



The African Union and Its Radical Stance Towards Human Rights and Democracy

By

Tobias Thobani Msimang

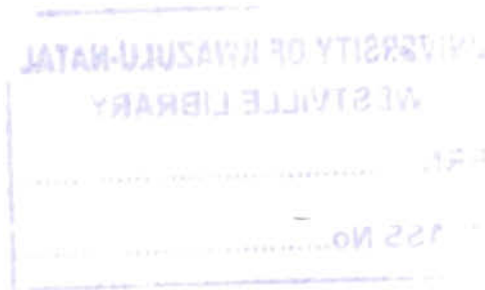
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Supervisor: Prof. J Mubangizi

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Dedication

This thesis is dedicated to my grandparents Mr. Bhanoyi Msimang (late) and his two beautiful wives Mrs. Zikhiphile Msimang and Mrs. Bester Msimang.



Declaration

I, Tobias Thobani Msimang, registration 9404367, hereby declare that the dissertation entitled '**The African Union and Its Radical Stance Towards Human Rights and Democracy**' is the result of my own investigation and research, and it has not been submitted in part or full for any other degree or to any other university.

Signature

Date

Acknowledgements

I like the old Zulu proverb, *'Umntu ungumntu ngabantu'*, because it hits the nail right on the spot in respect of human natural dependence on each other for survival. The first President of the democratic Republic of South Africa has used this proverb a couple of times in his famous reconciliatory speeches, meaning: *'we are humans only through the humanity of other people'*. This proverb is in agreement with the word of God in the Book of Philippians 2: 3 – 4: *'don't be jealous or proud, but be humble and consider others more important than yourselves. Let each of you look out not only for his own interests, but also for the interests of others.'* I therefore wish to acknowledge the contributions and true humility of individuals that made this work a success.

In no particular order, my humble thanks go to the following people for their varying contributions during the course of this study:

- First and foremost, all praises must go to the Lord for giving me courage, strength and wisdom to push this precious piece of work to the bitter end;
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Summary

Any research that attempts to tackle the issue of human rights in Africa is likely to raise emotions because of the history of perpetual human rights violations in the region. Nevertheless, the establishment of the African Union (AU) brings hope that Africa has turned the corner. The provisions of the preamble, objectives and principles of the Constitutive Act of the African Union are crystal clear. Article 3 (h) of the Act makes a critical provision in terms of human and people's rights. (See appendix 1). Paradoxically, this article recognizes the African Charter on Human and Peoples' Rights, which led to innumerable inconsistencies in enforcing human rights under the Organization of African Unity (OAU) (See appendix 2).

By implication, the recognition of the 'Charter' justifies its existence in the new African human rights set up. The 'Charter' historically introduced the concept of peoples' in the definition and application of human rights in the African region. This further complicated the concept of human rights, and made it difficult to enforce them. As a result, the dichotomy between human rights and peoples' rights practice in the African region became difficult to reconcile. Hence, the concepts became vulnerable to abuse by governments, who justified their violation of individual human rights for the benefit of peoples' rights.

The above assertions hold true for the ailing African region that has evolved from a defunct OAU regime into the radical African Union human rights corpus. The dissolution of the OAU on 9 July 2002 during the last 38th ordinary session of the OAU Assembly in Durban, and the subsequent launching of the AU on the same occasion pioneered a new era for human and peoples' rights approach in the African region. The shift from the toothless-human-rights-system to a clear-visionary-human-rights-regime is an articulation of the desire and commitment to transform the African region.

This study therefore reviews the pattern or system that the AU has employed in transforming human and peoples' rights in the African continent. Chapter two attempts to assess the prospects of the African Union to bring reforms in areas of human and peoples' rights, the rule of law, good governance and so on. A comparative analysis of the African Charter on Human and Peoples' Rights and the Constitutive Act of the African Union is drawn from the key clauses, objectives and intentions of the two human rights regimes.

Chapter three presents an analytical comparison between the African Union and the European Union. The chapter documents the historical developments of the European Union to illustrate how far the African Union has to go to ensure long lasting peace and stability in the region. The discussion in this chapter acknowledges the differences in these two regions, but uses the European Union to draw some lessons. In so doing the study reviews the historical developments of the union of states that has advanced itself in critical areas of democracy, human rights, good governance and so on.

Hence, the chapter recognizes the remarkable accomplishments of the African Union in the last five years. The parity of judges in the AU Commission, the commitment of 53 African nations to adopt and ratify the Constitutive Act of the African Union in record time, the establishment of the New Partnership for Africa's Development, the introduction of the African Peer Review Mechanism and the peace-keeping missions in Liberia, Democratic Republic of Congo and so on are among the achievements of the Union in the last few years of its existence.

In an attempt to justify the radical shift of the African Union from the OAU past, chapter four discusses the establishment of the African Court on Human and Peoples' Rights. Even though the idea of establishing a Court of justice emanated from the OAU decades after its existence, the chapter acknowledges the radical stance of the African Union to put in place a 'Court' from the

beginning. The chapter further looks at the structure of the 'Court' in terms of its composition and election of judges, court procedure, court judgments and their execution and its relationship with the African Commission.

In making recommendations and drawing conclusions, chapter five makes a strong point that the pre-requisite for stability and prosperity in the African region is through transforming and consolidating national institutions into democracy. The chapter also acknowledges the continued existence of the African Charter on Human and Peoples' Rights, but raises a concern that its existence is subject to abuse by non-democratic governments. The chapter concludes the study by drawing an inference that indeed the African Union represents a radical shift from the OAU in terms of promoting and protecting human and peoples' rights. However, the study acknowledges that the African Union will take some time to fully bear the benefits, but its efforts so far are worth the accolades.

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The African Union and Its Radical Stance Towards Human Rights and Democracy

Chapter One Introduction and Background

1.1 Introduction

The birth of the African Union (AU) replacing the heavily criticized Organization of African Unity (OAU), and its well-publicized launch in July 2002, at Durban, South Africa, set a positive yet cautious direction for the African regional human rights system. The birth of the African Union should be seen in conjunction with the launch of the 'New African Initiative' and the operationalisation of the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) initiative.¹ The African Union is the new regional institution for economic and political coordination for the 53 African nations excluding Morocco.

The African Union was conceptualized and formed in order to replace the OAU that represented the old leadership and obsolete governance values in the African region. The AU provides a new vision, and seeks to enhance the good intentions of the OAU. It represents change and progress in critical areas of democracy, governance, human rights, the rule of law and justice for all the people of Africa.

The AU's mechanisms and structures are more persuasive than any other previous African regional human rights system, and its archetype possesses some commercial logic, for example, the establishment of the economic wing called the New Partnership for Africa's Development (NEPAD) and the introduction of the Peer Review Mechanism to monitor progress in speeding up transformation among member states.

¹ See Background on the African Union and the New African Initiative, 19 July 2001 at <http://www.dfa.gov.za/events/auback.htm>:

This study attempts to review the implementation mechanisms of the African Union in terms of promoting and protecting human rights, as well as entrenching democratic values in the African region. The study makes an attempt to assess the commitment of African states to ensure progress in achieving the AU's imperative functions. The spectacle of adoption, and hasty ratification of the Constitutive Act of the African Union is also evaluated against the need to correct Africa's governance deficiencies and ambiguity in honoring regional agreements.

The study also reflects on the historical operations of the OAU vis-à-vis the new ideology of the African Union. It asks some critical questions about multilateral organizations, membership in such organizations and their effectiveness in achieving their broad intentions. In particular, more emphasis is put on the African regional multilateral organizations, such as the African Union, the Organization of African Unity, Economic Community Of West African States (ECOWAS), Southern African Development Community (SADC), and so on. The study also reviews the historical and structural development of the European Union (EU), which is regarded as one of the most organized Unions of states in the world.

1.2 The New Partnership for Africa's Development (NEPAD)

At the center of the African Union lies the most progressive commerce-driven initiative, NEPAD. NEPAD is an African innovation practically designed to support the vision and goals of the African Union. The New Partnership for Africa's Development is an economic development programme of the African Union. NEPAD was adopted at the 37th session of the Assembly of Heads of State and Government in July 2001 in Lusaka, Zambia.² It is meant to develop values and monitor their implementation within the framework of the African Union.³ It is a progressive action plan to address critical issues relating to

² See The New Partnership for Africa's Development at <http://www.wikipedia.org/wiki/NEPAD>

³ Ibid

democracy, human rights, governance, development and cooperation, peace and security.⁴ It is an undertaking by African leaders based on common values to reverse the ills of colonialism and its post-colonial shames.

NEPAD is an engine driving the success of the African Union. It might determine the success or failures of the AU in the long term. It holds out the hope of a radical development and relationship with its international partners on the basis of a clear commitment to good governance. This initiative deserves some accolades because it is the first practical institution of its kind in the region. Its motives and objectives are acceptable by any measurable standards.

NEPAD sets a platform not only for states to participate in reconstructing Africa, but also for business and individuals to come on board to make their contributions in building Africa's wealth. It is unique in various ways, as it shifts away from previous initiatives that relied heavily on the phantom wording of the Banjul Charter. It allows its international mentors such as the EU to play a meaningful role in pursuing its goals. It must be stressed that NEPAD, as a means to an end, cannot be divorced from human rights and democratic issues. In other words, the success of NEPAD depends on building strong democracies that can compete favorably in the world economy. African leaders have made a perfect start that puts ordinary people on par with international developments.

The main initiators of NEPAD, such as South Africa, contest that it is a more effective institution for increasing prosperity in the region.⁵ Clearly, the intention of NEPAD is to create a more radical instrument that can withstand the 21st century challenges of Africa. The African Union and NEPAD come at an opportune time when Africa needs some divine intervention to curb wars, poverty, HIV/AIDS and deteriorating political structures. It mushrooms as a

⁴ See Department of Foreign Affairs (RSA), *Basic Information: Birth of the African Union and the New Partnership for Africa's Development*, October 2001.

⁵ See Steinberg, A. *Background Paper on African Union*, October 24, 2001

homemade initiative, which seeks to entrench respect for human rights, democracy, and to improve economic cooperation.

The main objective of NEPAD is to harmonize the economic and political environment of all African nations in order to improve pan-African welfare, and provide Africans with a solid voice in international affairs.⁶ While this objective is achievable, it is not effortless under the unstable political conditions of Africa. The political scene among member states is volatile. Hence, there is a serious threat of abject poverty and the scourge of HIV and AIDS.

Clearly, there is no way in which such threats could be separated from the overall intentions of NEPAD. The question of propagating respect for human rights, democratic values, rule of law, and so on, cannot be achieved in solitude. As a building block, the bold awareness to democratization and insistence on respect for human rights portrays an organization going forward. However, its functions will transcend its horizon to address bread and butter issues in the region. NEPAD therefore has an important role to play in shaping the commercial side of Africa.

1.3 The difference between the African Union and the OAU

The African Union is a successor to the Organization of African Unity that had the mandate to unite Africans, and was empowered to route out colonialism in Africa. The OAU was established on 25 May 1963 in Addis Ababa, on signature of the OAU Charter by representatives of 32 governments.⁷ More African states joined gradually over the years, with South Africa becoming the 53rd member on 23 May 1994.⁸ At the time, the establishment of the OAU was critical to formulate a regional mechanism that would seek to unite and direct all African initiatives.

⁶ Ibid

⁷ See the New Partnership for Africa's Development at http://www.nepad.org.ng/PDF/about%20nepad/oau_aupdf

⁸ Ibid

The biggest challenge, at the time, was fighting the oppressive imperialists that had ruled Africa for over 300 years. The preamble to the African Charter on Human and Peoples' Rights, entered into force on 21 October 1986, suggests broader intentions of the OAU, but it carelessly puts more emphasis on the then burning issues that were critical at the time, such as the sovereignty of African states, their territorial integrity, their independence, and anti-colonialism.

The Organization of African Unity was structured to accommodate the establishment of enforcement institutions. The African Commission on Human and Peoples' Rights was established in 1987.⁹ It was an enforcement mechanism established under the African Charter on Human and Peoples' Rights. The African Commission was created to promote and protect rights in the African Charter, to engage in conflict resolution and to investigate violations of human and peoples' rights.¹⁰ The Commission and other structures did not achieve much in this regard. Its structure failed to enable it to perform the mandate of promoting and safeguarding human rights in member states. The "claw-back clauses" of the Banjul Charter exacerbated the situation. For example, article 14 of the Charter guarantees the right of individuals to property, but reneges to allow aggressors of international law to break international rules on expropriation of property. In terms of article 14, the right to property may 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 African Union is a different organization. Its objectives are different and more comprehensive than those of the OAU.¹¹ Its formal structure consists of the General Assembly, the Executive Council, the Pan-African Parliament, the Court

⁹ See Protocol to the Establishment of the African Commission on Human and Peoples' Rights, 1987: <http://www.achpr.org/index.html>

¹⁰ Ibid

¹¹ Ibid

of Justice, the Commission, the Permanent Representatives Committee, the Economic, Social and Cultural Council and the financial institutions. The Constitutive Act of the AU is more concrete, firm and cohesive on its principles than the Banjul Charter. There is a visible synergy between the institutions of the African Union and its Constitutive Act.

