secretary-Generals Report on the Draft AFCHPR op cit p.2.

The concept of the right to development is recognized by UN General Assembly and the UN Commission of Human Rights as evidenced in UN Resolutions[334] and in the Reports of the UN Secretary General[335].

The concept was given regional prominence by the Algerian Commission on Justice and Peace which publicized the Report on the Right of Underdeveloped Peoples to Development[336]. The idea was developed and given international prominence by Judge Keba Mbaye in 1972 through his lecture on "The Right to Development as a Human Right". The incorporation of the right to development in the AFCHPR owes as much to the realisation of African States of the significance of the concept as to the personal initiative of Judge Keba Mbaye as the Chairman of the Meeting of Legal Experts to Draft the AFCHPR. In a memorandum on the concept of the right to development submitted to the Meeting of African Legal Experts, Judge Keba Mbaye states that:-

> "The philosophical equality of men stems from his freedom and must necessarily be extended to include economic and cultural equality; the right of every human being to enjoy the fruits of the earth and to ensure the full development of his intellectual, moral, cultural and physical qualities. Such a right is the offshoot of the most fundamental right: the

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334 UN Commission on Human Rights, Res.5(XXXV) 1979; and UN General Assembly Res.34/46 (1979), "emphasizes that the right to development is a human rights and that equality for development is as much a prerogative of nations as of individuals within nations" - para.8.

335 The International Dimensions of the Right to Development as a Human Right in Relation to Other Human Rights Based on International Cooperation, Including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and the Fundamental Human Needs - Report of the Secretary-General (UN Doc E/CN-4/1334 of 2 January 1979); and the Regional and National Dimensions to the Rights to Development as a Human Right. See also the Regional and National Dimensions of the Right to Development as a Human Right - Study by the UN Secretary-General (UN Doc E/CN r/1488 of 31 December 1981).

336 Commission 'Justice et Paix d'Algerie, le droit des peuples sons developpe au developpement, in Rene-Jean Dupuy (ed): The Right to Development at the International Level; Workshop, Hague Academy of International Law. The Hague 16-18 October 1979 (Alphen aan den Rijn, 1980).

right to life. Since no one disputes the right to life, the right to a better life is equally inalienable. An effort must be made to convince people that such an imperative implies conditions which... guarantee the security and dignity of man and make his power to be free and to his capacity to be happy meaningful. These conditions constitute the right to development.

The right to development implies... the right to self-determination of peoples. This means the right to freely dispose of their natural wealth and resources which lie beneath the earth. This right underlies the right to nationalise or expropriate... but subject to any obligations arising out of international economic cooperation.

The right to development is also the right to a worldwide redistribution of the fruits of labour of the peoples in accordance with the canons of justice and not those of economic strength. These conditions constitute the right to development"[337].

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337 Keba Mbaye "From the Right to Equality to the Right to Development" Report submitted to the Meeting of African Legal Experts preparing the Draft AFCHPR. p.2 1979.

The concept of the right to development has attracted considerable literature[338], some criticisms[339] and has been explored by international colloquia[340].

While the AFCHPR was being drafted, African countries were contemporaneously exploring the concept of development as reflected in the African Document on Development Strategy for the Third Decade[341], the Monrovia Strategy for the Economic Development of Africa[342] and the

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338 Hector Gros Espiel "The Right to Development" Texas International Law Journal 16 Spring 1981 pp.189-205. Emanuel de Kadt, "Some basic questions on human rights and development" World Development 8:2 (February 1980): p.97-105; Robert E. Goodin "The development rights trade-off: Some unanswered economic and political assumptions" Universal Human Rights 1 (April 1979) p.31-42; Keba Mbaye Emergence of the Right to Development in the Context of a New International Economic Order UNESCO Doc. SS-78/Conf.630/8 16 July 1979; Stephen P. Marks "Development and human rights: Some reflections on the study of development, human rights, and peace" Bulletin of Peace Proposals 8:3 (1977) p.236-246; James C.N. Paul, "Introduction: Law socialism and human rights to development in third world countries" Review of Socialist Law (Neth) 7 Sept 1981: p.235-241; Rich "The Right to Development as an Emerging Human Right" Virginia Journal of International Law, 23 (1983) p.289.

339 For instance, Jack Donnelly regards the right to development as "largely a right not to be economically underdeveloped, transforming human rights concerns related to development into little more than a device to gain ecomonic concessions on largely spurious grounds, or still another way to assert the priority of economic and social rights" - J. Donnelly "The 'Right to Development': How not to Link Human Rights and Development" in R. Meltzer and C. Weld (eds) Human Rights and Development in Africa; op cit p.267.

340 Keba Mbaye"Le developpement et les droits de l'homme rapport introductif-Dakar Colloquium, 1978" Revue Senegalaise de droit 11.22 (Dec.1977) p.19-51.
UNESCO - "Expert Meeting on Human Rights, Human Needs and the Establishment of a New International Economic Order" Final Report 19-23 June 1978 SS.78/CONF-630/COL2, Paris 1978 SS78/CONF 630-12.
R.J. Dupuy (ed) The Right to Development at the International Level, Workshop, (Hague Academy of International Law, The Hague 18-18 Oct 1979), op cit; Development, Human Rights and the Rule of Law, (Report of a Conference held in Hague 27 April - 1 May 1971, Oxford, New York 1981); Seminar on the Relations that exist between human rights and development, (New York, 3-14 August 1981). UN Doc ST/HR/SER-A/10.
Edward Kannyo "African Seminar on human rights and development" Human Rights Internet Reporter 7.5 (June-August 1982) pp.937-938.

341 C.M. Resolution 332 (XIV) and Annex A & B of 27 March 1979.

342 CM Resolution 722 of June 1979.

Lagos Plan for Action for the Implementation of the Monrovia Strategy for the Economic Development of Africa[343]. The cumulative effect of these factors influenced the UN Commission on Human Rights in 1981, to establish a working Group of Governmental Experts for the Study and Preparation of a draft Declaration on the Right to Development[344]. The draft Declaration will form the basis of a "Universal Declaration of the Right to Development as a Human Right".

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[343] Resolution ECM/EC/9(XIV) Rev.2 April 1980.

[344] Report of the Working Group of Governmental Experts on the Right to Development /E/CN.4/1489, E/CN 4.1983/11 the Technical Consolidated Text thereto in E/CN.4./1984/13 Annex II.

The UN draft declaration on the right to development recognizes that "the right to development is an inalienable human right of every person, individual or in entities established pursuant to the right of association and of other groups including peoples"[345]. In contrast, the AFCHPR in recognizing the right to development, expressly refers only to "peoples" as the beneficiaries of the right. We submit that the failure of the AFCHPR to expressly mention individuals as the beneficiaries of the right to development is a lacuna which may be exploited by States to demand this right of "peoples", without contributing much to the well-being of individual persons. It may however be stated that since "there is no real development without fundamental human rights, (and) individual participation"[346], it may be implied that the right to development of the individual is thus protected under the AFCHPR. The best solution however is to expressly incorporate the individuals right to development especially in the light of Article 22(2) of the AFCHPR which imposes the duty of implementing the right to development on States, individually and collectively. The corollary of this duty is that States will be required to observe the principle of equality of peoples[347], ergo individuals, in discharging their duty.

By collective implementation of the right to development, the AFCHPR makes a tacit reference to utilization of universal, regional and sub-regional institutions such as the UN, OAU, the EEC, Economic Community of West African States (ECOWAS), the Southern African Development Coordinating Conference (SADCC) and similar groups towards enhancing the right to development.

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345 E/CN4/1984/13 Annex II.

346 Address of the former Secretary-General of the OAU EdemKodjo, to the Meeting of African Experts preparing the Draft AFCHPR, Dakar, Senegal 28 Nov - 8 Dec 1979. OAU Doc. CAB/LEG-Vol.1 p.3-4.

347 AFCHPR, Article 19.

The enforcement of the right to development will prove difficult especially in the light of the absence of a specific implementation machinery for this purpose. However, under the existing machinery, peoples who are the beneficiaries of the right may be able to submit complaints to the African Commission in cases where their right to development has been infringed, for instance in a case where a Government perpetuates policies or practices which neglect the rights of a particular ethnic group to equal opportunities in breach of Article 19. The feasibility of this approach, admittedly, will depend on the interpretation given to the word "peoples" by the African Commission. However Article 22, (unlike Article 21, regarding the right of peoples to free development of natural resources) does not expressly provide for the State to claim or represent the rights of peoples thereto. Consequently, we may perceive the African Commission accepting communications from representatives of peoples or groups[348] claiming State infringement of Article 22.

Furthermore, if the African Commission accepts the view that the right to development attaches to individuals and encapsulates all human rights, it should be possible for an individual to claim State-contravention of his right to development where any of his human rights have been infringed.

In the hypothetical scenario, where a State is required to respond to the complaint alleging a breach of the right to development, we foresee a typical State response to be: "the State recognises its duty to "ensure the exercise of the right to development", however such a right can only be ensured as far as the economic resources of the State permit". Thus the right to development may encourage the elasticization of the permissible margin of appreciation accorded economic and social rights in

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348 Under the AFCHPR procedural framework Article 55 grants the African Commission power to consider "other communications".

international law to cover all rights, particularly civil and political rights.

Herein lies one of the main hazards of the right to development as a capsule of all rights. We submit that the right to development, as presently couched in the AFCHPR, is too vague a term to constitute a legal right. The right to development being a package of human rights could lead, at the national level, to progressive detachment from the realities of implementation in particular cases[349]. Indeed it could be used as a political shield to deflect genuine concern for civil and political rights, in defence of purely economic imperatives. In defence of our thesis that civil and political rights and social and economic rights are complementary, it is essential to highlight the possibility that States may utilize the right to development as an inroad to erode civil and political rights especially in the light of the Preamble of the AFCHPR which provides that: "it is henceforth essential to pay particular attention to the right to development... the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights"[350]. While we await the definitive Universal Declaration of the Right to Development, it is necessary for the African Commission on Human Rights to evolve rules, both procedural and substantive, applicable to the right to development. Such a solution is imperative, with a view to safeguarding the first and second generation rights from encroachment through the possible misinterpretations of the third generation of rights, particularly the right to development. The vulnerability of the right to development to political misapplication does

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349 J. Donnelly "The Right to Development" How not to link Human Rights & Development" op cit p.275.

350 AFCHPR 7th Preambular Paragraph.

not necessarily diminish its moral[351] or legal basis[352].

The moral and legal justifications for the right to development have been challenged[353] and explored elsewhere[354], however suffice it to say that in Africa, our focal point, the AFCHPR has obviated the need to plunge into an interesting controversy rendered foreclosed, albeit concisely, by Article 22 thereof and the impending adoption of the Universal Declaration of the Right to Development.

We submit that the African Commission on Human and Peoples Rights may utilize the device of Article 62 to effectively enhance the right to development. Article 62 requires each State Party to submit every two years a report of legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter. By "other measures", the AFCHPR implies, among others, social and economic policies pursued by State Parties towards enhancing

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[351] In referring to the ethical basis of the right to development, the UN Secretary-General's study states that development is the condition of all social life and therefore an inherent requirement of every obligation. The right to development is based on the moral duty of reparation for the underdevelopment caused by colonial and neo-colonial exploitation. On the basis of moral interdependence and economic interdependence it is in the interest of all nations to protect the right of development so as to preserve world peace. The Regional and National Dimensions of the Right to Development as a Human Right: Study by the UN Secretary-General op cit (Paras. 40-51).

[352] The UN Secretary-Generals Study outlines a "substantial body of principles...which demonstrate the existence of a human right to development in international law"; these include Articles 55 and 56 of the UN Charter, Articles 22, 26(2), 28 and 29(1) of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights especially Articles 1(1), 2(1) and 11; Ibid paras 55-78.

[353] According to J. Donnelly there is no legal or moral basis for the existence of the right to development. He further states that the right to development was devised by developing States as additional leverage in the pursuit of development and to deflect attention from national responsibility for the violation of humanrights. See J. Donnelly "The Right to Development: How Not to Link Human Rights & Development" op cit p.224.

[354] See footnote 3 at p.108.

the right to development. The Commission may also assess State performance against regional and sub-regional social and economic standards as adopted by institutions, such as ECOWAS, the ECA and under the Lagos Plan for Action.

The forthcoming Universal Declaration on the Right to Development as a Human Right, may also complement the regional strategies as objective standards of reference. The effective utilization of Article 62 in this context is particularly relevant, first, because the right to development as presently couched is too vague to constitute a legally enforceable right; secondly, the right to development should be appreciated as a right of every individual and peoples to participate in and benefit from development as a process of progressive improvement in the standard of living. Consequently, the reporting procedure is presently, the most efficacious method of enhancing, nay enforcing, the right to development. In the final analysis, the right to development should be regarded as a response to the need to look beyond the symptoms of human rights problems, to deal with the root causes as well.

(ii) Right to Peace and Security

One of the moral justifications of the right to development is the preservation of world peace. Thus the AFCHPR expressly states that: "All Peoples shall have the right to national and international peace and security..." based on the principles of solidarity and friendly relations implicitly affirmed by both the UN and the OAU Charter[355].

The AFCHPR represents the first international human rights instrument to incorporate the right to peace. Peace is a necessary corollary of the

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[355] Article 23(1).

right to development[356] because an era of peace and tranquillity should obviate the necessity to procure armaments with funds that should be better utilized for social and economic development. Africa, today, spends about $15 billion (US Dollars) per annum on arms, almost twice the amount the sub-Saharan States are receiving in development aid[357]. The fact that several African States are indeed embroiled in military conflict, both internal and external, may seem to justify large military expenditure. While this may ring true to an extent, it has been established that the enlargement of military budgets in African States is due primarily to the militarization of political institutions of African States through coups d'etat[358]. This observation is based on the fact that African States which have not been involved in major military engagements have notwithstanding, progressively increased their military spending[359], no doubt ostensibly to buttress internal security, ergo, security of tenure.

The phenomenon of military rule in Africa, has not only undermined the concept of the legality of government but it has had devastating effects on human rights. Consequently, it may be suggested that the existence of military regimes in Africa is a threat to peace and the protection of the right to development. Western capital investors are also implicated in this trend to militarize Africa. Firstly, they believe that strong military dictatorships ensure political stability thus securing their

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356 See UN General Assembly Resolution 38/124 - which emphasizes that "international peace and security are essential elements for the full realization of human rights including the right to development" - preamble para 14.

357 Zdenek Cervenka "The Effects of Militaization of Africa on Human Rights" in Africa Today 1987 1st/2nd Quarters p.75.

358 Nicole Ball "Security Expenditure and Economic Growth in Developing Countries" Pugwash Annals 1985 (London Macmillan, 1986). See also Baynham Simon (ed) Military Power and Politics in Black Africa (London: Croom Helm, 1986).

359 Nicole Ball Ibid.

investments. Secondly, international armaments producers are only too eager to sell stockpiled outmoded armaments to the developing States. It is indeed a paradox that these investors from liberal political cultures are willing to accommodate the sacrifice of civil and political rights in return for "stable" military dictatorships in Africa. The perceived stability of these authoritarian regimes invariably breeds and is breeding a hitherto docile but determined and increasingly agitative citizens who, being dissatisfied with western liberal double standards are prepared to embrace socialism and Marxism.

Thus a major step towards effectively protecting the right to peace and security in Africa should be through the demilitarization of political institutions of African States. The right to national and international peace and security will be difficult to enforce as a legal right in the absence of details on what the right entails. The Commission will have to initially determine which "people(s)" can bring a communication alleging a breach of their right to peace. However, it is arguable that since the provision refers to the right to "national and international peace", the only beneficiaries of this right are the people collectively constituting a nation or State, (i.e. Ugandans or Nigerians), and not ethnic groups.

A major advantage of Article 23(1) is that the people of a State threatened or in conflict with another State may submit a communication to the African Commission alleging a violation of the right to peace. Should the African Commission on Human and Peoples Rights accept such a liberal interpretation, and receives the cooperation of States, it could succeed in intervening in African inter-State conflicts, where the defunct OAU Commission of Mediation, Conciliation and Arbitration failed.

With a view to strengthening peace and solidarity, Article 23(2) expressly imposes obligations on States to ensure that:

> (a) any individual that has been granted the right of asylum should not engage in subversive activities against his country of origin or any State Party to the Charter, and
>
> (b) State Parties should 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.

The AFCHPR thus recognizes one of the root causes of inter-State conflicts in Africa. However, the rendering of assistance to liberation movements, recognized by the OAU as exercising their right to self-determination, will not be affected by Article 23(2).

(iii) Right to a Satisfactory Environment

Article 24 of the AFCHPR provides that:

"All peoples shall have the right to a general satisfactory environment favourable to their development".

This provision is vague in the sense that it does not specify the parameters of "a general satisfactory environment". A narrow interpretation would suggest that this phrase refers only to the physical and natural attributes of the environment, thus limiting its application to such matters as pollution, deforestation and ancillary matters[360]. On the other hand, a broad interpretation of the provision would encapsulate all

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[360] Deforrestation has been identified as one of the major causes of drought in Africa - See Rene Dumont and Marie-France Mottin - Stranglehold on Africa (London Andre Deutsch 1983). See also Odidi Okidi, Regional Control of Ocean Pollution, Legal and Institutional Problems and Prospects (Alphen aanden Rijn 1978).

matters, both institutional[361] and natural which create obstacles to development, thus requiring States to remove such problems and establish conditions favourable to development. It is however, submitted that the problems of interpretation created by the vagueness of the provision may reduce the provision to a moral exhortation rather than a legal right. In view of the increasing tendency of industrialized nations to dump toxic wastes in Africa, the significance of the provision is highlighted. It is thus arguable that where a State Party fails to prevent such dumping or neglects to take corrective measures to dispose of the waste, the people of a State and possibly the community proximately affected by such omission may seek to invoke Article 24 in domestic courts and possibly before the African Commission.

The incorporation of peoples rights in the AFCHPR has attracted several criticisms[362]. For instance Olajide Aluko argues that:-

> "This emphasis on peoples rights... seems to be an attempt by African Leaders to continue the near autocratic control of their countries and the remorseless exploitation of their own peoples, ...[w]ho determines the peoples rights and by what yardstick?"[363].

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361 The institutional problems of development include corruption and misuse of government apparatus, reserved for conserving national resources, by elites for private profit - See Lester R. Brown "A False Sense of Security" State of the World (1985) (World Watch Institute, 1985) p.20.

362 Rhoda Howard identifies the danger in extending "grounp-rights" to justify scapegoat politics as reflected in the persecution of Asians in East Africa. Group rights, according to Howard "failed to recognize that in modernizing urbanizing Africa, peoples are less and less members of particular ethnic groups and more and more individuals with a multiplicity of associations" R. Howard "The Full Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rihts? Evidence from Sub-Saharan Africa" Human Rights Quarterly p.467, 481.

363 Olajide Aluko "The Organization of African Unity and Human Rights" The Round Table, July 1981 p.237.

In the foregoing analysis we have attempted to respond to the issues raised by O. Aluko. We have suggested that the African Commission by virtue of its power to interpret the provisions of the AFCHPR, should be sufficiently liberal to regard "peoples" as distinct ethnic groups where these are 'prima facie' grounds to believe that they are oppressed. However the term "people" is such an amorphous term that the meaning should be specifically determined by the African Commission in the context of each case reported to it. The need to adopt a cautious but liberal posture with regard to the interpretation of "peoples" is underlined by the volatility of the heterogeneous States of Africa. However, the peoples right to self-determination does not, in this context, per se legitimize secession. Thus we suggest the exploration of internal socio-political solutions such as the granting of autonomy to minority or oppressed groups. On the other hand, the word "peoples" in the context of the right of peoples to dispose of their natural resources refers to the aggregation of groups comprising a nation State. This conclusion is derived from the Charters provision that State Parties shall represent the interest of the people in that regard[364].

The incorporation of peoples rights in the Charter is not only a response to the needs of the economically deprived rural, subsistence populace against the onslaught of the increasingly acquisitive urban ruling elites but also a device to protect the ethnically distinct minority groups from the oppressive political measures of the ruling majority.

The foregoing analysis of individual and peoples rights cannot be concluded without reference to the duties imposed upon States as well as individuals by the AFCHPR.

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364 Article 21 AFCHPR.

(j) Duties and Obligations

One of the unique features of the AFCHPR is its incorporation of the concept of duties within the framework of the Charter. Chapter I of the Charter is devoted to human and peoples rights, while Chapter II specifically sets out the duties of the individual "towards his family and society, the State and other legally recognized communities and the international community"[365]. The Charter also imposes duties on the State[366]. The AFCHPR, lays more emphasis on the concept of duties than other international and regional human rights instruments in the sense that the concept of 'duty' in the latter documents restrict the concept to the respect of the rights or reputation of others, and the obligations of a State towards its citizens or of an alien towards the State[367]. However, it should be noted that the American Declaration of the Rights and Duties of Man (1948) specifies a list of duties of the individual[368].

The AFCHPR reference to individual duties towards his community is consistent with the established values of traditional African societies which emphasise the individuals duties towards his family, age group, clan or community. The philosophical foundation of the concept of duties in African society has been explored[369]. The 'Introductory Statement',

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365 Article 27(1), Chapter II, AFCHPR.

366 Articles 25 and 26 Ibid.

367 5th preambular paragraph and Artricle 19(3) of the International Covenant on Civil and Political Rights; Article 32, American Convention. Article 32(1) of the American Convention states that "Every person has responsibilities to his family, community and mankind".

368 The duties of the individual are to the society, toward children and parents, to receive instruction, to vote, to obey the laws, to serve the community and nation, to pay taxes,to work and to refrain from political activities in a foreign country The American Declaration of the Rights and Duties of Man (1948) Chapter 2; OAS Rex.XXX adopted by the 9th International Conference of American States, Bogota, 1948.

369 See our discussion on human rights in pre-colonial traditional Africa, in Chapter One, above.

to the Meeting of African Legal Experts convened to draft the AFCHPR, states that:

> "The conception of the individual who is free and utterly irresponsible and opposed to society is not consonant with African philosophy"[370].

Similarly, the seventh preambular paragraph of the AFCHPR emphasises the consideration:

> "that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone...".

(i) Duties of Individuals

Chapter II of the AFCHPR titled "Duties", expressly provides for the duties of individuals. Article 27(1) places duties on the individual towards his family and society, the State and other legally recognized communities and the international community[371]. Article 27 further provides that in the exercise of the individual rights and freedoms protected in the Charter, due regard should be given to "the rights of others, collective security, morality and common interest"[372].

Article 28 elaborates upon Article 27(2) by imposing a duty on every individual to respect and consider his fellow being without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Furthermore, Article 29 of the AFCHPR spells out in eight paragraphs, the specific duties of the individual namely:

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370 OAU Doc. CAB/LEG/67/3/Rev.1, p.2.

371 AFCHPR, Article 27(1).

372 Ibid Article 27(2).

(1) to preserve the harmonious development of the family, to respect his parents at all times and to maintain them in case of need[373].

(2) To serve his national community by placing his physical and intellectual abilities at its service[374].

(3) Not to compromise the security of the State whether he is a national or a resident.

(4) To preserve and strengthen social and national solidarity.

(5) To preserve and strengthen national independence and the territorial integrity of his country, and to contribute to its defence according to the law.

(6) To work to the best of his abilities and competence, and to pay tax[375].

(7) To preserve and strengthen positive African cultural values and morals.

(8) To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

It is evident that some of the duties enumerated above correspond to the provisions of the 1948 American Declaration. However, the latter instrument did not have the desired impact on the subsequent development of human rights instruments. The practical application of the foregoing catalogue of duties enumerated by Article 29, will create major problems. For instance, to whom or what will those who breach the duties be accountable? Secondly, what are the standards for measuring accountability?

Article 29(1) imposes a duty on the individual to preserve the harmonious development of the family and to work for the cohesion and respect of the family. The essence of this provision lies in its moral

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373 This provision is similar to Article XXX of the American Declaration (1948).

374 See corresponding Article XXIV Ibid.

375 See corresponding Article XXXVII, of the American Declaration Ibid.

appeal especially in the light of the existence of divorce and matrimonial laws[376] in all African States.

The second leg of Article 29(1) which imposes the duty on the individual to respect his parents and to maintain them in case of need, reaffirms the existence of the traditional African social security system as represented by the extended family support system. However we submit that the duties imposed on the individual to support his parents in case of need should be taken in conjunction with the provisions of Article 18(4) which states that "the aged and the disabled shall also have the right to special measures of protection in keeping with the physical or moral needs", and Article 18(1) which provides that "the State shall have the duty to assist the family...". Consequently, in the application of the duty of the individual towards his family, the State is required to partake in this responsibility. The practical application of these provisions will depend upon the criteria adopted by the African Commission as to where the duty of the State stops and that of the individual begins or vice versa; or indeed whether these duties run concurrently.

The effect of Article 29(2) which requires the individual "to serve his national community by placing his physical and intellectual abilities at its service" creates a substantial inroad to the individual rights protected by the Charter. Ostensibly, the purpose of this provision is to protect the State's investment, through educational and technical programmes, in its manpower resources, by preventing a "brain drain"[377]. Although the rationale appears legitimate, it may be widely abused by States wishing

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376 For instance see the Matrimonial Causes Act (1975) Nigeria.

377 For instance, in 1987 Nigerias premier hospital, the University Teaching Hospital, Ibadan, experienced the departure of 40 Nigerian medical consultants for greener pastures in the Middle East and Europe. - African Guardian 25 April 1988.

to mobilize its citizens for purely political purposes against their will[378].

The duties required of the individual in Article 29(3)-(6) are duties which may be regarded as universally recognized by most States in their respective local laws. These duties include the preservation of the States national independence, security, defence, national solidarity, and the payment of tax in the interest of the society.

We submit, however, that the loose wording of the provisions give a certain amount of leeway that States may seize to restrict individual rights, for instance, "to preserve and strengthen social and national solidarity".

Professor Collomb has observed that living in Africa "means abandoning the right to be an individual, particular, competitive, selfish, aggressive, conquering being... in order to be with others, in peace and harmony with the living and the dead, with the national environment and the spirits that people it or give life to it"[379].

Professor Collomb's observation thus informs the inclusion in the AFCHPR, the individuals duty "to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society"[380].

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[378] Le Combat Pour les Droits de l'Homme En Afrique: Symposium International Sur La Charte Africane Des Croits De l'Homme Et Des Peuples, Dakar, 25-28 October 1982 in Droit et Culture, No.5 (1983) p.108.

[379] Quarantieme Congrés Medical Francophone (Dakar) 1975 p.25.

[380] AFCHPR, Article 29(7).

The Charter does not define "positive African cultural values", nor does it specify who or what will determine these values. However it may be suggested that by emphasizing the "spirit of tolerance, dialogue and consultation", the Charter's thrust is toward the maintenance of social equilibrium through positive African cultural values that enhance social interaction.

The significance of Article 29(8) lies in its projection of the duty of promoting and maintaining African unity beyond States to individuals[381]. Thus the individual is required to contribute to the best of his abilities, at all times and at all levels to the promotion and achievement of African unity.

It is significant that the catalogue of duties imposed on the individual is restricted to his family, society, the State and other legally recognized communities and the international community. The Charter does not specifically mention the individual obligations towards his ethnic group or clan, although it may be argued that an ethnic group or people may come under the terms "society" or "other legally recognized communities". If this interpretation were admissible, the individuals duty to his ethnic group or "society" would be confined to preserving and strengthening its cultural values in relation to other members of the society "in the spirit of tolerance, dialogue and consultation"[382]. Such an interpretation is pertinent in the light of the threat posed by ethnicism to national unity and human rights.

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[381] Hitherto, the legal duty to promote and achieve African Unity was limited to Member States of the OAU. Article II OAU Charter.

[382] Article 29 of the Universal Declaration of Human Rights states that everyone has duties to the community and that individual rights and freedoms are subject to limitations determined by law solely for the purpose of seeing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

In summation therefore, we believe that the inclusion of individual duties in the AFCHPR confirms, the universally acknowledged principle that individual rights give rise to corresponding duties. The AFCHPR, proceeds beyond this principle by specifically placing duties, which do not correspond to specific rights. The Constitution and legislations of several African States reflect some of the duties expressed in the AFCHPR. Thus by incorporating the concept of duties into a regional human rights instrument the AFCHPR brings within its jurisdiction some measure of international control or review of domestic legal duties imposed on the individual. The efficacy of these Charter provisions are doubtful, since they are couched in generally vague terms, however, is will be left to the African Commission to eliminate or reduce the possible areas of misuse or abuse.

