

# The reform and renewal of the African regional human and peoples' rights system

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## 1 Introduction

Every social institution, like every living organism, undergoes changes necessitated either by subjective self-will and initiative or by objective circumstances and pressures lying outside of the social institution or living organism itself. The point is therefore not whether reform or change is desirable. The question to be asked relates to the extent of the change and whether the reform or change embarked upon leads to the renewal and reinvigoration of the institution, or to degeneration and ruin. The Organisation of African Unity<sup>1</sup> (OAU) and its human and peoples' rights system have not remained static since their establishment. However, to date changes within the African human rights system, though significant, remain minimal compared to the current initiative to qualitatively transform the OAU and to re-invent it as the African Union (AU).

This contribution comments briefly on the African Charter on Human and Peoples' Rights<sup>2</sup> (African Charter or Charter) and its institutional mechanisms within the broader context of the African human rights

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<sup>1</sup> Established under the Charter of the Organisation of African Unity (OAU Charter), adopted by the Summit Conference of Independent African States, Addis Ababa, Ethiopia, on 25 May 1963, reprinted in (1963) 2 *International Legal Materials* 766. There were 32 independent African states at the time.

<sup>2</sup> Adopted by the 18th Assembly of the Heads of State and Government of the OAU, Nairobi, Kenya, 26 June 1981; entered into force on 21 October 1986.

system. The unnecessary duplication of enforcement mechanisms is pointed out and the changes within the OAU and its human rights system are reviewed and criticised. A case is made for rationalisation of the various treaties and instruments and the mechanisms for their enforcement. The central argument is for mainstreaming the human rights system within the principal organs of the AU in order to strengthen the system. It is pointed out that to achieve this purpose, a special amendment, by way of a Protocol, to the Constitutive Act of the African Union (Constitutive Act)<sup>3</sup> would be necessary. The failure to mainstream the African human rights system within the OAU partly explains the weaknesses that have been experienced in the implementation and enforcement of the African regional human rights instruments. Failure to anchor the African human rights system as a principal instrument of the newly created AU is likely to reproduce the marginalisation of the collective protection and promotion of human and peoples' rights on the continent.

## 2 Recent developments in the African human rights system

A distinction may be made between the broader African human rights system and the narrower African Charter and the institutional machinery for its implementation and enforcement, the African Commission on Human and Peoples' Rights (African Commission or Commission). The reason for this distinction rests on the fact that there are a number of African regional human and peoples' rights instruments or generalised instruments that incorporate important rights issues but which do not fall directly within the promotion and protection mandates of the Commission.<sup>4</sup> Notable instruments are the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969,<sup>5</sup> the African Convention on the Conservation of Nature and Natural Resources of 1968; the African Charter on the Rights and Welfare of the Child of

<sup>3</sup> Approved in principle by the Declaration on the Establishment of an African Union that was adopted at the 4th extraordinary session of the Assembly of Heads of State and Governments, Sirte, Libya, 9 September 1999. The Constitutive Act of the AU entered into force on 26 May 2001 during the 38th anniversary of the establishment of the OAU. The Constitution of the AU is the Constitutive Act of the African Union adopted by 50 Heads of State and three Heads of Government at Lomé, Togo on 11 July 2000. Morocco was the only independent African state not represented since it suspended its participation in the OAU in 1981 in protest against the OAU's official recognition of the right of the Sahrawi people to self-determination.

<sup>4</sup> Art 45 African Charter.

<sup>5</sup> Adopted on 10 September 1969, entered into force on 20 June 1974, OAU Doc CAB/LEG 24.3.

1990,<sup>6</sup> the Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa of 1991;<sup>7</sup> and the OAU Convention on the Prevention and Combating of Terrorism of 1999.<sup>8</sup>

Even though some aspects of the above instruments have direct bearing on several rights recognised in the African Charter,<sup>9</sup> the present provisions relating to interpretation and application of the African Charter only mandate the Commission to 'draw inspiration from'<sup>10</sup> or 'take into consideration'<sup>11</sup> international law in respect of human and peoples' rights. The position of these regional instruments and other international human rights principles, norms and treaties within the African Charter enforcement mechanism could be enhanced with the entry into force of the Protocol on the Establishment of an African Court on Human and Peoples' Rights (the Court) and its subsequent establishment and operation. There is a jurisdictional anomaly between the mandate of the Commission and that of the Court. Unlike the wording of the African Charter in respect of the Commission's mandate, the Protocol defines the jurisdiction of the Court as follows:

Article 3: Jurisdiction

- (1) The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
- (2) In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 7: Sources of Law

The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.