However, the artistic selection of words in creating the Constitutive Act should not be misinterpreted and confused with prosperity or success. This might not determine the effectiveness of the African Union. Kofi Annan contends that it is not the smartly worded constitutions that matter but the decision-making mechanisms and their ability to bind Member States on the vision.¹² The Banjul Charter fell into this trap and failed to deliver on its mandate. The African Union will arguably have the “teeth” that the OAU lacked, including the power to create a common African Parliament, a Central Bank, a common African currency and an African Court of Justice.¹³

Further, the African Union will have the authority and ability to achieve economic and political integration among member states, as well as work towards a common defense, foreign and communications policy: national boundaries will be blurred, armies merged, and a single passport introduced.¹⁴

The objectives of the African Union, as contained in the Constitutive Act, are to:

- a. Achieve greater unity and solidarity between the African countries and the peoples of Africa;
- b. Defend the sovereignty, territorial integrity and independence of its Member States;
- c. Accelerate the political and socio-economic integration of the continent;
- d. Promote and defend African common positions on issues of interest to the continent and its peoples;

¹² See A club full of dictators, *Sunday Times*, 25 May 2003

¹³ See Steinberg, A. Background Paper on African Union, October 24, 2001

¹⁴ Ibid

- e. Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;
- f. Promote peace, security, and stability on the continent;
- g. Promote democratic principles and institutions, popular participation and good governance;
- h. Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
- i. Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
- j. Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;
- k. Promote cooperation in all fields of human activity to raise the living standards of African peoples;
- l. Coordinate and harmonize policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
- m. Advance the development of the continent by promoting research in all fields, in particular in science and technology;
- n. Work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent¹⁵.

The Constitutive Act of the African Union replaces the Charter of the OAU, which was heavily criticized for failing to discipline its delinquent Member States. The Banjul Charter has not been thrown into the sea. It shall controversially remain operative for a transitional period of one year from the AU launch or such further period as may be determined by the Assembly. While the Charter did not have much to celebrate in the context of human rights and democracy, the African Union must build on the limited successes of the OAU. The African Union takes over the spear from an institution, which did reasonably well to unify the region, but, on the other hand, failed to live up to its expectations in respect of human rights. The Apartheid system, in South Africa, is among the few obstacles that were dismantled by the previous institution. Civil wars in Burundi, Liberia,

¹⁵ See Appendix 1.

Democratic Republic of Congo; massacres in Rwanda; political turmoil in Zimbabwe, to mention but a few, reflect countless failures of the OAU.

Unlike the OAU, the African Union is expected to show a sense of urgency in finding solutions to African problems. The African Union inherits the OAU membership and its problems in all imaginable respects. It inherits dictatorial leadership, poverty, diseases and dysfunctional structures of human rights instruments. The African Union is expected to be well orchestrated in order to democratize the African region, and to succeed in its intentions to quickly deal with some of its problems. It is predestined to be better funded through its Central Bank and international donors. The vision is to create a self-sufficient institution that is capable of sustaining itself.

It suffices for this study to make a claim that respect for human rights and 'governing for the people by the people' are prerequisites for accepting AU membership. While this claim was secondary in the OAU set up, the new breed of thinking makes it difficult to achieve any of its objectives if Member States are not compliant with the international trends in governance. Significantly, the African Union is crystal clear about its broad intentions, how these are to be implemented and the individual roles to be played by member states. The preamble to the Constitutive Act of the African Union, as agreed by Heads of State of all consenting countries, makes a remarkable commitment to peace, prosperity, respect for human rights and democracy.¹⁶ This assertion correctly dictates terms and conditions for participation in the AU.

1.4 Economic Disparities and Inequalities

It is sensible to be cautious about not overstating the prospects of the African Union considering the current political and economic status of its member states. While the goal of more effective continental unity is widely accepted, economic

¹⁶ See Appendix 1.

and political disparities among African states are so huge that a fair balance of bargaining power and economic engagements is not possible. This condition has resulted in innumerable wars and other political instabilities in the African region. As Von Clausewitz pointed out, war is a continuation of politics through additional means.¹⁷

There is huge economic gap between those few rich and poor majority African states with small economies. The GNP of 15% of the richest countries amounts to 80% of the total world figure, while that of 20% of the poorest countries is only about 2%.¹⁸ There are countries where the GNP is decreasing, especially in Africa.¹⁹ This is not a healthy condition for any region that hopes to curb wars and famine. Some analysts claim that there exists a direct correlation between the lines of disparity and exploding conflicts.

While other factors have contributed to political instabilities in the African region, there is a link between economic status and conflicts in warring African states. Clashes of interest in various African states, such as Liberia, Angola, Sierra Leone, Democratic Republic of Congo, Burundi, Rwanda and so on, are perpetuated largely by diamonds, economic dominance of one group, land claims and other factors. The fighting in the Congo, for example, has an in-built connection to the uranium assets, which are prime resources for West Africa. This complicates any efforts to bring stability in strategic sub-regions of Africa.

The Southern African Development Community (SADC) has not covered too much ground in its objectives to loosen trade barriers in the region partly because of the economic gap between Member States. This ambition is widely acceptable in the region, but to put this in practice is not easy because of huge disparities in sub-regional economies. SADC Member States have continuously

¹⁷ See Nikitin, A, Background Paper Working Group 2: Political and Economic Causes of War, 50th Pugwash Conference on Science and World Affairs: "Eliminating The Causes of War", Queens College, Cambridge, 3-8 August 2000..

¹⁸ Ibid.

¹⁹ Ibid.

attempted to implement economic reforms aimed at achieving both macro-economic stability and putting their economies on a high sustainable growth path.²⁰ Consequently, the region achieved a positive weighted GDP growth rate of 1.4 per cent in 1999 compared with 1.2 per cent in 1998.²¹ This growth rate is however still below the average population growth rate in the SADC region.

There are traditional political schools of thought that consider conflicts or clashes of interests as being unnecessary exceptions from other harmonious surroundings. At the same time, modern political science rather recognizes conflicts of interest in the political “universe” as inevitable and even natural.²² In the light of socio-political conditions in the African region, it is imperative for this study to assess whether the African Union will have the necessary muscle to harmonise economic and political disparities in order to wrestle subsequent conflicts in the region.

1.5 The African Regional Economic Communities

Long before the establishment of the Organization of African Unity, African leaders had recognized that cooperation and integration among African countries in the economic, social and cultural fields were indispensable to the accelerated transformation and sustained development of the African continent.²³ Since the early 1960s, member states were encouraged to combine their economies into sub-regional markets that would ultimately form one Africa-wide economic union.²⁴ In 1980, the OAU’s Extraordinary Summit adopted the Lagos Plan of Action as a major step towards the goal of integration.

²⁰ See the Southern African Development Community at <http://www.polity.org> <http://www.polity.org.za/html>

²¹ Ibid.

²² Alexander Nikitin (4), contends that conflict of interest are unavoidable because they proceed from and reflect differences in social positions, roles, power, capabilities, and characteristics of political actors

²³ See Organization of African Unity at <http://www.dfa.gov.za/for-relations/multilateral/oau.htm>

²⁴ Ibid.

Subsequently, the commitments in this plan and the Final Act of Lagos were translated into concrete form in Abuja, Nigeria in June 1991 when the Heads of State and Government signed the treaty establishing the African Economic Community (AEC).²⁵ Like other regional blocs, the Abuja Treaty's aim was to promote economic, social and cultural development as well as African economic integration in order to increase self-sufficiency and endogenous development and to create a framework for development. This initiative did not enjoy much progress in its ambitions partly due to governance breakdown in OAU leadership.

The New Initiative for Africa's Development embraces the integration of the activities of the regional economic communities. The regional economic communities are regarded as the building blocks of the African Union. They are well positioned to carry out and implement the mandate of the African Union and its action plans. There are five sub-regional economic communities in Africa, namely, the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), the Common Market of Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS) and the Arab Maghreb Union (AMU). It is evident in the African Union objectives that the question of cooperation is necessary for joint economic growth and political maturity at the regional level.

By and large, current governance structures in the sub-regional blocs are dysfunctional. This is extrapolated from the current political instabilities in these regions. Despite the visible existence of sub-regional instruments, Member States are highly unstable and conflict ridden. Some Member States are involved in instigating or are drawn into costly wars in their respective sub-regions. The intention of the African Union is to promote strong sub-regional blocs, which will be empowered to respond to sub-regional crises. The political turmoil in Côte d'Ivoire presents a typical crisis in various sub-regions of Africa.

²⁵ Ibid.

According to the Human Rights Watch:

“The crisis in Côte d’Ivoire has highlighted the ever-increasing fragility of the West African sub-region. The eight months of armed conflict in Côte d’Ivoire, and in particular, the patterns of human rights abuses in the western part of the country, are a renewed reminder of the need to address the underlying causes of an ever-shifting regional crisis. While the conflict in Côte d’Ivoire has clear internal origins, the evolution of the conflict underlines the extent to which the states of the region are interlinked.”²⁶

The above sentiments illustrate the significance of building strong sub-regional groups to tackle interstate conflicts. While mainly internal forces spur Cote d’ Ivory’s war, it has attracted external regional dynamics, with Liberia, Burkina Faso and Guinea playing roles in its evolution and sharing some responsibility for the increasing overlap with the Liberian conflict. The African Union by its very nature condemns such instabilities in the region, but the influence of ECOWAS in condemning human rights abuses surpasses any other external intervention.

The study attempts to look beyond the good intentions of strengthening the sub-regional economic communities, but also to review governance structures of sub-regional blocs in creating conditions of democracy and respect for the rule of law and promotion of human and peoples’ rights. How effective are sub-regional blocs in the African region? Can they really make a visible contribution to the African Union’s mission?

1.6 Promoting Democratic Values in the African Region

From the inception of the OAU, Africa had neither embarked on nor invested its efforts to promoting democratic values. The Organization of African Unity has been reluctant to condemn human rights abuses by its Member States. There were various reasons that perpetuated this dubious behavior. Firstly, the foundation of sub-regional blocs lacked political coordination from the OAU. These blocs had their own agendas that were more sub-regional and divorced

²⁶ See Human Rights Watch Publications: The Regional and International Response at <http://www.hrw.org/reports/2003/cotedivoire/htm>

from the OAU principles. Secondly, the political conquerors of colonialism were correctly extolled as heroes of the struggle for change. Indeed, the change of political rulers in many African states was well orchestrated. However, the change of rulers meant little or nothing at all in respect of human rights. In contrast, this turned out to be disastrous as freedom fighters turned martyrs and oppressors of their own fellow Africans.

The so-called heroes of the struggle abused their heroism to cling to power for as long as they possibly could. The Organization of African Unity could not help the situation. The OAU simply ignored human rights abuses by these unsung heroes. Political opponents were executed for challenging repressive governments. Those who questioned the system were blackmailed as remnants of colonialism, and were killed. Ken Saro-Wiwa was among many political activists who were killed for challenging governments.

This weakness is likely to dominate the political circles in the African Union. There is no consensus in moving away from the post-colonial leadership style to the Mandela type of shared governance. While the ratification of the protocol establishing the AU is remarkable and record-breaking, the African Union continues to house governments that show no regard for human rights and democracy. Like the OAU, the African Union embraces governments irrespective of their dubious human rights records.

The Peer Review Mechanism of the African Union does not provide comprehensible solutions to the problem. Critics of the new grouping of African states noted that a much-publicised "Peer Review Mechanism" has failed to address the crisis in Zimbabwe. Robert Mugabe's regime has defied international pressure to halt human rights abuses and re-establish the rule of law.²⁷ 'The problem with the Peer Review Mechanism is that it is voluntary,' South Africa-based rights activist Louis Livingston told IPS." Nations have to sign a declaration

²⁷ See The Peer Review Mechanism at <http://www.africa.no/detailed>

supporting democracy, and throw themselves open to annual inspections by AU monitors. Dictators and un-elected governments will not gladly volunteer, and invite criticism of themselves.²⁸

This study examines the peer review mechanism of the African Union in terms of addressing human rights issues and promoting democratic values. The idea of creating a peer review mechanism is highly controversial though it forms an essential element of NEPAD. Current governance practices suggest that most governments will be reluctant to embrace the peer review mechanism. With the exception of South Africa, most governance structures in the region are dysfunctional and undemocratic.

1.7 Transition from OAU to AU

According to Amara Essy, outgoing Chairperson of the African Union, the transition process is not complete yet.²⁹ The highlight of the 2000 OAU/AEC Assembly of Heads of State and Government in Lomé, Togo was the adoption of the Constitutive Act of the African Union, in terms of the Sirte Declaration of 9 September 1999.³⁰

Following this event, a decision declaring the establishment of the African Union, based on the unanimous will of Member States was adopted by the 5th Extraordinary OAU/AEC Summit held in Sirte, Libya from 1 to 2 March 2001. In the decision, Heads of State and Government specified that the legal requirements for the Union would have been completed upon the deposit of the 36th instrument of ratification of the Constitutive Act of the African Union.³¹

²⁸ Ibid

²⁹ See *New African* Publication, Article: African Union so far, so good, August/September 2003, no. 421.

³⁰ See Department of Foreign Affairs, Republic of South Africa, May 2002, Article: Transition from the OAU to the African Union.

³¹ Ibid

South Africa deposited its instrument of ratification of the Constitutive Act of the African Union on 23 April 2001 with the OAU General Secretariat and became the 35th Member State to do so. South Africa's ratification as one of these 36 member states means that it is a founding member of the African Union. On 26 April 2001 Nigeria became the 36th Member State to deposit its instrument of ratification. This concluded the two-thirds requirement and the Act entered into force on the 26th of May 2001.

Of crucial importance in the establishment of the organs of the Union is the challenge to move away from the overtly state-centric character of the OAU and its concomitant lack of civil participation. The cooperation of African NGO's, civil societies, labour unions, and business organizations were perceived to be essential to the process of cooperation and implementation of the Abuja Treaty, as was expressed in the *Ouagadougou Declaration* and provided for in the *Sirte Declaration*.³²

During the Lusaka Summit several references were made to the African Union being loosely based on the European Union model, in which respect it was said that Africa 'should not re-invent the wheel'. However, it was agreed that the African Union should be something new, with the emphasis on being an African experience. Whereas the OAU was in principle a political organization that also discussed matters of economic and social concern, the African Union should be an organization aimed at economic integration and social development, which should lead to political unity.

³² Ibid

On paper, the Constitutive Act of the African Union presents a different face, which is more progressive and ambitious. Progressively, the AU will have a peacekeeping force,³³ whereas the OAU put more emphasis on respect for sovereignty among member states.³⁴ Moreover, the AU has adopted NEPAD as an engine for its success. NEPAD pledges improved economic and political governance for the people of Africa. NEPAD as a programme of action is an affirmative indication that the AU is driven by progress rather than being a token body which serves to entrench the individual interests of a few politicians.