States may seek to justify derogations from rights invoking the provisions on individual duties such as the duty to serve the national community and preserve social and national solidarity.

The African Commission, armed with its power of interpretation[383] should seek to clarify the concept of duties as presented in the African Charter. In exercising this power, consideration should be given to the recommendation of the study commissioned by the Sub-Commission on Prevention of Discrimination and Protection of Minorities[384] which prescribes that the limitation of human rights and freedoms resulting from the enforcement of individual duties have to be interpreted as narrowly as possible and that such restrictions have to be laid down or

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383 AFCHPR, Articles 60 and 61.

384 The Individuals' Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, (A Contributin to the Freedom of the Individual under the law), Study prepared by Erica-Irene A. Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/432/Rev.2.

authorized by law[385]. In the final analysis, African States ought to refrain from exploiting the lacuna offered by the concept of individual duties since the words of Sidgwicks good friend, John Stuart Mill: "The worth of a State, in the long run, is the worth of the individuals composing it".

(ii) Duties and Obligations of States

Much as the individual is burdened with duties, the AFCHPR also imposes several duties and obligations of State Parties. By virtue of Article 1 of the Charter, State Parties undertake to recognise the rights, duties and freedoms enshrined in the Charter and to adopt legislative or other measures to give effect to them. Article 1 thus imposes on State Parties absolute and immediate obligations to secure the specified rights. Furthermore, the obligations are not expressed as being dependant on available resources as in the case for example, in the International Covenant on Economic, Social and Cultural Rights. Thus the efficacy of the AFCHPR will depend to an appreciable extent, on legislative and other practical measures taken by States to give effect to the rights and freedoms guaranteed in the Charter[386]. Several African States have already given legislative effect to the provisions of the Charter by adopting local laws in that regard[387].

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385 Ibid p.172.

386 AFCHPR, Article 2.

387 For example, The National Assembly of Nigeria passed the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1983, as far back as 17 March 1983. Article 1 thereof provides that the provisions of the AFCHPR "shall have the force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria".

In addition to safeguarding the rights and freedoms guaranteed in the AFCHPR, State Parties have an implied obligation to create a general satisfactory environment favourable to their realization[388].

The socio-economic right to work, to education, health and development in the Charter are couched in relatively absolute terms, thus imposing corresponding immediate obligations on States to protect those rights[389].

However, we submit that since the practical realization of these socio-economic rights will invariably depend on the availability of resources, it is likely that the African Commission may utilize Article 2 of the International Covenant on Economic, Social and Cultural Rights as a guide[390] and thus cushioning States from the immediacy of their obligation.

By undertaking to submit periodic (two yearly) reports, to the African Commission, on measures taken to give effect to the rights, State Parties are thus obliged to submit their efforts towards achieving the rights and freedoms in the Charter, to the Commissions scrutiny[391].

One of the main problems with this provision is that it does not specify the form and content of these reports and does not provide a procedure according to which they should be reviewed.

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388 AFCHPR, Article 24.

389 Ibid, Article 1.

390 The International Covenant on Economic, Social and Cultural Rights allows States to achieve progressively the full realization of the rights protected subject to the maximum of their available resources: - Article 2.

391 AFCHPR, Article 62.

The African Commission may decide to adopt the rules governing such reports under the International Covenant on Economic, Social and Cultural Rights[392].

Articles 25 and 26 of the AFCHPR expressly impose two significant duties on States. Firstly, Article 25 provides that State Parties have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the Charter and ensure that the rights and freedoms as well as corresponding obligations and duties are understood. Given the relatively high level of illiteracy in Africa, the importance of the States duty of mass enlightenment is underlined by the fact that the Commission is also charged with the duty to disseminate information regarding human and peoples rights[393].

Secondly, by virtue of Article 26, State Parties have a duty to guarantee the independence of the Courts and to allow the establishment and improvement of appropriate "national institutions" entrusted with the promotion and protection of the rights and freedoms guaranteed by the AFCHPR. The frequent incidents of executive encroachment on the independence of the judiciary in Africa informs the significance of this provision[394]. Although Article 26 lays the foundation for the establishment of "national institutions" for the promotion and protection of human rights it is not clear whether this refers to independent and

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[392] The International Covenant provides that reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the Covenant. Such reports are to be furnished in stages in accordance with a programme to be established by the Economic and Social Council after consultation with States and the specialized agencies concerned - Article 17(2) International Covenant on Economic, Social and Cultural Rights. See Dana Fisher "Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee, AJIL (1982) pp.142-153.

[393] AFCHPR, Article 45(1)(a).

[394] See B.O. Nwabueze, Judicialism in Commonwealth Africa (New York, St. Martins Press) 1977.

private institutions or institutions established by the State, or both. From our experience, it is necessary that institutions established solely for the purpose of promoting and protecting human rights, are totally independent of government or State control and influence. The role of the judiciary in the protection of human rights cannot be overemphasized albeit strictly limited to the clinical issues of law and fact brought before the courts. Thus privately established, non-governmental organisations, are in a better position to propagate the rights; freedoms and duties protected in the Charter, advise and criticize the government when appropriate and undertake legal action on behalf of individuals or people whose rights and freedoms have been infringed. We are inclined to believe that although the State is in a better position financially to propagate human rights, through its existing institutional organs, it will invariably be reluctant to do so. However if the Nigerian exercise is anything to go by, establishment of the Nigerian Council for Human Rights (NCHR) without State interference, reflects the attitude of the present Nigerian military Government to abide by the provisions of Article 26 of the AFCHPR.

The African Charter expressly imposes other duties on States. These include the duty to protect the health of their people and ensure that they receive medical attention[395], the duty to promote and protect the morals and traditional values recognised by the community[396], the duty to assist the family[397], and to ensure the elimination of every discrimination against women and to ensure the protection of the rights of women and children as stipulated in international declarations and

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395 AFCHPR, Article 16(2).

396 Ibid, Article 17(3).

397 Ibid, Article 18(2).

conventions[398].

With regard to peoples rights, by virtue of Article 20(3) States have the implied duty to render assistance to all peoples in their liberation struggle against foreign dominance be it political, economic or cultural. This implied duty transforms into an express legal duty when taken in conjunction with Article III(6) of the OAU Charter[399] and the Lusaka Manifesto[400] especially as regards the territories still under foreign political domination.

The State Parties to the AFCHPR also have the duty to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies[401]. Article 22(2) imposes the duty on States to individually and collectively ensure the exercise of the right to development. With a view to enhancing peace and solidarity, States have a duty to ensure that individuals enjoy the right of asylum and that they do not engage in subversive activities. State are also under the obligation to ensure that their territories are not used as bases for subversive and terrorist activities against the people of another State Party[402].

The duties imposed on States by the AFCHPR are necessary and desirable for the enhancement of individual and peoples rights. The concept of State duties invariably restrain negative effects of the

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398 Ibid, Article 18(3).

399 Article III(6) of the OAU Charter states that "Member States... solemnly affirm and declare their... absolute dedication to the total emancipation of the African territories which are still dependant".

400 See UN Document A17754 of 9 November 1969. See also Chapter 4 above.

401 AFCHPR, Article 21(5).

402 Ibid, Article 23(2)(a) and (b).

restrictions placed on the rights and freedoms by the AFCHPR. Much as the authors of the AFCHPR have striven to achieve a balance between the rights and duties, the delicate act of maintaining this balance while enhancing the protection of individual and peoples rights will be the responsibility of the African Commission. We thus propose to examine the procedure of the Commission as set out by Chapter III of the AFCHPR.

(k) Machinery for the Promotion and Protection of Human & Peoples Rights

We propose to examine the composition, organisation and competence of the African Commission on Human and Peoples Rights (hereinafter referred to as the African Commission) and its procedures for the protection and promotion of the rights recognized in the Charter[403]. Unlike the American and European Conventions which provide for a two-tier system consisting of a commission and a court, the machinery for the promotion and protection of human rights under the African regime, is the African Commission.

(i) Composition & Organisation of the Commission

Article 31 of the AFCHPR envisages the establishment of an African Commission composed of eleven members serving in their personal capacity and chosen from amongst personalities of the highest reputation known for their high morality, integrity, impartiality and competence in matters of human and peoples rights[404]. In the appointment of the members of the Commission, particular consideration should be given to

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403 Part II (Articles 30-63) of the AFCHPR deal with the African Commissions establishment and organisation (Chapter I); mandate (Chapter II); procedures (Chapter III); and applicable principles (Chapter IV). Part III (Articles 64-68) concerns general enactment provisions.

404 Ibid, Article 31.

"persons having legal experience", thus non-Lawyers may be appointed. Members of the Commission must be nationals of one of the State Parties to the Charter.

At least four months prior to elections, the OAU Secretary-General is to invite nominations from State Parties[405]. Each State may nominate not more than two candidates provided that where two candidates are nominated, one of them shall not be a national of that State[406].

The Secretary-General of the OAU shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections[407]. The Members of the Commission are then to be elected by secret ballot by the Assembly from the list of nominees compiled by the OAU Secretary-General[408]. The Commission shall not include more than one national of the same State[409].

The Members of the African Commission on Human and Peoples Rights were elected by the Assembly of Heads of State and Government at the twenty-third OAU Summit held in Addis Ababa in July 1987[410].

Once elected, the mandate of the members of the commission lasts six years and they may be re-elected. However regarding the first elections, the terms of four of the elected members shall terminate after

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405 Ibid, Article 35(1).

406 Ibid, Article 34.

407 Ibid, Article 35(2).

408 Ibid, Article 33.

409 Ibid, Article 32.

410 The List of Members of the African Commission on Human and Peoples Rights: Appendix XI, post.

two years and the term of the office of the three others, at the end of four years[411]. The Chairman of the Assembly of Heads of State and Government shall draw lots immediately after the first election to decide the mandates of two and four years[412]. The Charter envisages that every member of the Commission shall be in office until the date his successor assumes office[413]. After their election, the members shall make a solemn declaration to discharge their duties impartially and faithfully[414].

In the event of the death or resignation of a member, the seat is declared vacant by the Secretary-General of the Commission.

A member who, in the unanimous opinion of his colleagues ceases to fulfil his functions or is incapable of continuing to fulfil them, shall have his seat declared vacant unless his failure is due to absence of a temporary nature. In the event of a seat becoming vacant due to death, resignation or non-fulfilment of his functions, the Assembly of Heads of State and Government shall replace the relevant member for the remaining period of his term, unless the period is less than six months[415]. Unlike the American Convention[416], the AFCHPR requirement of unanimity for removal should reduce the influence of extraneous considerations.

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411 Ibid, Article 36.

412 Ibid, Article 37.

413 Ibid, Article 40.

414 Ibid, Article 38.

415 Ibid, Article 39.

416 The members of the American Commission may remove a member by an affirmative vote of five out of its seven members, subject to approval of the OAS Assembly. Article 10 Statement of the Inter-American Commission on Human Rights OAS Res.477 of Oct 1978.

The Commission is required to elect its own Chairman and Vice Chairman for a renewable two year period. The AFCHPR provides that members are required for a quorum[417] and that in case of equality of votes, the Chairman shall have a casting vote[418]. The status of the Members of the Commission is enhanced by the provision granting them diplomatic privileges and immunities[419]. The Charter stipulates that provisions shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the OAU[420]. The Commission is empowered to evolve its own rules of procedure by virtue of Article 42(2). The Secretary-General of the OAU is responsible for the appointment of the Secretary of the Commission and he is to provide the staff and services necessary for the effective discharge of the functions of the Commission[421]. The Charter provides that the Secretary-General of the OAU "may attend the meetings of the Commission but he shall neither participate in the deliberation nor be entitled to vote"[422]. However Judge Keba Mbaye, the Chairman of the OAU Committee of Legal Experts for preparing the Draft African Charter, states that the OAU Secretary-Generals opinion may be heard orally especially where the Commission needs to obtain clarification on a particular issue[423].

The foregoing rules on the composition and organisation of the Commission invites some comments.

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417 Ibid, Article 42(3).

418 Ibid, Article 42(4).

419 The privileges and immunities shall be those provided for in the General Convention on the Provileges and Immunities of the OAU. Ibid, Article 43.

420 Ibid, Article 44.

421 Ibid, Article 41.

422 Ibid, Article 42(5).

423 Keba Mbaye "Keynote Address on the African Charter on Human and Peoples Rights" op cit p.37.

The Charters provision for an eleven-member Commission may be regarded as too small, both for the effective discharge of its extensive mandate and for a continent of 51 States. Although this figure corresponds to the equitable geographic distribution adopted by the OAU namely, North, East, West, Centre and South of Africa, the addition of a few more members, may enhance the functioning of the Commission[424]. It would be impractical to suggest the system adopted by the European Convention which provides for the establishment of a Commission whose membership is equal to that of the High Contracting Parties[425].

Whereas the members of States eligible to subscribe to the European Convention are relatively few[426], the AFCHPR anticipates a total repetoire of 53 State Parties. Furthermore, under the American Convention, although Article 35 thereof states that the Commission shall represent all member countries, Article 34 specifically states that the Inter-American Commission shall be composed of seven members[427]. Consequently, an increase in the number of the members of the African Commission to bring the ratio of Commission members vis-a-vis State Parties to a realistic proportion should be considered. In the alternative, the Commission may consider the establishment of Special Sub-Commissions on specific human rights areas, thereby enlarging its capacity to undertake its vast responsibilities.

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[424] It is instructive to note that the UN Monrovia Proposal for the Setting Up of an African Commission on Human Rights, recommended that the membership of the Commission should consist of 16 experts - Article 4, UN Doc ST/HR/SER A/4.

[425] European Convention, Article 20.

[426] Presently 17 countries are parties to the European Convention.

[427] Nineteen of the thirty one Member States of the OAS have ratified the American Convention on Human Rights, which entered into force in 1978.

It has been observed that the absence of incompatibility between the quality of a member of the commission and that of a member of government or diplomatic corps could compromise the independence of the Commission vis-a-vis States[428]. While this may be true, the current composition of the African Commission reveals an overwhelming presence of distinguished African judges and lawyers of proven integrity and competence.

With regard to the election of the Commission Chairman and Vice Chairman, the members of the Commission in evolving internal rules of procedure should consider adopting the mode of secret (not public) ballots in such elections[429]. Such a method would not only guarantee the sincerity of votes but avoid clash of personality among members.

The eligibility of members of the Commission for re-election not only enhances their security of tenure but ensures administrative continuity. However, we submit that the eligibility of the Chairman and Vice Chairman for re-election to two-yearly terms, does not promote democratization within the Commission[430]. Although the African Charter is silent on the specific functions of the Chairman and his Vice Chairman, one would expect a detailed provision on this issue in the

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[428] Obinna Okere, The Protection of Human Rights in Africa and the African Charter on Human and Peoples Rights: A Comparative Analysis with the European and American Systems - Vol.6 Human Rights Quarterly (1984) p.150.

[429] The Chairman and Vice Chairman of the African Commission were elected by members of the Commission at its first session held in Addis Ababa in July 1987. The Commissions Chairman is Mr. Isaac Nguema of Gabon [The Gabonese High Commissioner of State for Public and Civil Rights]. The Vice Chairman is Dr. I. Badawi El-Sheikh of Egypt [Deputy Director, Legal and Treaties Affairs, Ministry of Foreign Affairs, Egypt, and a former member of the UN Center for Human Rights (1978-1986].

[430] For instance, Article 14 of the American Convention states that the Chairman and his two Vice Chairmen whose terms are for a year may be re-elected only once in each four year period.

Commissions rules of procedure[431].

The Charter is equally silent on the location of the Headquarters of the Commission. In this regard Article 30 of the Charter merely states that the Commission shall be established within the OAU. Does this refer only to the legal framework of the OAU or also to its physical location? We are inclined to believe that the Charter envisages the headquarters of the Commission to be based in Addis Ababa especially in view of the fact that the Commissions staff and services are to be provided by the OAU Secretary-General[432]. The financial constraints of the OAU Secretariat may limit the possibility of staff recruitment, thus the Commission may have to share common staff and services with the OAU Secretariat. Article 44 states that provision shall be made for the emoluments and allowances of the members of the Commission in the Regular OAU Budget. It is evident that the financial implications for establishing a Commission on Human Rights have not been fully explored[433].

We submit that the workload of the Commission may not be sustained by ad hoc budgetary allocations and the sharing of staff and services of the OAU Secretariat. The OAU Secretary-General should anticipate this by making adequate provisions both human and material, towards enhancing the efficient and speedy functioning of the African Commission.

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[431] Article 10 of the Statue of the Inter-American Commission on Human Rights enumerates 13 specific functions of the Chairman including the duty to represent the Commission before the OAS organ and other international organisations. Res.447 General Assembly of the OAS - (as amended by Res.508 of Nov 1980).

[432] AFCHPR, Article 41.

[433] See OAU Diary No.6 of 21 June 1981 - at para.(5).

An examination of the functions and competence of the Commission will reveal that such an organ requires not only clerical services but also a professional body of legal and research staff to undertake supportive roles.

(ii) Functions & Competence of the Commission

By virtue of Article 45, the African Commission, has four main functions, namely, the promotion and protection of human rights, interpretation of the Charter, and the performance of any other tasks which may be entrusted to it by the Assembly of Heads of State and Government[434].

The AFCHPR lays emphasis mainly on the promotional function of the African Commission. Towards this end, the African Commission is charged with following duties:-

(a) The formulation of principles and rules directed at solving legal problems relating to human and peoples rights upon which African Governments may base their legislation.

(b) Cooperation with other African and international institutions concerned with the promotion and protection of human rights[435].

The Commission is thus envisaged primarily to be a documentation and information centre in the field of human rights in Africa. The Commission may utilise its data bank to encourage research on human rights issues including the awarding of scholarships and prizes in cooperation with the OAU Secretary-General.

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434 The European Convention does not stipulate the specific functions of its Commission of Human Rights other than charging it with ensuring the observance of the Conventions provisions (See Article 19(1)); The American Convention endows the Inter-American Commission on Human Rights with a comprehensive list of functions (See Article 41).

435 AFCHPR, Article 45.

By granting the Commission a quasi-legislative function of evolving rules and principles on human rights issues, the Commission may serve as a useful source for the drafting of State Laws pertaining to human rights.

In view of the initial difficulties of establishing a data bank on human rights, the cooperative functions of the Commission, will enable it to explore the existing resources of established international and regional human rights institutions including those of non-governmental organisations. The performance of the existing OAU information department suggests that it canot effectively handle the dissemination of the Commissions information. Amnesty Internationals suggestion in this regard is apt:

> "International NGO's and Regional African NGO's have a role... by helping to ensure that those who seek to promote and protect human rights at national and local levels are kept informed of the (African) Commission's work"[436].

The second main function of the African Commission is to "ensure the protection of human and peoples rights under the conditions laid down by the present Charter"[437].

The competence of the Commission is based upon the satisfaction of three traditional conditions of 'ratione loci', 'ratione materiae', and 'ratione personae'.

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436 Protecting Human Rights: International Procedures and How to use them: The Organisation of African Unity and Human Rights (Amnesty International Papers Series): IOR 03/04/87 p.16.

437 AFCHPR, Article 45(2).

As regards competence 'ratione loci', the alleged violation must have taken place on the territory of one of the State Parties for the Commission to be competent. It is however, significant that the AFCHPR does not contain a provision similar to Article 1 of the European Convention under which the States guarantee the recognized rights to persons within their jurisdiction[438]. Consequently, it can be argued that the Commission is competent to handle a violation by a State Party where it involves a protected person outside the national boundary, especially in the absence of restrictions regarding the obligations of State Parties to protect the rights recognized in the AFCHPR.

As to competence 'ratione materiae', the African Commission can consider any violation of the rights and duties guaranteed by the AFCHPR. Indeed the breadth of Article 47 invites the Commission to entertain communications revealing the violation of other provisions of the AFCHPR as well.

The competence 'ratione personae' envisages both States and individuals. However, the Commission may only be seized of a matter if the alleged violations have been committed by a State Party. Thus, violations ascribable to individuals and other non-State institutions will not fall within the jurisdiction of the Commission. Individuals, however, do have capacity for action since the Commission may receive both inter-State communications and "communications other than those of State Parties"[439]. We shall address the issue of communication procedures very shortly.

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438 See also Article 1 of the American Convention.

439 AFCHPR, Article 53.

The third main function of the Commission is to interpret the provisions of the Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU. As earlier discussed, the inclusion of this provision resulted in three States entering reservations thereto[440]. The Commissions power of interpretation extends beyond the normal functions undertaken by other regional human rights commissions[441].

Since the African Commission cannot refer matters to itself, the Charter grants the Commission the competence to render opinions on matters of interpretation generally requested by a State Party, an institution of the OAU or an African Organization recognized by the OAU. Although the OAU itself is not expressly mentioned, in our opinion, nothing prevents it from seeking such opinions. Individuals are ostensibly excluded from seeking such opinions, however a recognized institution may represent the individuals interest. International non-Government Organizations, such as Amnesty International may thus be excluded from seeking such opinions. The AFCHPR does not provide for safeguards, regarding interpretation, that are designed to protect rights and duties protected therein. For instance the American Convention, expressly states that none of its provisions shall be interpreted as permitting any State Party, group or person to suppress the enjoyment or exercise of the rights and freedoms protected or restrict them to a greater extent than is provided[442]. Quite apt to our case for the demilitarization of African political institutions, is the relevant provision of the American

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440 Tanzania, Burundi and Kenya.

441 Under the American and European Conventions, the function of interpretation of the respective Conventions is reposed in the Inter-American Court of Human Rights (Article 62(3) American Convention) and the European Court of Human Rights, respectively (Article 45 European Convention).

442 American Convention, Articles 29(9) and Article 30.

Convention that forbids the interpretation of any of its provisions as "precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government"[443].

The inclusion of such a clause in the AFCHPR would have strengthened the otherwise vague Charter provision on the right to participate in government[444].

In what context, therefore, should the African Commission interpret the AFCHPR? without prejudice to different schools of interpretation[445].

Articles 60 and 61 of the AFCHPR envisage that the Commission shall "draw inspiration" from international law of human rights including African instruments on human and peoples rights, and other subsidiary measures such as other general or special international conventions and general principles of law expressly recognized by OAU Member States, to determine the principles of law.

The Charter, thus envisages the interpretation of the provision in the context of the international human rights instruments. The Vienna Convention states that treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[446].

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[443] Article 29(5) Ibid (underlines for emphasis).

[444] AFCHPR, Article 13.

[445] The three main schools of thought on the subject are referred to as "the intention of the parties" or "founding fathers" school; the textual or "ordinary meaning of the word" school, and the "theological" or aims and objects" school. These schools are not necessarily mutually exclusive.

[446] Article 31(1) Vienna Convention on the Law of Treaties: - See 63, AJIL - (1964) p.875..

Consequently, where the Charters provisions are vague, as several provisions indeed are, the African Commission may adopt supplementary means of interpretation especially the provisions of international human rights instruments[447]. This method would certainly minimize the utilization of subjective criteria that seek to ascertain only the intent of the Parties. The motive behind the expressed reservation by several African States to Article 45(3) granting the African Commission the power of interpretation, is informed by their desire to maintain the subjective criteria which may likely render the Charters provisions obscure and lead to results manifestly absurd or unreasonable. However the efficacy of the wide method interpretation will depend upon the extent to which State Parties of the AFCHPR have ratified or acceded to the relevant international human rights instruments... and also to the extent that these principles are reflected in national constitutions. Secondly, the effect of the State reservations to Article 45(3) of the Charter would invariably limit the Commissions power to render interpretations affecting relevant States.

The fourth main function of the African Commission is to "perform any other tasks" which may be entrusted to it by the Assembly of Heads of State and Government[448]. In the absence of any further clarification, one can only presume that the African Commission, may for instance be, called upon by the Assembly, to examine an issue involving the violation of AFCHPR provisions by a State Party in respect of which no communication has been received; thus obviating the need to pursue the traditional OAU practise of setting-up ad-hoc committees.

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447 Article 31(2)(b) Ibid.

448 ARCHPR, Article 45(4).

Communications before the Commission

The AFCHPR envisages two methods of lodging "communications" before the Commission, namely "Communications from States" and "other Communications". The procedural system is graphically illustrated in the following page.

All Measures are Confidential unless otherwise decided by Assembly

OAU ASSEMBLY OF HEADS OF STATE AND GOVERNMENT

53

States concerned — Report on Findings and Recommendations

54 | 58(3) 58(2) | 58(1)

Settlement | No solution | Annual Report | Indepth Study & Factual Report | Serious or Massive Violations | inadmissible

50
Admissibility, Friendly solution, Local Remedies

56
Screening Admissibility, local remedies

OAU COMMISSION OF HUMAN AND PEOPLES' RIGHTS

49 | 48 | 48 | 58(3) | 55

No solution — Amicable solution Settlement

47

Inter State Communications | Emergency | Other Communications

Communications on violations of Human Rights

PROCEDURE FOR COMMUNICATION UNDER THE AFRICAN CHARTER

(iii) Communications from States[449]

The AFCHPR provides State Parties, complaining of violations of the Charter provisions, with two avenues for action. The first avenue provides for a system where the Commission may investigate a matter following a failure in parties efforts to seek a friendly settlement[450]. The second channel allows a State Party direct recourse to the Commission[451].

The essence of the first channel is to allow the two States concerned to explore and reach a peaceful and friendly settlement through bilateral negotiations. In the event of a failure in reaching a peaceful settlement, after one State has informed the other of an alleged violation, both States can submit the matter to the Commission. Such a notification is addressed to the Commission through its Chairman, and also to the State concerned and the Secretary-General of the OAU. It is pertinent to note that under this procedure, the notification to the Commission is permissible if the issues has not been finally settled within three months from the date the original communication was received by the State to which it was addressed.

The main defect in this procedure is that it fails to provide for notification, to the Commission and other relevant institutions, on the peaceful settlement and/or agreement reached or measures taken to conform to the Charter.

The second channel regarding inter-State communications enables a State Party that considers that another State Party has violated the Charter to

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449 Ibid, Articles 47-54.

450 Ibid, Articles 47-48.

451 Ibid, Article 49.

refer the matter directly to the Commission by way of a communication addressed to its Chairman, the State concerned and the Secretary-General of the OAU.

All inter-State communications, whether channelled directly or indirectly, must fulfil three conditions of validity before the Commission can deal with the matter. First, the communication must originate from a State Party to the Charter and contain allegations against another State Party. Secondly, the allegation must involve the violation of a provision of the AFCHPR. Thirdly, the Commission can only deal with the matter after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged[452].

Once a matter scales these hurdles, the Commission may proceed to investigate it. The Commission may ask the States concerned to provide it with all relevant information[453]. The States concerned may be represented before it and submit written or oral representations[454]. The Commission may also resort to "any appropriate method of investigation"[455] that is not inconsistent with the Charter and with international law. In exercising this apparently wide investigative power, the Commission may hear from the Secretary-General of the OAU or any other person capable of enlightening it. Thus the Commission will be able to utilize the expertise and information banks of NGO's and

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[452] Ibid, Article 50. The American Convention provides significant exemptions to the local remedies rule, namely: when the domestic elgislation of the State concerned does not provide due process of law for alleged human rights violations or when a denial to remedies under domestic law has occurred or there has been an unwarranted delay of remedies - Article 46(2).

[453] AFCHPR, Article 51(1).

[454] Ibid, Article 51(2).