<sup>6</sup> Adopted in July 1990, entered into force on 29 November 1999, OAU Doc CAB/LEG 153/REV 2. The Children's Charter is reprinted in C Heyns (ed) *Human rights law in Africa 1997* (1999) 38.

<sup>7</sup> Adopted at Bamako, Mali, 29 June 1991, reprinted in (1991) 30 *International Legal Materials* 773.

<sup>8</sup> Adopted by the 35th ordinary session of the Assembly of Heads of State and Government, Algiers, Algeria, 14 July 1999.

<sup>9</sup> For example, the Bamako Convention would greatly invigorate the interpretation of art 24 of the African Charter that provides for the right of all peoples to a general satisfactory environment favourable to their development. Similarly, certain rights and obligations provided for in the OAU Refugee Convention fall within the scope of art 12 of the African Charter that provides for the right to seek and obtain asylum as well as the injunction against non-expulsion of non-nationals. The Refugee Convention is, however, operationalised through the OAU Bureau for Refugees, Displaced Persons and Humanitarian Affairs which hardly connects with the African Charter enforcement regime.

<sup>10</sup> Art 60 African Charter.

<sup>11</sup> Art 61 African Charter.

Observers have commented on some aspects of the more expansive jurisdiction of the Court as compared to that of the Commission.<sup>12</sup> In the interest of greater protection and promotion of human and peoples' rights on the continent, it is my opinion that the relevant provisions in the Charter be revised so as to bring it in line with the positive approach in the Protocol. In other words, the anomaly should not be read to narrow the more recent appreciation and formulation in the Protocol. As Botswana's Appeal Court correctly observed in a case about the significance of ratifying the African Charter, there is a presumption that when states sign or ratify treaties or human rights instruments they signify their intention to be bound by and to adhere to the obligations arising from such treaties or human rights instruments even if they do not enact domestic legislation to effect domestic incorporation.<sup>13</sup> In other words, African states cannot in good faith argue that the regional instruments identified above that do not form part of the African Charter do not bind them or have legal consequences where they are relevant to specific rights and freedoms. To ignore the norms in binding instruments simply because they do not formally form part of the African Charter would be tantamount to renegeing on the obligation to recognise the instruments entered into freely and in good faith.<sup>14</sup>

The duplication of enforcement mechanisms within the African human rights system is rather unfortunate and disturbing. For example, it does not make sense, given the resource constraints in Africa, that an instrument such as the African Charter on the Rights and Welfare of the Child, should have its own enforcement mechanism that duplicates the enforcement mechanism under the African Charter.<sup>15</sup> The rights and freedoms of children, although elaborated and expanded in the special children's charter, can easily be interpreted and enforced through the African Commission, and in future through the African Human Rights Court

<sup>12</sup> J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256 264; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 12 *Human Rights Quarterly* 342; I Osterdahl 'The jurisdiction *ratione materiae* of the African Court on Human and Peoples' Rights: A comparative critique' (1998) 7 *Review of the African Commission on Human and Peoples' Rights* 132 136.

<sup>13</sup> *Attorney-General v Dow* 1994 6 BCLR 1 (Botswana), per Ammisah JP 27-30 and Aguda JA 43-47.

<sup>14</sup> C Anyangwe 'Obligations of the states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625 630.

<sup>15</sup> Art 32 of the Children's Charter establishes an African Committee of Experts on the Rights and Welfare of the Child. The Committee has a promotion and protection mandate similar to that of the African Commission, art 42. The protection mandate includes examining periodic reports by states (art 43) and receiving and determining complaints by individuals and groups as well as interstate complaints (art 44). Note that the complaints are referred to as 'communications' in both the African Charter and the Children's Charter.

as well. Similarly, the enforcement of aspects of the OAU Refugee Convention ought to be connected to the enforcement of the African Charter. Compared to many states in the world, both industrial and underdeveloped, African states are generally considered to be exemplary in the enforcement of international and regional norms and standards applicable to refugees. Despite this, there is limited scope for refugees and asylum seekers to resort to any of the African regional enforcement mechanisms to protect their rights in case of violations or threatened violations.