In practical terms, the African Union began its operations on a very low morale. Its transition was characterized by mediocre responses to crunching issues which continued to cloud the continent. The African Union has been dragging its feet on key issues facing the region concerning human rights and respect for the rule of law. Zimbabwe's political turmoil is a typical example of the backtracking and the indecisiveness of African human rights instruments emanating from the OAU. For some reason, human rights violations in Zimbabwe have not attracted the attention of the African Union.

This raises some critical questions and challenges for the African Union. Is it premature to expect miracles from the African Union? Would it be justifiable to quickly conclude that the AU is a replica of the OAU without looking at the conditions within which it operates? Of course, the African Union has a challenge to deal with these perceptions. It has a responsibility to quickly show that it is different from its predecessor body. However, its biggest challenge is to set the record straight for those members who undermine the main purpose of the union.

Surprisingly, the chairperson of the AU, Mr. Thabo Mbeki, admitted at the first All-African Editors Conference in Midrand, South Africa, on 13 April 2003, that, twelve months down the line, the AU has not taken a stance and has never

³³ See Constitutive Act of the African Union, Done at Lome' Togo, 11th July 2000.

³⁴ See African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986:

discussed the issue of Zimbabwe.³⁵ Mbeki was responding to a question by African journalists on why he could not as AU president express himself more forcefully towards his Zimbabwean counterpart. This attitude puts in question the commitment of African leaders to reprimand other African leaders who transgress human rights in their own countries.

While it might sound justifiable for South Africa, for example, to let the Zimbabweans decide their political fate, it is unacceptable for South Africa, fresh from the Apartheid regime, to turn a blind eye on the Zimbabweans. Whether President Mugabe's expropriation of white-owned land is conducted in the best interest of the public or not, the fact of the matter is that best international practices on the expropriation of property under international law must be observed. Zimbabwe as a strategic member of the African Union poses a serious threat to the credibility of the organization. This also entrenches cynical views that AU is "the same old animal in new clothing".³⁶ Not surprisingly, the African Union has a responsibility to prove its critics wrong that it is different from the OAU, and that it is willing to punish aggressive governments.

On a positive light, due credit must be given to the African Union, without prevarication, for its commitment to peace and stability in the Democratic Republic of Congo (DRC), Burundi, Lesotho, Liberia and a few other war torn states. This is an indication that the African Union means business in its venture to paint a new beginning for Africa. However, the best is yet to come. This commitment is articulated in article (f) of the Constitutive Act of the African Union, which sets an objective for the promotion of peace, security and stability in the continent. For the first time, an African instrument demands intervention in the sovereign issues of its member states to achieve respect for human rights, democratic values, peace and stability in the region.

³⁵ See 'The Challenge of African Reforms'.Sowetan, 14 April 2003.

³⁶ See 'The African Union: the same old animal in new clothing' City Press, 06 July 2002. .

Over and above this, the African Union upholds many human rights principles.³⁷ Its protocol provides that the AU will abide by the African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights (UDHR) as well as the UN Charter.³⁸ Its unconditional compliance with the UN Charter and the UDHR makes it a fully-fledged international instrument. The AU encompasses some of the objectives of the OAU with the exception of the eradication of colonialism. This is an important observation in view of the hype around the OAU's inflated achievements.

It might be misleading for the AU leadership to blindly embrace victories over colonialism as a resounding success in view of its untransformed Member States. In principle, the struggle against colonialism was worthwhile. In its political context, African leaders could celebrate this because it was a unified effort that was worth fighting for. In a human rights context, post-colonial Africa was marred by worse incidents of human rights violations by fellow Africans. The African Union therefore represents a radical shift from the past. The articulated vision and objectives show a paradigm shift from mediocrity to economic prosperity and respect for human and peoples' rights.

With regard to human rights, the AU introduces new objectives, which seek to create a new approach to human rights. This is reflected in articles (d), (g), (h), (j), and (l) of the Constitutive Act of the African Union. Article (d) creates an uncompromising awareness that Africa is a unique region that has its own interests in the international arena, and these must be promoted and defended by Africans themselves. Article (g) significantly insists on the promotion of democratic principles and institutions and good governance. This article unambiguously highlights the need for Member States to democratize and observe good governance principles.

³⁷ See Steinberg, A. Background Paper on African Union, October 24, 2001

³⁸ See Institute for Human Rights Development in Africa, http://www.Africa.org/eng/afSystem/conact_au.shtml

Article (h) specifically puts emphasis on human rights protection in accordance with international human rights instruments and the African Charter on Human and People's Rights. Article (l) attempts to promote meaningful economic partnerships and linkages among different regional economic blocs in Africa. These objectives complement each other in creating a holistic human rights instrument for the African region.

The principles of the AU, as well as those of the OAU, are more or less the same except for the emancipation of African territories from colonial powers.³⁹ Interestingly, articles (c), (d), (k), (l), (m), (n) and (p) are completely new and the emphasis is on the establishment of a common defence policy, promotion of self-reliance within the union, promotion of gender equality, respect for democratic principles, human rights, the rule of law, condemnation and rejection of unconstitutional changes of government and promotion of social justice to ensure balanced economic development. This portrays a fundamental shift of ideology towards a unitary system of regional development in the economic and political spheres.

Significantly, articles (f), (h), (l) and (j) enable the AU to limit the sovereign rights of Member States which neglect their obligations. These articles insist on the right of the union to intervene, upon decision of the assembly, in cases of war crimes, genocide and crimes against humanity, prohibition of the use of force or threat among members, the right of Member States to live in peace and security and the rights of Member States to request intervention from the union in order to restore peace and security.

In an attempt to give the union some "teeth", new provisions that did not exist in the OAU Charter are progressively included.⁴⁰ These are articles 17, 18, 19, 22, 23 (2), 30, and 33 (3).⁴¹ Article 17 establishes the Pan-African Parliament to

³⁹ See Appendix 1 and 2.

⁴⁰ See Appendix 1 and 2.

⁴¹ See Appendix 2

ensure the full participation of African peoples in the development and economic integration of the continent. Article 18 establishes the African Court of Justice to deal with human rights atrocities, which are prevalent in Africa. Article (19) creates new regional financial institutions to address the financial part of its operations, namely, the African Central Bank, the African Monetary Fund and the African Investment Bank.

Article 22 adopts the Economic, Social and Cultural Council which serves as an advisory organ composed of different social and professional groups of the Member States of the Union. Article 23 (2) further imposes sanctions or penalties for any Member State that fails to comply with the decisions and policies of the Union. Article 30 takes a clear stance that coups de' tat are unacceptable, and governments which come to power through unconstitutional means are not welcome in the new African system.

Most of the organs of the AU are still in their infant stage, and are facing numerous obstacles in terms of funding, and the protocols establishing these organs have not yet been adopted or ratified by Member States to give it effect. The current defunct national structures could further constrain the implementation mechanisms of the African Union. Therefore, the transition process is critical in laying a solid foundation for the African Union's main objectives.

1.8 Objectives of the study

In view of the background discussed above, the main objectives of this study are:

- i. To critically analyze the organs of the African Union in the wake of steady political and economic changes in the region;**
- ii. To assess the strengths of the African Union's structures, for example the peer review mechanism and to ascertain its role in reforming governance structures at national levels;**

- iii. **To reflect and highlight the human rights situation by drawing a comparative analysis of the African Charter on Human and Peoples' Rights and the Constitutive Act of the African Union;**
- iv. **To draw some lessons from the European Union by reviewing its organs, structures and its wealthy historical background.**

1.9 Significance of the study

It goes without saying that this study is significant in a number of ways. In summary, the importance of any study is determined by its ability to raise controversial issues, and succeed in defending its position. Like other studies, this thesis is momentous because:

- i. **It seeks to raise critical issues pertaining to the African Union by highlighting problem areas and constraints to the much-awaited and long-overdue progress in Africa since the end of colonialism;**
- ii. **It is an attempt to contribute to finding the solutions that can take Africa forward;**
- iii. **Like any well-researched study, it draws inferences, and on the basis of informed assumptions makes recommendations thereto.**

1.10 Research Questions

The study attempts to critically analyze the efforts of the African Union to correct and improve the human rights record in the region. The creation of a more stable organization shows Africa's willingness to move away from its shameful past. As Makau wa Mutua correctly puts it, "It's better late than never".⁴² Africa has spoken in one voice to move forward. While it is necessary to review the working

⁴² Makau wa Mutua: in Steiner H. J, and Alston P, *International Human Rights in Context: Law, Politics and Morals, Text and Materials*, pp703 -704.

of the OAU, there is no point in sulking about the past failures of the OAU. The critical challenge for the new African dispensation is how leaders turn the African region around to correct misdemeanors of the past.

This study recognizes the importance of taking into account the enormous constraints Africa faces in terms of the funding of its projects and institutions. So far, the AU's five wealthiest members, South Africa, Nigeria, Libya, Algeria and Egypt, pay the lion's share of the Union's costs.⁴³ This is an indication of the type of membership AU possesses. Eight countries could face possible sanctions, including exclusion from future summits, for being in arrears of membership dues by two or more years.⁴⁴ These poor countries are DR Congo, Central African Republic, Comoros Islands, Guinea Bissau, Liberia, Sao Tome e' Principe, Seychelles and Somalia. The sanctions could include preventing debtor nations from speaking or voting at future AU meetings, at both summit and executive council level; or the countries may be prevented from presenting candidates from their countries for AU posts.

This could further unsettle the region, which requires involvement of all member states to achieve greater prosperity. It is of critical importance that member states are active in the design and implementation of the African Union. In this way it will foster a sense of ownership and member states will be able to address those aspects of the day-to-day functioning of the organization which will streamline the implementation of decisions.⁴⁵

This is just the tip of the iceberg. There are other structural problems, which might hinder the progress of the Union. These range from ratification of protocols establishing the implementation institutions, such as the peer review mechanism to funding of these institutions. More like the EU, the establishment of the

⁴³ See *New African* Publication, Article: African Union so far, so good, August/September 2003, no. 421.

⁴⁴ Ibid

⁴⁵ See Transition from the OAU to the African Union. Department of Foreign Affairs, http://www.au2002.gov.za/docs/background/oau_to_au.htm

African Union overtly means that Africa will have to deal with its own problems and find solutions to decide on its future.

This background therefore informs the following research questions:

- a) Can the African Union achieve its objectives to promote and protect human rights under the current political and economic conditions among its Member States?
- b) Is the African Union able to promote democratic values and good governance in the region taking into account the disparities in the balance of power among Member States?
- c) Is the African Union setting itself measurable goals to deliver on its promises and expectations at the desirable time?

Improving governance and resolving conflicts is perhaps the most basic requirement for quicker achievement of the AU objectives. Widespread civil conflicts impose enormous costs in an already ailing environment. Can the AU wrestle this situation more effectively than the OAU?

1.12 Conclusion

In conclusion, this chapter attempts to lay the necessary background to the grounds of the study. It begins by highlighting the urgency of implementing the AU objectives to deal with the present. This chapter tries to review the human rights conditions in the region in relation to the African Union's mission to turn the situation around. It also serves as a preamble to the discussions, which unpack some of these issues in succeeding chapters. Furthermore, this chapter sets clearly the objectives and background of the study, and imposes key questions that are attempted in the study.

Chapter Two

The African Union: The Challenge of Regional Reform

2.1 Introduction

Africa cannot be said to be short of international, regional and sub-regional institutions with various mandates for promoting everything from economic integration, human rights, conflict and peace keeping matters.⁴⁶ All corners of Africa have at least one internationally recognized sub-regional institution claiming to represent the varying interests of a particular group of states. The challenge for the regional reform therefore is not the structural inadequacy, but relates to the capacity and scope of the existing regional structures to facilitate reforms in their respective regions. The African Union joins a network of defunct structures across Africa that continue to exist for invisible statistical and mere political ends of a few states or individuals.

The African Union initiative is a reinforcement of the historical engagements in Africa that have not achieved much in the effort to transform the region. The African Union comes not only to transform the regional human rights system but also to strengthen existing structures, which had not delivered on various mandates for one reason or another. The lack of assertiveness from the African Charter on Human and Peoples' Rights (of the OAU) is among the cluster of characteristics that describe most African institutions. In most cases, sub-regional groups have served to entrench the interests of economically stronger states in order to preserve the political status quo for autocratic leaders.

This chapter therefore attempts to critically assess the prospects of the African Union to achieve greater regional reforms in respect of human rights, good governance, and its capacity to incubate the culture of democracy. A comparative analysis of the founding charter of the Organization of African Unity and its successor progressive document, the Constitutive Act of the African

⁴⁶ See Professor Maria Nzomo, *The Architecture and Capacity of the African Union*, Paper presented at the AU/ADF Symposium, 3 - 8 March 2003

Union is drawn from the pillar clauses, objectives, intentions and mechanisms that unfold the existence of the African Union.

2.2 Comparative Analysis of the Banjul Charter and the Constitutive Act of the African Union

2.2.1 The African Charter on Human and Peoples' Rights

The African human rights system and its implementation mechanisms are based on the viability of the two founding documents, first and foremost, the African Charter on Human and Peoples' Rights of the OAU, which is the mother text, and secondly, the Constitutive Act of the African Union, which acknowledges and considers the principles and objectives stated in the African Charter.⁴⁷ These two regional regimes form the new human rights paradigm in Africa. The African Charter, which entered into force on 21 October 1986, upon ratification by a simple majority of member states of the organization of African Unity,⁴⁸ was a covenant establishing a unified effort or approach to African challenges in respect of the liberation of the African region, human rights and self-determination.

It represents an important milestone in the history of Africa in general, as well as establishing a progressive human rights system in the African region. Under the OAU, the regional human rights system has had to evolve over time to keep pace with changes in global human rights systems. Consequently, the establishment of the African Union is related to strategic developments that continue to permeate the region and the globe in respect of human rights, good governance, the rule of law and the promotion of democratic values. Like any other human rights system, the African regional human rights system has had to adjust itself to address its problems within the new framework, which is more focused and relevant to the needs of Africans.