[455] Ibid, Article 46.

related institutions to assist its deliberation. The parameters of these broad investigative powers will have to be spelt out in the Commissions rules of procedure whether the Commission will be able to undertake on-site observations or fact finding missions will depend upon the evolution of the rules by the Commission. It must be emphasised that while the Commission is carrying out its investigations, it must attempt by "all appropriate means to reach an amicable solution" based on human rights[456]. Where an amicable solution is not reached, the Commission must prepare a report stating the facts and its findings "within a reasonable time" from when the matter was referred to it[457]. The Commissions report is then transmitted to the States concerned and to the Assembly of Heads of State and Government. While transmitting its report to the Assembly the Commission may make any recommendations it deems useful[458]. It is not clear whether the recommendations will form part of the report, especially as the Commissions report may be published if the Assembly so decides[459] whereas "all other measures" including recommendations are to remain confidential[460]. The Assembly will then determine the appropriate steps to take on the Commissions report and recommendations. One should expect that the ultimate sanction will be the publication of the Commissions Report, and possibly an OAU resolution addressed to the defaulting State to take appropriate measures to rectify the situation.

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[456] Ibid, Article 52.

[457] Ibid.

[458] Ibid, Article 53.

[459] Article 59(2).

[460] Ibid, 59(1).

(iv) Other Communications

It is universally acknowledged that international and regional systems of human rights that do not give individuals and private groups standing to file petitions, generally are less effective than those that do grant standing[461]. The effectiveness of the AFCHPR may be tested by examining its procedure for receiving "other communications".

The AFCHPR empowers the Commission to receive "communications other than those of State Parties"[462]. The reference to "other communications" is a very broad one. The absence of a definition stating the subjects of this procedure leaves a lacuna which hopefully will be filled as the Commissions jurisprudence develops. In the meantime, however, two issues are clear under this procedure. Firstly, individuals are competent to refer matters to the Commission in the event of violation of any of the rights recognized by a State Party. Secondly, States not-party to the Charter and public institutions dependent on them are not entitled to the procedure of Article 55.

The Commission will however, have to evolve a criteria for accepting "other communications", such as those claiming the violation of peoples rights or group rights, and indeed communications emanating from private organizations alleging the violation of rights. The provision of the Charter are instructive on this point.

By virtue of Article 45(3), the Commission can interpret all the provisions of the Charter only at the request of a State Party, an institution of the OAU or an African Organization recognized by the

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461 Thomas Buergenthal, "The American and European Conventions on Human Rights: Similarities and Differences", in The American University Law Review 30:1:Fall 1980 p.159-160.

462 Article 55(1).

OAU. Thus, discounting the applicability of the Article 55 procedure to State Parties, it is incontrovertible that the Commission will allow communications from "African Organizations" recognized by the OAU.

The only existing yardstick for "recognizing" or determining "an African Organization" is the OAU criteria for Granting Observer Status[463]. An examination of the list of institutions and organizations with OAU Observer Status reveals a predominance of public institutions dependent on States[464] and are as such excluded from submitting communications to the African Commission.

Among the "recognized" organizations only two organizations have a direct bearing on human rights, namely, the Anti-Apartheid Committee and the African Jurists Association. Thus by applying existing OAU Observer Status criteria the African Commission will severely restrict its jurisdiction 'ratione personae'.

On the other hand, Article 46 of the Charter states that the Commission may hear from any person capable of enlightening it in the context of its investigative functions. Mutatis Mutandis, the Commission should be able to accept communications from any person, group of persons, or institution capable of enlightening it that a State Party has violated the Charters provisions. Whether such institutions must be legally constituted is not clear. The American Convention, for instance, provides that:

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463 For a discussion on Observer Status at the OAU, See Chapter 2 above.

464 For a list of Organizations with Observer Status at the OAU. See Appendix VIII post.

> "Any person or group of persons, or any non-governmental entity legally recognized in one or more Member States of the Organization may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention by a State Party"[465].

It is thus necessary that the Rules of Procedure of the Commission should state precisely whether any non-governmental organization legally recognized by a State Party will be permitted to submit complaints. It will be interesting to see whether a communication from an international non-governmental organizations (NGO's) will be accepted.

The AFCHPR has nevertheless advanced further than existing regional and international human rights rules with regard to capability of individuals and private groups to file petitions. Under the European Convention the State Party concerned must make a declaration to recognize the competence of the Commission to receive such petitions. Such a declaration may be made for a specific period[466]. Although the American Convention does not limit the capacity of the individual to file a petition to victims of the violation, it however requires the declaration of a State recognizing the competence of the Inter-American Commission to receive and examine petitions from individuals or non-governmental organizations[467]. Similarly, under the Optional Protocol to the International Covenant on Civil and Political Rights, and the UN Racial Convention, the acceptance by States of the rights to private petition is optional.

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[465] American Convention, Article 44.

[466] Ibid, Article 25(2).

[467] American Convention Article 45(3). For an analysis of the rationale for this regulation, see T. Buergenthal, "The American Convention on Human Rights: Illusions and Hopes" Buffalo Law Review 21 (1971) p.130.

The AFCHPR does not require petitioners to be victims of violations of the rights protected. Furthermore, the jurisdiction of the African Commission to receive private petitions is not encumbered by the requirement of an additional declaration by State Parties to that effect.

Despite the advantages of the Charters liberal locus standi provisions, its benefits are ameliorated by the procedural rules imposing strict conditions of validity which "communications other than those from State Parties" must meet.

The relevant provisions require that before each session of the Commission, its members should receive from the Secretary a list of communications other than those from State Parties[468]. The Commission may request for more information on a communication received and if satisfied, a simple majority of the members can decide to consider the communication[469]. However, prior to any substantive consideration all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission[470].

Before the substantive consideration of any communication, it must satisfy seven conditions of validity, namely;

(1) The author of the communication must indicate his identity even if anonymity is requested for personal reasons or where the fear of reprisals exist. The members of the Commission will, thus have to conceal his identity.

(2) The communication must be compatible with the Charter of the OAU and with the AFCHPR.

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468 Article 55(1) AFCHPR.

469 AFCHPR, Article 55(2).

470 Ibid, Article 57.

(3) The communication must be written in measured language. The language used must not be disparaging or insulting against the State concerned, its institutions or the OAU.

(4) The communication must not be confined exclusively to news emanating from the mass media.

(5) The communication must observe the rule of the exhaustion of local remedies, unless it is obvious that this procedure will be unduly prolonged.

(6) The communication must be submitted within a reasonable period, that is, from the time local remedies are exhausted or from a date decided by the Commission in cases where a State concerned tactically delays proceedings.

(7) The facts giving rise to the complaint must not concern cases that have already been settled by the State(s) concerned under other procedures envisaged by the Charter of the UN; the Charter of the OAU or the AFCHPR[471].

Some of the foregoing procedural conditions of validity correspond to those of the European and American Conventions with some variations. For example, both Conventions provide for six months within which communications must be submitted after the exhaustion of local remedies[472], whereas the African Charter envisages "a reasonable period". Furthermore, the American Convention[473] and European Convention[474] prescribe rules regarding the exhaustion of local remedies. The former provides significant exceptions to the exhaustion of local

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[471] Ibid, Article 56.

[472] American Convention Article 46(1)(b); European Convention Article 26.

[473] Article 46(1)(a); See also Article 37, Regulation of the Inter-American Commission of Human Rights.

[474] European Convention, Article 26; the Commission may only deal with a matter after all domestic remedies have been exhausted according to generally recognized rules of international law.. The European Court of Human Rights has also developed jurisprudence regarding the issue of exhaustion of domestic remedies. Donelly et al v United Kingdom (No.1) and (No.2); 43, Collection of Decisions 149 (1973), 4 Decisions and Reports 4 (1976). See also, K. Boyle & H. Hannum, "The Donnelly Case, Administrative Practice and Domestic Remedies under the European Convention: One Step Forward and Two Steps Back" 71 AJIL (1977) p.316.

remedies when the domestic legislation of a State does not grant due process of law, or where the victim has been denied access to local remedies or prevented from exhausting them or where there has been undue delay in litigation[475]. The existence of domestic laws in some African States, which deny access to local remedies and purport to grant public officers and institutions immunity from both criminal and civil litigations will prevent may individual communications from seeing the light of day[476]. In the absence of comprehensive exemptions to the requirement of exhaustion of local remedies it will be left to the African Commission to determine whether such laws amount to rendering the procedure "unduly prolonged".

The requirement that communication should not be written in disparaging or insulting language corresponds to the procedural rules of the Sub-Commission on Prevention of Discrimination Protection of Minorities[477].

After the African Commission has deliberated on a matter, it may decide not to continue further investigations into the matter. However, if the Commission decides that one or several communications concerning specific situations reveal "the existence of a series of massive violations of human and peoples rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to them"[478]. This provision is so vague that it may render the procedure for individual petitions futile. The Charter envisages that the Commission cannot proceed on a matter unless there exists "a series of serious or massive

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475 American Convention, Article 46(1) and (2).

476 See the Nigerian Protection of Public Officers (Miscellaneous) Decree No.7 1984 (repealed in 1986). See also the Tanzanian Government Proceedings Act, No.16 of 1967.

477 Resolution (XXIV) adopted by the Sub-Committee on 14 August 1971 under Res.1503 XLVII of 27 May 1970.

478 AFCHPR, Article 58(1).

violations of human and peoples rights". It is evident that the prerequisite for "a series of violations" prevents individual or isolated cases from being considered further by the Commission, especially as the violation must also be "serious" or "massive". The AFCHPR does not elaborate on what constitutes "serious or massive violations". The admissibility rules of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities indicate that communications will be admissible only if they "...reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms..."[479].

Consequently an isolated violation, despite being serious, may not be referred to the Assembly by the Commission, since it does not constitute a series of violations or consistent pattern of violations.

On the other hand, it is arguable that a series of serious violations, if perpetuated against an individual could constitute the basis for action. Furthermore, massive violations, even if they are not serious, may provide a course of action in accordance with Articles 55 and 58 of the AFCHPR. To illustrate this point, in our opinion, the Commission should not be able to consider a communication revealing the prolonged torture or detention of an individual. Furthermore if the Commission receives one or more communications revealing a consistent pattern of torture and detention of individuals by a State Party, these should amount to "a series of serious violations" thus justifying referral to the Assembly of Heads of State and Government. While we appreciate the rationale for such a criteria, including the need to minimise frivolous communications

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479 Para.1(b), op cit. The UN Commission on Human Rights has utilized this phrase to commence action on charges of torture and ill treatment of prisoners and detainees or persons in police custody in South Africa - See Commission on Human Rights Res.2.(XXIII), 42 UN ESCAR, Supp.No.6 76-78, UN Doc E/4322, E/CN.4/940 (1967).

etc., we cannot overemphasize the essence of any regional system for human rights protection which is primarily to prevent violation of individual rights. Therefore, the African Commission must elaborate further on the terms: "serious violations", "massive violations" and "a series of violations".

The Charter provides that when these "special cases" are referred by the Commission to the Assembly, the latter may request the former to undertake an in-depth report, accompanied by its findings and recommendations[480]. The Charter does not define what an "in-depth study" entails but existing international practice may provide the Commission with precedence[481]

The Chairman of the Assembly of Heads of State and Government may also request such an in-depth study where an urgent case is submitted to the Chairman by the Commission[482]. The rationale for this provision is that, since the Assembly convenes only once a year, the current OAU Chairman can respond swiftly to emergency cases referred to him.

The Charter envisages two kinds of Reports on its procedural system. Firstly, the State Reports which each State Party must submit once every two years, on the legislative and other measures taken with a view of giving effect to the rights and freedoms recognized and guaranteed in the Charter[483]. Secondly, the Commission is required to publish a

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480 AFCHPR, Article 58.

481 See Economic & Social Council, Res.1503, para.6(9).

482 AFCHPR, Article 58(3).

483 The State Reports procedure envisaged by the AFCHPR is not unlike the practice of the Committee of Experts on the Application of Conventions and Recommendations of the ILO and the Human Rights Committee. See Wolf, Aspects Judicieres de la Protection Internationale des Droits de l'Homme par l'O.I.T.; 4. Revue des Droits de l'Homme 1971 p.781-87.

report on its activities after it has been approved by the Assembly[484]. The frequency of the publication of the Commissions Report is not stated but it is not unreasonable to expect it to be annually[485].

With regard to State Reports, if the experience of the UN Commission on Human Rights[486] is considered, on may expect that AFCHPR State Parties will be reluctant to submit reports. States may regard the AFCHPR reporting procedure as violating the OAU Charters prohibition of interference in the internal affairs of a State[487]. It should however be recognized that several African State Parties to the International Covenant on Civil and Political Rights have submitted their initial State Reports pursuant to Article 40 of the Covenant[488].

(v) An Overview

The foregoing analysis of the Commissions procedural system of examining communications reveals that the role of the OAU Assembly of Heads of State and Government will ultimately determine the effectiveness of the system. Since the Assembly is essentially a political "club of heads of states" we can expect emphasis on the promotion rather than the protection of human rights. Since the final result of each action, taken by the Commission on a violation of human rights, is the production of a report specifically for the Assembly, the prospects of

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484 AFCHPR, Article 59(2) and (3).

485 For instance - Acticle 63 of the Statute of the Inter-American Commission provides for annual Reports.

486 L.B. Sohn, Human Rights: Their Implementation and Supervision by the United Nations in T. Meron ed. Human Rights in International Law op cit pp.373-5; See Dana Fisher op cit p.142.

487 OAU Charter, Article III(1).

488 For instance Tanzania and Kenya submitted their reports in August 1979, although they were due in 1977. See further Allan McChesney "The Promotion of Economic and Political Rights: The African Approaches"; in JAL (1980) Vol.24, No.2, p.163.

any further publication to the world at large is severely limited. The essence of an effective regional human rights system is the utilization of pressures and sanctions to enforce compliance by States to established legal standards. The failure of the AFCHPR to provide adequate procedural measures for ensuring remedies to individual victims of violations will reduce the Charters effectiveness. Furthermore, the sustained veil of confidentiality over the Commissions deliberations as violations included in its reports, subject only to a contrary declaration by the Assembly, is not desirable.

In an ideal situation, the rationale for placing the Assembly at the head of the machinery and having deliberations "in camera" is to encourage the diplomatic solutions to human rights problems. However in the African scenario, it is not unlikely that political considerations will overwhelm the human rights issues and thus clog the Commissions 'modus operandi'.

Inter-State Communications will be rare within the African rights regime because a plethora of political factors which enter into a governments decisions whether to file a human rights complaint against another government[489]. The filing of inter-State complaints are generally regarded as unfriendly acts of diplomacy and only the few States with strength of conviction will lodge complaints against other States basically in the interest of protecting human rights[490]. It is submitted that since interstate complaints are given a far higher profile in the public forum than individual petitions, it is necessary that African States appreciate

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489 For instance, among over 11,000 requests submitted under the framework of the European Convention, there are only 7 interstate cases.

490 T. Buergenthal, "Proceedings Against Greece under the European Convention of Human Rights" 62 AJIL p.450 (1968). See also D. Jessup "International Litigation as a Friendly Act" 60 Colombia Law Review, (1960) p.24.

that official concern for human rights in other States does not constitute interference in domestic affairs and is not contrary to the spirit of African Unity.

It is submitted that the State Parties to the AFCHPR may exploit the fact that there is no obligation for a State charged with violation of human rights to appear before the Commission[491].

The perceived reluctance of African States to lodge complaints coupled with the inadequate individual petition procedure under the Charter, underlines the need for an African Court of Human Rights. However the Charter does not provide for such an institution. The absence of a court in the African regional system is predicated on the regional apathy towards courts in general. According to R.P. Anand:

> "Asian and African countries are generally reluctant to accept the jurisdiction of the International Court of Justice, and are apathetic towards the use of the Court, or even any other third party judgement for the settlement of disputes according to law"[492].

African States are generally reluctant to submit to the regime of traditional international law on the grounds that their sovereignty and interests cannot be guaranteed. Consequently, the need to sustain

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[491] Under Article 48 of the American Convention, when the Inter-American Commission requests for such information, it must be submitted by the State concerned within a reasonable period. The practice of the American Convention has revealed that States were generally reluctant or slow in responding, thus the Inter-American Commission on Human Rights, at its 25th Session (March 1971) adopted Article 51 which provides that "The occurrence of the events on which information has been requested will be presumed to be confirmed if the Government referred to has not supplied such information within 180 days of the request, provided always, that the invalidity of the events denounced is not shown by any other elements of proof". See ACHR Regulation Article 51 OAS Doc OEA/Ser.L/V/II.25/Doc 41/Rev at 25 (1971).

[492] Cited in M.K. Navaz (ed) Essays on International Law in Honour of K. Krishna (Rao Sijthoff - Legden 1976) p.227.

political and economic sovereignty overwhelms any impulse to seek solutions in the international judicial fora.

For instance, a former president of the defunct OAU Commission on Mediation, Conciliation and Arbitration has observed that:

> "My OAU experience is that they (African States) will always show great reluctance in limiting their own political and diplomatic freedom beyond what they regard as absolutely necessary to secure their immediate objectives. In one interstate dispute after another, secret offers of assistance by my Commission could not induce the States involved in the disputes to submit to the jurisdiction of a body they persistently regard as judicial. The political element in most inter-State disputes even where such political element is not the predominant one makes States assume that their vital interests are at stake in every dispute"[493].

It may also be observed that some decision of the International Court of Justice such as the South West African Case[494] have further alienated African States from the Courts' procedures[495].

Although the absence of a court in the AFCHPR does not necessarily adversely affect the prospects of regional human rights protection, it is pertinent that the Commission is protected from the political manoeuvres of the Assembly. We submit that the Commission should be endowed with greater powers to make binding decisions especially as regards individual communications and provide, where appropriate, remedies for the violation of individual rights, without necessarily having recourse to the Assembly. Such an amendment is necessary since some of the rights in the Charter are not mere aspirations but substantive rights requiring

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493 M.A. Adesanya "Reflections on the Pacific Settlement of Inter-State Disputes in Africa" a paper to the Third Annual Conference of the Nigerian Society of International Law (March 1971) p.49.

494 Judgement ICJ Reports 1966 p.6.

495 I. Shihata - "The Attitudes of New States Towards the International Court of Justice", International Organization Vol.19 (1965) p.203.

concrete and speedy action to be taken to give effect to them; for example, the freedom from arbitrary arrest and detention.

The African Commission should provide comprehensive guidelines on procedures and methods of investigation since Article 46 as it stands is not effective. Furthermore, to ensure compliance with the Commissions recommendations and the Charters provisions, all measures taken by the Commission and the Assembly should be made public, unless they affect the security of a State.

Admittedly, some advantages attach to confidentiality such as the possibility that publication may hamper the Commissions work and other desirable diplomatic manoeuvres, however, the weight of evidence to the contrary is compelling. Many objectionable State practices have been scuttled precisely because of adverse publicity[496].

In addition to the foregoing perfectible procedural provisions, the efficacy of the Charter will also depend on its legal effect.

(1) Applicable Principles & the Legal Effect of the AFCHPR

It is evident that only Member States of the OAU are eligible to become parties to the Charter[497] . All State Parties to the AFCHPR have an obligation to "recognize the rights, duties and freedoms enshrined [in the Charter] and... undertake to adopt legislative or other measures to give effect to them"[498].

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496 For instance, in Ireland v United Kingdom, the Government of Ireland alleged that the British Security Forces had applied "deep interrogation methods" on alleged terrorists. The Government concerned promptly abandoned the practice by virtue of the adverse publicity. European Court of Human Rights Series A.No.25, Judgement of 18 January 1978.

497 AFCHPR, Article 63(1).

498 AFCHPR, Article 1.

Thus State Parties to the AFCHPR not only recognize the rights, duties and freedoms consecrated therein but they also pledge to adopt and secure them within their respective jurisdictions by legislation and other measures. A literal interpretation of this provision presumes the creation of a legal obligation on States. However, since the Charter obliges States to "recognize" the rights and freedoms instead of ensuring the "guarantee" of their implementation, the obligation required of State Parties is thus reduced. Consequently, the Charter may be interpreted as promoting rather than protecting human rights[499]. The general phraseology of the Charter provisions reveal no express obligation on States to guarantee rights and duties.

It may be however argued that the Charter does impose obligations on State Parties to guarantee the rights protected in the Charter since they have undertaken "to adopt legislative or other measures to give effect to [the rights, duties and freedoms enshrined in the Charter]"[500]. Nevertheless, the drafting history of the provision upholds the contention that the Charters binding effect is reduced[501]. The efficacy of the AFCHPR is dependent upon the idiosyncrasies of State Parties in adopting local laws reflecting the Charters provisions. It is instructive to note that the historical development of other Conventions such as the Inter-American System began with a legally non-binding American

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[499] For a discussion on the genesis of Article 1 - See pp424-5 above.

[500] AFCHPR, Article 1.

[501] The reduction in the binding nature of the Charter is evidenced by the amendment of Article 1 of the Dakar Draft of the AFCHPR which provided that State Parties "shall recognize and shall guarantee the rights and freedoms stated in the present Convention (sic) and shall undertake to adopt, in their constitutional provisions, legislative and other measures to ensure their respect". See the Draft AFCHPR OAU Doc/CAB/LEG/67/3 Rev.1 (Meeting of the Experts to Draft the AFCHPR, Dakar, Senegal, 23 Nov - 8 Dec 1979). It is apparent that the elimination of the underlined words ("guarantee" and "ensure")from the AFCHPR has dissipated much of the Charters force.

Declaration of the Rights & Duties of Man (1948)[502].

However, we do not subscribe to the notion of the non-binding nature of the Charter, firstly because of obligations of State Parties to adopt legislative measures giving effect to the Charters provisions and secondly the designated function of the Commission is to "(e)nsure the protection of human and peoples rights under conditions laid down by the Charter". It however, must be noted that the non-retention of the original provision of Article 1 of the Dakar Draft Charter reflects the inclination of African States to fulfil their duties under the Charter through the adoption or reformulation of municipal laws. Thus, the application of the rights and duties in the Charter will invariably be dependent on national legislation of State Parties.

Our analysis of the Constitutional provisions of African States reveals that a considerable number of these constitutions protect and guarantee both civil and political rights and economic, social and cultural rights. In some cases the constitutions confer a broader protection than the Charter. Consequently, in such cases States cannot confine the interpretation of their national provisions to the narrow scope of the Charter provisions. However, where State Constitutions permit self-execution of treaties, the AFCHPR will be automatically applicable in the domestic context. In other States where the self-execution of treaties is not recognized, legislation will have to be enacted to give effect to the provisions of the Charter - the domestic sphere. For instance, in Nigeria, the African Charter on Human & Peoples Rights (Ratification and Enforcement) Act 1983 was enacted into law as far back as 17 March 1983. The Act provides that the provisions of the Charter shall have the "force of law in Nigeria and shall be given full recognition and effect

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502 The American Declaration of the Rights & Duties of Man 2 May 1948, OAS Off.Rec.OEA/Ser/L/V/II, 23 doc 21 rev.6.

and be applied by all authorities and persons exercising legislative , executive or judicial powers in Nigeria"[503].

A comparison of the provisions of the Nigerian Constitution and the AFCHPR reveals that the Charter gives a legal effect to certain non-justiceable provisions of the Constitution[504]. On the other hand, the Charters provisions on due process of law, for instance, are very narrow in comparison thereto[505]. It is only a matter of time before these apparent conflicts are tested both before the national courts and the African Commission.

In this regard, some constitutions empower the Supreme Court to make rulings on the compatibility of international treaty obligations with constitutional and other municipal laws[506] and furthermore to recognize the supremacy of treaties once they are legally incorporated into the domestic legal regime[507]. However it should be emphasized that some constitutions deprive treaties of supremacy over constitutional and other

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503 The African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1983, Section 1.

504 See Chapter II of the 1979 Federal Constitution of Nigeria on the fundamental objectives and directive principles of State Policy which provide for social, economic and cultural rights in non-justiceable terms.

505 See Chapter 5, above.

506 See for instance the Constitution of Madagascar, 1972, Article 92; the Constitution of Male, 1974, Article 61.

507 Ibid.

domestic laws[508]. The efficacy of the Charter will therefore be dependent upon the willingness of African States to adopt enabling laws or acts incorporating the provisions of the Charter into the municipal sphere. This measure is necessary because the ratification of the AFCHPR per se does not necessarily render the Charter legally enforceable within the domestic legal regime of many States.

Thus one of the first functions of the Commission will be to encourage States to adopt legislative measures giving effect to the Charters provisions. In adopting such measures, many State Parties will have to reconcile glaring conflicts between the Charters provisions and their domestic laws. Such conflicts will involve, private ownership of property against communal or State ownership, womens rights, religious freedom, free participation in government through freely chosen representatives, the suspension and limitation of guarantees and declarations of emergencies by military regimes to mention but a few issues.

These obstacles are formidable as they involve not only legal reform but also entail the reorientation of social values and institutional practices. The latter problem can be surmounted by the promotion of human and peoples rights through public enlightenment programmes, while the former requires the political will of States to discharge their treaty obligations under the AFCHPR.

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[508] For instance, Article 2 of the Constitution of Mauritius 1977 provides that "the Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, tht other law shall to the extent of the inconsistency, be void". See the Kenyan Case of Republic (of Kenya) v Charles Okundo Mushinyi and Another which declared the supremacy of the Kenyan Constitution over an international treaty. ILM Vol.9, 1970 p.556-566; See also Republic (of Kenya) v Donald M. Ombisi Ibid. These Kenyan cases appear to contradict two decisions of the old Permanent Court of International Justice (PICJ) concerning conflicts between international treaties and municipal laws. The PCIJ held that on the basis of accepted principles of international law, when such conflicts occur, treaties should prevail. See The Greco-Bulgarian Communities (PCIJ) Ser B. No.17, 32 and German Interests in Polish Upper Silesia (Merits) (M26) Series A No.7 (1 WCR, p.510).

(i) The International Law of Human Rights and its effect on AFCHPR State Parties

In addition to the obligations imposed on State Parties to the AFCHPR to recognize the rights and duties enshrined in the Charter, they are also required to conform to certain international standards.

The Preamble of the AFCHPR reaffirms the pledge of States to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the UN Charter and the Universal Declaration of Human Rights[509]. The AFCHPR also reaffirms the adherence of State Parties to the principles of human and peoples rights as contained in the declarations, conventions and other instruments adopted by the OAU, the Movement of Non-Aligned Countries and the UN[510]. All Member States of the OAU have undertaken to observe international human rights obligations and standards by ratifying the OAU Charter[511] and the UN Charter[512]. The relevant provisions of the UN Charter impose obligations on all Member States to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"[513]. Despite the debate on the parameters of this obligation, consensus exists however, that meaning of "human rights and fundamental freedoms" can be determined by reference to the list of rights proclaimed in the main UN human rights instruments namely, the Universal Declaration on Human

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509 Third preambular paragraph, AFCHPR.

510 Ninth preambular paragraph, Ibid.

511 Article II(e) and eighth preambular paragraph, OAU Charter.

512 Articles 1(3), 55(c) and 56, UN Charter.

513 Ibid.

Rights[514], the International Covenants on Human Rights and the Racial Convention. Indeed it may be argued that limits are established by the principles of non-intervention and sovereign equality, with regard to enforcement measures. However, gross violations of human rights have been consistently regarded by the UN as matters of international concern. No State an invoke domestic jurisdiction in order to exclude international discussion of the States internal human rights situation[515].

It is a cardinal principle of international law that the demand by one State that another State live up to its international obligations does not constitute an illegal intervention (nay interference) into the domestic affairs of that State. Since State Parties to the AFCHPR have among themselves assumed international obligations relating to human rights, disputes among them concerning these obligations are matters of international rather than domestic concern. Thus where an AFCHPR State Party demands that another Party live up to its international obligations, with regard to human rights, such action cannot be deemed to violate Article III(2) of the OAU Charter.

Furthermore, African States have to varying degrees ratified various international agreements and conventions which impose specific human rights obligations on them. An examination of the pattern of African State ratification of major human rights instruments[516], reveals that the response of African States to the International Covenants on Human

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514 Although the Universal Declaration of Human Rights is not a Convention, it is characterized as part of international law. An examination of the majority of African Constitutions reveals that they subscribe to the Universal Declaration and/or expressly guarantee human rights which are contained in the Universal Declaration.

515 See Rudolf Bernhardt, "Domestic Jurisdiction of States and International Human Rights Organs" HRLJ Vol.7 No.24 pp.205-216.