There have been other notable developments within the OAU and the human rights system in the pre-AU era that call for a thorough re-examination of the African human rights system within the new AU. At the OAU, there was the establishment of the somewhat moribund Mechanism for Conflict Prevention, Management and Resolution in 1993<sup>16</sup> and the formal entry into force on 12 May 1994 of the treaty establishing the African Economic Community (AEC).<sup>17</sup> The African Charter mechanism has also somehow reinvigorated itself by, among others, being sensitive to the need for balanced gender representation on the Commission.<sup>18</sup> From 1987 to the early 1990s, the Commission was composed only of men, many of them having limited appreciation of the disproportionate negative impact of human rights denial and violations on women and female children. This little but significant change was effected in response to strong representation from civil society.<sup>19</sup> The Commission has since moved on and has initiated an important process of reinforcing the African Charter with a Protocol on women's rights.<sup>20</sup> With the intervention of the OAU Secretariat, the

<sup>16</sup> Declaration on the Establishment within the OAU of the Mechanism for Conflict Prevention, Management and Resolution, adopted by the Assembly of the Heads of State and Government of the OAU at the 29th ordinary session in Cairo, Egypt, 28–30 June 1993. On the background to the institution, see BG Ramcharan 'The evolving doctrine of democratic legitimacy' (1998) 60 *Review* 182. For a critical comment on the institution see SBO Gutto 'The new Mechanism of the Organization of African Unity for Conflict Prevention, Management and Resolution, and the controversial concept of humanitarian intervention in international law' (1996) 113 *South African Law Journal* 314 and in (1996) 4 *CODESRIA Bulletin* 15; PM Mwati 'The Organization of African Unity and its role in regional conflict resolution and dispute settlement' (1999) 19 *Boston College Third World Law Journal* 578. See also CJ Bakwe-segeha 'The role of the OAU in conflict prevention, management and resolution' (special issue, 1995) *International Journal of Refugee Law* 207.

<sup>17</sup> Adopted in Abuja, Nigeria, on 3 June 1991, reprinted in (1991) 30 *International Legal Materials* 1241.

<sup>18</sup> In June 2001 the Commission of 11 members is composed of seven men and four women. The women are Julienne Ondziel-Gnelenga (Vice-Chairperson), Florence Butegwa, Jainaba Johm and Vera Chirwa.

<sup>19</sup> EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedure* (1996) 16.

<sup>20</sup> Draft Protocol to the Charter on the Right of Women of Africa adopted by the Commission at its 26th ordinary session held in Kigali, Rwanda, 1–15 November 1999, DOC/OS(XXVI)125.

Commission's Draft Protocol has been embraced by the OAU and has been elaborated and extended.<sup>21</sup>

Another improvement initiated by the Commission involved the revision of its Rules of Procedure in 1995.<sup>22</sup> This enabled the Commission's decisions and recommendations on specific complaints or communications to be published and not hidden in secrecy under the so-called 'confidentiality' clauses in the African Charter<sup>23</sup> and the original Rules of Procedure. Prior to this, the decisions on specific complaints were clouded in secrecy. The quality of the Commission's decisions or 'jurisprudence' improved as a result of the revision of the Rules of Procedure as the commissioners became aware that their work is subject to public scrutiny.<sup>24</sup>

The Commission also interpreted its mandate broadly and progressively by initiating the internationally recognised special rapporteurs mechanism that is not specifically provided for in the African Charter.<sup>25</sup> So far there are the following three Special Rapporteurs:

- the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions (appointed in 1994);<sup>26</sup>
- the Special Rapporteur on Prisons and Conditions of Detention in Africa (appointed in 1996);<sup>27</sup>
- the Special Rapporteur on Women's Rights in Africa (appointed in 1999).<sup>28</sup>

To date, only the Special Rapporteur on Prisons has proved effective, thus underscoring the important principle that the effectiveness of any law or institution is not only dependent on the legal instrumentality and financial resources alone — the expertise and commitment of the people in charge are equally critical. The Commission ought to seriously consider the possibility of appointing independent experts as special rapporteurs, in cases where expertise is lacking within the Commission

<sup>21</sup> See OAU Doc CAB/LEG/66.6 of 13 September 2000, Annex A. The Protocol shall only acquire legal status once it is adopted by a meeting of the Assembly of Heads of State and Government or its successor authority under the AU. For an analysis of the Draft Protocol, see MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40.

<sup>22</sup> At its 18th ordinary session held in Praia, Cape Verde, 12–11 October 1995.

<sup>23</sup> Art 59 African Charter.

<sup>24</sup> The reports on the decisions of the Commission appear in, amongst others, *Review of the African Commission on Human and Peoples' Rights* (established by the Commission in 1991); Institute for Human Rights and Development in Africa, *Compilation of decisions on Communications of the African Commission on Human and Peoples' Rights: Extracts from the Commission's Activity Reports 1994–1999* (2000) and the *International Human Rights Reports* (since 1996).

<sup>25</sup> Art 45 African Charter.

<sup>26</sup> See Eighth Annual Activity Report of the African Commission, Annex VII.

<sup>27</sup> See Tenth Annual Activity Report of the African Commission, Annex VII.