⁴⁷ Ibid.

⁴⁸ See African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, extracted from Harris, D. J. *Cases and Materials on International Law*, Sweet and Maxwell Ltd., 1991.

In line with the 21st century international human rights trends, the OAU adopted a protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights in June 1998.⁴⁹ This effort was one of the progressive stances to be adopted by the OAU. The Court was intended to complement the African Commission on Human and Peoples' Rights, which was meant to play the role of human rights watch dog in the region since 1987.⁵⁰

These developments suggest that Member States of the OAU realized the loopholes in the manner in which the Organization functioned regarding its enforcement mechanisms. Various changes that took place in some African states over the past few years have created a consciousness that a new approach was necessary to accommodate these developments. The new constitutional and human rights regime in the Republic of South Africa, which established the Human Rights Commission and other legal instruments, represents a shift towards a more sensitive human rights system that was perceived to be in conflict with the OAU human rights thinking. The African Union represents a shift from the mediocre, state-centric human rights system into a more organized, holistic system. This is a fundamental change, which accommodates current developments in the African region.

The African Union is an old ideology that has matured over a period of time prior to its official establishment in July 2002. Although neo-democratic states like South Africa took the prominent lead in reshaping the new African identity, revolutionary leaders of the 1960's like Kwame Nkrumah initiated the principles of a union of states in Africa. Even before some countries became independent in 1960, there was a debate in Africa and in the black world that all Africans should get together and create one single country. That was called Pan-

⁴⁹ See The Protocol to the African Charter on Human and peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ouagadougou, Burkina Faso, June 1998, OAU document.

⁵⁰ See The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Commission on Human and Peoples' Rights.

Africanism and people like Du Bois, Marcus Garvey, Kwame Nkrumah and Nnamdi Azikiwe took part in that debate that all African countries should be united and that they should create a federation of African states.⁵¹

Kwame Nkrumah of Ghana proposed the establishment of a union that would be strong enough to tackle African problems. After Ghana had achieved her independence in 1957, Nkrumah hosted two Accra conferences in 1958. These conferences were followed by the all-Africa Trade Union Federation Conference in Accra in 1959.⁵² The conferences, which brought several Africans together, provided hope for African Unity. However, divisions that cropped up in the early 1960's first hampered progress towards unity. The major divisions included the Monrovia group and the Casablanca bloc.

At the second conference of Independent African states in Addis-Ababa in June 1960, the Monrovia group opposed Nkrumah's proposal of a Union of African States.⁵³ The Monrovia group was suspicious of Nkrumah's ambitions. Fortunately, some members of the Casablanca bloc took the initiative to convince the other countries to accept a loose association of African states. As a result, a conference of independent African states was held at Addis-Ababa in May 1963 and this ended with the birth of the Organization of African Unity (OAU). Nkrumah's passionate attempts to create a proper and broader organization were rejected by other Africans leaders for mere political reasons.

Although the African Charter makes a significant contribution to the human rights corpus, it creates an inefficient enforcement system.⁵⁴ Its most notable contributions are the codification of the three "generations" of rights, including the innovative concept of peoples' rights, and the imposition of duties on individuals.

⁵¹ See Cote d'Ivoire 's crisis: "The situation is getting better and we hope that it will normalize very soon", says Emile M'Lingui Keffa (13/6/2003) @lacotedivoire.net at http://www.lacotedivoire.net/anglais/actual130603_3.htm:

⁵² Ibid.

⁵³ Ibid.

⁵⁴ See Mutua, M. The African Human Rights System: A critical evaluation, at http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF

These achievements have been overshadowed by the “claw back” clauses in the Charter, which were vulnerable to abuse by repressive governments.

The establishment of the new human rights system therefore does not come as a surprise. The improvements in the Constitutive Charter of the African Union are based on a bunch of failures and incidents that clouded the operations of the OAU. The constitutive Act of the African Union seeks to expand the earlier innovations of the African Charter on Human and Peoples’ Rights. The mistakes and flaws in the African Charter are well documented.⁵⁵ These include the “clawback” clauses, ambiguous terminology and statements, the potential abuse of the language of duties, and the absence of an effective protection mandate for the African Commission.⁵⁶

Surprisingly, the African Charter is a well-thought human rights piece of writing. It consists of 68 articles and is divided into 4 chapters.⁵⁷ These chapters are: human and peoples’ rights, duties, mandate of the Commission and applicable principles.⁵⁸ Compared to similar regional human rights instruments, the African Charter charts new ground in the protection of human rights in a number of key areas: (a) it expressly recognizes the rights to development, peace and security; (b) it grants special protection to the aged and disabled; (c) it espouses a concept of peoples’ rights and individual duties; and (d) it firmly entrenches the principle of the indivisibility, interdependence and interrelatedness of all human rights.⁵⁹

The Charter contains an express recognition of several economic, social and cultural rights, including the right to work under equitable and satisfactory

⁵⁵ See Makau wa Mutua, “African Human Rights System in a Comparative Perspective,” 3 *REV. African Commission on Human and Peoples’ Rights* 5, 7 (1993), see Arthur E Anthony, “Beyond the Paper Tiger: the Challenge of a Human Rights Court in Africa,” 32 *Tex. International Law Journal L. J.* 511, 518 (1997).

⁵⁶ See Makau Mutua, *The African Human Rights System: A critical evaluation*

⁵⁷ See Appendix.

⁵⁸ See The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Commission on Human and Peoples’ Rights.

⁵⁹ *Ibid.*

conditions; the right to the best attainable state of physical and mental health; the physical health of families alongside protections for women, children, the aged and the disabled; the right to education; the freedom to take part in the cultural life of one's community; the right of all peoples 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; and the right to a general satisfactory environment.

It also creates three generations of rights, namely: civil and political rights; economic, social and cultural rights; and group and peoples' rights. It also create three generations of rights, namely, civil and political rights; social and cultural rights; and group and peoples' rights. The creation of "generations" is perceived by commentators to be traditionally linked to African culture and history.

The imposition of duties on individuals is unique, but creates some ambiguities and is in direct contrast with the responsibilities of the state. Article 27 of the Charter imposes duties on individuals towards their family and society, the state and other legally recognized communities and the international community.⁶⁰ It continues to limit the rights and freedoms of individuals which must be exercised with due regard to the rights of others, collective security, morality and common interest.

This article has been subjected to innumerable abuses by repressive governments, which utilized it for political reasons to suppress their rivals. The African Charter for example permits the Zimbabwean government to label its rivals as unpatriotic, rebellious, and immoral in terms of duties imposed on them. The more general critique sees the language of duties as little more than the formulation, entrenchment and legitimization of state rights and privileges against individuals and peoples.⁶¹ "Clawback" clauses, that is, qualifications or

⁶⁰ Ibid

⁶¹ See Makau WA Mutua, "African Human Rights System in a Comparative Perspective," 3 REV. African Commission on Human and Peoples' Rights, 5, 7 (1993).

limitations, permeate the provisions of the African Charter dealing with fundamental freedoms.

These fundamental civil and political rights are severely compromised by clauses like “except for reasons and conditions previously laid down by law,” “subject to law and order,” “abides by the law,” “in accordance with the provisions of the law,” and other restrictions justified for the protection of national security.⁶² Typically, this was perpetuated by the clawback clauses in the African Charter, which allowed states to restrict basic human rights.

2.2.2 The African Commission on Human and Peoples' Rights

The African human rights system is anchored by the African Charter and implemented by the African Commission.⁶³ The African Commission on Human and Peoples' Rights was the third regional instrument, after the European and American Conventions, for the promotion and protection of human rights. It was comprised of eleven commissioners elected by the OAU. Its three major functions were: promoting human and peoples' rights in Africa, protecting these rights and interpreting the African Charter.⁶⁴ The African Commission was established in 1987, the year after the African Charter entered into force.⁶⁵

Prior to the establishment of the African Union, the African Commission had offered its promotional duties just over one decade without much success. Apart from common problems facing all multi-state organizations in their early age, the African Commission was designed and set up to achieve less in its mandate. The African Charter on Human and Peoples' Rights did not provide the guiding support that would give it more biting power. Instead, the Charter allowed states

⁶² Ibid

⁶³ Ibid.

⁶⁴ See The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Commission on Human and Peoples' Rights

⁶⁵ See Makau wa Mutua, “African Human Rights System in a Comparative Perspective,” 3 *REV. African Commission on Human and Peoples' Rights*, 5, 7 (1993).

to renege on the principles of the Organization thus compromising the work of the Commission.

Although the African Commission on Human and Peoples' Rights is the principal body mandated to monitor the implementation of the African Charter by State parties, it has failed to concretely engage the continent's important human rights problems and address Africa's pervasive economic, social and cultural rights denials. The absence of an expeditious and effective individual complaints procedure before the Commission has impeded the development of appropriate jurisprudence on human rights in general and economic, social and cultural rights in particular.⁶⁶

2.2.3 The Constitutive Act of the African Union

On 11 July 2000, the OAU adopted the Constitutive Act of the African Union (AU Act) to replace the OAU Charter. The AU Act, which established the African Union (AU), was ratified with asthmatic breathlessness and entered into force on 26 May 2001, less than one year after its adoption.⁶⁷ As of 26 September 2002, all former Member States of the OAU have ratified the AU Act, with the exception of Guinea-Bissau and Madagascar, though these two countries signed the Act on 12 July 2000.⁶⁸

The OAU was formally dissolved on 9 July 2002, during the last (38th) ordinary session of the OAU Assembly in Durban, South Africa. The AU was formally launched during the same period, holding its first session between 9 and 10 July 2002. With the launching of the AU, the OAU ceased to be an umbrella international organization for collective Africa. However, during the rites of passage, the AU Assembly sang *Nunc Dimittis* for the OAU, praising it "as a

⁶⁶ Ibid

⁶⁷ See Nsongurua Udombana, *Institutional Structure of the African Union* at <http://academic.udayton.edu/race/06hrights/GeoRegions/Africa/AU01.htm>

⁶⁸ Ibid

pioneer, a liberator, a unifier, an organizer, and the soul of [the African] continent." The Assembly also praised the founding leaders of the OAU for "their tenacity, resilience and commitment to African Unity" and for standing "firm in the face of the divisive manipulations of the detractors of Africa and [fighting] for the integrity of Africa and the human dignity of all the peoples of the continent."

The Constitutive Act of the African Union is indeed a major improvement on the 1963 OAU Charter in terms of its objectives and institutional framework outline for realizing its objectives. The African Union's Act describes a new pathway for human rights system in the African region. It alleviates the weaknesses of the African Charter, and resuscitates the promotional and protective functions of the African Commission of Human and Peoples' Rights.

The Constitutive Act (of the AU) affirms that the 53 African states are determined to take up the multifaceted challenges that confront the region in respect of social, economic and political changes in the world.⁶⁹ African leaders have resuscitated the noble ideals, which guided the founding ancestors of continental Organization, and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African states.⁷⁰ By adopting the Constitutive Act of the African Union, Member States further assume the responsibility to promote and protect human rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law.⁷¹

Reflecting Africa's commitment to break from the legacy of brutal human rights abuses, the Constitutive Act of the African Union came into force with more commitment and direction than its successor document. The entry in to force of the Act within a relatively short period after its adoption shows an urgency in tackling African problems head on. The establishment of the voluntary Peer

⁶⁹ See The Constitutive Act of the African Union, National Model, AU National Conference 2003

⁷⁰ Ibid

⁷¹ Ibid.

Review Mechanism is expected to give the Act some biting power in promoting human rights in Africa.

2.3 The African Peer Review Mechanism (APRM)

Peer review has been described as the systematic examination and assessment of the performance of a state by other states (peers), by designated institutions, or by a combination of states and institutions.⁷² This suggests a vested interest by peers (AU Member States) to put an ultimate effort to help the reviewed Member State improve its governance systems, adopt best practices and comply with established standards and principles. The primary purpose of the African Peer Review Mechanism is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration of Democracy, Political, Economic and Corporate Governance.⁷³

The African Peer Review mechanism provides for African leaders to voluntarily submit themselves periodically to the test, and be accountable to each other for their commitment to good governance, respect for human rights and the rule of law as well as economic and corporate governance. The APR mechanism provides for best practices as regards specified codes and standards for political and corporate governance, complete with an in-built reward and sanction system for all those who sign up.⁷⁴ A peer examination is typically conducted on a non-adversarial basis, and relies heavily on mutual trust among the states involved in the review, as well as their shared confidence in the process.⁷⁵ Peer Review processes are therefore often characterised by dialogue and interactive

⁷² See Malachia Mathoho, *An African Peer Review Mechanism: A Panacea for Africa's Governance Challenges*, Policy Brief 29.

⁷³ See 38th Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity: *Peer Review Mechanism*, Durban, South Africa, 8 July 2002.

⁷⁴ See Cyril Obi, *Reconstructing Africa's Development in the new Millenium Through NEPAD: Can African Leaders Deliver the Goods?*, Paper prepared for presentation at the 10th CODESRIA General Assembly, Nile International Conference Centre, Kampala, December 8-12, 2002.

⁷⁵ *Ibid.*

investigation, but can admittedly take the questionnaire route, which usually involves no formal reporting by the examined state.

2.3.1 *Types of Reviews*

There are four types of reviews:

- i. The first country review is the base review that is carried out within 18 months of a country becoming a member of the APRM process;
- ii. Then there is a periodic review that takes place every two to four years. This serves as a follow up to base review;
- iii. In addition to these, a member country can, for its own reasons, ask for a review that is not part of the periodically mandated reviews; and
- iv. Early signs of impending political or economic crisis in a Member State would also be sufficient cause for instituting a review. Participating Heads of State and Government can call for such review in a spirit of helpfulness to the government concerned.