516 Appendix X at post.

Rights has not been encouraging[517]. With regard to the specific human rights treaties that African States have subscribed to, they cannot invoke domestic jurisdiction to oust the competence of the organs established by the respective treaties. The limits of the competence of each organ is generally determined by the treaty or the organ established, and not by the State concerned. We thus, submit that all State Parties to the AFCHPR are subject generally to the regime of the international law of human rights. Furthermore the specific human rights obligations of these States are defined by the relevant conventions they have ratified.

By virtue of Articles 61 and 62 of the AFCHPR, the African Commission on Human and Peoples Rights is empowered to expand the normative scope of the AFCHPR by interpretation and reference to international human rights instruments and standards. However, the application of these instruments to non-Parties will be predicated on their norm creating effect. The capability of the African Commission to evolve a jurisprudence based on its wide powers of interpretation will largely depend upon the willingness of the majority of African States to subscribe to the international human rights covenants and other relevant instruments. Consequently, we suggest that one of the major tasks of the African Commission should be to inspire African States to ratify the major international human rights instruments.

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[517] The Convention for the Protection and Punishment of Genocide of 9 Dec 1948 (ratified by 14 African States); the Convention on the Political Rights of Women of 31 March 1953 (24 African States); the Convention relating to the Status of Stateless Persons of 28 September 1954 (9 African States); the Convention relating to the Nationality of Married Women of 20 February 1957 (12 African States); the Convention against Discrimination in Education of 15 December 1960 (19 African States); the Convention on the Status of Refugees of 28 July 1951 (39 African States); and the Protocol thereto of 31 January 1961 (40 African States); the ILO Conventions Nos. 29, 105 and 111 on Forced Labour, Discrimination in Employment and Occupation of 28 June 1930, 25 June 1957 and 25 June 1958 to which 43, 39 and 39 African States have ratified, respectively (as at 31 December 1987).

It is pertinent to spotlight the failure of the authors of the AFCHPR to anticipate the likelihood of concurrent and possibly conflicting human rights regimes that State Parties may be subject to. For instance, in the event of the Arab Convention on Human Rights being operative, at least eight OAU Member States will be subject to both the African and Arab human rights regimes. In this context, Article 56(7) of the Charter ousts the jurisdiction of the African Commission regarding human rights matters that have been settled by the States concerned, in accordance with the principles of the UN Charter, the OAU Charter or the AFCHPR. An amendment of this provision to include matters settled in accordance with other internationally recognized human rights treaties, is desirable.

(ii) Ratification & Reservations

The AFCHPR was open to signature, ratification and adherence by OAU Member States on 17 June 1981 after the 18th Assembly of Heads of State and Government had adopted the Charter. The instruments of ratification or adherence are to be deposited with the Secretary-General of the OAU[518]. By virtue of Article 63(3), the Charter is to come into force three months after the OAU Secretary-General has received the instruments of ratification of a simple majority of the 51 Member States of the OAU; (i.e. 26 States). The AFCHPR entered into force on 21 October 1986; and as at 12 May 1987, 33 States had ratified the AFCHPR[519]. The rate of ratification is relatively rapid when compared to the experience of other conventions[520].

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[518] Article 63(2) AFCHPR.

[519] For the List of States that have signed, ratified or adhered to the AFCHPR, See Appendix IV post.

[520] The International Covenant on Civil and Political Rights required a simple majority of 35 States, yet it took 10 years to come into force; Similarly, the American Convention came into force 9 years after its adoption in November 1969. The AFCHPR entered into force only 5 years after adoption.

The legal effect of the AFCHPR on States that have expressed reservations to some of its provisions remains to be ascertained[521]. It is however noteworthy that these reservations were made during the drafting stage of the Charter, before its adoption. Furthermore none of these States are reported to have expressed their reservations on depositing their instruments of ratification. This observation may not be unconnected with the fact that the AFCHPR, unlike the European and American Conventions, has no provision governing reservations. However the statement of the Secretary General of the OAU to the Ministerial Conference on the Draft African Charter, anticipated reservations by stating that "Member States were free to express reservations and even not to verify the Charter"[522]. Disingenuous as the statement may be, it nevertheless should be read in the context of fiercely competing State interests in the course of drafting the Charter.

In the absence of a provision on reservations in the Charter it is safe to assume that the relevant provisions of the Vienna Convention on the Law of Treaties, 1969[523], will be applicable. Article 2(1)(d) of the Convention defines a reservation as:

> "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their applications to that State".

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[521] The States that have expressed reservations to specific articles of the draft AFCHPR include Burundi (Article 45(3)); Ghana (Article 58); Kenya (Articles 45(3) and 68); Tanzania (Articles 45(3), 53, 58 and "all other articles of the Charter relating to the African Commission... with the Assembly of Heads of State and Government"); Zambia (Articles 58 and 63); Angola, Cape Verde, Guinea-Bissau and Mozambique (Article 4). Rapporteurs Report of the Ministerial Conference on the Draft African Charter on Human and Peoples Rights. Doc CM/1149(XXXVII) Annex 1, p.28 paras 121-125 and p.8 para 38.

[522] Reprint of the Secretary-General of the OAU, OAU Doc CM/Phen, Rapporteurs Report (XXXVII) p.59 para 206.

[523] Vienna Convention on the Law of Treaties - 63 AJIL (1969) p.876.

There have been no reservations made by State Parties while signing or ratifying the AFCHPR, other than those reservations expressed at drafting states and before the adoption of the treaty. The question therefore arises whether a State which has expressed such reservations only at the drafting stage can successfully claim the non-applicability of a relevant Charter provision to itself?

The jurisprudence of the Genocide Convention (1948)[524] which contains no reservations clause is instructive.

In its Advisory Opinion on the "Reservations to the Convention on Genocide Case[525] the International Court of Justice held that:

> "In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, provision, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect..."[526].

Consequently, although the African Charter has no reservation clause, the 'traveauax preparatoire' of the Charter acknowledges the existence of expressed reservations of certain State Parties, albeit prior to the adoption of the treaty; secondly since an OAU Assembly Resolution specifically requested Member States to submit reservations to the OAU

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524 The Convention on the Prevention and Punishment of the Crime of Genocide 1948 (adopted on 9 Dec 1948 and entered into force on 12 Jan 1951) 45 AJIL Supp.6 (1951); 78 UNTS.288.

525 Advisory Opinion ICJ Reports 1951 p.15.

526 Ibid.

General-Secretary[527], it is arguable that reservations were envisaged by the authors of Regional instruments[528].

It is evident that reservations must not be incompatible with the object and purpose of the Charter[529]. The reservations made by some OAU Member States during the drafting of the Charter pertained mainly to the provisions regarding the interpretation of the OAU Charter, the representation of African non-State Parties on the African Commission and the conditions justifying the Commissions request for in-depth studies. We submit that none of the reservations expressed by the States, with the possible exception of Tanzania, are basically incompatible with the objects and purpose of the Charter. Consequently, it may be argued that the reservations submitted by States during the drafting stage of the Charter are valid as long as they are not regarded as being in conflict with the objects of the AFCHPR.

The AFCHPR does not make any provision for its abolition, nor does it envisage denunciations or withdrawals. However, amendments are permitted by Article 68, if a State Party so requests and is approved by a simple majority of State Parties. Such an amendment will apply to each State that has accepted it in accordance with its constitutional procedure.

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527 The same resolution requested Member States who have amendments "to examine their amendments and to resubmit them at the Nineteenth Ordinary Session of the Assembly of Heads of State and Government" (scheduled for Iripoli, Libya in 1982) See AHS/Resolution on African Charter of Human and Peoples Rights, OAU Doc AHG/Dft.Res.5 paras 2-4.

528 The OAU Assembly's rejection of an amendment to incorporate reservation and denunciation provisions (proposed by Congo, Niger and CAR) in the AFCHPR, suggests a contrary intention. OAU Secretary-General Report AHG/OAU Doc June 1981.

529 See Article 19 of the Vienna Convention on the Law of Treaties 1969 op cit.

In summation, it is evident that the AFCHPR is not too ambitious a treaty since it attempts to strike a fair balance between the respect for national sovereignty[530] and the need for monitoring implementation of its provisions. The Charters emphasis on promotion rather than protection, reflects a cautious but reasonable strategy that a pioneering human rights instrument in a volatile region should take. The Charter is equipped to serve primarily as an educative and enlightening vehicle which should make Africans aware of their rights and encourage them to seek the protection of their rights. On the substantive level, the Charter ensures the protection of civil and political rights as guaranteed in the constitutions of many African States. In this respect, the AFCHPR does not necessarily impose novel obligations on State Parties other than establishing an international, nay regional, jurisdiction for their observation. In the monitoring of the social and economic rights guaranteed in the Charter, the African Commission should take cognisance of Africa's underdevelopment in ensuring their progressive achievement. Social and economic rights cannot be immediately attainable, a fact that is recognized in most African State constitutions, which either do not contain any socio-economic guarantees or portray them as objectives of State Policy.

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530 The AFCHPR accords a fair amount of concessions to State sovereignty as reflected in the following articles:

- Article 57 - requiring that all communications be brought to the knowledge of the State concerned before any substantive consideration by the Commission.
- Article 51 - A State concerned has a right of representation before the Commission and may submit writter or oral representation.
- Articles 50 & 56(5) - require the exhaustion of local remedies prior to the consideration of any communication by the Commission.
- Articles 47 & 52 - both emphasize recourse to friendly settlement and the exhaustion of "all appropriate means" to breach an amicable solution in resolving human rights matters.
- Article 59(1) The requirement of confidentiality throught the procedure of the Commission until the Assembly of Heads of State and Government otherwise decide.

In the final analysis, it is one thing to ratify a treaty, and another to implement its provisions. One can only hope that the African States that are yet to ratify the Charter will do so, while those that have, will abide by their undertaking to promote and protect human and peoples rights, and endeavour to adopt legislative measures to implement the Charters provisions.

Chapter Eight

Conclusion

This thesis is based on the premise that the last ten years, during which unprecedented measures were undertaken toward the establishment of a regional machinery for the promotion and protection of human and peoples rights in Africa, is a period in African nay world history which has significant implications for international law and international politics, and which therefore, merits legal research.

The increasing emphasis on regional rather than universal measures for the promotion and protection of human rights is highlighted by the establishment of the European Convention on Human Rights, the American Convention on Human Rights and the recent African Charter on Human and Peoples Rights. The rationale for this shift of emphasis from the universal regime to the regional regime is that the implementation of human rights measures are easier at the regional level because the number of nations and the sphere of activity is reduced. Regional organizations offer the advantage of geographic proximity and a greater likelihood of adherence by States to regionally evolved measures. In the context of human rights protection, the regional approach removes such issues from the highly politicized global arena. Regionally evolved institutions tend to have a unified cultural and historical heritage and States are more capable of reaching agreement in the context of human rights norms and the application thereof.

The first point which has emerged is that regional systems basically conform to the universal human rights principles of the UN but adopt local arrangements to achieve greater respect for human rights norms. Regionalism can thus be viewed as complementary to universalism in the context of human rights protection.

· The underlying philosophy of the African Charter on Human and Peoples Rights encapsulates the historical traditions and values of African civilization. The research into the concept of human rights in pre-colonial traditional African societies reveals that these societies observed the respect for equality, the right to life, right to receive justice, freedom of thought, speech and beliefs, freedom of association and the freedom to enjoy property. These rights and freedoms were asserted through the imposition of both positive and negative customary values and rules, the establishment of democratic institutions and the observance of the "rule of law" in a sense relative but not exactly in syncopation with western notions. In traditional Africa individual rights were exercised within the framework of the legitimate concerns of the community, whereas in the European context, human rights are encapsulated in a catalogue of principles essentially favouring the individual against groups to whom they are opposed. In traditional Africa, group or collective rights were emphasised as well as the individuals duties to the community. The basis of the African concept of human rights was distributive justice. The members of a given community shared its common wealth and they assumed responsibilities towards one another and more significantly towards the community.

An appraisal of some of the main theories of human rights, revealed certain inherent inadequacies. We thus proposed a normative theory derivative of the naturalist, sociological, anthropological and justice theories. Eclectic though it may appear, the theory is predicated upon the satisfaction of mans needs based on human dignity, social justice and development. This conceptualization recognizes that all societies acknowledge the need to protect the human dignity inherent in man. Thus to preserve mans dignity, it is essential to fulfil his basic needs for subsistence. The concern for social justice and development as reflected in the theory, is based on the belief that these will enhance

the recognition and protection of human rights, increase universal participation, encourage the provision of basic services and infrastructure through the recognition of economic and social rights, and provide adequate and vital procedures for the redress of wrongs against individuals and groups. A normative theory that encapsulates the foregoing characteristics will to a large extent provide a basis for accommodating the largely contrasting cultural and ideological conceptions of human rights. Such a theory accommodates the novel incorporation of peoples rights, individual duties and the right to development in the AFCHPR.

With regard to the ongoing debate on the hierarchy of human rights based either on the priority of socio-economic rights over civil and political rights or vice versa, we subscribe to the thesis of the interdependence of human rights. Social and economic rights including the right to subsistence are as significant as civil and political rights. Both groups of rights have a universal scope since everyone is entitled to them, despite the different obligations they impose. The absence of a universally acknowledged right to subsistence can be attributed to the western socio-economic and legal system, which has been influenced by theories which advocate the primacy of civil and political rights and take subsistence for granted. This attitude and the exploitative effects of the world economic system on Africa has fuelled the prevailing view in Africa that economic and social rights should take preference over civil and political rights. Hence, in identifying the minimum content of human rights, the basic civil and political rights, and social and economic rights, particularly the right to subsistence should be recognized and protected. The hazard of adopting a hierarchical approach to human rights, especially in Africa, is that the protection of civil and political rights may be adjourned indefinitely, pending the satisfaction of social and economic rights, the prospects of which are dim in the prevailing inclement regional and international economic climate.

Research into the history of the OAU vividly shows that the organization was established primarily as an alliance of States endowed with the task of promoting continental unity. Article II of the OAU Charter formally subscribes to the human rights principles as consecrated in the UN Charter and the Universal Declaration of Human Rights. OAU Member States thus have a duty to promote and protect human rights through inter-State cooperation. The organs established by the OAU Charter are not endowed with express powers to pursue human rights promotion and protection. However, it is possible to argue that since one of the purposes of the OAU is to promote international cooperation having due regard to the UN Charter and the Universal Declaration of Human Rights, OAU organs are enjoined to pursue human rights issues. The difficulty with such an argument, admittedly, is that all OAU organs are subject to the executive power of the Assembly of Heads of State and Government. The concentration of power in the Assembly has been a restrictive factor in the pursuance of human rights matters within the OAU regime, since the Assembly has been reluctant to respond to massive human rights violations on the continent.

Article II of the OAU Charter which emphasises non-interference, sovereignty and territorial integrity has been a major obstacle to the effective review of human rights violations by Member States. Several African States have only been too eager to raise the shield of "non-interference" against international concern over such human rights violations. The inability of the OAU to effectively review human rights violations on the continent may also be attributed to the organisations propensity to resolve disputes by compromise and diplomatic dialogue. Furthermore, the lack of defined criteria for membership of the OAU and the absence of any provision for suspension or expulsion informs the relative apathy of OAU States towards human rights issues. Despite the absence of such provisions, we submit that since the OAU is responsible

for the interpretation of its own Charter, the organization has the inherent right to decide who should be permitted to participate in its activities, especially where a Member State violates the organisations primary purposes. The OAU has not been willing to adopt the legal approach, preferring the political method of resolving disputes.

Legal, diplomatic, economic and military solutions have however been adopted by the OAU in its goal of eliminating colonialism and racial discrimination in Africa. An examination of colonial policies and practices in Africa reveals that colonial subjects did not enjoy human rights as prescribed by the Universal Declaration of Human Rights and the European Convention on Human Rights, the latter instrument having been extended to include some of British colonies. The formation of the OAU maybe regarded as the culmination of the efforts of independent African States in 1963, to consolidate their hard won independence and evolve a forum for a concerted action to eradicate colonialism and racial discrimination on the continent. Towards this end, African States at the UN, influenced by adoption of numerous resolutions which regarded the eradication of colonialism (a corollary of the right to self-determination) as a precondition for the achievement of international peace and security, for instance the General Assembly Resolution 1514(XV) of 14 December 1960, the Declaration of the Granting of Independence to Colonial Countries and Peoples.

An examination of scholarly and political opinion, including UN practice, reveals that self-determination is a basic principle of international law of universal application and amounts to a legal right which may be part of jus cogens. The ongoing debate in Africa is whether international law recognizes self-determination beyond independence or decolonization. The overwhelming African State view is that the basic principle of territorial integrity as established by the OAU Charter and various OAU

resolutions militate against claims for political self-determination or secession within an independent State. OAU resolutions on the inviolability of existing boundaries have established a standard of African State practice which provide a basis for a rule of regional customary international law binding on States which have subscribed to the existing boundary regimes at independence. Notwithstanding the foregoing submission, by virtue of paragraph 7 of the UN General Assembly Declaration on Friendly Relations and Cooperation Among States it may be argued that the inviolability of territorial boundaries and the denial of the right of secession are predicated upon the observance of the right of peoples to self-determination by States. Article 20 of the AFCHPR specifically grants all peoples the right to self-determination, and provides that all "colonized or oppressed peoples" shall have the right to free themselves from the bounds of domination by resorting to any means recognized by the international community. In the absence of a definition of the word "peoples" in the AFCHPR, it may not be unreasonable to conclude that the word includes ethnic groups within a nation State, especially in the light of the Charters specific reference to "oppressed peoples" and its prohibition of discrimination along ethnic lines. There exists a presumption against secession in international law, however, we submit that where an ethnic group or people are oppressed and as a result seek to express their right to self-determination via secession on universally acknowledged humanitarian grounds, the presumption may be rebutted subject to the exhaustion of AFCHPR procedures. On the practical level. African States will jealously guard their hard won independence and resist any international or regional trend aimed at establishing a right to secessionist self-determination, the Nigerian Civil War being an apt example. Consequently, we suggest that oppressed ethnic peoples could utilize the machinery of the AFCHPR through which their right to self-determination can be amplified and thus hopefully influence the decentralization of socio-political and economic structures in multi-ethnic African States.

In the investigation into the right of economic self-determination, we established the moral, political and legal justifications of the concept, however the legal effect of right remains debatable. Recent African State practice reveals a significant shift from the progressive stance of domestication toward the internationalization of economic or trade agreements, a trend not unconnected to the harsh realities of contemporary economic problems of African States. This trend is remarkable in the light of the professed goal of self-reliance adopted by African States in the Lagos Plan of Action for the Economic Development of Africa by the Year 2000 (LPA). The essence of self-reliance is that African States need to gradually disengage themselves from depending on the global economic and ideological networks and re-engage on more equitable grounds. The current lip service paid by some African States to the total and immediate disengagement from the world financial network sounds hollow since no State can successfully embark on such a venture alone.

The LPA can achieve its objectives if African Statesmen can go beyond the symbolic endorsement of the Plan and commit themselves to a regime of binding rules and supervisory organs in ensuring the implementation of the Plan. The AFCHPR does not refer to the LPA, an omission which we consider would have given greater legal force to the enforcement of the right to economic self-determination.

The main obstacles to the protection of human rights in Africa are ethnicism, racism, apartheid and militarism. Most African States are composed of diverse ethnic groups some of which are traversed by State boundaries. Ethnic groups compete for political power and scarce social and economic goods. The dominance of a particular ethnic group in a heterogeneous State is predicated upon its ability to monopolise or at least control socio-economic and political institutions. The implication of

this phenomenon on human rights arises where this control or power is utilized by the dominant ethnic group to secure advantages for itself to the detriment of others and without due regard to established or prescribed norms of equality, merit and justice. Ethnic hegemony therefore ensures discrimination, subjugation and in some cases, genocide as the recent massacres in Burundi have proved. In our examination of the problem of ethnicism in Africa, we proffered several solutions; firstly, African States should enact constitutional provisions which will ensure that ethnically composite entities within a State are granted relative self-government subject to limited central government control or supervision. Secondly, there should be the enactment of constitutional provisions that will ensure equal representation of diverse ethnic groups in national or central social political and economic institutions. Thirdly, multi-ethnic African States should introduce integrated rural development and enterprise schemes in the field of agriculture and commerce, to ensure the commercial viability of rural areas, thus stemming the problems of urbanization.

The problems of racism in East Africa, have been fuelled by the cultural aloofness and exploitative practices of the settler Asian communities, thus inviting nationalization and mass expulsion orders. While the policy of Africanization of economic institutions creates job opportunities for the hitherto deprived and disadvantaged citizens of African States, it ought to be tempered with a liberal "citizenization" policy whereby aliens with genuine contributions to the socio-economic systems, can be integrated. States should also encourage the establishment of interracial organizations with the object of promoting goodwill between the various groups.

The racism and apartheid in South African have remained one of the most formidable obstacles to the protection of human rights in Africa. The OAU has adopted various strategies towards the elimination of racism and

apartheid in Southern Africa. The OAU has adopted diplomatic and mandatory economic sanctions against racist regimes in Southern Africa as well as supplying Liberation Movements in Africa with military and financial assistance. However, a cursory examination of these measures raises pertinent issues as to their legality in the light of international law. It is universally acknowledged that apartheid not only violates international law but, is also regarded as an international crime. It has also been established that States have a duty under jus cogens human rights norm of racial nondiscrimination, to take separate action in implementation of international accountability with regard to apartheid in South Africa. However, there exists a lack of universal consensus as to the types of 'action' or 'measures' to be employed to deal with apartheid. With regard to the OAU's application of diplomatic and comprehensive mandatory economic sanctions against racist regimes, there is no doubt that some of these measures have received the approval of both the UN General Assembly and the Security Council, with special reference to the case of Zimbabwe and the arms embargo in respect of South Africa. The failure of the UN Security Council to endorse the General Assembly's resolution for the imposition of mandatory economic sanctions against South Africa is due to the refusal of US, France and the UK to take on board the argument that apartheid constitutes a threat to peace and security thus making it obligatory to take "action" under Chapter VII.

Nevertheless, the OAU has proceeded to adopt more drastic measures beyond those endorsed by the UN Security Council resolution. The OAU established a Co-ordinating Committee and a Special Fund for the specific purpose of supplying Liberation Movements in Africa with military and financial assistance. The OAU Lusaka Manifesto of April 1969 specifically underlines the determination of the OAU to utilize these measures for the eradication of racism and apartheid in Southern Africa. It is therefore in the light of Article 2(4) of the UN Charter which prohibits the use of force that the issue of the legality of the OAU's measures arise.

Several justifications may be proffered for the OAU's military and financial assistance to National Liberation Movements in Africa. For instance, it may be argued, firstly that it is the national liberation movements and not the OAU that are engaged in the use of force and, secondly, that since Article 2(4) applies to State actions, the OAU being a regional organization, and its measures being of an indirect nature, cannot be so charged. Furthermore, from a teleological viewpoint, the UN General Assembly has through its positive endorsement of OAU resolutions such as the Lusaka Manifesto, endowed OAU measures in this regard with legal authorization; consequently the actions taken may constitute "enforcement action" within Article 53 of the UN Charter. The legal efficacy of this argument is, admittedly, doubtful especially in the light of the absence of universal consensus on the capacity of the General Assembly to legally authorise "enforcement action" with Article 53(1).

A more plausible justification for OAU measures in this regard, is that they fall within the proviso of Article 2(4) as far as the assistance rendered is in tandem with the purposes of the UN, which include the right to self-determination. Furthermore, we have established that self-determination is now a legal right which justifies the use of force in self-defence of it. This conclusion is supported by UN practice, evidenced by the General Assembly Resolution 2625(XXV) of 24 October 1970, the Declaration on Friendly Relations and Cooperation between States.

It is pertinent to note that the OAU Member States have not regarded the campaign against colonialism and apartheid as a matter confined to the domestic jurisdiction of the State concerned. However with regard to social and political upheavals and consequent massive human rights violations within some OAU Member States, these issues have hitherto been regarded as matters solely of domestic concern of Member States;

especially in the light of Article II of the OAU Charter, and the constitutional provisions of State Parties which emphasise the absolute sovereignty of the State over all matters especially those touching on human rights and the administration of justice.

The investigation into the human rights provisions in African State constitutions reveals that the majority of African States have a comprehensive Bill of Rights incorporated into their respective National Constitutions. These constitutions also provide for the enforcement of the rights guaranteed whereby any person alleging that a fundamental right has been, is being or is likely to be contravened in relation to him may apply to the High Courts of Justice for redress. The National Courts are thus under a duty to hear and determine the justiceable issues involved and may in consequence thereof make such orders they may consider appropriate. The rights of the individual and the scope of judicial review of legislative and executive measures are however, curtailed by the complexity and detail of exceptions to the rights and freedoms guaranteed by these Bills of Rights. The catalogue of human rights and freedoms guaranteed by African State Constitutions may be derogated from by virtue of legislative and executive measures enacted in the interest of defence, public safety, public health and morals and public order. Several neo-Nigerian African Constitutions provide the vague safeguard that such measures restricting human liberties must be 'reasonably justifiable in a democratic society'.

The preponderance of African judicial decisions on fundamental human rights tend to be in favour of legislative or executive measures purportedly taken in the interest of public good. In a few cases Courts have been courageous enough to invalidate such measures and several responsible governments have complied therewith. However in many instances, the State either ignores such rulings or takes the more

drastic measure of enacting legislations which reverse such rulings or go even further by ousting the jurisdiction of the Courts.

The constitutional protection of human rights in African States may also be encroached upon through the constitutional provisions which exist to preserve the security and safety of the State from either actual public emergency or some other threatened danger that may face a State. The significance of constitutional provisions on State Security and Emergency cannot be overemphasised and they hinge on the principle of "Salus populi est supreme lex" (the safety of the nation is supreme law).

The developing States of Africa have to contend with fragile and underdeveloped socio-political and economic institutions which are vulnerable to the threats posed by competing claims made upon them. The majority of African Constitutions expressly provide for the derogation of fundamental rights during an emergency, and in practise, African States have shown a propensity to proclaim states of emergency and invoke Public Security Laws. Human rights are invariably the first casualties of such declarations of emergency since the executive and legislature invariably have the freedom to derogate from the human rights and freedoms consecrated in the constitution.

An examination of African Constitutions reveals that only the Constitutions of Kenya, Nigeria, Senegal, Zambia and Zimbabwe provide for the preservation of certain rights from encroachment during an emergency period or at any time; namely, the right to life, freedom from slavery and forced labour, freedom from inhuman treatment and the right to the protection of the law. The absence of this safeguard in the majority of African Constitutions provides a "carte blanche" for most States to derogate from all the human rights and freedoms guaranteed under the constitution. It is therefore desirable that African States

enact constitutional provisions safeguarding basic human rights from derogation under any circumstances, especially in the light of the absence of a derogation clause in the AFCHPR.

In the absence of such safeguards, African Courts should be prepared to rebut the presumption of constitutional validity of statutes, and the legality of executive measures where they appear prima facia to invade rights guaranteed by the constitution. African States adopt either the a priori or a posteriori procedure for the judicial review of constitutionality of laws. It is submitted that African States should emulate the Zambian Constitution by adopting both methods of review of the constitution validity of statutes and executive measures, thus providing a double guarantee for persons whose rights or liberties may be threatened by State measures.

At least nine African States currently have no constitutional human rights guarantees. The absence of such provisions is due either to the abrogation/suspension of State Constitutions which hitherto protected human rights, for instance Ghana and Lesotho, or purposive State policies against the adoption of Bills of Rights as in the case of Ethiopia and Malawi. The abrogation or suspension of constitutional Bills of Rights and indeed whole constitutions, have invariably been effected by military regimes on the assumption of power. In our examination of the legality of coup detat, we arrived at the conclusion that Military Government by its very essence and characteristics is a denial of the right of the majority of the polity to govern themselves according to a constitutional promulgated by their collective will. Consequently, it is a fundamental philosophical and juristic contradiction to refer to fundamental rights in a military era. Nevertheless, by gaining de facto and arguably subsequent de jure control of the machinery of the State, military forces are effectively recognized as legitimate rulers. A few

African States, for instance Nigeria, have adopted constitutional provisions which declare coup detat illegal, but such solutions have proved futile in preventing the recurrence of military coups.