<sup>28</sup> See Eleventh Annual Activity Report of the African Commission.

or in instances where the work involved may be such that the commissioners, who are all part-time, may not have the time to accomplish the complex and protracted visits and inquiries expected of special rapporteurs.

The location of the International Criminal Tribunal for Rwanda<sup>29</sup> in Arusha, Tanzania, and the proposed establishment of the Special International Tribunal in Freetown, Sierra Leone<sup>30</sup>, although not strictly 'African' initiatives, are nonetheless also significant in appreciating the current status of responses to serious and gross violations and denial of human and peoples' rights in Africa. As others have argued, the trials and the resultant jurisprudence of the Rwandan tribunal in Arusha have some radiating effect on the continent.<sup>31</sup> In my opinion these experiences ought to point to the direction as to where Africa should go with the reform and renewal of the African human rights system under the new AU. There is a pool of expertise developing within the continent that could be tapped into to strengthen the regional human rights enforcement mechanisms.

### **3 The case for constitutional mainstreaming of the African human rights system within the AU**

The movement from the OAU to the AU is a historical imperative. The world to which Africa belonged in the early 1960s when the OAU was created was a very different one from the world at the beginning of the twenty-first century. Not only have the objective material conditions of the world been transformed, but subjective factors such as values and the relations among people and nations have also undergone some qualitative change, both positive and negative. The OAU, despite its many weaknesses, failures and challenges, has accomplished some of its original purposes and realised the principles connected with those purposes. For example, one of its purposes was 'to eradicate all forms of colonialism from Africa'.<sup>32</sup> This was informed by the principle of absolute

<sup>29</sup> Established under the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, UN SC Res 955 of 8 November 1994.

<sup>30</sup> Special Court for Sierra Leone, UN SC Res 1315(2000) of 14 August 2000. See background analysis and critique of the political process of establishing the Court in A Tejan-Cole 'The special court for Sierra Leone: Conceptual concerns and alternatives' (2001) 1 *African Human Rights Law Journal* 107; A Tejan-Cole 'Painful peace: Amnesty under the Lome Peace Agreement on Sierra Leone' (2000) 9 *Review of the African Commission on Human and Peoples' Rights* 238.

<sup>31</sup> F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 18 32.

<sup>32</sup> Art II(d) OAU Charter.

dedication to the total emancipation of African territories which were still dependent.<sup>33</sup> In fact, the particular purpose and principle in question were elevated to the status of peoples' rights and the obligation of the independent states in the African Charter.<sup>34</sup> If 'colonialism' is to be interpreted to mean classical colonialism by European states and European settler population it can be said today that this task is formally accomplished, save for the few small islands in the Indian and Atlantic oceans that are adjacent to the African continent and which could form the basis for legitimate African claims.

The rest of the original purposes and the principles informing them were, and remain, long-term or even eternal objectives and challenges. Forging unity and solidarity among African states and peoples,<sup>35</sup> intensifying co-operation and achieving better life for the peoples of Africa,<sup>36</sup> defending sovereignty and territorial integrity and independence<sup>37</sup> and promoting international co-operation, having due regard to the Charter of the United Nations (UN) and the Universal Declaration of Human Rights,<sup>38</sup> are all continuing and continuous objectives and challenges. And, naturally, there are additional new challenges that could not have been anticipated in the early 1960s.

The OAU grappled with the challenge of creating a viable regional economic and social institution that could have complemented the faltering sub-regional political and economic arrangements on the continent.<sup>39</sup> Although on paper the AEC was realised when its Constitution theoretically 'entered into force' as far back as 12 May 1994,<sup>40</sup> the AEC has not existed in practice. It is therefore important to appreciate the fact that the new AU is not a sudden invention by some so-called 'maverick' African leaders but rather a culmination of long-term efforts by all African countries to link the living-but-not-very-healthy OAU with the existing-on-paper-only AEC,<sup>41</sup> with a view to creating a new single organic institution that is relevant to current challenges faced by Africa.

<sup>33</sup> Art III(6) OAU Charter.

<sup>34</sup> Art 20 African Charter.

<sup>35</sup> Art II(a) OAU Charter.

<sup>36</sup> Art II(b) OAU Charter.

<sup>37</sup> Art II(c) OAU Charter.

<sup>38</sup> Art II(e) OAU Charter.

<sup>39</sup> Such as the Economic Community of West African States (ECOWAS), the revived East African Community (EAC), the Southern African Development Community (SADC), the Common Market for Eastern, Central and Southern Africa (COMESA).

<sup>40</sup> n 17 above.