2.3.2 *APRM Process*

The process entails periodic reviews of the policies and practices of participating states to ascertain progress being made towards achieving mutually agreed goals. The Peer Review process will act as a spur to consider seriously the impact of domestic policies, not only on internal political stability and economic growth, but also on neighboring states.⁷⁶ The lack of rule of law in Zimbabwe has huge consequences for South Africa and other SADC states. The perceived support of the South African government for the ruling party in Zimbabwe has been critiqued as constraints to donor confidence in Africa and the SADC region.

⁷⁶ Ibid.

2.3.3 *Stages of the Peer Review Process*

Stage one involves a study of the political, economic and corporate governance and development environment in the country to be reviewed, based principally on up-to-date background documentation prepared by the APRM Secretariat and material provided by national, sub-regional, regional and international institutions. This is regarded in part as an attempt to inject under-performing member states to improve their governance systems. Because the process is voluntary, it suggests that states will not be pushed to adopt the South African view or Nigerian view of good governance, but the emphasis is based on compliance with agreed norms and standards. Significantly, the country to be reviewed will prepare a draft plan of action to improve its governance and socio-economic development and submit to the APR Secretariat.

In Stage two, the review team visits the country concerned where its priority order of business will be to carry out the widest possible range of consultations with the government, officials, political parties, parliamentarians and representatives of civil society organizations, including the media, academia, trade unions, business and professional bodies. The main focus of the country's review visit is on identifying whether the country's draft programme of action is adequate to address the assessed challenges and, if not, how the country can best be assisted in strengthening its final draft programme of action and its capacities to implement it.

Stage three is the preparation of the team's country review report based on the background documentation and country visit. The report focuses on recommendations that seek to improve, accelerate and resource the programme of action through time bound additions to it. This report must be discussed with the government concerned to ensure accuracy of the information and provide the government with an opportunity both to react to the team's findings and to put forward its own views on the identified shortcomings, including modifying the

draft programme of action. The responses of the government are subsequently appended to the team's report.

The fourth stage begins when the APR Secretariat submits the country to the APR Panel who submits its recommendations to the APR Forum. The stage concludes with the chairperson of the APR Forum communicating the decisions of the forum to the head of the country concerned. During the fifth and final stage, six months after the conclusion of the previous stage, the final APRM Report is formally and publicly tabled in key regional and sub-regional structures such as the Assembly of the African Union, the Pan-African Parliament and within the relevant sub-regional structures.⁷⁷

2.3.4 What is Unique About the Peer Review Mechanism?

The peer Review Process is a completely new effort in Africa, which is aimed at correcting governance deficiencies among APRM consenting states. It has never been attempted in Africa before and unlike judicial proceedings, the final outcome of a review is not legally binding, so the impact of this process will probably be limited.⁷⁸ In practice the peer review process may, in part, play the role of a dispute settlement mechanism by encouraging the kind of dialogue among states that helps to clarify their positions and interests.

While its intentions are noble, the approach employed in realizing these intentions is limited. The APRM is voluntary and non-punitive. The peer review system has so far been ratified by 15 of the 53 AU members.⁷⁹ This number needs to triple to ensure compliance with the system. These countries have acceded to being reviewed by their peers in this group by signing a memorandum of agreement. They are South Africa, Algeria, Ethiopia, the

⁷⁷ Ibid.

⁷⁸ See Malachia Mathoho, *An African Peer Review Mechanism: A Panacea for Africa's Governance Challenges*, Policy Brief 29.

⁷⁹ See African States Face Peer Review at <http://www.news24.com>

Democratic Republic of Congo, Ghana, Kenya, Mozambique, Nigeria, Rwanda, Uganda, Mali, Cameroon, Gabon, Burkina Faso and Senegal. Understandably, authoritarian governments are yet to submit themselves to APRM scrutiny. Dictators are likely to perceive the APRM's aims and objectives as dangerous to their continued rule.⁸⁰

There are many reservations about whether the APRM will achieve its objectives, as many African states are unlikely to make the NEPAD grade in terms of democracy and governance standards as outlined in the African Charter, Constitutive Act of the African Union, Charter of the United Nations and other international instruments. Like other African projects, the APRM requires financial assistance from non-African states and organizations such as the EU, United States of America and United Kingdom who subscribe to the best governance standards. The African reluctance to embrace the APRM may cast doubts on the outcomes, and discourage donors from funding it.

A peer review of political governance is a novel practice, never before tried anywhere in the world.⁸¹ It is necessary in Africa as many African conflicts are the result of poor governance and power mongering. This means that the APRM will address electoral issues, human rights, civil society participation, media role, rule of law, and independence of the judiciary and government opposition. The basic structure of the African Union as outlined in the Constitutive Act presents the organs, committees and units that could play a role in political governance review. These organs include:

- i. The Pan African Parliament;
- ii. The Election Monitoring Committee;
- iii. The Court of Justice;
- iv. The Economic, Social and Cultural Council;
- v. The Commission of the African Union;

⁸⁰ See Malachia Mathoho, *An African Peer Review Mechanism: A Panacea for Africa's Governance Challenges*, Policy Brief 29.

⁸¹ Ibid.

- vi. The Financial Institutions, and
- vii. The General Assembly

2.4 Conclusion

The issues engaged in this chapter show that there is a shift from the old OAU format in terms of the human rights approach in the African region. This immediately raises questions as to what needs to be done to reinforce the noble ideas of the new human rights system of the African Union. The unfolding of events in the last five years clearly suggests that there is a need for radical transformation in the African region. The new democratic states like South Africa have added pressure on other African states to initiate reforms in their own countries.

The introduction of certain key organs, such as the Peer Review Mechanism, reaffirms the commitment of African leaders to transform their current economic and political conditions. In principle, this shows signs of progress in a region that has not tasted peace, which remains a crisis-ridden continent in the eyes of the international community. Indeed, the African Union has put tremendous efforts towards laying a firm foundation for the protection of human and peoples' rights as well as the transformation of national structures. These efforts could spur more reforms in the African region.

Chapter Three

Can Africa Learn from The European Experience?

3.1 Introduction

The incidents leading to the establishment of the African Union can be said to be similar to those leading to the establishment the European Union. The emergence of new democracies in Africa, such as South Africa, has created a need for the region to think along the lines of unity of African political and economic sectors in order to deal with the scourges of war, poverty and diseases. The background for European unity is the idea that only cooperation could put a definitive end to conflicts and wars in Europe. A similar background has dominated the thinking of regional integration of Africa.

In Africa, in the early 1960's the concept of the African Union was a subject of debate among respected African leaders, such as Kwame Nkruma. In Europe, the notion of a United States of Europe was part of a humanistic-pacifist dream, which was shattered by the conflicts that brought so much destruction to the European continent in the first half of the 19th century.⁸² The vision of a Europe, which would transcend antagonistic nationalism, finally emerged from the resistance movements that had sprung up to resist totalitarianism during the Second World War.⁸³

While the two regions represent different cultures, history, politics and environments, it makes sense for this study to highlight the European progress in establishing one of the strongest states' union in the world. The two regional instruments present different political experiences, which are shaped by unique regional conditions. However, the European Union is an advanced form of multi-sectoral integration, its competence extending to the economy, industry, citizens' rights and the foreign policy of its members. The European Union serves to illustrate just how far the African Union has to go in making things happen on the

⁸² See History of the European Union at http://europa.eu.int/comm/publications/booklets/eu_glance/12/txt_en.htm

⁸³ Ibid.

ground. Moreover, the EU is the most stable region in the world since the Second World War. It is therefore necessary for this study to review events leading to the integration of Europe.

Surprisingly, in a period of four years, Africa has accomplished more than what the EU could achieve in five decades. Unlike Europe, Africa has achieved the necessary unity despite the difficulties in funding and external pressure from its critics. It took Europe far longer to build a united and stronger Europe. It also took the Europeans some time to ratify the EU protocols. Moreover, it looks as if Africa wants to do the right thing from the start. The AU Commission, for example, is very representative. There are five men and five women commissioners, and this makes it the only institution in the world to have such parity.⁸⁴

3.2 Brief Review of European Integration

For centuries, Europe was the centre of regular and bloody wars and civil uprisings that cost millions of lives and money. In the period 1870 to 1945, France and Germany fought each other three times, with terrible loss of life.⁸⁵ Contributed by politics of the time, Europe found itself struggling to prosper as a region, as well as individual countries. A number of European leaders became convinced that the only way to secure a lasting peace between their countries was to unite them economically and politically.

Altiero Spinelli, the Italian federalist, and Jean Monnet, the man who provided the inspiration for the Schuman Plan which led to the European Coal and Steel Community (ECSC) in 1951, were the main proponents of two approaches, the federalist and the functionalist, which were to provide the impetus for European integration.⁸⁶ Central to the federalist approach is the idea that local, regional,

⁸⁴ See New African Publication, Article: African Union so far, so good, no. 421, August/September 2003.

⁸⁵ See History of the European Union, at http://europa.eu.int/abc/history/index_en.htm

⁸⁶ Ibid.

national and European authorities should cooperate and complement each other. The functionalist approach, on the other hand, favoured a gradual transfer of sovereignty from national to Community level.

The two schools of thought have merged in a conviction that national and regional authorities need to be matched by independent, democratic European institutions with responsibility for those areas in which joint action is more effective than action by individual States: the single market, monetary policy, economic and social cohesion, foreign and security policy, employment policy, environmental protection, foreign and defence policy, the creation of an area of freedom and justice. So, in 1950, the French Foreign Minister Robert Schuman proposed integrating the coal and steel industries of Western Europe. As a result, in 1951, the European Coal and Steel Community (ECSC) was set up, with six members: Belgium, West Germany, Luxembourg, France, Italy and the Netherlands.⁸⁷ Economic and political integration between the member states of the European Union meant that these countries had to take joint decisions on many matters.

On 7 February 1992, the Treaty on European Union was signed (known as the Maastricht Treaty). This treaty is seen as the most comprehensive reform of the Treaties of Rome. It also produces a clear timetable for further progress on the road to the Economic and Monetary Union (EMU), involving the introduction of a single currency by no later than 1999 and a European Central Bank.

In 1994, the EU and the seven-member European Free Trade Association (EFTA) formed the European Economic Area, a single market of 19 countries.⁸⁸ The EU completed membership negotiations with EFTA members Austria, Finland, Norway (which did not ratify the accession treaty in 1995) and

⁸⁷ See History of the European Union, at http://europa.eu.int/abc/history/index_en.htm.

⁸⁸ Ibid

Sweden.⁸⁹ The Treaty of Paris establishing the European Coal and Steel Community (ECSC) (1951), the Treaties of Rome establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) (1957), as amended by the Single European Act (1986), the Maastricht Treaty on European Union (1992) and finally the Amsterdam Treaty (1997), form the constitutional basis of the Union, binding its Member States more firmly than any conventional agreement between sovereign States.⁹⁰ The European Union generates directly applicable legislation and confers specific rights, which can be relied upon by its citizens.

The Treaty on European Union, which entered into force on 1 November 1993, sets the Member States an ambitious programme: monetary union by 1999, new common policies, European citizenship, a common foreign and security policy and internal security.⁹¹ Applying the review clause in the Maastricht Treaty, the Member States negotiated a further treaty, signed in Amsterdam on 2 October 1997, which adapted and strengthened the Union's policies and powers, particularly in judicial cooperation, the free movement of persons, foreign policy and public health. The European Parliament, the Union's immediate democratic voice, was granted new powers, confirming its role as joint legislator.⁹²

In almost five decades of integration, the EU has had a profound effect on the development of the continent and the attitudes of its people. It has also changed the balance of power to accommodate the previously voiceless small states that were easily ignored by Europe's superpowers. All governments, regardless of political complexion reasonably recognise that the era of absolute national sovereignty might not deliver the goods more like an integrated effort. Only by joining forces and working towards a "destiny henceforward shared", to quote the

⁸⁹ Ibid

⁹⁰ See *History of the European Union*, at http://europa.eu.int/abc/history/index_en.htm.

⁹¹ Ibid.

⁹² Ibid.

ECSC Treaty, have Europe's old nations continued to enjoy economic and social progress and maintain their influence in the world.

The Community method, which involves a constant balancing of national and common interests, respect for the diversity of national traditions and the forging of a separate identity has proved to be efficient and relevant for today's challenges. Devised as a way of overcoming deep-rooted hostilities, superiority complexes and the warring tendencies so characteristic of relations between States, it kept the democratic nations of Europe united in their commitment to freedom throughout the Cold War.⁹³ The eclipsing of East-West antagonism and the political and economic reunification of the continent are a triumph for the European spirit.⁹⁴

3.3 Africa and the European system

While Europe is a credible reference for African development, one must acknowledge the historical differences between the two regions. Africa poses a slightly different experience to the fore. Africa is an ailing continent in almost all sectors, such as politics, economy, health, sports, and so on. It has suffered the effects of colonialism, and its transition into post-colonialism was not smooth. The African Union further represents the poorest region in the world, which is unstable and wriggled with wars, famine and diseases. The region has seen many more *coups de tat* than any other region in the world. On the contrary, the EU presents an opposite arena in all its spheres, namely, health, sports, economy, politics and so on. On average, the European Union arguably represents order and progress in international affairs.

The European Union further houses a group of less than 30 states, which are reasonably easy to contain. The enlargement of the European Union to include central and Eastern Europe countries has been based on the conformity of these

⁹³ Ibid.

⁹⁴ Ibid.

countries with the principles of capitalism and democracy neglecting their communist backgrounds. The message was clear that whoever joins the union must fully embrace and comply with the principles and ideologies of the EU. In contrast, The African Union is a club of 53 states, which present a totally different political environment within the union itself. There are more dictatorships and totalitarian governments than democratic states, yet they have consented to the principles of regional integration and transformation.