We thus submit that the effective protection of human rights in military governed African States is dependent on three main factors; first, the extent to which the government is prepared to accommodate individual rights and freedoms, secondly, the courage and independence of the judiciary, and thirdly, the initiative, resource and courage of the public and the press. In the absence of the willingness of African governments to ensure adequate local guarantees for individual freedoms, the African judiciary should be prepared to enhance human rights by the domestic application of international and regional human rights norms. Admittedly, in most African Countries, international or regional conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, national courts should now be willing to have regard to regional and international norms where domestic law is uncertain or inadequate. It is within the proper nature of the judicial process and established judicial function for national courts to have regard to international and regional obligations which a State undertakes, whether or not they have been incorporated into domestic law, especially for the purpose of erasing ambiguity or uncertainty from national constitutions or legislation. Practising lawyers and judges who have hitherto ignored the international dimension should take judicial notice of the recent comprehensive developments in regional and international human rights law, to redress the current inadequate state of domestic human rights legal regimes of African States.

In view of the limited scope within which the judiciary can operate in Africa, the public should evolve institutions for the promotion and protection of human rights within their respective States. Such pressure groups may be formed by religious societies, professional associations in collaboration with the press, to effectively disseminate information to the largely non-literate populace regarding their fundamental rights. The establishment of human rights pressure groups can ensure the protection of human liberties by evolving mechanisms to respond to human rights violations and seek redress when infringements do occur. Currently, only international organisations such as Amnesty International and "Rights & Humanity" perform the function of safeguarding the rights of individuals particularly in Africa, and the world in general. The mandate of such international NGO's are limited, and restricted to research and publication of violations of human rights and official representations on such violations to governments where necessary. It is thus pertinent that privately established regional and national human rights organisations are encouraged to flourish in view of the advantages of their being able to promptly respond to threats to or violations of human rights through publicity and legal redress. The establishment of organisations such as the African Association for Human and Peoples Rights (AAHPR) and the Nigerian Council on Human Rights (NCHR) indicate the feasibility of this solution as complementary to the efforts of the judiciary and international human rights organisations in ensuring adequate protection of fundamental liberties in Africa.

The evolution, adoption and entry into force of the African Charter on Human and Peoples Rights (AFCHPR) is a response to the inadequate state of human rights promotion and observance in the region. It is pertinent to acknowledge the role of the UN as the single most important catalyst to the evolution of the AFCHPR. From the conception of the idea of a regional human rights machinery for Africa at the 1961 ICJ

Rule of Law Conference (Lagos, January 1961) to the adoption of the AFCHPR, (Banjul, Gambia, June 1981) the UN has relentlessly pursued the idea through the organisation of seminars and conferences on the establishment of a regional human rights machinery for Africa. The significance of the UN efforts in this regard is further evidenced by the adoption of the UN "Monrovia Proposal for the setting up of an African Commission on Human Rights", as one of the working papers of the Meeting of Legal Experts which drafted the AFCHPR.

A comparative analysis of the Monrovia Proposal and the AFCHPR reveals that most of the basic recommendations of the former are reflected in the latter instrument. The twenty year period between the sowing of the idea of an African Commission on Human Rights and its metamorphosis as the AFCHPR may be attributed to several factors. These factors include the divergence of political, ideological and legal structures of African States, the strong aversion of these States to external interference in local human rights matters which they regard as issues solely of domestic domain, and the recurring destabilizing effects of ethnicity and military intervention. It has also been suggested that the economic underdevelopment of Africa is a major stumbling block to the evolution of an effective regional machinery for Africa. We submit that much as the economic status of States may affect the protection of socio and economic rights, it is less likely per se to undermine the preservation of personal security rights and the civil/political rights of citizens. An examination of the Charters drafting process, reveals that much as its authors endeavoured to produce a legally proficient human rights instrument, political factors contributed firstly to the reduction of the several rights and freedoms and secondly to the erosion of the independence of the African Commission on Human and Peoples Rights. These reductions were perhaps necessary sacrifices for securing the collective adoption of the AFCHPR by the majority of African States. Nevertheless the coming

into force of the African Charter on Human and Peoples Rights (AFCHPR), is a remarkable achievement in view of the aforementioned obstacles and the hitherto dismal state of human rights protection in Africa.

The AFCHPR derives its inspiration primarily from African historical, cultural and legal sources without sacrificing the exogamous influences of Judeo-Greco jurisprudence as represented by existing regional human rights conventions and international human rights instruments. The impact of these instruments is reflected in the provisions of the AFCHPR on personal security rights, civil and political rights and the Rules of Procedure of the African Commission on Human and Peoples Rights. It was prudent to allow these external influences on the AFCHPR since they invariably represent, firstly, international human rights procedures of proven viability and secondly they encompass universal human rights norms solemnly consecrated in various international instruments adopted by States including a fair number of African Countries. Thirdly, most of the rights protected by these international instruments are not alien to the traditional African concept of human rights.

However, in contradistinction to existing regional human rights conventions and international human rights instruments, the AFCHPR expands upon the classical concept of human rights by protecting peoples rights, consecrating the duties of the individual towards his family, society, the State and the international community, and by couching social and economic rights in legally enforceable terms, thus imposing corresponding and immediate obligations on States. The AFCHPR therefore represents the first international human rights instrument to incorporate the three generations of rights namely, civil and political rights, economic, social and cultural rights, and the rights of solidarity and peoples rights.

It is universally acknowledged that the efficacy of an international human rights instrument is dependent upon the degree to which derogations and limitations are permissible to the rights and freedoms protected therein. A significant flaw in the AFCHPR is the absence of a derogation clause which prescribes the modalities for the suspension of rights and freedoms in time of war or state of emergency and also safeguard certain basic freedoms from encroachment in such circumstances. The AFCHPR utilizes the device of limitation clauses, otherwise known as "claw-back" clauses, which permit encroachment on individual rights and freedoms in the interest of law and public order, public interest and other variations thereof. Under the AFCHPR, the rights to equality, personal dignity and a fair hearing are guaranteed without qualifications or limitations. However, the right to life and liberty and the freedoms of conscience, expression, assembly and movement may be restricted or derogated from "by the law". The social, economic and cultural rights are couched in relatively absolute terms, with the exception of the right to property which latter right may be encroached upon in the interest of public need.

The permissible scope of limitations to personal security rights and civil and political rights consecrated in the AFCHPR will depend upon the interpretation adopted by the African Commission in determining the meaning of such claw-back phrases as "in accordance with the law", and "by the law". By adopting a narrow interpretation, the African Commission will be confining itself to the consideration of domestic laws only, thus subjecting the rights consecrated in the AFCHPR to the vagaries and restrictions of local laws. We submit that due to the inadequacy of domestic laws, exemplified by the various Detention and Public Security Laws, and the susceptibility of African Constitutional Bills of Rights to suspension and abrogation, the African Commission should adopt a wider interpretation of claw-back phrases. A broad

interpretation of these limitation clauses should entail three main considerations: first, Member States should not be permitted to adopt these clauses as a general authorization to establish new restrictions on the rights consecrated in the AFCHPR. Secondly, where a law exists that purports to restrict established rights, it must amount to a general legal norm linked to the general welfare, passed by democratically elected legislative organs established by the Constitution and evolved through procedures set forth by the State Constitution for that purpose; thirdly, in cases where the constitution or domestic law of a State Party provides greater protection for human rights and freedoms than the AFCHPR, the State should be estopped from relying entirely on the restrictive provisions of the latter. Finally, by virtue of Articles 60 and 61 of the AFCHPR which empowers the African Commission to "draw inspiration" from international human rights instruments and to utilize general and special international conventions as subsidiary measures to determine the principles of law, it is submitted that the African Commission may refer to these international norms, as "laws" which restrict government encroachment on human rights to a greater degree than the AFCHPR.

In addition to interpreting the Charter by reference to international instruments, the African Commission may also directly apply the provisions of the International Covenant on Civil and Political Rights, for instance, as long as the State Party has an obligation thereunder - pacta sunt servanda. Thus, for example where an African State being a party to both the AFCHPR and the International Covenants, declares a State of Emergency, the African Commission should be able to enhance the rights of the individual in such a situation by directly applying the provisions of Article 4 of the International Covenant on Civil and Political Rights which secures several basic freedoms from derogation. The adoption of this broad interpretation will achieve a greater overall substantive and procedural protection for the individual in the light of the AFCHPR's

vague "claw-back" clauses and the Charter's catalogue of duties of the individual towards the State.

The duties of individuals and States as consecrated in the AFCHPR raises some issues. The justificability of the individuals duties is questionable in the light of the fact that the individual cannot be arraigned before the African Commission. The concept of individual duties however, grants States an opportunity to erode some of the individual rights protected by the Charter; for example, where a State decides to implement or enforce on the individuals duty to "strengthen social and national solidarity" under Article 29(5) of the AFCHPR.

The AFCHPR consecrates social, economic and cultural rights in relatively absolute and legally enforceable terms, thus creating corresponding and immediate obligations on States. However by adopting the broad method of interpretation which takes into consideration the provisions of international human rights instruments, in this context, the International Convention on Social, Economic and Cultural Rights, it may be possible to argue that African State Parties to the Convention will only be required to take steps to the maximum of their available resources with a view to achieving progressively, the full realisation of those rights; thus obviating the immediacy of the obligations imposed by the AFCHPR.

It is pertinent to highlight the fact that since a limited number of African States are parties to the international human rights Covenants (See Appendix X, post), the evolution by the African Commission of consistent and uniform rules in this regard will be jeopardised. Consequently, the African Commission should consider recommending the incorporation of comprehensive provisions on derogations, as well as modalities for enhancing socio-economic rights in the AFCHPR, either by

way of an amendment or through the adoption of a Protocol. In the unlikely event of an immediate adoption of such a Protocol, we will have to await the evolution of the jurisprudence of the African Commission to clarify the limits of permissible incursions into individual rights by State measures.

The incorporation of peoples rights in the AFCHPR is not only a response to the needs of the economically deprived rural, subsistence populace against the onslaught of the increasingly acquisitive urban ruling elites, but also a device to protect ethnically distinct minority groups from oppressive political measures of the ruling majority. The AFCHPR does not define the word "peoples". We thus submit that by virtue of its power to interpret the provisions of the Charter, the African Commission should regard the word "peoples" as distinct ethnic groups where prima facie grounds reveal that they are being "oppressed". Furthermore, since the term "peoples" is such an amorphous concept susceptible to various definitions, it is suggested that its meaning should be specifically determined by the African Commission in the context of each case reported to it.

The need to adopt this cautious approach is underlined by the volatility of heterogeneous States of Africa. The fact that the AFCHPR protects peoples rights to self-determination may be regarded in some quarters as a license for secession. We submit that the concept of peoples rights to self-determination as consecrated in the AFCHPR does not per se justify secessionist claims of oppressed ethnic or minority groups within a State. This is underlined by the fact that the AFCHPR specifically imposes a duty on individuals to pursue national independence and the territorial integrity of his State. The provisions of the Charter may however, justify the claim by "oppressed" ethnic or minority groups within a State to seek autonomy and devolution of political power of the Central

Government through the creation of Federal or confederal political systems, where these solutions enhance the equitable distribution of the nations resources and secure the rights of the ethnic group or minority to self-determination. With regard to peoples rights to dispose of their wealth and natural resources, the concept of peoples refers to the entire national community, whose interests in this regard is represented and protected by the State.

The AFCHPR makes provision for the establishment of a Commission to be composed of eleven individuals to be elected by the Assembly of Heads of State and Government. The major function of the Commission is to promote and protect human and peoples rights in Africa. Towards this end the African Commission is empowered to undertake studies and public enlightenment exercises and establish principles to guide Member States on human and peoples rights legislation. The Commission may also cooperate with African and international institutions. More significantly, the Commission can receive complaints from Member States, individuals or organisations, arising from a violation of the Charter's provisions. The Commission is empowered to resolve interstate disputes initially through the peaceful procedure of negotiations and conciliation. However if the peaceful and friendly procedure should fail, this triggers the complaint procedure which ultimately results in the referral of the Commissions report to the Assembly of Heads of State and Government. The Charters overemphasis on the role and power of the Assembly, may undermine the effectiveness of this procedure. It will not be unreasonable to expect that inter-State communications will be rare, especially in the light of the Charters provision that emphasises the exhaustion of bilateral negotiations between disputing States before the Commission can be seized of the matter.

The Charter's provisions as regards communications submitted by parties other than Member States are subject to conditions of receivability which may forestall their consideration by the Commission. For instance Article 56 of the AFCHPR provides that such communications should be compatible with the Charter of the OAU. Article III(2) of the OAU Charter emphasizes the principle of non-interference in the domestic affairs of States. Consequently, it is possible that a State may raise objections to an individual or State complaint on that basis. We have argued that since State Parties to the AFCHPR have assumed regional and international obligations relating to human rights, disputes concerning these obligations are matters of regional and international rather than domestic concern. Thus where an individual alleges a violation of his rights under the AFCHPR or where a Member State demands that another Party live up to its regional and international obligations with regard to human rights, such an action cannot be deemed to violate Article III(2) of the OAU Charter.

Individual complaints are subjected to further restrictions such as the requirement of the exhaustion of local remedies and the fact that the Commission may not undertake an "in-depth" or "thorough study" of a communication revealing the existence of a series of serious or massive transgressions of human and peoples rights, without the prior approval of the Assembly of Heads of State and Government of the OAU. An examination of the domestic statutes and the machineries of justice of African States reveals the existence of systems which may be manipulated to inhibit an individual from redressing an injustice perpetuated by State officials and organs. Thus the African Commission should consider laying less emphasis on the exhaustion of local remedies. The Commission should pay more attention to the substance of an individual petition and should be willing to waive the rule of exhaustion of local remedies where the petition reveals the existence of official measures, domestic statutes or laws which deny access to local remedies.

The requirement of the prior approval of the Assembly before the Commission can undertake an "in-depth" or "thorough study" of complaints revealing a series of serious or massive violations of human rights, creates a major obstacle to the enhancement of the Charters effectiveness. The Assembly, composed of Heads of State who have hitherto historically glossed over human rights violation on the continent, may be unwilling to submit a fellow member to such embarrassing investigations. For instance, the OAU's apathy in the light of the deplorable practices of Idi Amin and Bokassa is instructive. We therefore submit that the Commission should be granted statutory powers to embark upon "on-site" observations independent of the Assembly, not unlike the power Inter-American Commission on Human Rights under Article 41 of the American Convention and Article 55 of the Rule of Procedure of the Inter-American Commission.

The African Commission on Human and Peoples Rights does not posses any enforcement power. Unlike its American and European counterparts which are empowered to refer cases to the Inter-American Court of Human Rights and the European Court of Human Rights respectively, the AFCHPR does not make any provision for an African Court of Human Rights. African States should consider the long-term solution of establishing such a court, especially in the light of what we perceive as the inherent deficiency of the current deterrent measures of investigation, publicity and condemnation of offending States by the OAU Assembly. In the meantime, the independence of the Commission should be enhanced through the granting of autonomous powers to the Commission vis a vis the Assembly thus reducing the likelihood of political interference from the latter.

It is evident that neither the OAU Charter nor the AFCHPR provide for the utilisation of sanction of expulsion from the OAU for matters involving massive human rights violations. In the absence of such a provision, we submit that the OAU, being a regional organisation is responsible for the interpretation of its own Charter, which interpretation should give effect to the organisations primary purposes. Consequently, a regional organisation such as the OAU, despite the absence of a provision on expulsion of its members, should have the inherent right to decide on who should be permitted to participate in its activities, thus facilitating the expulsion of members that habitually or consistently violate its central purposes which include the promotion and protection of human rights.

Would this really help? What happens to citizens after expulsion?

The AFCHPR imposes legal obligations on State Parties to observe its provisions and to adopt legislative measures giving effect to them. The constitutional provisions of the majority of African States guarantee the protection of human rights in various forms and to varying degrees. The constitutional provisions of some African States permit the self-execution of international treaties, thus implying automatic applicability of the provisions of the AFCHPR in domestic legal regimes. However, in most African States regional and international treaties are given the force of law only through the enactment of domestic statutes. Thus, the enforceability of the provisions of the AFCHPR in most African States will depend upon the immediacy with which these States adopt domestic measures to give effect them. Furthermore, several African State Constitutions empower their respective Supreme Courts to make rulings on the compatibility of international and regional treaty obligations with constitutional and other municipal laws. In other States, Courts are bound to recognise the supremacy of treaties once they are legally incorporated into the domestic legal regime.

However, in most Common law African States, where national law is clear and inconsistent with the international obligations of the State concerned, the judiciary is obliged to give effect to national law. We submit that in such circumstances, the judiciary should be willing to invite the attention of the relevant authorities to such inconsistency since the supremacy of national law does not mitigate a breach of an international legal obligation undertaken by a State. It is our considered opinion that the domestic application of the AFCHPR will ultimately depend upon the ability of the judiciary to have regard to the Charters provisions and those of other international human rights instruments, for the purpose of extinguishing ambiguity or uncertainty from national constitutions, legislations or common law.

The AFCHPR entered into force on 21 October 1986. The Members of the African Commission for Human and Peoples Rights were elected by the OAU Assembly in July 1987. The Commission held its first session at the headquarters of the OAU (Addis Ababa) on 2 November 1987 during which the 11 members of the Commission elected Isaac Nguema of Gabon and Ibrahim Badawi El-Sheikh of Egypt as President and Vice-President respectively for a renewable period of two years. During the meeting members were requested to present remarks, comments or amendments on the Commissions draft rules of procedure for the next meeting.

The second session of the Commission was held in Dakar Senegal from 8th - 13th February 1988 during which the Commission adopted its rules of procedure. An analysis of the Commissions Rules of Procedure is regrettably, beyond the scope of this thesis due to the constraints of our period of reference (the cutoff point being January 1988). However, see Appendix XII for the Rules of Procedure of the African Commission on Human and Peoples Rights.

It is to be hoped that the Commissions Rules of Procedure will take due cognisance of dark areas of the Charter, some of which we have attempted to highlight. Admittedly, most of these problem areas are beyond the statutory powers of the Commission to rectify, nevertheless, the Commission could utilise its powers of interpretation to surmount the vagueness of some of the Charters provisions. The Commission's promotional role which should normally be in public will include the encouragement of States to adopt legislative measures giving effect to the Charters provisions. In adopting such measures, many Member States will have to reconcile the glaring conflict between the Charters provisions and domestic legislation. The Commission should also encourage the formation of local human rights organisations which will be better placed to enlighten the public on human rights and spontaneously respond to human rights violations in African States.

It is evident that a new era of human and peoples rights has been ushered into Africa. The birth of the African Commission on Human Rights and the recent upsurge in the activities of national and international non-government human rights organisations on the African continent, all coinciding with the 40th Anniversary of the Universal Declaration of Human Rights (10 December 1988), underline our conviction that human and peoples rights are a significant part of any future agenda for Africa, a fact which African governments should recognise and pursue more vigourously.

APPENDIX

APPENDIX I

LAW OF LAGOS

The African Conference on the Rule of Law consisting of 194 judges, practising lawyers and teachers of law from 23 African nations as well as 9 countries of other continents.

Assembled in Lagos, Nigeria, in January 1961 under the aegis of the International Commission of Jurists,

Having discussed freely and frankly the Rule of Law with particular reference to Africa, and

Having reached conclusions regarding Human Rights in relation to government security, Human Rights in relation to aspects of criminal and administrative law, and the responsibility of the Judiciary and of the Bar for the protection of the rights of the individual in society,

NOW SOLEMNLY

Recognizes that the Rule of Law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of the individual and to establish social, economic, educational and cultural conditions under which the individual may achieve his dignity and realize his legitimate aspirations in all countries, whether dependent or independent,

Reaffirms the Act of Athens and the Declaration of Delhi with special reference to Africa and

Declares

1. That the principles embodied in the Conclusions of this Conference which are annexed hereto should apply to any society, whether free or otherwise, but that the Rule of Law cannot be fully realized unless legislative bodies have been established in accordance with the will of people who have adopted their Constitution freely;

2. That in order to maintain adequately the Rule of Law all Governments should adhere to the principle of democratic representation in their Legislatures;

3. That fundamental human rights, especially the right to personal liberty, should be written and entrenched in the Constitutions of all countries and that such personal liberty should not in peacetime be restricted without trial in a Court of Law;

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

5. That in order to promote the principles and the practical application of the Rule of Law, the judges, practising lawyers and teachers of law in African countries should take steps to establish branches of the International Commission of Jurists.

This Resolution shall be known as the Law of Lagos.

Done at Lagos this 7th day of January 1961.

APPENDIX II

CHARTER OF THE ORGANISATION OF AFRICAN UNITY

Addis Ababa, May, 1963.

We, the Heads of African States and Governments assembled in the City of Addis Ababa, Ethiopia;

Convinced that it is the inalienable right of all people to control their own destiny;

Conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples;

Conscious of our responsibility to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour;

Inspired by a common determination to promote understanding among our peoples and co-operation among our States in response to the aspirations of our peoples for brotherhood and solidarity, in a larger unity transcending ethnic and national differences;

Convinced that, in order to translate this determination into a dynamic force in the cause of human progress, conditions for peace and security must be established and maintained;

Determined to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our States, and to fight against neo-colonialism in all its forms;

Dedicated to the general progress of Africa;

Persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive co-operation among States;

Desirous that all African States should henceforth unite so that the welfare and well-being of their peoples can be assured;

Resolved to reinforce the links between our States by establishing and strengthening common institutions;

Have agreed to the present Charter.

ESTABLISHMENT

Article 1

1. The High Contracting Parties do by the present Charter establish an Organisation to be known as the Organisation of African Unity.
2. The Organisation shall include the Continental African States, Madagascar and other Islands surrounding Africa.

PURPOSES

Article II

1. The Organisation shall have the following purposes:
   (a) to promote the unity and solidarity of the African States;
   (b) to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa;

(c) to defend their sovereignty, their territorial integrity and independence;
(d) to eradicate all forms of colonialism from Africa; and
(e) to promote international co-operation, having due regard to the the Charter of the United Nations and the Universal Declaration of Human Rights.

2. To these ends, the Member States shall co-ordinate and harmonise their general policies, especially in the following fields:
(a) political and diplomatic co-operation;
(b) economic co-operation, including transport and communications;
(c) educational and cultural co-operation;
(d) health, sanitation, and nutritional co-operation;
(e) scientific and technical co-operation; and
(f) co-operation for defence and security.

PRINCIPLES

Article III

The Member States, in pursuit of the purposes stated in Article II, solemnly affirm and declare their adherence to the following principles:
1, the sovereign equality of all Member States;
2, non-interference in the internal affairs of States;
3, respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence;
4, peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration;
5, unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or anyother State;
6, absolute dedication to the total emancipation of the African territories which are still dependent;
7, affirmation of a policy of non-alightnment with regard to all blocs.

MEMBERSHIP

Article IV

Each independent sovereign African State shall be entitled to become a Member of the Organisation.

RIGHTS AND DUTIES OF MEMBER STATES

Article V

All Member States shall enjoy equal rights and have equal duties.

Article VI

The Member States pledge themselves to observe scrupulously the principles enumerated in Article III of the present Charter.

INSTITUTIONS

Article VII

The Organisation shall accomplish its purposes through the following principal institutions:
1, the Assembly of Heads of State and Government;

2, the Council of Ministers;
3, the General Secretariat;
4, the Commission of Mediation, Conciliation and Arbitration.

THE ASSEMBLY OF HEADS OF STATE AND GOVERNMENT

Article VIII

The Assembly of Heads of State and Government shall be the supreme organ of the Organisation. It shall, subject to the provisions of this Charter, discuss matters of common concern to Africa with a view to co-ordinating and harmonising the general policy of the Organisation. It may in addition review the structure, functions and acts of all the organs and any specialised agencies which may be created in accordance with the present Charter.

Article IX

The Assembly shall be composed of the Heads of State and Government or their duly accredited representatives and it shall meet at least once a year. At the request of any Member State and approval by the majority of the Member States, the Assembly shall meet in extra-ordinary session.

Article X

1. Each Member State shall have one vote.
2. All resolutions shall be determined by a two-thirds majority of the Members of the Organisation.
3. Questions of procedure shall require a simple majority. Whether or not a question is one of procedure shall be determined by a simple majority of all Member States of the Organisation.
4. Two-thirds of the total membership of the Organisation shall form a quorum at any meeting of the Assembly.

Article XI

The Assembly shall have the power to determine its own rules of procedure.

THE COUNCIL OF MINISTERS

Article XII

1. The Council of Ministers shall consist of Foreign Ministers or such other Ministers as are designated by the Governments of Member States.
2. The Council of Ministers shall meet at least twice a year. When requested by any Member State and approved by two-thirds of all Member States, it shall meet in extraordinary session.

Article XIII

1. The Council of Ministers shall be responsible to the Assembly of Heads of State and Government. It shall be entrusted with the responsibility of preparing conferences of the assembly.
2. It shall take cognisance of any matter referred to it by the Assembly. It shall be entrusted with the implementation of the decisions of the Assembly of Heads of State and Government. It shall co-ordinate inter-African co-operation in accordance with the instructions of the Assembly and in conformity with Article II(2) of the present Charter.

Article XIV

1. Each Member State shall have one vote.
2. All resolutions shall be determined by a simple majority of the members of the Council of Ministers.
3. Two-thirds of the total membership of the Council of Ministers shall form a quorum for any meeting of the Council.

Article XV

The Council shall have the power to determine its own rules of procedure.

GENERAL SECRETARIAT

Article XVI

There shall be an Administrative Secretary-General of the Organisation, who shall be appointed by the Assembly of Heads of State and Government. The Administrative Secretary-General shall direct the affairs of the Secretariat.

Article XVII

There shall be one or more Assistant Secretaries-General of the Organisation, who shall be appointed by the assembly of Heads of State and Government. The Administrative Secretary-General shall direct the affairs of the Secretariat.

Article XVII

There shall be one or more Assistant Secretaries-General of the Organisation who shall be appointed by the Assembly of Heads of State and Government.

Article XVIII

The functions and conditions of services of the Secretary-General, of the Assistant Secretaries-General and other employees of the Secretariat shall be governed by the provisions of this Charter and the regulations approved by the Assembly of Heads of State and Government.
1. In the performance of their duties the Administrative Secretary-General and the staff shall not seek or receive instruction from any government or from any other authority external to the Organisation. They shall refrain from any action with might reflect on their position as international officials responsible only to the Organisation.
2. Each member of the Organisation undertakes to respect the exclusive character of the responsibilities of the Administrative Secretary-General and the Staff and not to seek to influence them in the discharge of their responsibilities.

COMMISSION OF MEDIATION, CONCILIATION AND ARBITRATION

Article XIX

Member States pledge to settle all disputes among themselves by peaceful means and, to this end, agree to conclude a separate treaty establishing a Commission of Mediation, Conciliation and arbitration. Said treaty shall be regarded as forming an integral part of the present Charter.

SPECIALIZED COMMISSIONS

Article XX

The Assembly shall establish such Specialized Commissions as it may deem necessary, including the following:
1. Economic and Social Commission.
2. Educational and Cultural Commission.
3. Health, Sanitation and Nutrition Commission.
4. Defence Commission.
5. Scientific, Technical and Research Commission.

Article XXI

Each Specialized Commission referred to in Article 20 shall be composed of the Ministers concerned or other Ministers of Plenipotentiaries designated by the Governments of the Member States.

Article XXII

The functions of the Specialized Commissions shall be carried out in accordance with the provisions of the present Charter and of the regulations approved by the Council of Ministers.

THE BUDGET

Article XXIII

The budget of the Organization prepared by the Administrative Secretary-General shall be approved by the Council of Ministers. The budget shall be provided by contributions from Member States in accordance with the scale of assessment of the United Nations; provided, however, that no Member State shall be assessed an amount exceeding twenty per cent of the yearly regular budget of the Organization. The Member States agree to pay their respective contributions regularly.

SIGNATURE AND RATIFICATION OF CHARTER

Article XXIV

This Charter shall be open for signature to all independent sovereign African and Malagasy States and shall be ratified by the signatory States in accordance with their respective constitutional processes.