<sup>41</sup> Some commentators have dubbed the AEC and its organs such as the African Court of Justice 'stillborn'. See J Oloka-Onyango 'Gender and conflict in contemporary Africa: Engendering the mechanism for the promotion of human rights and conflict prevention' (2000) 9 *Review of the African Commission on Human and Peoples' Rights* 1 12.

Notwithstanding the laudable efforts made so far to construct the AU as an integrated political, economic, social, cultural and legal institution capable of pushing African interests and agenda within the increasingly hostile world, it is more than apparent that there has been little thinking in the direction of mainstreaming the human rights system into the new entity. The African human rights system, especially its central instrument, the African Charter and its operational institutions, developed incrementally over the decades as subsidiary organs of the OAU. No specific constitutional changes to the OAU Charter were effected by way of amending protocols. This meant that the African human rights system remained organically linked to and operated within the framework of the OAU without necessarily becoming principal organs of the OAU. By analogy to the constitutional arrangements of and around the UN, it could be said that the African human rights system fell within the 'subsidiary organs'<sup>42</sup> and not the 'principal organs'.<sup>43</sup>

It is quite evident from the Constitutive Act of the African Union that the principal organs of the OAU and the AEC are directly incorporated, even though with some necessary adjustments, while the institutions within the African human rights system are not. The following nine principal organs of the AU are entrenched within the Constitutive Act:<sup>44</sup>

- the Assembly of the Union;
- the Executive Council;
- the Pan-African Parliament;
- the Court of Justice;
- the Commission;<sup>45</sup>
- the Permanent Representatives Committee;
- the Specialised Technical Committees;
- the Economic, Social and Cultural Council; and
- the Financial Institutions.

The provisions establishing the above enumerated organs are followed by a general provision for '[o]ther organs that the Assembly may decide to establish', in other words subsidiary bodies.

When the UN succeeded and superceded the League of Nations, the statute of the previous Permanent Court of International Justice was expressly incorporated as an integral part of the UN Charter and was annexed to the UN Charter.<sup>46</sup> This direct approach to incorporation, also replicated in the incorporation of the International Trusteeship

<sup>42</sup> Art 7(2) UN Charter.

<sup>43</sup> Art 7(1) UN Charter.

<sup>44</sup> Arts 5, 6, 10, 14, 17, 18, 19, 20, 21 & 22.

<sup>45</sup> The 'Commission' contemplated in the Constitutive Act is the Secretariat of the Union (arts 1 & 20), the successor to the OAU's Secretariat, not the African Commission on Human and Peoples' Rights.

<sup>46</sup> Arts 7(1) & 92-96 UN Charter and art 1 Statute of the ICJ.

System and the Trusteeship Council,<sup>47</sup> created legal, institutional and operational certainty that ought to be emulated with regards to the AHPRS in the construction of the nascent AU.

It is appropriate, but not sufficient, to make reference to the African human rights system in the 'Objectives'<sup>48</sup> and the 'Principles'<sup>49</sup> sections of the Constitutive Act. Such reference ought to be followed by the concrete incorporation of the African human rights system, especially its principal instruments and operational organs, within the AU's constitutional framework. Failure to do so has left the system within the ambit of the general category of 'other organs that the Assembly may decide to establish'. The African Commission has experienced many problems, including a lack of meaningful resourcing, especially financial and administrative support from the OAU. This is partly because it was viewed to be subsidiary to the principal mission of the OAU. Africa should not repeat this mistake.

#### 4 Conclusion

The African human and peoples' rights system is broader than the African Charter system. The various regional human rights instruments or regional instruments incorporating provisions relevant to the promotion and protection of human and peoples' rights on the Africa continent have unfortunately not been invoked with a view to strengthening African initiatives in responding to denial and violations of human and peoples' rights in Africa. This is despite the fact that the African Charter is one of the most comprehensive international and regional human rights instruments covering civil, political, social, economic and cultural rights. The envisaged establishment of an African Court on Human and Peoples' Rights with a broader mandate than that of the African Commission will reach out to other international and regional human rights instruments. This is a welcome development.

As Africa moves from the OAU to the AU, a historic and golden opportunity is being missed — the opportunity to incorporate the African human rights system within the principal constitutional organs of the new AU. Before the AU becomes a living reality with entrenched traditions, it is suggested that the African human rights system be mainstreamed within the AU's constitutional structure. This could be done by way of a protocol that would be similar to the way in which the International Court of Justice and the trusteeship system and Trusteeship Council were incorporated within the UN in 1945.

<sup>47</sup> Arts 7(1), 75–85 & 86–91.

<sup>48</sup> Arts 3(e) & (h).

<sup>49</sup> Arts 4(l)–(o).