Consequently, most African states still trade with their colonial masters in Europe, and prefer this more than trading with their weak and ill-organized African counterparts. Although AU Member States have expressly committed themselves to AU, most governments would not be keen to concede their sovereignty because of their rigid political systems. Indeed, the African Union has a tough assignment ahead of it; firstly, in making itself respected as a human rights watchdog in the region, and, secondly, in being recognized by its international peers as a progressive commercial organization. Its recognition will be determined by its solid attempts to change the status quo in the region, and to instill good governance values and human rights principles as stipulated in the Universal Declaration of Human Rights of 1948, and the African Charter on Human and Peoples' Rights, and the Constitutive Act of the African Union.⁹⁵

It is significant that Africa has realized that its faith in human rights development, respect for justice and human rights and sustainable development is not a concern for aliens from the outer space, but a responsibility for fellow Africans to unite, act and decide on its future. The African Union's structures present a perfect platform for such kinds of developments. Over and above this, Africa has to find and define its meaning, role, vision, direction and its participation in international affairs. Again, the AU perfectly affords this opportunity. Like the European Union, its structures are designed to allow NGO's, civil societies and business organizations to make their mark in rebuilding the region.

⁹⁵ See Brownlie, I. Basic documents On Human Rights: Universal Declaration of Human Rights (1981) .

The European Union presents a credible record in these two areas. It therefore becomes imperative to highlight these achievements in relation to the new African Union that hopes to achieve similar goals. This study acknowledges the fact that it is not going to be easy to achieve the union's goals. "To build a successful union in such conditions will require great stamina and iron political will", argues Koffie Annan.⁹⁶ Neither of these challenges will be overcome without sound efforts and endurance from African countries. How can a Union of more than 50 ideologically different countries operate without problems?

Henceforth, the African Union has no choice but to progress along the road towards an organization which is efficient and democratic, capable of making decisions and taking action while preserving the identity of each member state. The African traditional "community thinking", which involves a constant balancing of individual, peoples', national, and international (respect for strangers) forms the basis for the African Union architect.

3.4 The institutions of the European Union

The European Union is built on an institutional system that is more or less similar to that of the African Union. Most analysts have argued that the African Union has adopted the EU system without considering their different contexts. The EU system is unique and advanced such that, in accepting the European Treaties, Member States relinquish a measure of sovereignty to independent institutions representing national and shared interests. The institutions complement one another, each having a part to play in the decision-making process. The Member States delegate sovereignty for certain matters to independent institutions, which represent the interests of the Union as a whole, its member countries and its citizens.

⁹⁶ See Kofie Annan United Nations General Secretary, BBC News at <http://news.bbc.co.uk/>

The Commission traditionally upholds the interests of the Union as a whole, while each national government is represented within the Council, and citizens directly elect the European Parliament.⁹⁷ Democracy and the rule of law are therefore the cornerstones of the structure. Two more institutions - the Court of Justice and the Court of Auditors - and five other European bodies, flank this “institutional triangle” of Commission, Council and Parliament. In addition thirteen specialised agencies have been set up to handle certain essentially technical, scientific, or management tasks.⁹⁸

3.4.1 *European Parliament*

Elected every five years by direct universal suffrage, the European Parliament is the expression of the democratic will of the Union's 374 million citizens. Brought together within pan-European political groups, the major political parties operating in the Member States are represented.

Parliament has three essential functions:

1. It shares with the Council the power to legislate, that is to adopt European laws (directives, regulations, decisions). Its involvement in the legislative process helps to guarantee the democratic legitimacy of the texts adopted;
2. It shares budgetary authority with the Council, and can therefore influence EU spending. At the end of the procedure, it adopts the budget in its entirety;
3. It exercises democratic supervision over the Commission. It approves the nomination of Commissioners and has the right to censure the Commission. It also exercises political supervision over all the institutions.

⁹⁷ See History of the European Union, at http://europa.eu.int/abc/history/index_en.htm.

⁹⁸ Ibid.

3.4.2 Council of the European Union

The Council is the EU's main decision-making body. It is the embodiment of the Member States, whose representatives it brings together regularly at ministerial level. According to the matters on the agenda, the Council meets in different compositions: foreign affairs, finance, education, telecommunications, and other groups.

The Council has a number of key responsibilities:

1. It is the Union's legislative body; for a wide range of EU issues, it exercises that legislative power in co-decision with the European Parliament;
2. It coordinates the broad economic policies of the Member States;
3. It concludes, on behalf of the EU, international agreements with one or more States or international organizations;
4. It shares budgetary authority with Parliament;
5. It takes the decisions necessary for framing and implementing the common foreign and security policy, on the basis of general guidelines established by the European Council;
6. It coordinates the activities of Member States and adopts measures in the field of police and judicial cooperation in criminal matters.

3.4.3 European Commission

The European Commission embodies and upholds the general interest of the Union. The President and Members of the Commission are appointed by the Member States after the European Parliament has approved them. The Commission is the driving force in the Union's institutional system:

1. It has the right to initiate draft legislation and therefore presents legislative proposals to Parliament and the Council;

2. As the Union's executive body, it is responsible for implementing the European legislation (directives, regulations, decisions), budget and programmes adopted by Parliament and the Council;
3. It acts as guardian of the Treaties and, together with the Court of Justice, ensures that Community law is properly applied;
4. It represents the Union on the international stage and negotiates international agreements, chiefly in the field of trade and cooperation.

3.4.4 Court of Justice of the European Communities

The Court of Justice ensures that the law is observed in the interpretation and application of the Treaties. As the judicial institution of the Union, it ensures that Community law is interpreted and applied in the same way in each Member State, in other words that it is always identical for all parties and in all circumstances. Since its creation in 1952, the Court has had many thousands of cases brought before it.

To cope with this influx and improve the legal protection offered to citizens, a Court of First Instance was created in 1989. This Court is responsible for ruling on certain categories of case in the first instance, particularly those relating to competition rules and actions brought by private individuals.

i. Seat and composition

The seat of the Court of Justice is in Luxembourg. The Treaty does not lay down any composition by nationality but, in practice, the Court comprises one judge per Member State, so that the various national legal systems are represented. The Court is aided by eight advocates-general, whose role is to present publicly and impartially reasoned opinions on the cases brought before the Court.

The judges and the advocates-general are appointed by joint agreement of the governments of the Member States for a renewable term of six years, with partial reappointment every three years. These are members of the highest national judiciary or juris consults of recognised competence presenting all the guarantees of independence. The Court of Justice and the Court of First Instance each have a President, appointed for a term of three years.

ii. Role

In order to ensure that the law is observed in the interpretation and application of the Treaties, the Court has wide jurisdiction that it exercises in the context of the various categories of proceedings, of which the following are the most common:

- Preliminary rulings;
- Proceedings for failure to fulfill an obligation;
- Proceedings for annulment;
- Proceedings for failure to act.

3.4.5 European Ombudsman

All individuals or entities (institutions or businesses) resident in the Union can apply to the European Ombudsman if they consider that they have been harmed by an act of "misadministration" by an EU institution or body.

3.4.6 European Central Bank

The arrival of the Monetary Union in Europe has brought with it a new currency, the euro, and a new central bank, the European Central Bank (ECB). The ECB and the central banks of the countries that have adopted the euro make up a new entity known as the "Euro system". As certain Member States of the European Union have not yet adopted the euro, it is important to make a distinction

between the Euro system of 12 countries and the European System of Central Banks (ESCB), which comprises 15 countries. Founded on 1 June 1998, the European Central Bank (ECB) took over from the European Monetary Institute (EMI), which had played a central role in preparing for the launch of the euro on 1 January 1999.

i. Seat and composition

The seat of the European Central Bank is in Frankfurt am Main (Germany). Its staff comes from all the Member States of the European Union. It enjoys total independence in its work. Neither the ECB, the national central banks of the Euro-system, nor any member of their decision-making bodies can ask for or accept instructions from any other body. The European institutions and Member State governments must respect this principle and must not seek to influence the ECB or the national central banks.

The ECB works in close collaboration with the national central banks in order to prepare and implement the decisions taken by the decision-making bodies: the Governing Council, the Executive Board and the General Council. The President of the ECB and the other five members of the Executive Board are appointed by the Member States for a non-renewable term of eight years.

ii. Role

The European Central Bank is the pivot of the Euro system. It guarantees that the tasks delegated to it are performed either by it or via the participating national central banks. In pursuit of its primary objective, price stability, the ECB's main missions are to:

- Define and implement the monetary policy of the euro zone;

- Conduct foreign exchange operations, hold and manage the official exchange reserves of the countries of the euro zone;
- Issue notes in the Euro Zone;
- Promote the smooth operation of payment systems.

It is also responsible for:

- Collecting the necessary statistical information, either from the national authorities, or directly from economic agents such as financial institutions;
- Following developments in the banking and financial sectors, and promoting the exchange of information between the ESCB and the banking authorities.

The main objective of the Euro system is to maintain price stability in the euro zone, thus preserving the euro's purchasing power. The strategy is based on two pillars:

- A prominent role for money, as signaled by the announcement of a quantitative reference value for the growth of the money supply in the broadest sense, with inflation seen as the consequence of an excessive money supply compared to the supply of goods and services;
- A broadly based assessment of future price trends and risks to price stability in the euro zone as a whole (wages, exchange rates, long-term interest rates, various measures of economic activity, etc.).

In order to allow the public to gauge the success of the single currency policy, the ECB has announced a precise definition of its main objective. Price stability is defined as a year-on-year increase in consumer prices of less than 2%.

3.4.7 European Economic and Social Committee

The Economic and Social Committee (ESC) is an advisory body ensuring that the various economic and social interest groups (employers, trade unions, farmers, consumers, etc.) are represented in the institutional framework of the European Union. Founded in 1957 by the Treaty of Rome, the ESC is both a forum for dialogue and the institutional platform that gives groups involved in economic and social life the opportunity to be an integral part of the Community's decision-making process. Through its opinions, the ESC contributes to the definition and implementation of the European Union's policies.

The ESC therefore plays a special role in the institutional structure of the Community: it is where Europe's organised civil society, of which socio-professional organizations are a vital part, is represented, can take part in debates and make its voice heard. It is thus a bridge between Europe and its citizens. The entry into force of the Treaty of Maastricht (1993) gave the ESC a status similar to that of the other institutions, especially with regard to its rules of procedure and budget, the reinforcement of its right of initiative and the management of staff in its Secretariat-General. In 1997, the Treaty of Amsterdam significantly broadened its field of action, notably in social matters.

i. Seat and composition

The seat of the ESC is in Brussels, where most of its meetings and the plenary sessions are held. Meetings are also organised at other locations. The members of the Committee are put forward by the governments of the Member States and appointed by the Council of the European Union for a renewable term of four years. The 222 members are totally independent, and the number from each Member State approximately reflects the population size (24 members for France, Germany, Italy and the UK, 21 for Spain, 12 for Austria, Belgium, Greece, the Netherlands, Portugal and Sweden, 9 for Denmark, Finland and Ireland, and 6 for Luxembourg). The Committee has a Plenary Assembly, a

Bureau, three Groups, six Sections and a Secretariat-General. It elects its President and two Vice-Presidents for a two-year term. The President represents the ESC externally.

ii. Role

The Economic and Social Committee has three main roles:

- To advise the three large institutions (Council, Commission and, since the Treaty of Amsterdam, the European Parliament);
- To promote a greater commitment/contribution from organised civil society to the European venture, thus promoting a more participatory, more inclusive and therefore more democratic society;
- To bolster the role of civil society organisations and associations in non-Community countries by fostering structured dialogue with their representatives and, whilst respecting their economic, social and cultural realities, to support the creation of advisory structures.

3.4.8 Committee of the Regions

The Committee of the Regions is an advisory body which ensures that local and regional authorities are represented at the heart of the European Union. Provided for in the Treaty on European Union, it was created in 1994 and plays a complementary role in the decision-making process between the Commission, Parliament and Council. It allows representatives of local and regional authorities to give opinions on European Union policies. Since the Amsterdam Treaty came into force in 1999, the Committee of the Regions has had an autonomous organisational structure and its own rules of procedure (without the need for the Council's approval in advance, as was the case before). Moreover, the Committee's field of action has been considerably enlarged, in particular in the areas of social affairs, the environment and transport.

3.5 Conclusion

Unlike the African regional system, the European system makes provision for treaties and community laws to be interpreted and applied, equally and efficiently, in the same way in each EU Member State. Europe's regional laws are applicable to and within the jurisdiction of each member state. While Africans have made use of the European system to build the African Union, their system is still sensitive to the sovereign rights of members. Given the weaknesses evident in the political and economic areas, one should expect several years to elapse before there are real results in the promotion of human rights and democratic values.

As a vital step forward, the adoption of best international practices, in areas such as economic and political cooperation; human rights; individual and peoples' participation; enforcement of regional law; and so on, is an extraordinary vision which confirms the commitment of African leaders to the principles of the African Union.

Chapter Four

The Role of the Proposed African Court on Human and Peoples' Rights

4.1 Introduction

Prior to the establishment of the African Union, Member States of the Organization of African Unity (OAU) formalized their commitment to the promotion and protection of human rights with the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. To complement this, article 5 of a Constitutive Act of the African Union makes provision for the establishment of the Court of Justice, a Commission and other key institutions to ensure a better political climate in the African region.⁹⁹

The only implementation mechanism created under the African Charter, to keep check of State's compliance with human rights principles, was the African Commission on Human and Peoples' Rights (African Commission). Its four areas of mandate were: promotional activities, protective activities, the examination of state party reports, and interpreting the Charter. Despite the international acclaim that heralded the adoption of the African Charter in 1981, its subsequent entry into force in 1986, and its latest achievements in establishing the African Court, the African human rights system remained ineffective and invisible. The lack of an adequate enforcement instrument created a demand to establish an alternative system that would seek more justice.