The original instrument, done in English and French, both texts being equally authentic, shall be deposited with the Government of Ethiopia which shall transmit certified copies thereof to all independent sovereign African and Malagasy States.

Instrument of ratification shall be deposited with the Government of Ethiopia, which shall notify all signatories of each such deposit.

ENTRY INTO FORCE

Article XXV

This Charter shall enter into force immediately upon receipt by the Government of Ethiopia of the instruments of ratification from two-thirds of the signatory States.

REGISTRATION OF THE CHARTER

Article XXVI

This Charter shall, after due ratification, be registered with the Secretariat of the United Nations through the Government of Ethiopia in conformity with Article 102 of the Charter of the United Nations.

INTERPRETATION OF THE CHARTER

Article XXVII

Any question which may arise concerning the interpretation of this Charter shall be decided by a vote of two-thirds of the Assembly of Heads of State and Government, present and voting.

ADHESION AND ACCESSION

Article XXVIII

1. Any independent sovereign African State may at any time notify the Administrative Secretary-General of its intention to adhere or accede to this Charter.
2. The Administrative Secretary-General shall, on receipt of such notification, communicate a copy of it to all the Member States. Admission shall be decided by a simple majority of the Member States. The decision of each Member State shall be transmitted to the Administrative Secretary-General who shall, upon receipt of the required number of votes, communicate the decision to the State concerned.

MISCELLANEOUS

Article XXIX

The working languages of the Organisation and all its institutions shall be, if possible, African languages, English and French.

Article XXX

The Administrative Secretary-General may accept on behalf of the Organisation, gifts, bequests and other donations made to the Organisation, provided that this is approved by the Council of Ministers.

Article XXXI

The Council of Ministers shall decide on the privileges and immunities to be accorded to the personnel of the Secretariat in the respective territories of the Member States.

CESSATION OF MEMBERSHIP

Article XXXII

Any State which desires to renounce its membership shall forward a written notification to the Administrative Secretary-General. At the end of one year from the date of such notification, it not withdrawn, the Charter shall cease to apply with respect to the renouncing State, which shall thereby cease to belong to the Organisation.

AMENDMENT OF THE CHARTER

Article XXXIII

This Charter may be amended or revised if any Member State makes a written request to the Administrative Secretary-General to that effect; provided, however, that the proposed amendment is not submitted to the assembly for consideration until all the Member States have been duly notified of it and a period of one year has elapsed. Such an amendment shall not be effective unless approved by at least two-thirds of all the Member States.

IN FAITH WHEREOF, We, the Heads of African States and Governments have signed this Charter.

ALGERIA
BURUNDI
CAMEROON
CENTRAL AFRICAN REPUBLIC
CHAD
CONGO (Brazzaville)
CONGO Leopoldville)
DAHOMEY
ETHIOPIA
GABON
GHANA
GUINEA
IVORY COAST
LIBERIA
LIBYA
MADAGASCAR
MALI
MAURITANIA
MOROCCO
NIGER
NIGERIA
RWANDA
SENEGAL
SIERRA LEONE
SOMALIA
SUDAN
TANGANYIKA
TOGO
TUNISIA
UGANDA
UNITED ARAB REPUBLIC
UPPER VOLTA

Article XXXIV

In the absence of any provision in the compromise regarding the applicable law, the Arbitral Tribunal shall decide the dispute according to treaties concluded between the parties, International Law, the Charter of the Organisation of African Unity, the Charter of the United Nations and, if the parties agree, ex aequo et bono.

Article XXXV

1. Hearings shall be held in camera unless the arbitrators decide otherwise.
2. The record of the proceedings signed by the arbitrators and the Registrar shall alone be authoritative.
3. The arbitral award shall be in writings and shall, in respect of every point decided, state the reasons on which it is based.

PART VI

FINAL PROVISIONS

Article XXXVI

The present Protocol shall, upon approval by the Assembly of Heads of State and Government, be an integral part of the charter of the Organisation of African Unity.

Article XXXVII

This Protocol may be amended or revised in accordance with the provisions of Article XXXIII of the Charter of the Organisation of African Unity.

In Faith Whereof, We, the Heads of African State and Government, have signed this Protocol.

APPENDIX III

THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

PREAMBLE

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay a particular attention to the right to development an 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;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

HAVE AGREED AS FOLLOWS:

PART I: RIGHTS AND DUTIES

CHAPTER I

HUMAN AND PEOPLES' RIGHTS

ARTICLE 1
The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

ARTICLE 2
Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

ARTICLE 3
1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

ARTICLE 4
Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

ARTICLE 5
Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

ARTICLE 6
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. In particular, no one may be arbitrarily arrested or detained.

ARTICLE 7
1. Every individual shall have the right to have his cause heard. This comprises:
   a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
   b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
   c) the right to defence, including the right to be defended by counsel of his choice;
   d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

ARTICLE 8
Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

ARTICLE 9
1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

ARTICLE 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligations of solidarity provided for in Article 29 no one may be compelled to join an association.

ARTICLE 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

ARTICLE 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

ARTICLE 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

ARTICLE 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

ARTICLE 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

ARTICLE 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

ARTICLE 17

1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

ARTICLE 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

3. The State shall ensure the elimination of every discrimination against women and also censure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

ARTICLE 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

ARTICLE 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

ARTICLE 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter 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.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practices by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

ARTICLE 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

ARTICLE 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:

   (a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;
   (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter

ARTICLE 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

ARTICLE 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

ARTICLE 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

CHAPTER II

DUTIES

ARTICLE 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

ARTICLE 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

ARTICLE 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need:
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

PART II - MEASURES OF SAFEGUARD

CHAPTER I

ESTABLISHMENT AND ORGANIZATION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

ARTICLE 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

ARTICLE 31

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.

ARTICLE 32

The Commission shall not include more than one national of the same State.

ARTICLE 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

ARTICLE 34

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States parties to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

ARTICLE 35

1. The Secretary General of the Organization of African Unity shall invite States parties to the present Charter at least four months before the elections to nominate candidates;
2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

ARTICLE 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of the three others, at the end of four years.

ARTICLE 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

ARTICLE 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

ARTICLE 39

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

ARTICLE 40

Every member of the Commission shall be in office until the date his successor assumes office.

ARTICLE 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the costs of the staff and services.

ARTICLE 42

1. The Commission shall elect its Chairman and Vice Chairman for a two year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form a quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The Secretary General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

ARTICLE 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

ARTICLE 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

CHAPTER II

MANDATE OF THE COMMISSION

ARTICLE 45

The functions of the Commission shall be:

1. To promote Human and Peoples' Rights and in particular:
   a) to collect documents undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
   b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.
   c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

CHAPTER III

PROCEDURE OF THE COMMISSION

ARTICLE 46

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

COMMUNICATION FROM STATES

ARTICLE 47

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

ARTICLE 48

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

ARTICLE 49

Notwithstanding the provisions of Article 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

ARTICLE 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

ARTICLE 51

1. The Commission may ask the States concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

ARTICLE 52

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, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government.

ARTICLE 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

ARTICLE 54

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities.

OTHER COMMUNICATIONS

ARTICLE 55

1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of State parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

ARTICLE 56

Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

ARTICLE 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

ARTICLE 58

1. When it appears after deliberation of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Assembly of Heads of State and Government who may request an in-depth study.

ARTICLE 59

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by the Chairman after it has been considered by the Assembly of Heads of State and Government.

CHAPTER IV - APPLICABLE PRINCIPLES

ARTICLE 60

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

ARTICLE 61

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

ARTICLE 62

Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

ARTICLE 63

1. The present Charter shall be open to signature, ratification or adherence of the member states of the Organization of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the member states of the Organization of African Unity.

PART III GENERAL PROVISIONS

ARTICLE 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

ARTICLE 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

ARTICLE 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

ARTICLE 67

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

ARTICLE 68

The present Charter may be amended if a State party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

APPENDIX IV

LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED OR ADHERED TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

No.	COUNTRY	DATE OF SIGNATURE	DATE OF RATIFICATION	DATE DEPOSITED
1.	Algeria	10/04/86	01/03/87	20/03/87
2.	Angola			
3.	Benin		20/01/86	25/02/86
4.	Botswana		17/07/86	22/07/86
5.	Burundi			
6.	Burkina Faso	05/03/84	06/07/84	21/09/84
7.	Cameroun			
8.	Cape Verde	31/03/86		
9.	Central African Rep.		26/04/86	27/07/86
10.	Chad	29/05/86	09/10/86	11/11/86
11.	Comoros		01/06/86	18/07/86
12.	Congo	27/11/81	09/12/82	17/01/83
13.	Djibouti			
14.	Egypt	16/11/81	20/03/84	03/04/84
15.	Equatorial Guinee	18/08/86	07/04/86	18/08/86
16.	Ethiopia			
17.	Gabon	26/02/82	20/02/86	26/06/86
18.	Gambia	11/02/83	08/06/83	13/06/83
19.	Ghana			
20.	Guinee	09/12/81	16/02/82	13/05/82
21.	Guinee Bissau		04/12/85	06/03/86
22.	Cote d'Ivore			
23.	Kenya			
24.	Lesotho	07/03/84		
25.	Liberia	31/03/83	04/08/82	29/12/82

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

No.	COUNTRY	DATE OF SIGNATURE	DATE OF RATIFICATION	DATE DEPOSITED
26.	Libya	30/05/85	19/07/86	26/03/87
27.	Madagascar			
28.	Malawi			
29.	Mali	13/11/81	21/12/81	22/01/82
30.	Mauritania	25/02/82	14/06/86	26/06/86
31.	Mauritius			
32.	Mozambique			
33.	Niger	09/07/86	15/07/86	21/07/86
34.	Nigeria	31/08/82	22/06/83	22/07/83
35.	Republique Rwandaise	11/11/81	15/07/83	22/07/83
36.	Saharawi Arab Dem.Rep.	10/04/86	02/05/86	23/05/86
37.	Sao Tome & Principe		23/05/86	28/07/86
38.	Senegal	23/09/81	13/08/82	25/10/82
39.	Seychelles			
40.	Sierra Leone	27/08/81	21/09/83	27/01/84
41.	Somalia	26/02/82	31/07/85	20/03/86
42.	Sudan	03/09/82	18/02/86	11/03/86
43.	Swaziland			
44.	Togo	26/02/82	05/11/82	22/11/82
45.	Tunisia		16/03/83	22/04/83
46.	Uganda	18/08/86	10/05/86	27/05/86
47.	Tanzania	31/05/82	18/02/84	09/03/84
48.	Zaire			
49.	Zambia	17/01/83	10/01/84	02/02/84
50.	Zimbabwe	02/02/86	30/05/86	12/06/86

ADOPTED: By the eighteenth Assembly of Heads of State and Government June, 1981 Nairobi, Kenya.

REQUIRES: Ratification or adherence of a simple majority of the Member States, to come into force.

CAME: into force on 21st day of October, 1986.

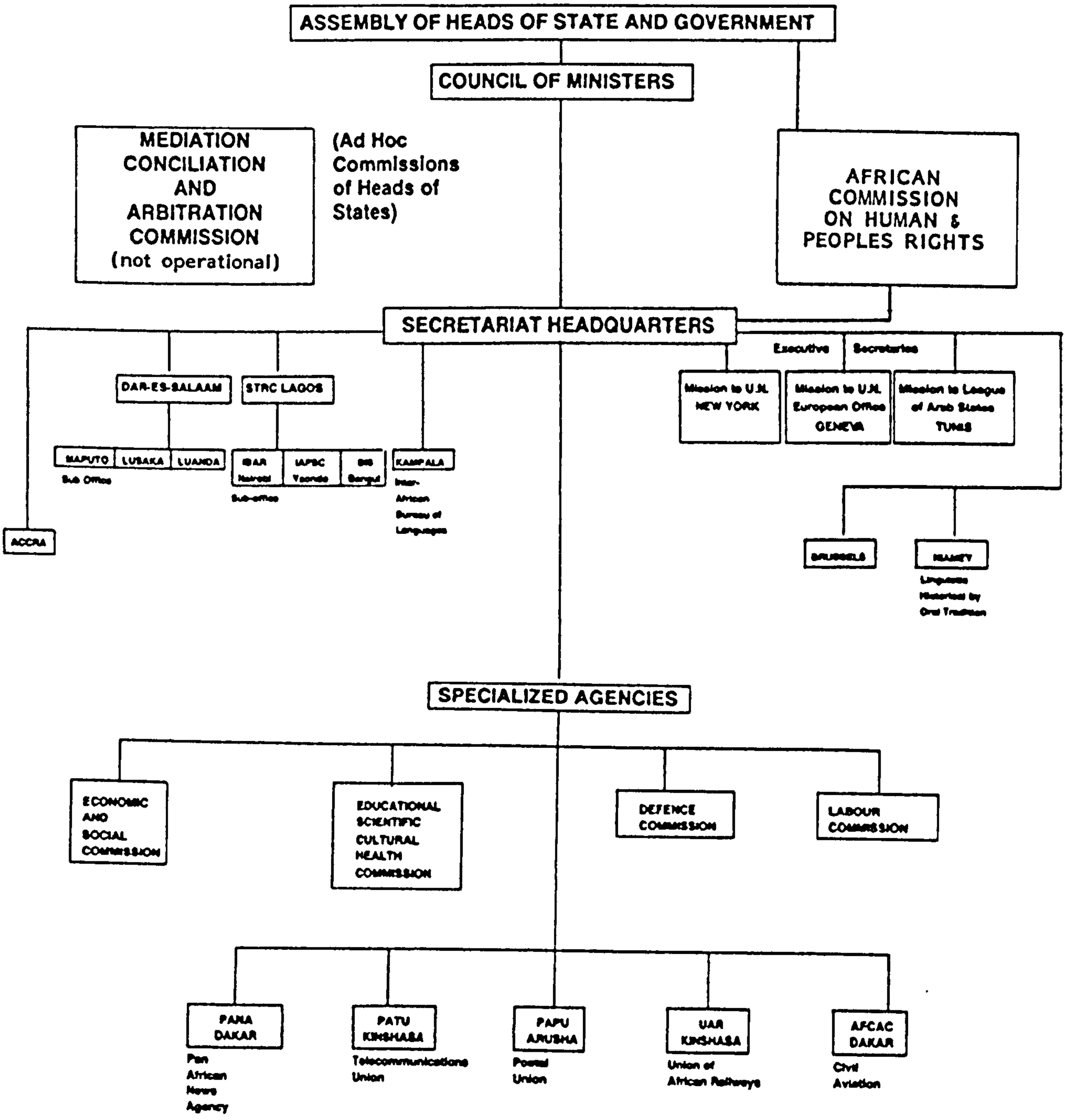
APPENDIX V

Comparative Table of Provisions of the African Charter with Corresponding Provisions in Major Conventions

Articles African Charter	European Convention	American Convention	Universal Declaration	Covenant on Civil and Political Rights	Covenant on Economic, Social & Cultural Rights
1.	1	1,2		2	2
2.	14	1	2	2(1),3,27	2(2),3
3.		24	7	26	
4.	2(1)	4	3,1	6	
5.	3,4	3,5,6,11	4,5,6,12	7,8,16,17	
6.	5	7	3,9	9	
7.	6,7,13	8,9,25	8,10,11	14,15	
8.	9	12	18	18	
9.	10	13	19	19	
10.	11	16	20	22	8
11.	11	15	20	21	
12.		22	13,14	12,13	
13.		23	21	25	
14.		21	17		
15.			23,24		6,7
16.			25		12
17.			26,27		13,15
18.	8,12	17,19	15,25(2)	23,24	10
19.				1(1),1(3)	1(1),1(3)
20.				1(2)	1(2),25
21.			28	2(1)	2(1),11
22.			28		
23.			28,28		
24.			Prambular proclamation		
25.				2(3)	
26.		25			
27.		32	29		
28.					
29.			29		
30.	19(1)	33(a)		28	
31.	20,23	34		28	
32.	20	37(2)		31(1)	
33.	21	36(1),80		29(1)	
34.	21	36(2)		29(2)	
36.	22(1)	37		32	
37.	22(2)	37		32	
38.				38	
39.	21(2),23(3)	38		33,34	
40.	22(4)				
41.	37	40		36	
42.	34,36	39		39	
43.	59	70		43	
44.	58	72		43	
45.	19	41		28(1)	
46.					
47.				41(1)a	
48.	24	45		41(1)b	
49.	24	45			
50.	26	46,47		41(1)c	
51.	28(a)	48(a),(c)-(e)		41(f),(g)	
52.	28(b)-30,31(1)-(2)	48(f),50		41(e),(h)	
53.	31(3)	50(3)			
54.				45,Opt.Prot.6	
55.	25	44		Opt.Prot.	
56.	26,4	46,47		Opt.Prot.2,3,5(2)	
57.	28	48		Opt.Prot.4 4	
58.	31,32	51		41(1)h,Opt.Prot.	
59.	32	73			
60.					
61.					
62.	57			40	16
63.	66	74		48,49	16
64.	35	79		37	
65.	66(3)	74(2)		49(2)	27(2)
66.	Op.Prot.	77		Opt.Prot.	23
67.	60(4)	74(3)		48(5)	26(5)
68.		78		51	29

APPENDIX VI

ORGANIZATIONAL CHART OF THE OAU



APPENDIX VII

CHRONOLOGICAL LIST OF HUMAN RIGHTS CONFERENCES/ SEMINARS IN AFRICA

	CONFERENCE TITLE	PLACE AND DATE	SOURCE REFERENCE
1.	UN Seminar on Participation of Women in Public Life	Addis Ababa, Ethiopia, 12-23 Dec. 60	Doc.ST/TAO/HR 8
2.	African Conference on the Rule of Law	Lagos, Nigeria, 3-7 Jan. 1961	Report of the Proceedings, ICJ, Geneva, 1961
3.	UN Seminar on Status of Women in Family Law	Lome, Togo, 18-31 Aug. 1964	Doc.ST/TAO HR.22
4.	UN Seminar on Human Rights in Developing Countries	Dakar, Senegal, 8-22 Feb. 1966	Doc.ST/TAO/HR.25
5.	Conference of French-Speaking African Jurists	Dakar, Senegal, 5-9 Jan. 1967	Bulletin of the ICJ, Vol.28 1967
6.	UN Seminar on Civil and Political Education of Women	Accra, Ghana, 19 Nov.- 2 Dec. 1968	Doc.ST/TAO/HR.35
7.	5th Summit Conference of East Central African States	Lusaka, Zambia, 16 Apr. 1969	The Review (ICJ No.2(1969)
8.	UN Seminar on the Establishment of Regional Commissions on Human Rights	Cairo, UAR, 2-15 Sept. 1969	Doc.ST/TAO/HR.38
9.	UN Seminar on the Realisation of Social and Economic Rights	Lusaka, Zambia, 23 Jun.-4 Jul. 1970	Doc.ST/TAO/HR.40
10.	UNECA Conference of African Jurists	Addis Ababa, Ethiopia, 19-23 Apr. 1971	T.GH. Verheist (ed.,),Legal Process and Individual African Addis Ababa: Faculty of Law, 1971 UN Doc.ECA/HR.WP.1-16
11.	UN Seminar on Measures aimed at Combating and Eliminating Racial Discrimination	Yaounde, Cameroun, 16-29 Jun. 1971	Doc.ST/TAC/HR.42
12.	UN Seminar on the Participation of Women in Economic Life	Libraville, Gabon, 27 Jul.-9 Aug.1971	Doc.ST/TAO/HR.43
13.	UN Seminar on New Ways and Means for Promoting Human Rights with Special Attention to the Problemsand Needs of Africa	Dar as Salaam, Tanzania, 23 Oct.-5 Nov. 1973	Doc.ST/TAO/HR.48
14.	AACC/World Council of Churches Consultation on Violations of Human Rights	Khartoum, The Sudan, 16-22 Feb. 1975	"Structures of Injuste"... Report By AACC/World Council of Churches, Nairobi, 1975
15.	UN Seminar on the Human Rights of Migrant Workers	Tunis, Tunisia, 12-2 Nov. 1975	Doc.ST/TAO/HR.50
16.	Conference of Algiers on Universal Human Rights of Peoples'	Algiers, Algeria, 4 Jul. 1976	"Declaration of Algiers" in Cassese ed., Pour un dorit des peuples. GBerger-Levrault, 1978

	CONFERENCE TITLE	PLACE AND DATE	SOURCE REFERENCE
17.	Seminar on Human Rights in a One Party State	Dar as Salaam, Tanzania, Sept. 1976	Human Rights in a One Party State, ICJ, 1978
18.	The Buttare Colloquium on Human Rights and Economic Development	Buttare, Rwanda, 3-7 Jul. 1978	H. Hannun, Universal Human Rights Vol. No.2 (1979).
19.	African Bar Association Third Biennial Conference	Freetown, Sierra Leone, 1-5 Aug. 1978	Amnesty International Newsletter Vol.8 No.10 (1978)
20.	Seminar on Human Rights and Development	Dakar, Senegal, Sept. 1978	Y. Kushalani, Human Rights Law Journal Vol.4 No.4 1983
21.	Colloqquium on Human Rights and Right to Legal Defence (Franco-Phone Bar Association)	Dakar, Senegal, 13-17 Jan. 1979	Amnesty International Newsletter Vol.9 (No.4) 1979
22.	International Conference on Human Rights in South Africa	Cape Town, S.Africa, 22-26 Jan. 1979	Forsyth C.F. et al (ed), Human Rights: The Cape Town Conference, Juta & Co. 1979
23.	OAU Symposium "What Kind of Africa by the Year 2000?"	Monrovia, Liberia, 12-16 Feb. 1979	Final Report of the Monrovia Symposium...Addis Ababa: the OAU, 1979
24.	Conference on African Refugee Problems	Arusha, Tanzania, 7-17 May 1979	L.G. Eriksson et. al. eds., An Analysis Account of the Conference on African Refugee Problems, Scandinavia Institute of African Studies, 1981.
25.	Conference of French Speaking African Countries	Kigali, Rwanda, 21-22 May 1979	
26.	OAU Summit Meeting	Monrovia, Liberia, 17-21 Jul. 1979	Doc.AHG/Res.115(XVI)
27.	UN Seminar on Regional Arrangements for Promotion and Protection of Human Rights	Monrovia, Liberia, 10-20 Sept. 1979	Doc.A/34/359 Annex 1
28.	OAU Meeting of Experts Preparing Draft African Charter	Dakar, Senegal, 28 Nov.-8 Dec. 1979	Doc. CAB/LEG/67/3/Rev.1
29.	OAU Ministerial Conference on African Charter on Human and Peoples Rights	Banjul, The Gambia, 9-15 Jun. 1980 and 7-27 Jan. 1981	Doc.CAB/LEG/67/3 Rev.5
30.	Conference of Organisation of African Socialist Parties	Tunis, Tunisia, 26-28 Feb. 1981	"Charter of Tunis"

	CONFERENCE TITLE	PLACE AND DATE	SOURCE REFERENCE
31.	18th OAU Summit Meeting (at which the African Charter on Human and Peoples Rights was adopted for ratification by a simple majority of states)	Nairobi, Kenya, 24-28 Jun. 1981	African Charter...OAU: Addis Ababa, 1981, ILM, Vol.XXI No.1 (1982)
32.	Conference on The State and Human Rights in Africa. (Graduate School of International Studies, University of Denver)	Denver, USA 9-10 Nov. 1984	Africa Today Vol.32 (1985) Nos.1&2 p.3
33.	ICJ Conference on Human and Peoples Rights in Africa and the African Charter	Nairobi, Kenya 2-4 Dec. 1985	Report of the Conference: International Commission of Jurists, (ICJ-Geneva)
34.	Fifth African Seminar on Inteernational Humanitarian Law (Institut Henry Denant, Geneva and Cameroon Red Cross)	Yaounde, Cameroon, 26 Nov.-4 Dec 1986	Rights & Humanity Vol.1 No.2 Summer 1987 p.38
35.	Seminar on the Promotion of Human Rights within the Commonwealth (Commonwealth Legal Education Association and the Human Rights Unit of the Commonwealth Secretariat)	Windsor Great Park, Feb. 1982	Rights & Humanity Vol.1 No.2 1987 p.39
36.	Colloquium on the African Commission of Human and Peoples Rights. (International Academy of Human Rights/ICJ/African Association of International Law)	Dakar, Senegal, Jun. 87	International Commission of Jurists, (ICJ) Geneva 1987
37.	Human Rights Documentation Conference in Africa (National University of Lesotho & Human Rights Interest (HRI) Harvard Law School)	Maseru, Lesotho, Aug. 1987	Commonwealth Judicial Journal Vol.7 No.3 1988 p.7
38.	Congress of the African Association for Human & Peoples Rights in Development	Harare, Zimbabwe, 29 Aug.-3 Spt. 1987	Commonwealth Legal Education Association, Jan. 1988. Commonwealth Judicial Journal Vol.7 No.3 1988 p.7
39.	The Pan Nigerian Multi-Disciplinary Workshop on Human Rights. (Rights and Humanity (African Section) in collaboration with the Faculty of Law, University of Calabar)	Calabar, Nigeria, 10-13 Nov. 1987	Rights & Humanity Vol.1 Jan (1988)
40.	The Pan-African Consultation on the Rights of the Economically and Socially Disadvantaged. (Rights & Humanity (African Section) in collaboration with the University of Jos, Nigeria)	Jos, Nigeria, 7-12 Dec. 1987	Africa Today Nos. 1&2 1987

APPENDIX VIII

LIST OF ORGANIZATIONS
GRANTED OBSERVER STATUS WITH THE OAU.

	NAME OF THE ASSOCIATION & HEADQUARTERS ADDRESS	DATE GRANTED OBSERVER STATUS	SESSION (COUNCIL OF MINISTERS OF THE OAU)
1.	Pan-African Women Association (Organisation Panafricaine des Femmes) (Conference des Femmes Africaines) 23 Boulevard Colonel Amirouche Alger, ALGERIE	12 September 1968	11th Session of C.M. Algiers
2.	Central African Economic and Customs Union (CACE) B.P. 969 Bangui, Central African Republic	12 September 1968	11th Session of C.M. Algiers
3.	Organisation Commune Africaine et Malgache B.P. 965 Bangui, Central African Republic	12 September 1968	11th Session of C.M. Algiers
4.	River Niger Commission Secretariat B.P. 729 Niamy, NIGER	12 September 1968	11th Session of C.M. Algiers
5.	Union des Radios diffusions et Televisions Nationales D'Afrique (Union of National Radio and Television Organization for Africa) (Secretaire General) B.P. 3237, Dakar, SENEGAL	6 September 1969	13th Session of C.M. Addis Ababa
6.	Association of African Universities P.O.Box 5734, Accra, GHANA	6 March 1970	14th Session of C.M. Addis Ababa
7.	Pan-African Youth Movement B.P. 72 Plateau Souliere, Alger, ALGERIE	31 August 1970	15th Session of C.M. Addis Ababa
8.	Association of Schools of Medicine (Secretary-General) B.P. 102, Khartoum, SUDAN	31 August 1970	15th Session of C.M. Addis Ababa
9.	Commission du Bassin du Lac Tchad (Secretaire General) B.P. 727, Ndjamena, TCHAD	31 August 1970	15th Session of C.M. Addis Ababa
10.	The African Training & Research Center in Administratin for Development (CAFRAD) P.O.Box 310 (Centre Africaine de Formation et de recherche Administrative pour le developpement) Tanger, MAROC	12 June 1972	19th Session of C.M. Addis Ababa

NAME OF THE ASSOCIATION & HEADQUARTERS ADDRESS	DATE GRANTED OBSERVER STATUS	SESSION (COUNCIL OF MINISTERS OF THE OAU)
11. Pan-African Federation of Film Makers (Federation Pan Africaine des Cineastes) 39 rue Mohamed V B.P. 1814, Dakar, SENEGAL	12 June 1972	19th Session of C.M. Addis Ababa
12. Organization of African Trade Union Unity (OATUU) (Secretary-General) P.O.Box M386, Accra, GHANA	4 April 1974	22nd Session of C.M. Kampala
13. Association for Social Work Education for Africa. (The President) P.O.Box 1176, Addis Ababa	4 April 1974	22nd Session of C.M. Kampala
14. Institut des Relations Internationales du Cameroun (Institute of International Relations of Cameroun) B.P. 1637, Yaounde, Cameroun	11 June 1974	23rd Session of C.M. Mogadishu
15. Anti-Apartheid Committee (M.le Secretaire Permanent du Comite Anti-Apartheid) B.P. 380, Kinshasa	11 June 1974	23rd Session of C.M. Mogadishu
16. Union of African Journalists (The President) Avenue Talaat Harb, Cairo, or Avenue Haroun AR-Rachid A Dooki B.P. 81 Bab El-Louk Cairo, AL-Jizza, Cairo	21 February 1975	24th Session of C.M. Addis Ababa
17. West African Science Association (Secretary-General) P.O.Box 7 Legon, Accra, Ghana	21 February 1975	24th Session of C.M. Addis Ababa
18. Encyclopaedia Africana Project (The Director) P.O.Box 2797, Accra, Ghana	21 February 1975	24th Session of C.M. Addis Ababa
19. Association for the Advancement of Agricultural Sciences in Africa. (Administrative Secretary General) P.O.Box 30087, Addis Ababa, ETHIOPIA	1 March 1976	26th Session of C.M. Addis Ababa

NAME OF THE ASSOCIATION & HEADQUARTERS ADDRESS	DATE GRANTED OBSERVER STATUS	SESSION (COUNCIL OF MINISTERS OF THE OAU)
20. Federation of African Organization of the Engineers (Secretary-General) P.O.Box 1588, Cairo, EGYPT	1 March 1976	26th Session of C.M. Addis Ababa
21. Comite Regional de l'Organisation Mondiale pour la Promotion Sociale des Aveugles 81 Avenue de Londres (Secretaire-General) Tunis, TUNISIE	3 July 1976	27th Session of C.M. Mauritius
22. Association Internationale pour le Developpement de la Librairie en Afrique (Secretaire-General) B.P. 375, Dakar, SENEGAL	3 July 1976	27th Session of C.M. Mauritius
23. African Airlines Association (Secretary-General) P.O.Box 20116, Nairobi, KENYA	3 July 1976	27th Session of C.M. Mauritius
24. Center for the Co-ordination of Research and Documentation in Social Sciences. (CERDAS) (The Director) P.O.Box 30123, Kinshasa, ZAIRE	3 July 1976	27th Session of C.M. Mauritius
25. Congres Internationale des Etudes Africaines (The President) B.P. 11122, Kinshasa, ZAIRE	3 July 1976	27th Session of C.M. Mauritius
26. Inter-African Parliamentary Union (Secretary-General) B.P. 1381, Abidjan, COTE D'IVORIE	4 March 1979	32nd Session of C.M. Nairobi
27. Org. Africaine des Institutions Superieures de Controle des Finances Publiques (Secretaire General) B.P. 288, Lome, TOGO	4 March 1979	32nd Session of C.M. Nairobi
28. Eastern African Center for Oral Traditions and African National Languages (EACROTANAL) P.O.Box 600, Zanzibar, TANZANIA	15 February 1980	34th Session of C.M. Addis Ababa

NAME OF THE ASSOCIATION & HEADQUARTERS ADDRESS	DATE GRANTED OBSERVER STATUS	SESSION (COUNCIL OF MINISTERS OF THE OAU)
29. L'Union des Villes Africaines (President) B.P. 2051, Dakar, SENEGAL	1 March 1981	36th Session of C.M. Addis Ababa
30. African Cultural Institute (A.C.I.) (Director-General) B.P. 01, Dakar, SENEGAL	1 March 1981	36th Session of C.M. Addis Ababa
31. Science, Education Programme for Africa (Executive Secretary) P.O.Box 9169, Accra, GHANA	1 March 1981	36th Session of C.M. Addis Ababa
32. Societe Africaine de Culture (President) 19 Rue Vincent, B.P.1, Dakar, SENEGAL	1 March 1981	36th Session of C.M. Addis Ababa
33. Association Internationale du Festival Mondial des Arts Negres (FESTAC) 19 Rue Vincent, B.P.1, Dakar, SENEGAL	March 1981	36th Session of C.M. Addis Ababa
34. African Reinsurance Corporation P.M.B. 12765 Book Shop House 50152 Broad Street, Lagos, NIGERIA	1 March 1981	36th Session of C.M. Addis Ababa
35. Inter-African Coffee Organization B.P. V 210, Abidjan, IVORY-COAST	26 June 1981	37th Session of C.M.
36. African Regional Standardization Organization P.O.Box 57363, Nairobi, KENYA	22 February 1982	38th Session of C.M. Addis Ababa
37. Confederation of African Medical Association and Societies (CAMAS) C/o Dr. O.O. Adekunle Department of Surgery University College Hospital Ibadan, NIGERIA	4 March 1985	41st Session of C.M. Addis Ababa

APPENDIX IX

OBJECTIVES OF THE NIGERIAN COUNCIL FOR HUMAN RIGHTS*

(2) CONSIDERING that every member of the human family has the right freely to hold and to express his or her convictions and the obligations to extend the like freedom to others, the object of the NCHR shall be to secure throughout Nigeria the observance of Human Rights generally and as guaranteed in the Nigerian Constitution, the African Charter on Human and Peoples Rights, and in the Universal Declaration of Human Rights by:

(a) taking up cases of infringement of human rights of individuals with the appropriate authorities;

(b) providing Legal Advice on Human Rights;

(c) making Representation on Human Rights to governments and other relevant authorities;

(d) pressing for law reform towards enhancement of Human Rights enjoyment through Legislative Pressure Groups and by other constitutional means;

(e) cooperating with other Human Rights organisations in Nigeria and worldwide;

(f) educating and disseminating widely and publicly individual entitlement to Human Rights enjoyment;

(g) protecting the observance of Human Rights for the enjoyment of all persons;

(h) organising conferences, seminars, lectures and sponsoring studies on Human Rights;

(i) sending observers to trials of major significance to Human Rights both within and outside Nigeria;

(j) sponsoring proposals within the Economic Community of West African States (ECOWAS), the Organisation of African Unity (O.A.U.), the United Nations Organisation (U.N.O.) and other organisations that exist for the improvement and advancement of Human Rights;

(k) publishing books, journals, films and all forms of media about its activities and generally about Human Rights.

*Extracted from the Constitution of the Nigerian Council for Human Rights

APPENDIX X

Pattern of Ratification of Regional and Selected International Instrumements on Human Rights as at 1st January 1988

	African Charter on Human and Peoples Rights	OAU Convention on Refugees	Covenant on Civil and Political Rights	Covenant on Economic, Social and Cultural Rights	Optional Protocol to Covenant on Civil and Political Rights	Convention on the Elimination of All forms of Racial Discrimination	Convention Relating to the Status of Refugees	Protocol Relating to the Status of Refugees	Convention on the Suppression and Punishment of the Crime of Apartheid	Convention on Elimination of all forms of Discrimination Against women	Genocide Convention
ALGERIA	x	x	o	o		x	x	x	x		x
ANGOLA		x					x	x			
BENIN	x	x				o	x	x	x	o	
BOTSWANA	x	o				x	x	x			
BURKINA FASO	x	x				x	x	x	x	x	x
BURUNDI		x				x	x	x	x	o	
CAMEROON		x	x	x	x	x	x	x	x	o	
CAPE VERDE	o					x			x	x	
CENTRAL AFRICAN REP.	x	x	x	x	x	x	x	x	x		
CHAD	x	x				x	x	x	x		
COMOROS	x										
CONGO	x	x	x	x	x		x	x	x	x	
DJIBOUTI							x	x			
EGYPT	x	x	x	x		x	x	x	x	x	x
EQUATORIAL GUINEA	x	x		x			x	x		x	
ETHIOPIA		x				x	x	x	x	x	x
GABON	x	x	x	x		x	x	x	x	x	x
GAMBIA	x	x	x	x		x	x	x	x	o	x
GHANA		x				x	x	x	x	x	x
GUINEA	x	x	x	x	o	x	x	x	x	x	
GUINEA BISSAU	x						x	x		x	
IVORY COAST		o				x	x	x		o	
KENYA		o	x	x			x	x	o	x	
LESOTHO	o	x				x	x	x	x	o	x
LIBERIA	x	x	o	o		x	x	x	x	x	x
LIBYA	x	x	x	x		x			x		
MADAGASCAR		o	x	x	x	x	x		x	o	
MALAWI		o					x			x	
MALI	x	x	x	x		x	x	x	x	x	x
MAURITANIA	x	x				o	x				
MAURITIUS		o	x	x	x	x				x	
MOROCCO		x	x	x		x	x	x			x
MOZAMBIQUE		o				x	x		x		x
NIGER	x	x	x	x	x	x	x	x	x		
NIGERIA	x	x				x	x	x	x	x	
RWANDA	x	x	x	x		x	x	x	x	x	x
SAHARAWI ARAB DEM.REP.	x										
SAO TOME AND PRINCIPE	x						x	x	x		
SENEGAL	x	x	x	x	x	x	x	x	x	x	x
SEYCHELLES		x				x	x	x	x		
SIERRA LEONE	x	o				x	x	x			
SOMALIA	x	o				x	x	x	x		
SUDAN	x	x	x	x		x	x	x	x		
SWAZILAND		o				x		x			
TANZANIA	x	x	x	x		x	x	x	x	x	
TOGO	x	x	x	x		x	x	x	x	x	x
TUNISIA	x	o	x	x		x	x	x	x	x	x
UGANDA	x	o		x		x	x	x	o	x	
ZAIRE		x	x	x	x	x	x	x	x	x	x
ZAMBIA	x	x	x	x	x	x	x	x	x	x	
ZIMBABWE	x	x					x	x	x		
x Total Ratifications	32	33	22	24	9	38	45	42	35	24	17
o Total Signatures	2	12	2	2	1	2	-	-	2	7	-

APPENDIX XI

MEMBERS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS*

Isaac NGUEMA	Gabon	Chairman
Ibrahim A. BADAWI EL-SHEIKH	Egypt	Vice-Chairman
Elioune Blondin BEYE	Mali	
Alexis GABOU	Congo	
Mahmoud Abou HADIYA	Libyan Arab Jamahiriya	
Grace IBINGIRA	Uganda	
Sourahata B. Semega JANNEH	The Gambia	
Habesh Robert KISANGA	Tanzania	
R.M.D. MOKOMA	Botswana	
C.L.C. MUBANGA-CHIPOYA	Zambia	
Youssoupha NDIAYE	Senegal	

*Note

1. The Members of the African Commission on Human and Peoples' Rights were elected by the Assembly of Heads of State and Government at the twenty-third OAU Summit held in Addis Ababa in July 1987. (Pursuant to Article 33 of the African Charter on Human and Peoples' Rights - AFCHPR)
2. The Chairman and Vice-Chairman of the African Commission were elected by the members of the Commission at its first session held at the headquarters of the OAU (Addis Ababa) on 2 November 1987. (Pursuant to Article 42(1) of the AFCHPR)
3. The rules of procedure of the Commission were adopted at the second session of the African Commission held in Dakar, Senegal on 13 February 1988. (Pursuant to Article 42(2) of the AFCHPR)

APPENDIX XII

RULES OF PROCEDURE ON AFRICAN COMMISSION

ON HUMAN AND PEOPLES' RIGHTS

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DRAFT RULES OF PROCEDURE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

ADOPTED ON 13 FEBRUARY 1986

The African Commission on Human and Peoples' Rights.

Considering the African Charter on Human and Peoples' Rights,

Acting on the strength of Article 42 (2) of the Charter,

Hereby by adopts the present Rules.

PART ONE : GENERAL PROVISIONS - ORGANIZATION OF THE COMMISSION

CHAPTER I: SESSIONS

Rule 1: Number of Session

The African Commission on Human and Peoples' Rights hereinafter referred to as "The Commission" shall hold the Sessions which may be necessary to enable it to carry out satisfactorily its functions in conformity with the African Charter on Human and Peoples' Rights (hereinafter referred to as "The Charter").

Rule 2: Opening Date

The Commission shall normally hold two ordinary sessions a year each lasting two weeks.

The ordinary sessions of the Commission shall be convened on a date fixed by the Commission on the proposal of its Chairman and in consultation with the Secretary-General of the Organization of African Unity (OAU) (hereinafter referred to as "The Secretary-General").

The Secretary-General may change, under exceptional circumstances, the opening date of a session, in consultation with the Chairman of the Commission.

Rule 3: Extraordinary sessions

1. Extraordinary sessions shall be convened on decisions of the Commission. When the Commission is not in Session, the Chairman may convene extraordinary sessions in consultation with the members of the Commission. The Chairman of the Commission shall also convene extraordinary sessions.

   a) at the request of the majority of the members of the Commission,

   b) at the request of the Current Chairman of the Organization of African Unity (OAU).

2. Extraordinary Sessions shall be convened as soon as possible on a date fixed by the Chairman, in consultation with the Secretary-General and the other members of the Commission.

Rule 4: Place of Meetings

The Sessions shall normally be held at the Headquarters of the Commission. The Commission may, in consultation with the Secretary-General, decide to hold a Session in another place.

Rule 5: Notification of the Opening Date of the Session

The Secretary-General shall inform members of the Commission of the date of the first sitting of each Session and its venue. This notification shall be sent in the case of an Ordinary Session, at least eight (8) weeks and, in the case of an Extraordinary Session, at least three (3) weeks, if possible before the Session.

CHAPTER II: AGENDA

Rule 6: Drawing up the Provisional Agenda

The Provisional Agenda for each Ordinary Session shall be drawn up by the Secretary-General, in consultation with the Chairman of the Commission in accordance with the provisions of the Charter and these Rules.

The Provisional Agenda shall include if necessary, items on: "Communications from States", and "Other Communications" in conformity with the provisions of Article 55 of the Charter. It should not contain any information relating to such communications.

Except what has been specified above on the communications, the Provisional Agenda shall include all the items listed by the present Rules of Procedure as well as the items proposed:

a) by the Commission at a Previous Session;

b) by the Chairman of the Commission or another member of the Commission

c) by a State party to the Charter

d) by the Assembly of Heads of State and Government (or the Council of Ministers of the Organization of African Unity)

e) by the Secretary-General of the Organization of African Unity for every issue relating to the functions assigned to him by the Charter

f) by a national liberation movement recognized by the OAU or by a non-governmental organization

g) by a specialized institution of which the States parties to the Charter are members.

The items to be included in the provisional agenda under sub-paragraphs b,c,f and g of paragraph 3 must be communicated to the Secretary-General, accompanied by essential documents, not later than eight (8) weeks before the first sitting of each Session.

5. a) All national liberation movements or non-governmental organizations wishing to propose the inclusion of an item in the Provisional Agenda must inform the Secretary-General at least ten (10) weeks before the opening of the meeting. Before formally proposing the inclusion of an item in the Provisional Agenda, the observations likely to be made by the Secretary-General must duly be taken into account.

b) The proposal, accompanied by essential documents, must formally be submitted not later than eight (8) weeks before the opening of the Session.

All proposals made under the provisions of the present paragraph shall be included in the Provisional Agenda of the Commission, if a least two-thirds (2/3) of the members present and voting so decide.

6. The Provisional Agenda of the Extraordinary session of the Commission shall include only the item proposed to be considered at that Extraordinary session.

Rule 7: Transmission and Distribution of the Provisional Agenda

1. The Provisional Agenda and the essential documents relating to each item shall be distributed to the members of the Commission by the Secretary-General who shall endeavour to transmit them to members at least six (6) weeks before the opening of the Session.

2. The Secretary-General shall communicate the Provisional Agenda of that session and have the essential documents relating to each Agenda item distributed at least six weeks before the opening of the Session of the Commission to the members of the Commission, member States parties to the Charter, to the Current Chairman of the OAU.

3. The draft agenda shall also be sent to the specialised agencies, to non-governmental organizations and to the national liberation movements concerned with the agenda.

4. In exceptional cases, the Secretary-General, may, while giving his reasons in writing, have the essential documents relating to some items of the Provisional Agenda distributed at least four (4) weeks prior to the opening of the Session.

Rule 8: Adoption of the Agenda

At the beginning of each session, the commission shall if necessary, after the election of officers in conformity with Rule 18, adopt the agenda of the Session on the basis of the Provisional Agenda referred to in Rule 6.

Rule 9: Revision of the Agenda

The Commission may, during the Session, revise the Agenda if need be, adjourn, cancel or amend items. During the Session, only urgent and important issues may be added to the Agenda.

Rule 10: Draft Provisional Agenda for the Next Session

The Secretary-General shall, at each session of the Commission, submit a Draft Provisional Agenda for the next session of the Commission, indicating, with respect to each item, the documents to be submitted on that item and the decision of the deliberative organ which authorized their preparation, so as to enable the Commission to consider these documents as regards the contribution they make to its proceedings, as well as their urgency and relevance to the prevailing situation.

CHAPTER III: MEMBERS OF THE COMMISSION

Rule 11: Composition of the Commission

The Commission shall be composed of eleven (11) members elected by the Assembly of Heads of State and Government hereinafter referred to as "the Assembly", in conformity with the relevant provisions of the Charter.

Rule 12: Status of the Member

1. The members of the Commission shall be the eleven (11) personalities appointed on conformity with the provisions of Article 31 of the Charter.

2. Each member of the Commission shall sit on the Commission in a personal capacity, No member may be represented by another person.

Rule 13: Term of Office of the Members

1. The term of office of the members of the Commission elected on July 1987 shall begin from the date. The term of office of the members of the Commission elected at subsequent elections shall take effect the day following the expiry date of the term of office of the members of the Commission they shall replace.

2. However if a member is re-elected at the expiry of his or her term of office, or elected to replace a member whose term of office expired or will expire, the term of office shall begin from that expiry date.

3. In conformity with Article 39 (3) of the Charter, the member elected to replace member whose term of office has not expired, shall complete the term of office of his or her predecessor, unless the remaining term of office is less than six (6) months. In the latter case, there shall be no replacement.

Rule 14: Cessation of Functions

1. If in the unanimous opinion of the other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary-General of the Organization of African Unity who shall then declare the seat vacant.

2. In the case of the demise or resignation of a member of the Commission, the Chairman shall immediately inform the Secretary-General who shall declare the seat vacant from the date of the demise or from that on which the resignation took effect. The member of the Commission who resigns shall address a written notification of his or her resignation directly to the Chairman or to the Secretary-General and steps to declare his or her seat vacant shall only be taken after receiving the said notification. The resignation shall make the seat vacant.

Rule 15: Vacant Seat

Every seat declared vacant in conformity with Rule 15 of the present Rules of Procedure shall be filled on the basis of Article 39 of the Charter.

Rule 16: Oath

Before coming into office, every member of the Commission shall make the following solemn commitment at a public setting:

"I Swear to carry out my duties well and faithfully in all impartiality".

CHAPTER IV: OFFICERS

Rule 17: Election of Officers

1. The Commission shall elect among its members a Chairman and a Vice-Chairman.

2. The elections referred to in the present Rule shall be held by secret ballot. Only the members present shall vote, the member who shall obtain the two-thirds majority of the votes of the members present and voting shall be elected.

3. If no member obtains this two-thirds majority, a second and third and fourth ballot shall be held. The member having the largest number of votes at the fifth ballot shall be elected.

4. The officers of the Commission shall be elected for a period of two (2) years. They shall be re-eligible. None of them, may, however, exercise his or her functions if he or she ceases to be a member of the Commission.

Rule 18: Powers of the Chairman

The Chairman shall carry out the functions assigned to him by the Charter, the Rules of Procedure and the decisions of the Commission. In the exercise of his functions the Chairman shall be under the authority of the Commission.

Rule 19: Absence of the Chairman

The Vice-Chairman shall replace the Chairman during a session if the latter is unable to attend a whole or part of a sitting of a session.

Rule 20: Functions of the Vice-Chairman

The Vice-Chairman, acting in the capacity of the Chairman, shall have the same rights and the same duties as the Chairman.

Rule 21: Cessation of the Functions of an Officer

If any of the officers ceases to carry out his or her functions or declares that he or she is no longer able to exercise the functions of a member of the Commission or is no longer is a position for one reason or another, to serve as an officer, a new officer shall be elected for the remaining term of office of his or her predecessor.

CHAPTER V: SECRETARIAT

Rule 22: Functions of the Secretary General

1. The Secretary-General or his representative may attend the meetings of the Commission. He shall participate neither in the deliberations, nor in the voting. He may, however, be called upon by the Chairman of the Commission to address the meeting. He may make written or oral statements at the sittings of the Commission.

2. He shall appoint, in consultation with the Chairman of the Commission secretary of the Commission.

3. He shall, in consultation with the Chairman provide the Commission with the necessary staff, material means and services for it to actually carry out effectively the functions and missions assigned to it under the Charter.

4. The Secretary-General shall take all the necessary steps for the meetings of the Commission.

5. The Secretary-General shall bring immediately to the knowledge of the members of the Commission all the issues that would be submitted to them for consideration.

Rule 23: Estimates

Before the Commission shall approve a proposal entailing expenses, the Secretary-General shall prepare and distribute, as soon as possible, to the members of the Commission, the financial implications of the proposal. It shall be incumbent on the Chairman to draw the attention of the members to those implications so that they discuss them when the proposal shall be considered by the Commission.

Rule 24: Financial Rules

The Financial Rules adopted pursuant to the provisions of Article 41 and 44 of the Charter, shall be appended to the present Rules of Procedure.

Rule 25: Powers of the Secretary of the Commission

The Secretary of the Commission hereinafter referred to as "Secretary" shall be responsible for the activities of the Secretariat under the general supervision of the Chairman, and, particularly:

a) He/she shall assist the Commission and its members in the exercise of their functions;

b) He/she shall serve as an intermediary for all the communications concerning the Commission.

c) He/she shall be the custodian of the archives of the Commission.

Rule 26: Records of Cases

A special record, with a reference number and initialled, in which shall be entered the date of the registration of each petition and communications and that of the closure of the procedure relating to them before the Commission shall be kept at the Secretariat.

Rule 27: Financial Responsibility

The Organization of African Unity shall bear the expenses of the staff and the means and services placed at the disposal of the Commission to carry out its functions.

CHAPTER VI: SUBSIDIARY BODIES

Rule 28: Establishment of Committees and Working Groups

1. The Commission may during a session, taking into account the provisions of the Charter and in consultation with the Secretary-General, establish, if it deems it necessary for the exercise of its functions, committees or working groups, composed of the members of the Commission and send them any agenda item for consideration and report.

2. These Committees or working groups may with the prior consent of the Secretary-General, be authorised to sit when the Commission is not in session.

3. The members of the committees or working groups shall be appointed by the Chairman, subject to the approval of the absolute majority of the other members of the Commission.

Rule 29: Establishment of Sub-Commissions

1. The Commission may establish sub-Commissions of experts after the prior approval of the Assembly;

2. Unless the Assembly decides otherwise, the Commission shall determine the functions and composition of each sub-Commission.

Rule 30: Officers of the Subsidiary bodies

Unless the Commission decides otherwise, the subsidiary bodies of the Commission shall elect their own officers.

Rule 31: Rules of Procedure

The Rules of Procedure of the Commission shall apply, as far as possible, to the proceedings of its subsidiary bodies.

CHAPTER VII: PUBLIC SESSIONS AND PRIVATE SESSIONS

Rule 32: General Principle

The sittings of the Commission and of its subsidiary bodies shall be private and shall be held "in camera".

Rule 33: Publication of Proceedings

At the end of each private sitting, the Commission or its subsidiary bodies may issue a communique through the Secretary-General.

CHAPTER VIII: LANGUAGES

Rule 34: Working Languages

The working languages of the Commission and of all its institutions shall be those of the Organization of African Unity (OAU).

Rule 35: Interpretation

1. The address delivered in one of the working languages shall be interpreted in the other working languages.

2. Any person addressing the Commission in a language other than one of the working languages, shall, in principle, ensure the interpretation in one of the working languages. The interpreters of the Secretariat may take the interpretation of the original language as source language for their interpretation in the other working languages.

Rule 36: Languages to be used for Minutes of Proceedings

The summary minutes of the sittings of the Commission shall be drafted in the working language.

Rule 37: Languages to be used for resolutions and other official decisions

All the official decisions of the Commission shall be communicated in the working language, that shall also apply to the other official documents of the Commission.

CHAPTER IX: MINUTES AND REPORTS

Rule 38: Tape Recordings of the Sessions

The Secretariat shall record and conserve the tapes of the sessions of the Commission. It may also record and conserve the tapes of the sessions of the committees, working groups and sub-commissions if the Commission so decides.

Rule 39: Summary Minutes of the Sessions

The Secretariat shall draft the summary minutes of the private and public sessions of the Commission and of its subsidiary bodies. It shall distribute them as soon as possible in a draft form to the members of the Commission and to all other participants of the session. All those participants may, in the seven (7) working days following the receipt of the draft minutes of the session, submit corrections to the Secretariat. The Chairman may, under special circumstances, in consultation with the Secretary-General, extend the time for the submission of the corrections.

In case the corrections are contested, the Chairman of the Commission or the Chairman of the subsidiary body, whose minutes they are shall resolve the disagreement after having listened to if necessary, the tape recording of the discussion. If the disagreement persists, the Commission or the subsidiary body shall decide. The corrections shall be published in a distinct volume after the closure of the session.

Rule 40: Distribution of the Minutes of the Private Session and Public Session

1. The final summary minutes of the public and private sessions shall be documents intended for general distribution unless, under exceptional circumstances, the Commission decides otherwise.

2. The minutes of the private sessions of the Commission shall be distributed forthwith to all members of the Commission and to any other participants in the sessions.

Rule 41: Reports to be submitted after each Session

The Commission shall submit to the Current Chairman of the OAU, a report of the deliberations of each session. This report shall contain a brief summary of the recommendations and statements on issue to which the Commission would like to draw the attention of the Current Chairman and member States of the OAU.

Rule 42: Submission of official decisions and reports

The text of the decisions and reports officially adopted by the Commission shall be distributed to all the members of the Commission as soon as possible.

CHAPTER X: CONDUCT OF THE DEBATES

Rule 43: Quorum

The quorum shall be constituted by seven (7) members of the Commission, as specified in Article 42 (3) of the Charter.

Rule 44: General Powers of the Chairman

1. In addition to the powers entrusted to him under other provisions of the present Rules of Procedure, the Chairman shall have the responsibility to declare each session of the Commission opened and closed; he shall direct the debates, ensure the application of the present Rules of Procedure, grant the use of the floor, submit to a vote matters under discussion and announce the result of the vote taken. Subject to the provisions of the Present Rules of Procedure, the Chairman shall direct the discussions of the Commission and ensure order during meetings. The Chairman may during the discussion of an agenda item, propose to the Commission to limit the time accorded to speakers, as well as the number of interventions of each speaker on the same issue and close the list of speakers. He shall rule on the points of order. He shall also have the power to propose the adjournment and the closure of debates as well as the adjournment and suspension of a sitting. The debates shall deal solely with the issue submitted to the Commission and the Chairman may call a speaker, whose remarks are irrelevant to the matter under discussion to order.

Rule 45: Points or Order

1. During the debate of any matter a member may, at any time, raise a point of order and the point of order shall be immediately decided by the Chairman, in accordance with the Rules of Procedure. If a member appeals against the decision, the appeal shall immediately be put to the vote and if the Chairman's ruling is not cancelled by the simple majority of the members present, it shall be maintained.

2. A member raising a point of order cannot, in his or her comments deal with the substance of the matter under discussion.

Rule 46: Adjournment of Debates

During the discussion on any matter, a member may move the adjournment of the debate on the matter under discussion. In addition to the proposer of the motion one member may speak in favour of and one against the motion after which the motion shall be immediately put to the vote.

Rule 47: Limit of the Time accorded to Speakers

The Commission may limit the time accorded to each speaker on any matter, when the time allotted for debates is limited and a speaker spends more than one time accorded, the Chairman shall immediately call him to order.

Rule 48: Closing of the list speakers

The Chairman may, during a debate, read out the list of speakers and with the approval of the Commission, declare the list closed. Where there are no more speakers, the Chairman shall, with the approval of the Commission, declare the debate closed. This closure shall have the same effect as the one decided by the Commission.