While the African Commission had an elaborate promotional mandate under the African Charter, it did not possess sufficient protective powers.¹⁰⁰ Not surprisingly, neither the Charter nor the Commission provided for enforceable remedies. Despite some positive development in the Commission's individual complaint mechanism, it remained a defunct structure because the decisions it

⁹⁹ See Constitutive Act of the African Union, National Model, AU National Conference 2003

¹⁰⁰ See Amnesty International; African Court on Human and Peoples' Rights in Africa at <http://web.amnesty.org/library/index/engior630012002>.

made were non-binding, and attracted little or no attention from Member States. This automatically led to an institution that lacked direction and composure in serving its mandatory activities as spelt out in the African Charter on Human and Peoples' Rights.

Since the adoption of the African Charter, critics have criticized the African human rights system for its failure to establish a system that would safeguard and enforce the rights guaranteed in the Charter. Realizing the need to do this, in 1994, the OAU began the process of establishing an African Court of Human and Peoples' Rights. Given the lackluster performance of the African Charter's primary guardian institution, the African Commission, many commentators believed that the time had not yet come for the establishment of a court.¹⁰¹

However, the Assembly of Heads of State and Government of the OAU realized the general ineffectiveness of the African human rights mechanism. During its summit in Tunis, in June 1994, the Assembly adopted a resolution in which the Secretary-General of the organization was called upon to summon experts to meet on the establishment of an African Court of Human Rights. The series of meetings and consultations that ensued produced a draft Protocol on the African Court on Human and Peoples' Rights (Protocol), which was later adopted by the OAU in Ouagadougou, Burkina Faso in June 1998. The Protocol was inspired by existing regional instruments, which established the European and Inter-American Human Rights Courts, the Statute of the International Court of Justice and other international human rights institutions.

This chapter looks at the African Court on Human Rights as one of the key instruments vividly supported by the African Union as an impartial platform for ordinary Africans to defend their human and peoples' rights, which are unlawfully and unjustly denied in their national legal jurisdictions. The African Union's support of the African Court on Human and Peoples' Rights is clearly reflected in the objectives of the Union as provided for under article 3 of the Constitutive Act.

¹⁰¹ Ibid.

Article 3 (h) provides that one of the objectives of the Union shall be to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.¹⁰²

Unlike decisions of the African Commission, the African Court is authorized to issue a binding and enforceable decision if it deems necessary to do so. Moreover, the establishment of an enforcement mechanism makes it practical to relate and apply other international human rights instruments in the African region. This assumption derives from the skeleton and architecture of the African Union, which duplicates the best possible systems in the world, such as the European Union regional human rights system.

Article 7 of the Protocol to the establishment of the Court on Human and Peoples' Rights makes it compatible for the African human rights system to apply the provisions of the charter and any other relevant human rights instruments ratified by the states concerned.¹⁰³ Under Article 3 of the Protocol, the main object of the Court's adjudicatory function is to rule on whether a Member State has violated any of the rights contained in the African Charter, the Protocol of the Court, or any other relevant human rights instruments ratified by the State concerned, for which the victim seeks redress.¹⁰⁴

This provision has the potential of extending the jurisdiction of the Court over treaties dealing with issues of human rights applicable in Africa, such as the OAU Convention on Refugees and the African Charter on the Rights and Welfare of the Child.¹⁰⁵ By exercising this jurisdiction the Court is able to apply these instruments and issue a decision on merit, which may include the award of reparations or other remedies where the court finds a violation.

¹⁰² See Constitutive Act of the African Union, National Model, AU National Conference 2003

¹⁰³ See the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights

¹⁰⁴ See article 3 of the Protocol to the Establishment of the Court on Human and Peoples' Rights.

¹⁰⁵ See Amnesty International; African Court on Human and Peoples' Rights in Africa at <http://web.amnesty.org/library/index/engior630012002>.

The Court may thus apply the International Bill of Human Rights and various other international human rights treaties, whether adopted within the framework of the United Nations (UN), such as the Convention Against Torture, or within the specialized institutions, for instance the International Labour Organization (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), and so on. It is believed that domestic courts in Africa will look to the African Court for direction and precedents in their application of human rights instruments at the domestic level.¹⁰⁶

4.2 How the African Court will operate

4.2.1 Structure of the Court

The establishment of the African Court of Human and Peoples' Rights is an essential step in the historic process ensuring judicially enforceable, effective recourse to Africans who have been denied their basic rights as human beings within their inefficient domestic jurisdictions.¹⁰⁷ Firmly convinced that the attainment of the objectives of the African Charter requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the Commission, Member States of the OAU/AU presented one of the most progressive ideas in Africa to establish an African Court on Human and Peoples' Rights.

After careful consideration of the constraints of the African Commission on Human and Peoples' Rights in the promotion and protection of human and peoples' rights, article 1 of the Protocol to the Establishment of the African Court

¹⁰⁶ Ibid

¹⁰⁷ See Nsongurua Udombana, "Towards the African Court on Human and Peoples' Rights: Better Late Than Never", 3 *Yale Human Rights and Development, L. J.* 45, 47 (2000).

of Human and Peoples' Rights establishes the 'Court', the organization, jurisdiction and functioning of which shall be governed by its protocol.¹⁰⁸

In accordance with articles 3 and 4 of the Protocol, the Court is authorized to discharge its duties both in a judiciary and advisory capacity.¹⁰⁹ The provisions of article 5 refer to the court's competence *ratione personae*, namely that personal jurisdiction comprises of two types of jurisdiction: compulsory and optional.¹¹⁰ In terms of the Court's compulsory jurisdiction, article 5 (1) entitles the following parties to submit cases to the Court:

- i. The Commission;
- ii. The State Parties which have lodged a complaint to the Commission;
- iii. The state against which the complaint has been lodged at the Commission;
- iv. The State party whose citizen is the victim of human rights violation; and
- v. African intergovernmental organizations

Article 5(3) provides for optional jurisdiction with regard to cases filed by individuals or non-governmental organizations (NGOs) with observer status before the African Commission.¹¹¹ However, this is subject to article 34 (6).¹¹²

Another sphere of the Court's jurisdiction is advisory. Under Article 4 of the Protocol, a Member State of the OAU/AU, the OAU/AU, any of its organs or any African organization recognized by the OAU/AU may request the Court to provide an opinion on any legal matter relating to the Charter or any other relevant

¹⁰⁸ See the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights

¹⁰⁹ Ibid.

¹¹⁰ See Occasional Paper: The African Court on Human and Peoples' Rights, Presentation, analysis and commentary: The Protocol to the African Charter on Human and Peoples' Rights, establishing the court. Geneva, January 2000.

¹¹¹ See the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights

¹¹² Article 34 (6) provides that "at the time of the ratification of this protocol or any time thereafter, the state shall make a declaration accepting the competence of the court to receive cases under article 5 (3) of this protocol. The court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.

human rights instruments.¹¹³ However, the subject matter of the opinion sought must not be related to a matter being examined by the African Commission. This advisory jurisdiction would enable the Court to formally render legal opinions on issues presented before it.

However, those opinions have no binding legal effect in the form of requiring positive or negative action from parties. Nevertheless, advisory opinions can go a long way in affecting the conduct of states with respect to human rights. Indeed, the advisory function of the Court could prove very effective if states would approach the Court to test the compatibility of their domestic laws with the African Charter and the Protocol. The Republic of South Africa is one of the few African countries whose constitution is compatible with international human rights instruments. Section 231 of the Constitution recognizes the application of international law in South Africa.¹¹⁴

In addition, chapter 9 of the South African constitution establishes state institutions supporting constitutional democracy, namely, the Human Rights Commission, the Public Protector and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.¹¹⁵ Similarly, the advisory jurisdiction of the Court would be greatly enhanced by NGO participation by, among other things, providing the Court with *amicus curiae* briefs.¹¹⁶ This participation would further enrich the jurisprudence of the Court even though advisory opinions *per se* are not binding.¹¹⁷

¹¹³ Ibid

¹¹⁴ See Section 231 (4) of the Interim Constitution of South Africa provided that 'the rules of customary international law *binding on the Republic* shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic' (emphasis added). Adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly

¹¹⁵ Ibid.

¹¹⁶ See Amnesty International; African Court on Human and Peoples' Rights in Africa at <http://web.amnesty.org/library/index/engior630012002>.

¹¹⁷ Ibid

4.2.2 Composition of the Court and Election of Judges

In accordance with articles 11 to 15 of the Protocol, the Court is made up of eleven judges of the Member States of the OAU/AU for six terms of office which is renewable once only.¹¹⁸ Article 12 provides that only States Parties to the Protocol may nominate three candidates, at least two of whom shall be nationals of that state.¹¹⁹ While state members of the OAU that are not parties to the Protocol are barred from nominating candidates, they nevertheless participate in the election. They are thus afforded the opportunity to comment on the suitability of candidates who may be their nationals. This would make it possible for competent judges to be elected to the Court even though they are nationals of Member states of the OAU/AU, that have not ratified the African Charter.

Significantly, the States Parties must give due consideration to adequate gender representation in the nomination of candidates. Article 14 also reiterates the necessity of gender representation in the nomination of judges. The judges of the Court are elected by secret ballot by the Assembly of Heads of State and Governments. In order to ensure continuity in the operation of the Court, article 15 stipulates that the terms of four judges elected at the first election expire after two years, and the terms of four more judges expire at the end of four years, while the terms of the remaining three expire after six years. The judges perform their functions on a part time basis, apart from the President of the Court who performs his duties on a full-time basis, as articulated in article 15.

Although the candidates are forwarded by the Member States, the judges are elected in their individual capacity from among jurists of high moral character and of recognized practical, judicial or academic experience in the field of human rights. In accordance with article 16, judges of the Court shall make a solemn declaration to discharge their duties impartially and faithfully. It is desirable that these criteria for the selection of judges are strictly complied with, to ensure that

¹¹⁸ Ibid

¹¹⁹ Ibid

the candidates have the necessary knowledge of law and are competent in their work. While this does not in itself guarantee impartiality, it will help towards the realization of a more competent human rights instrument.

In pursuance of article 17, the independence of the judges is guaranteed in accordance with international law. They enjoy diplomatic immunities and privileges necessary for them to discharge their duties. Article 17 (2) also stipulates that no judge may hear any case in which the same judge has previously taken part as an agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the court *au Droit International*.¹²⁰

4.2.3 Court Procedure

Article 6 (2) provides that the court shall rule on the admissibility of cases taking into account the provisions of article 56 of the African Charter on Human and Peoples' Rights.¹²¹ This article seemingly takes a step back in clarifying the correct and firm rules of procedure. Article 56 (5) of the Charter lays down that communications relating to human and peoples' rights referred to in article 55 received by the Commission, shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.¹²² While the intention of the Court is not to take over the responsibility of states to take action against crimes and human rights abuses, the Protocol does not explain its relationship with national judiciaries. The Protocol should have clearly underlined or even implied that states are under an obligation to react to human rights abuses as agreed in the Constitutive Act of the AU. The African Court should attempt to combat impunity.

¹²⁰ Ibid.

¹²¹ See article 56 of the African Charter on Human and Peoples' Rights, which sets forth the conditions for admissibility of communications addressed to the African Commission on Human Rights, extracted from Patel, E. M. and Waters, C. *Human Rights: Fundamental Instruments*.

¹²² Ibid.

In other words, the protocol fails to provide any clarities or implications on what procedure and under what conditions a case being reviewed by the Commission or sent back to it by the court can subsequently be referred to the Court.¹²³ As with the European Convention and the American Convention on Human Rights, the Protocol does not provide any directions or rules of procedure of the Court.¹²⁴ Article 8 spells out that the rules of procedure of the Court shall lay down the detailed conditions under which the court shall consider cases brought before it, bearing in mind the complimentarity relationship between the Commission and the Court.¹²⁵ Some regard the non-incorporation of the rules of procedure into the Protocol as a regrettable omission.¹²⁶

Indeed, there has been a tendency in contemporary international law to refuse the Court the right to draw up its own rules and to vest that right in State Parties.¹²⁷ Such practice has found support among some scholars and judges. Andrew Chigovera, a member of the African Commission, also contends that the Protocol should have annexed to its provisions the rules of procedure of the Court in order to give a complete picture of things to come.¹²⁸ This failure might lead to unnecessary bureaucracy in the system.

4.2.4 Court Judgments and their Execution

The Court is empowered to make findings and order appropriate remedies when there is a violation of any rights, whether civil and political rights, or economic, social and cultural rights. Where the Court finds that there has been a violation of a human right, it is required under the Protocol to make appropriate orders to

¹²³ See Occasional Paper: *The African Court on Human and Peoples' Rights, Presentation, analysis and commentart: The Protocol to the African Charter on Human and Peoples' Rights, establishing the court.* Geneva, January 2000.

¹²⁴ See the European Union Treaty, adopted in 1992, entered into force on 1 November 1993, Reprinted in the *European Union Law 1 et seq.* (Frank Emmert, ed., 1999).

¹²⁵ See Rules of Procedure of the Protocol establishing the African Court on Human and Peoples' Rights.

¹²⁶ Nsongurua Udombana, *the African Regional Human Rights Court: Modelling its rules of Procedure*, The Danish Centre for Human Rights, Research Partnership 5/2002.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

remedy the violation, including the payment of fair compensation.¹²⁹ It is important that the Court avoids a restrictive interpretation of its remedial powers by ordering adequate reparation whenever the interest of justice demands.

Similarly, Article 27(2) provides that in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures, as it deems necessary.¹³⁰ The ability of the Court to grant provisional measures demonstrates the preventive function of international protection of human rights. If effectively used, it could serve as a veritable tool for ensuring human rights protection in Africa.

The Protocol also makes provisions for the judgment of the Court and its execution. The judgment of the Court decided by majority would be final and not subject to appeal.¹³¹ However, the Court is empowered to review its decisions in the light of new evidence under the conditions that would be set out in its Rules of Procedure. At the same time, the Court enjoys the power to interpret its decisions. In cases where the judgment of the Court is not unanimous, either in whole or in part, any judge would be entitled to deliver a separate or dissenting opinion.¹³²

The Court must however render its judgment within ninety days of having completed its deliberations.¹³³ The Protocol requires that the judgment of the Court be reasoned, and must be read in open Court, due notice having been given to the parties.¹³⁴ Regarding the execution of the judgment of the Court, states that ratify the Protocol undertake to comply with the judgment of the Court

¹²⁹ See Article 27 of the Protocol to the Establishment of the African Court on Human and Peoples' Rights

¹³⁰ Ibid.