Rule 49: Closure of the Debate

A member may, at any time, move the closure of the debate on the matter under discussion, even if other members of representatives expressed the desire to take the floor. The authorization to take the floor on the closure of the debate shall be given only to two speakers against the closure, after which the motion shall immediately be put to the vote.

Rule 50: Suspension or Adjournment of the Meeting

During the discussion of any matter, a member may move the suspension or adjournment of the meeting. No discussion on any such motion shall be permitted and it shall immediately be put to the vote.

Rule 51: Order of the Motions

Subject to the provisions of Rule 45 of the present Rules of Procedure, the following motions shall have precedence in the following order over all the other proposals or motions before the meeting:

a) to suspend the meeting;
b) to adjourn the meeting;
c) to adjourn the debate on the item under discussion;
d) for the closure of the debate on the item under discussion.

Rule 52: Submission of Proposals and Amendments of Substance

Unless the Commission decides otherwise the proposals, amendments or motions of substance made by members shall be submitted in writing to the Secretariat if a member makes the request, they shall be considered at the first sitting following their submission.

Rule 53: Decisions on Competence

Subject to the provisions of Rule 45 of the present Rules of Procedure, any motion tabled by a member for a decision on the competence of the Commission to adopt a proposal submitted to it shall immediately be put to the vote before the said proposal is put to the vote.

Rule 54: Withdrawal of a Proposal or a Motion

The sponsor of a motion or a proposal may still withdraw it before it is put to the vote, on condition that it has not been amended. A motion or a proposal thus withdrawn may be submitted again by another member.

Rule 55: New Consideration of Proposals

When a proposal is adopted or rejected, it shall not be considered again at the same session, unless the Commission decides otherwise. When a member moves the new consideration of a proposal, only one member may speak in favour of and one against the motion, after which it shall immediately be put to the vote.

Rule 56: Interventions

1. No member may take the floor at a meeting of the Commission without prior authorization of the Chairman. Subject to Rules 50, 49, 45 and 48 the Chairman shall grant the use of the floor to the speakers in the order in which it has been requested.

2. The debates shall deal solely with the matter submitted to the Commission and the Chairman may call to order a speaker whose remarks are irrelevant to the matter under discussion.

3. The Chairman may limit the time accorded to speakers and the number of interventions which each member may make on the same issue, in accordance with Rule 44 of the present Rules.

Only two members in favour of a motion and two against the motion of fixing such time limits shall be granted the use of the floor after which the motion shall immediately be put to the vote. For question of procedure the time accorded to each speaker shall not exceed five minutes, unless the Chairman decides otherwise. When the time allotted for discussions is limited and a speaker exceeds the time accorded the Chairman shall immediately call him to order.

Rule 57: Right of Reply

The right of reply shall be granted by the Chairman to any member requesting it. The member must try, while exercising this right, to be as brief as possible and to take the floor preferably at the end of the sitting at which this right has been requested.

Rule 58: Congratulations

The congratulations addressed to the newly elected members to the Commission shall only be presented by the Chairman or a member designated by the latter. Those addressed to newly elected officers shall only be presented by the outgoing Chairman or a member designated by him.

Rule 59: Condolences

Condolences shall be exclusively presented by the Chairman on behalf of all the members the Chairman may, with the consent of the Commission, send a message on behalf of all the members of the Commission.

CHAPTER XI: VOTE AND ELECTIONS

Rule 60: Right to Vote

Each member of the Commission shall have one vote. In the case of equal number of votes the Chairman shall have the casting vote.

Rule 61: Asking for a Vote

A proposal or a motion submitted to the decision of the Commission shall be put to the vote if a member so requests. If no member asks for a vote, the Commission may adopt a proposal or a motion without a vote.

Rule 62: Required Majority

1. Except in the cases the Charter or other Rules of the present Rules of Procedure otherwise provide, decisions of the Commission shall be taken by the simple majority of the members present and voting.

2. For the purpose of the present Rules of Procedure, the expression "members present and voting" shall mean members voting for or against. The members who shall abstain from voting shall be considered as non-voting members.

3. Nevertheless decisions may be taken by consensus before resorting to voting, subject to compliance with the provisions of the Charter and the Rules of procedure be and that the process for reaching that consensus shall not delay unduly the proceedings of the Commission.

Rule 63: Method of Voting

1. Subject to the provisions of Rule 68, the Commission, unless it otherwise decides, shall normally vote by show of hands, but any member may request the roll-call vote, which shall be taken in the alphabetical order of the names of the members of the Commission beginning by the member whose name is drawn by lot by the Chairman. In all the votes by roll-call each member shall reply "yes", "no" or "abstention". The Commission may decide to hold a secret ballot.

2. In case of vote by roll-call, the vote of each member participating in ballot shall be recorded in the minutes.

Rule 64: Explanation of Vote

Members may make brief statements for the only purpose of explaining their vote, before the beginning of the vote or once the vote has been taken. The member who is the sponsor of a proposal or a motion cannot explain his vote on that proposal or motion except if it has been amended.

Rule 65: Rules to be Observed while Voting

When the ballot shall begin, it may not be interrupted except if a member raises a point of order relating to the manner in which the ballot is held. The Chairman may allow members to intervene briefly, whether before the ballot beginning or when it is closed, but solely to explain their votes.

Rule 66: Division of Proposals and Amendments

The division of proposals and amendments shall be done if so requested. The parts of the proposals or of the amendments which has been adopted shall later be put to the vote as whole; if all the operative parts of a proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

Rule 67: Amendment

An amendment shall simply comprise an addition to or a deletion of another proposal of a change in a part of the said proposal.

Rule 68: Order of Vote on Amendments

When an amendment is moved to a proposal, the amendment shall be voted on first. When two or more amendments are moved to a proposal, the Commission shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so until all the amendments have been put to the vote. Nevertheless when the adoption of an amendment shall necessarily imply the rejection of another amendment, the latter shall not be put to the vote. If one or several amendments are adopted, the amended proposal shall then be put to the vote.

Rule 69: Order of Vote on the Proposals

1. If two or more proposals are made on the same matter, the Commission, unless it decides otherwise, shall vote on these proposals in the order in which they have been submitted.

2. After each vote the Commission may decide whether it shall put the next proposal to the vote.

3. However, the motions which do not require the opinion of the Commission on the substance of the proposals shall be considered as previous issues and put to the vote before the said proposals.

Rule 70: Elections

The Elections shall be held by secret ballot, unless the Commission otherwise decides when the election concerns one post for which only one candidate has been proposed and that the candidate or the list of candidates has been agreed upon.

Rule 71: Majority required to be Elected

1. When one post must be filled by elections the candidate who shall obtain in the first ballot the majority of the votes cast and the largest number of votes shall be elected.

2. If the number of the candidates in majority are fewer than the number of vacant posts, another round of voting shall be conducted to fill the remaining vacant posts.

CHAPTER XII: PARTICIPATION OF NON-MEMBERS OF THE COMMISSION

Rule 72: Participation of States in the Deliberation

1. The Commissions may invite any State to participate in the discussion of any issue that shall be of particular interest to that State.

2. A subsidiary body of the Commission may invite any State to participate in the discussion of any issue that shall be of particular interest to this State.

3. A State thus invited shall have no voting right, but may submit proposals which may be put to the vote at the request of any member of the Commission or of the subsidiary body concerned.

Rule 73: Participation of National Liberation Movements

The Commission may invite any National Liberation Movement recognized by the OAU or by virtue of resolutions adopted by the Assembly to participate, without voting rights, in the discussion of any issue which shall be of particular interest to this Movement.

Rule 74: Participation of Specialized Institutions and Consultations with the latter

1. Pursuant to the agreements concluded between the OAU and the Specialized Institutions, the latter shall have the right to:

a) be represented in the public sessions of the Commission and of its subsidiary bodies.

b) participate, without voting rights, through their representatives in deliberations on issues which shall be of interest to them and to submit, on these issues, proposals which may be put to vote at the request of any member of the Commission or the interested subsidiary body.

2. Before placing in the provisional agenda an issue submitted by a Specialized Institution the Secretary-General should initiate such preliminary consultations as may be necessary, with this institution.

3. When an issue proposed for inclusion in the provisional agenda of a session, or which has been added to the agenda of a session pursuant to Rule 5 of the present Rules of Procedure, contains a proposal requesting the Organization of African Unity to undertake additional activities relating to issues concerning directly one or several specialized institutions, the Secretary-General should enter into consultation with the institutions concerned and inform the Commission of the ways and means of ensuring coordinated utilisation of the resources of the various institutions.

4. When at a meeting of the Commission, a proposal calling upon the Organization of African Unity to undertake additional activities relate to issues directly concerning one or several specialized institutions, the Secretary-General, after consulting as far as possible, the representatives of the interested institutions, should draw the attention of the Commission to the effects of that proposal.

5. Before taking a decision on the proposals mentioned above, the Commission shall make sure that the institutions concerned have been duly consulted.

Rule 75: Participation of other Inter-Governmental Organizations

Representatives of Inter-Governmental Organizations to which OAU has granted permanent observer status and other Inter-Governmental Organizations permanently designated by the OAU or invited by the Commission, may participate, without voting rights, in the deliberations of the Commission on issues falling within the framework of the activities of these organizations.

CHAPTER XIII: CONSULTATION WITH NON-GOVERNMENTAL ORGANIZATIONS AND REPRESENTATION OF THESE ORGANIZATIONS

Rule 76: Representation

Non-Governmental organizations may appoint authorised observers to participate in the public sessions of the Commission and of its subsidiary bodies. The non-Governmental Organizations on the list as established by the Commission may send observers to these sessions where issues falling within their area of activity are being considered.

Rule 77: Consultation

1. The Commission may consult the non-Governmental Organizations either directly or through one or several committees set up for this purpose. In any case, these consultations may be held at the invitation of the Commission or at the request of the organization.

2. Upon recommendation of the Secretary-General and at the request of the Commission, organizations on the above-mentioned list may also be heard by the Commission.

CHAPTER XIV: PUBLICATION AND DISTRIBUTION OF THE REPORTS AND OTHER OFFICIAL DOCUMENTS OF THE COMMISSION

Rule 78: Report of the Commission

Within the framework of the procedure of communication among States, parties to the Charter referred to in Articles 47 and 49 of the Charter, the Commission shall submit to the Assembly a report containing, where possible, recommendations it shall deem necessary. The report shall be confidential. However, it shall be published by the Chairman of the Commission if the Assembly so decides.

Rule 79: Periodical reports of Member States

Periodical reports and other information submitted by States parties to the Charter as requested under Article 62 of the Charter, shall be documents for general distribution. The same thing shall apply to other information supplied by a State party to the Charter, unless this State shall request otherwise.

Rule 80: Reports on the activities of the Commission

1. As stipulated in Article 54 of the Charter, the Commission shall each year submit to the Assembly, a report on its deliberations, in which it shall include a summary of its activities.

2. The report shall be published by the Chairman after the Assembly shall have considered it.

PART TWO : PROVISIONS RELATING TO THE FUNCTIONS OF THE COMMISSION

CHAPTER XV: PROMOTIONAL ACTIVITIES

Reports submitted by States Parties to the Charter under Article 62 of the Charter

Rule 81: Contents of Reports

1. States parties to the Charter shall submit reports on measures they would have taken to give effect to the rights recognized by the Charter and on the progress made with regard to the enjoyment of these rights. The reports should indicate, where possible, the factors and difficulties impeding the implementation of the provisions of the Charter.

2. Whenever the Commission shall request State parties to the Charter to submit reports as provided for by Article 62 of the Charter, it shall fix the date for the presentation of these reports.

3. The Commission may, through the Secretary-General inform States parties to the Charter, of its wishes regarding the form and the contents of the reports to be submitted under Article 62 of the Charter.

Rule 82: Transmission of the Reports

1. The Secretary-General may, after consultation with the Commission, communicate to the specialised institutions concerned, copies of all parts of the reports which may relate to their areas of competence, produced by Member States of these institutions.

2. The Commission may invite the specialised institutions to which the Secretary-General has communicated parts of the reports, to submit observations relating to these parts within a time limit that it may specify.

Rule 83: Submission of Reports

The Commission shall inform, as early as possible, member States parties to the Charter, through the Secretary-General, of the opening date, duration and venue of the Session at which their respective reports shall be considered. Representatives of the States parties to the Charter may participate in the sessions of the Commission at which their reports shall be considered. The Commission may also inform a State party to the Charter from which it wanted complementary information, that it may authorise its representative to participate in a specific session. This representative should be able to reply to questions to be put to him by the Commission and make statements on reports already submitted to this State. He may also furnish additional information from his State.

Rule 84: Non-Submission of Reports

1. The Secretary-General, shall, at each session, inform the Commission of all cases of non-submission of reports or of additional information requested pursuant to Rules 81 and 85 of the Rules of Procedure. In such cases, the Commission may send, through the Secretary-General, to the State party to the Charter concerned, a report relating to the submission of the report or additional information.

2. If, after the reminder referred to in paragraph 1 of this Rule, a State party to the Charter does not submit the report or the additional information requested pursuant to Rules 81 and 85 of the Rules of Procedure, the Commission shall point it out in its yearly report to the Assembly.

Rule 85: Examination of information contained in reports

1. When considering a report submitted by a State party to the Charter under Article 62 of the Charter, the Commission should first make sure that the report provides all the necessary information pursuant to the provisions of Rule 81 of the Rules of Procedure.

2. If, in the opinion of the Commission, a report submitted by a State party to the Charter, does not contain adequate information, the Commission may request that State to furnish the additional information required, by indicating the date on which the information needed should be submitted.

3. If, following the consideration of the reports and the information submitted by a State party to the Charter, the Commission decides that the State has not discharged some of its obligations under the Charter, it may address all general observations to the State concerned as it may deem necessary.

Rule 86: Adjournment and transmission of the reports

1. The Commission shall, through the Secretary-General communicate to States parties to the Charter for comments, its general observations made following the consideration of the reports and the information submitted by States parties to the Charter. The Commission may where necessary, fix a time limit for the submission of the comments by the States parties to the Charter.

2. The Commission may also transmit to the Assembly, the observations mentioned in paragraph 1 of this Rule, accompanied by copies of the reports it has received from the States parties to the Charter as well as the comments supplied by the latter, if possible.

CHAPTER XVI: PROTECTION ACTIVITIES

COMMUNICATIONS FROM THE STATES PARTIES TO THE CHARTER

Section 1: Procedure for the Consideration of Communications Received in Conformity with Article 47 of the Charter

Rule 87: "Procedure for Communications-negotiations"
Purpose of the Procedure

1. Any Communication submitted under Article 47 of the Charter should be submitted to the Secretary-General and the Chairman of the Commission.

2. The communication referred to above should be in writing and contain a detailed and comprehensive statement on the actions denounced as well as the provisions of the Charter alleged to have been violated.

3. The notification of the communication to the State party to the Charter, the Secretary-General and the Chairman of the Commission shall be done through a registered letter accompanied by an acknowledgement from or through any known technical means.

Rule 88: Register of communications

The Secretary-General shall keep a permanent register for all communications received under Article 47 of the Charter.

Rule 89: Reply and time limit

1. The reply of the State party to the Charter seized of a written communication should reach the requesting state party to the Charter within 3 months following the receipt of the notification of the Communication.

2. It shall be accompanied particularly by:

a) written explanations, declarations or statements relating to the issues raised;

b) possible indications and measures taken to end the situation denounced;

c) indications on the law and rules of procedure applicable or applied;

d) indications on the local procedures for appeal already used, in process or still open.

Rule 90: Non-settlement of the issue

1. If within three (3) months from the date the notification of the original communication is received by the addressee State, the issue has not been settled to the satisfaction of the two interested parties, through the selected channel of negotiation or through any other peaceful procedure selected by common consent of the parties, the issue shall be referred to the Commission, in accordance with the provisions of Article 47 of the Charter.

2. The issue shall also be referred to the Commission if the addressee State party to the Charter fails to react to the request made under Article 47 of the Charter, within the same 3 months' period of time.

Rule 91: Seisin of the Commission

At the expiration of the 3 months time limit referred to in Article 47 of the Charter, and in the absence of a satisfactory reply or in case the addressee State party to the Charter fails to react to the request, each State Party may submit the communication to the Commission through a notification addressed to its Chairman, to the other interested State party and to the Secretary-General.

Section 2: Procedure for the Consideration of the Communications Received in Conformity with Articles 48 and 49 of the Charter

Rule 92: Seisin of the Commission

1. Any communication submitted under Articles 48 and 49 of the Charter may be submitted to the Commission by any one of the interested State parties through notification addressed to the Chairman of the Commission, the Secretary-General and the State party concerned.

2. The notification referred to in paragraph 1 of the present rule shall contain information on the following elements or accompanied particularly by:

a) measures taken to try to resolve the issue pursuant to Article 47 of the Charter including the text of the initial communication and any future written explanation from the interested States parties to the Charter relating to the issue;

b) measures taken to exhaust local procedures for appeal;

c) any other procedure for international investigation or international settlement to which the interested States parties have resorted.

Rule 93: Permanent Register of Communications

The Secretary-General shall keep a permanent register for all communications received by the Commission under Articles 48 and 49 of the Charter.

Rule 94: Seisin of the members of the Commission

The Secretary-General shall immediately inform members of the Commission of any notification received pursuant to Rule 91 of this Rules of Procedure and shall send to them, as early as possible, a copy of the notification as well as the relevant information.

Rule 95: Private session and Press Release

1. The Commission shall consider the communications referred to in Articles 48 and 49 of the Charter in close session.

2. After consulting the interested States parties to the Charter, the Commission may issue through the Secretary-General, releases on its activities for the attention of the media and the public at a close session.

Rule 96: Consideration of the Communication

The Commission shall consider a communication only when:

a) the procedure offered to the States parties by Article 47 of the Charter has been exhausted;

b) the time limit set in Article 48 of the Charter has expired;

c) the Commission is certain that all the available local remedies have been utilised and exhausted, pursuant to the generally recognized principles of international law, or that the process of achieving these remedies extend beyond reasonable time limit or has been unduly prolonged.

Rule 97: Amicable settlement

Except for the provisions of Rule 96 of the present Rules of Procedure, the Commission shall place its good offices at the disposal of the interested States parties to the Charter so as to reach an amicable solution on the issue based on the respect of human rights and fundamental liberties, as recognised by the Charter.

Rule 98: Additional information

The Commission may, through the Secretary-General, request the States parties concerned or one of them to communicate additional information or observations orally or in writing. The Commission shall fix a time limit for the submission of the written information or observations.

Rule 99: Representation of States parties to the Charter

1. The States parties to the Charter concerned shall have the right to be represented during the consideration of the issue by the Commission and to submit observations orally and in writing or in either form.

2. The Commission shall notify, as soon as possible, the States parties concerned, through the Secretary-General, of the opening date, the duration and the venue of the session at which the issue will be examined.

3. The procedure to be followed for the presentation of oral or written observations shall be determined by the Commission.

Rule 100: Report of the Commission

1. The Commission shall adopt a report pursuant to Article 52 of the Charter within a reasonable time limit which should not exceed 12 months, following the notification referred to in Article 48 of the Charter and Rule 90 of the present Rules of Procedure.

2. The provisions of paragraph 1 of Rule 99 of these Rules of Procedure shall not apply to the deliberations of the Commission, relating to the adoption of the report.

3. The report referred to above shall concern the decisions and conclusions that the Commission will reach.

4. The report of the Commission shall be communicated to the States parties concerned through the Secretary-General.

5. The report of the Commission shall be sent to the Assembly through the Secretary-General, together with the recommendations that it shall deem useful.

CHAPTER XVII: OTHER COMMUNICATIONS

PROCEDURE FOR THE CONSIDERATION OF THE COMMUNICATIONS RECEIVED IN CONFORMITY WITH ARTICLE 55 OF THE CHARTER

Section I: Transmission of Communications to the Commission

Rule 101: Session of the Commission

1. Pursuant to these Rules of Procedure, the Secretary-General shall transmit to the Commission the communications submitted to him for consideration by the Commission in accordance with the Charter.

2. No communication concerning a State which is not a party to the Charter shall be received by the Commission or placed on a list under Rule 102.

Rule 102: List of Communications

1. The Secretary of the Commission shall prepare lists of communications submitted to the Commission pursuant to Rule 101 above, to which he shall attach a brief summary of their contents and regularly cause these lists to be distributed to members of the Commission. Besides, the Secretary shall keep a permanent register of all these communications.

2. The full text of each communication referred to the Commission shall be communicated to each member of the Commission on request.

Rule 103: Request for clarifications

1. The Commission, through the Secretary-General, may request the author of a communication to furnish clarifications on the applicability of the Charter to his communications, and to specify in particular:

a) his name, address, age and profession by justifying his very identity, if ever he is requesting the Commission to be kept anonymous;

b) name of the State party referred to in the communication;

c) purpose of the communication;

d) provision(s) of the Charter allegedly violated;

e) "De facto" means of law;

f) measures taken by the author to exhaust local remedies;

g) the extent to which the same issue is already being considered by another international investigating or settlement body.

2. When asking for clarification or information, the Secretary-General shall fix an appropriate time limit for the author to submit the communication so as to avoid undue delay in the procedure provided for by the Charter.

3. The Commission may adopt a questionnaire for use by the author of the communication in providing the above mentioned information.

4. The request for clarification referred to in paragraph 1 of this Rule shall not prevent the inclusion of the communication on the lists mentioned in paragraph 1 of Rule 102 above.

Rule 104: Distribution of communications

For each communication recorded, the Secretary-General shall prepare as soon as possible, a summary of the relevant information received, which it shall distribute to the members of the Commission.

Section II: General Provisions Governing the Consideration of the Communications by the Commission or its Subsidiary Bodies

Rule 105: Private session

The sessions of the Commission or of its subsidiary bodies during which the communications provided for in the Charter shall be considered private. The sessions during which the Commission may consider general issues, such as the application procedure of the Charter, may be public, if the Commission so desires.

Rule 106: Press releases

The Commission may issue, through the Secretary-General and for the attention of the media and the public, releases on the activities of the Commission, in its private session.

Rule 107: Incompatibilities

1. No member shall take part in the consideration of a communication by the Commission:

a) if he has any personal interest in the case; or

b) if he has participated, in any capacity, in the adoption of any decision relating to the case which is the subject of the communication.

2. Any issue relating to the application of paragraph 1 above shall be resolved by the Commission.

Rule 108: Withdrawal of a member

If, for any reason, a member considers that he should not take part or continue to take part in the consideration of a communication, he shall inform the Chairman of his decision to withdraw.

Rule 109: Provisional measures

Before making its final views known to the Assembly on the communication, the Commission may inform the State Party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable prejudice being caused to the victim of the alleged violation. In so doing, the Commission shall inform the State party that the expression of its views on the adoption of those provisional measures does not imply a decision on the substance of the communication.

Rule 110: Information to the State party to the Charter

Prior to any substantive consideration, every communication should be made known to the State concerned through the Chairman of the Commission, pursuant to Article 57 of the Charter.

Section III: Procedures to Determine Admissibility

Rule 111: Time limits for consideration of the admissibility

The Commission shall decide, as early as possible and pursuant to the following provisions, whether or not the communication shall be admissible under the Charter.

Rule 112: Order of the Consideration of the Communications

1. Unless otherwise decided, the Commission shall consider the communications in the order they have been received by the Secretariat.

2. The Commission may decide, if it deems it good, to consider jointly two or several communications.

Rule 113: Working Groups

The Commission may set up one or several working groups, composed of 3 of its members at most, to submit recommendations on the conditions of admissibility stipulated in Article 56 of the Charter

Rule 114: Admissibility of the Communications

1. Communications may be submitted to the Commission by:

a) an alleged victim of a violation by a State party to the Charter on one of the rights enunciated in the Charter or, in his name, when it appears that the latter is unable to submit the communication himself;

b) an individual or an organisation alleging, with proofs in support, a serious or massive cases of violations of human and peoples' rights;

2. The Commission may accept such communications from any individual or organisation irrespective of where they shall be.

3. In order to decide on the admissibility of a communication, pursuant to the provisions of the Charter, the Commission shall ensure:

a) that the communication indicates the identity of the author even if he requests the Commission to be anonymous, in which case the Commission shall not disclose his name;

b) that the author alleges to be a victim of a violation, by a State party of any one of the rights enunciated in the Charter and, if necessary, that the communication is submitted in the name of an individual who is a victim (or individuals who are victims) who would be unable to submit a communication or to authorise it to be done;

c) that the communication does not constitute an abuse of the right to submit a communication under the Charter;

d) that the communication is not incompatible with the provisions of the Charter;

e) that the communication is not limited solely to information published or disseminated through the mass communication media;

f) that the same issue is not already being considered by another international investigating or settlement body;

g) that the alleged victim has exhausted all the available local remedies or that the process of such remedies are unduly taking a long time;

h) that the communication has been submitted within a reasonable time limit from the time the local remedies have been exhausted or from a period decided by the Commission.

Rule 115: Additional Information

1. The Commission or a working group set up under Rule 113, may, through the Secretary-General, request the State party concerned or the author of the communication to submit in writing additional information or observations relating to the issue of admissibility of the communication. The Commission or the working group shall fix a time limit for the submission of the information or observations to avoid the issue dragging too long.

2. A communication may be declared admissible only on condition that the State party concerned has received the text of the communication and that it has been given the opportunity to submit the information and observations pursuant to paragraph 1 of this Rule.

3. A request made under paragraph 1 of this Rule should indicate clearly that the request does not mean that a decision whatsoever has been taken on the issue of admissibility.

Rule 116: Decision of the Commission on Admissibility

1. If the Commission decides hat a communication is inadmissible under the Charter, it shall make its decision known as early as possible, through the Secretary-General to the author of the communication and, if the communication has been transmitted to a State party concerned, to that State.

2. If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it is seized by the interested individual or on his behalf, of a written request containing the information to the effect that the grounds for the inadmissibility have ceased to exist.

Section IV: Procedure for the Consideration of Communications

Rule 117: Proceedings

1. If the Commission decides that a communication is admissible under the Charter, its decision and the text of the relevant documents shall as soon as possible, be submitted to the State party concerned, through the Secretary-General. The author of the communication shall also be informed of the Commission's decision through the Secretary-General.

2. The State party to the Charter concerned shall, within the 4 ensuing months, submit in writing to the Commission, explanations or statements elucidating, the issue under consideration and indicating, if possible, measures it was able to take to remedy the situation.

3. All explanations or statements submitted by a State party pursuant to the present Rule shall be communicated, through the Secretary-General, to the author of the communication who may submit in writing additional information and observations within a time limit fixed by the Commission.

4. The Commission may review the decision by which it has declared a communication admissible, in the light of the explanations and statements submitted by the State party under the present Rule.

Rule 118: Final Decision of the Commission

1. If the communication is admissible, the Commission shall consider it in the light of all the information that the individual and the State party concerned has submitted in writing; it shall make known its observations on this issue. To this end, the Commission may refer the communication to a working group, composed of 3 of its members at most, which shall submit recommendations to it.

2. The observations of the Commission shall be communicated to the Assembly through the Secretary-General.

3. The Assembly or its Chairman may request the Commission to conduct an in-depth study on these cases and to submit a factual report accompanied by its findings and recommendations, in accordance with the provisions of Article 58 sub-paragraph 2 of the Charter.

FINAL CHAPTER: AMENDMENT AND SUSPENSION OF THE RULES OF THE RULES OF PROCEDURE

Rule 119: Method of Amendment

Only the Commission may modify the present Rules of Procedure.

Rule 120: Method of Suspension

The Commission may suspend temporarily, the application of any Rule of the present Rules of Procedure, on condition that such a suspension shall not be incompatible with any applicable decision of the Commission or the Assembly or with any relevant provision of the Charter and that the proposal shall have been submitted 24 hours in advance. This condition may be set aside if no member opposes it. Such a suspension may take place only with a specific and precise object in view and should be limited to the duration necessary to achieve that aim.

Deliberated and adopted by the Commission at its second session held in Dakar, Senegal, on 13 February 1988.

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