¹³¹ See article 28 of the Protocol to the Establishment of the African Court on Human and Peoples' Rights.

¹³² Ibid.

¹³³ Ibid

¹³⁴ Ibid

in any case to which they are parties, and within the time limit stipulated by the Court, as well as guarantee its execution.¹³⁵

However, the Court's judgment must be brought to the notice of the parties involved and Member States of the OAU as well as the African Commission. The Council of Ministers of the OAU would also be notified, and shall have the responsibility of monitoring the execution of the judgment on behalf of the Assembly of Heads of State and Government. The Court does not possess any express power to ensure that its judgments are adhered to, and thus appears powerless to react when its decisions are ignored. Instead, the Court is required to submit to each regular session of the OAU Assembly, a report on its work during the previous year.

The report would include cases in which a state has not complied with the Court's judgment. The OAU Assembly must protect the integrity of the system by adopting whatever political measures are necessary to secure compliance with the Court's judgment. It is hoped that the African Union when in place would provide the political platform to achieve this.

4.3. Relationship between the Court and the African Commission

The operation of the African Court of Human and Peoples' Rights will inevitably impact on the work of the African Commission. Nevertheless, the coexistence of the Court and the African Commission requires a proper clarification of the functions to be performed by each of these bodies in the new AU set up.¹³⁶ While the mandate of the African Commission is set out in Article 45 of the African Charter,¹³⁷ detailing promotional, protective and other functions, Article 2 of the Protocol dealing with the relationship between the Commission and the Court

¹³⁵ See Appendix 3.

¹³⁶ See Amnesty International; African Court on Human and Peoples' Rights in Africa at <http://web.amnesty.org/library/index/engior630012002>.

¹³⁷ See article 45 of the African Charter, Appendix 2.

does not make any specific provisions on that relationship, as regards particular functions.¹³⁸

Rather, it generally provides that the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights. A conclusion that can be drawn from this provision is that the function of the Court is limited to the protective provisions of the Charter. Thus, it emphasizes that the Court will not replace the Commission. Instead, it will strengthen its protective mandate. Similarly, the Commission would retain its protective and promotional mandate as established in the African Charter, but will have access to submit cases to the Court as well.

In essence, both the Court and the Commission would share the protective mandate. There remains potential for duplication of efforts by the Commission and the Court given that Article 45(3) of the Charter vests the Commission with the power to interpret all provisions of the Charter at the request of a State Party, an institution of the OAU or an African organization recognized by the OAU. However, the Commission's interpretative mandate is limited only to the African Charter. On the other hand, Article 3 of the Protocol extends the jurisdiction of the Court to the interpretation and application of the Charter, the Protocol, and any other relevant human rights instruments ratified by the state concerned. A dispute relating to any interpretation made by the Commission can be submitted to the Court. There is thus no doubt that the Court would occupy a primary place in the interpretation of not only the provisions of the Charter but other human rights documents that are applicable before it. By implication, this assertion embraces the Constitutive Act of the African Union.

Nevertheless, to avoid dispute, unnecessary competition or duplication, it is essential that the protective function of the Commission should be exclusively

¹³⁸ Article 2 of the Protocol to the African Court state that the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the Commission.

vested in the Court. The Commission would thus be more effective by concerning itself with promotional functions, including the consideration of state reports and facilitating dialogue with NGOs and government institutions in Member States, and encouraging the incorporation of human rights standards into State policies and domestic legislation.

Moreover, the division of duties would enhance cooperation and mutual reinforcement between the two institutions and ultimately contribute to the fulfillment of human and peoples' rights in Africa. The Rules of Procedure of the Court will be vital to the success or failure of the African Court as they will create the practical framework for the operation of the provisions of the Protocol and regulate the relationship between the Court and the Commission.

4.4 Conclusion

At face value, the African human rights system is more vigorous than ever before. The recognition of the African Court by the African Union has strengthened the ambition to consolidate a better instrument for the protection of human and peoples' rights in the region. Nevertheless, the Protocol to the establishment of the African Court on Human and Peoples' Rights raises genuine concerns in terms of rules of procedure, effectiveness of the Court in dealing with ineffective governments, reluctance by OAU/AU Member States to ratify the Protocol and so on.

Nsongurua Udombana wrote: 'just because we cannot see clearly the end of the road... that there is no reason for not setting out on the essential journey. On the contrary, great change dominates the world, and unless we move with change we will become victims.'¹³⁹ The evident limitations in the African Union human rights system and its enforcement mechanism cannot overshadow the future prospects ahead of African regional prosperity.

¹³⁹ See Nsongurua J. Udombana, *The institutional Structure of the African Union: A legal Analysis*, 33 *California Western International Law Journal* 69-135.

Chapter Five

Recommendations and Conclusion

5.1 Introduction

State legal deficiencies, lawlessness, poverty, and wars have continuously tormented the African region since the beginning of imperialism three centuries ago. For various well-known reasons, the African region is carelessly inhabited by a majority of states whose judiciary systems are dysfunctional, and are sanctioned to put into effect human rights protection. Some judiciaries, however, have started to engage in a progressive and sophisticated discussion of international human rights norms. The South African legal system, for example, provides for the entrenchment of human rights through the Human Rights Commission and other state institutions.

Like the European Union Member States, the success of the African Union will depend on Member States who have strong and effective national judiciary systems that will serve as both the catalyst for human rights protection, as well a connection (source) for the regional human rights system. Realizing that the plague of wars in Africa constitutes a major obstacle to the human rights protection in the African region, the formation of a strong African Union provides a firm foundation for the protection of human and peoples' rights.

The pertinent issue in this study has been whether the African Union is radical and firm enough to put an end to the string of human rights abuses and structural deficiencies that have continuously obstructed the principles of good governance and democracy in the African region. Since the African Union seems to imitate the European Union style, this study has reviewed the European Union structure and its historical background. As a result, the study proffers recommendations that are grounded on the principles and objectives of the African Union. It is submitted that the African Union will struggle to serve its purpose if such recommendations are not taken into account.

5.2 Recommendations

It has been argued that the successful enforcement of human rights in the African region will depend, in part, on the development of economic integration among states on the continent.¹⁴⁰ While this makes sense in the context of the new Pan-African dispensation, it presents a huge challenge for Africa to observe human rights protections and democratic principles. The current status quo presents a completely different affair. The integration of dysfunctional economic and political structures will not achieve much in realizing the African Union's ambitions. Instead the integration of badly organized systems will paint a picture of organized chaos within the African regional human rights system.

The challenge therefore is to mobilize Member States into more democratic entities in their sub-regional zones. While this rests more on the shoulders of the citizens of each Member State to transform their own political and economic systems, the African Union bears the responsibility to ensure that Member States comply with the principles of democracy and human rights protections as set out in the Constitutive Act of the African Union and other international human rights instruments. The objective of the African Union to promote popular participation and the corresponding principles of participation of African peoples in the activities of the Union must be made palatable for Member States to adopt similar principles in their own governments. The right to participate in the running of one's country is as good as the right to determine the future of the African region. Most importantly, this right is more necessary at the national level than at the international stage. Charity begins at home.

Significantly, the African human rights system is centered on two human rights instruments, namely, the African Charter on Human and Peoples' Rights and the Constitutive Act of the African Union. In general historical terms, the recognition of the African Charter as a legal instrument presents a region evolving from one era to another. However, this comes at a heavy price for the promotion and

¹⁴⁰ See Acheampong, 'Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and Political rights and socio-economic rights', *African Human Rights Law Journal*, Volume 1 No 2 2001.

protection of human and peoples' rights. It opens legal technicalities for aggressive governments to ignore the Constitutive Act of the African Union, and opt to utilize the claw back clauses of the African Charter.

It would have been proper for the new human rights system to disregard the African Charter as it dismally failed to neither entrench nor protect human and peoples' rights in the African region. The Constitutive Act of the African Union therefore must be amended to clearly disband the forces of the African Charter so that it can firmly implement its own vision without delay. The Assembly of the Heads of State and Government meeting in 2008/9 must adopt a decision to nullify the African Charter, and enlarge the jurisdiction of the Union to consider transgressions and human rights abuses that continue in the new African dispensation.

In respect of the African Court of Human and Peoples' Rights, a number of issues need to be addressed. While the Constitutive Act of the AU establishes the 'Court', it provides no details in terms of its functions, rules of procedure and whether this is a 'new court' or it is an extension of the African Court created under the African Charter. It is necessary for the new African human rights dispensation to specify or give clarity on these issues. Given the human rights record in the African region, the establishment of the clear-cut human rights system is essential. Both the African Charter and the Constitutive Act of the African Union give indication that a human rights court is a necessity for an effective African human rights regime. It therefore becomes important to set clear guidelines so that the 'Court' may function properly.

In terms of the rules of procedure, neither the protocol to the establishment of the 'Court' nor the Constitutive Act of the African Union is clear on how the rules will be set up. As a matter of concern, it serves the Union well to establish a Court that will determine its own rules of procedure to strengthen its impartiality. Over and above this, like other new African institutions, the African Court will have to do battle with financial constraints to fully get it on its feet.

5.3 Conclusion

An inference can be drawn that the African Union is a radical shift from the OAU taking into account its achievements in less than half a decade. It has taken the African Union a shorter period to put into effect its protocols, and transform its institutions into modern democratic entities. The African Union is more direct, clear and firm on human rights issues and the manner in which these are to be resolved. While it has its own limitations, it better provides a platform for the individuals and peoples of Africa to have a say in the development of the region. Human and peoples' rights have never been considered like this in the history of Africa.

Most significantly, the new Pan-African ideology is broad-based and futuristic in its approach to human rights, democracy and human development. It recognizes the need to resuscitate the economic activity of the peoples of Africa in order to change the status quo. Salim Ahmed Salim wrote: 'human rights is a basic requirement for any society and a pre-requisite for human progress and development.'¹⁴¹ It is therefore vitally important for African governments to dedicate a larger proportion of their transformation efforts to the resuscitation of democratic values and the promotion of human rights. The preamble to the Universal Declaration of Human Rights recognizes that the inherent dignity and... equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and that disregard and contempt for human rights resulted in barbarous acts.¹⁴²

¹⁴¹ Salim Ahmed Salim, the former OAU Secretary General said this at the adoption of the Draft Protocol to the Establishment of the African Court on Human and Peoples' Rights in December 1997.

¹⁴² See English, K and Stapleton, A. *The Human rights Handbook: A Practical Guide to Monitoring Human Rights*, Juta and Co, Ltd., 1997, pp 1-13.

APPENDIX 1

Constitutive Act of the African Union

We, Heads of State and Government of the Member States of the Organization of African Unity (OAU):

1. The President of the People's Democratic Republic of Algeria
2. The President of the Republic of Angola
3. The President of the Republic of Benin
4. The President of the Republic of Botswana
5. The President of Burkina Faso
6. The President of the Republic of Burundi
7. The President of the Republic of Cameroon
8. The President of the Republic of Cape Verde
9. The President of the Central African Republic
10. The President of the Republic of Chad
11. The President of the Islamic Federal Republic of the Comoros
12. The President of the Republic of the Congo
13. The President of the Republic of Cote d'Ivoire
14. The President of the Democratic Republic of Congo
15. The President of the Republic of Djibouti
16. The President of the Arab Republic of Egypt
17. The President of the State of Eritrea
18. The Prime Minister of the Federal Democratic Republic of Ethiopia
19. The President of the Republic of Equatorial Guinea
20. The President of the Gabonese Republic
21. The President of the Republic of The Gambia
22. The President of the Republic of Ghana
23. The President of the Republic of Guinea
24. The President of the Republic of Guinea Bissau
25. The President of the Republic of Kenya
26. The Prime Minister of Lesotho
27. The President of the Republic of Liberia

28. The Leader of the 1st of September Revolution of the Great Socialist People's Libyan Arab Jamahiriya
29. The President of the Republic of Madagascar
30. The President of the Republic of Malawi
31. The President of the Republic of Mali
32. The President of the Islamic Republic of Mauritania
33. The Prime Minister of the Republic of Mauritius
34. The President of the Republic of Mozambique
35. The President of the Republic of Namibia
36. The President of the Republic of Niger
37. The President of the Federal Republic of Nigeria
38. The President of the Republic of Rwanda
39. The President of the Sahrawi Arab Democratic Republic
40. The President of the Republic of Sao Tome and Principe
41. The President of the Republic of Senegal
42. The President of the Republic of Seychelles
43. The President of the Republic of Sierra Leone
44. The President of the Republic of Somalia
45. The President of the Republic of South Africa
46. The President of the Republic of Sudan
47. The King of Swaziland
48. The President of the United Republic of Tanzania
49. The President of the Togolese Republic
50. The President of the Republic of Tunisia
51. The President of the Republic of Uganda
52. The President of the Republic of Zambia
53. The President of the Republic of Zimbabwe

INSPIRED by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States;

CONSIDERING the principles and objectives stated in the Charter of the Organization of African Unity and the Treaty establishing the African Economic Community;

RECALLING the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation;

CONSIDERING that since its inception, the Organization of African Unity has played a determining and invaluable role in the liberation of the continent, the affirmation of a common identity and the process of attainment of the unity of our Continent and has provided a unique framework for our collective action in Africa and in our relations with the rest of the world;

DETERMINED to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world;

CONVINCED of the need to accelerate the process of implementing the Treaty establishing the African Economic Community in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization;

GUIDED by our common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among our peoples;

CONSCIOUS of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda;

DETERMINED to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law;

FURTHER DETERMINED to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them discharge their respective mandates effectively;

RECALLING the Declaration which we adopted at the Fourth Extraordinary Session of our Assembly in Sirte, the Great Socialist People's Libyan Arab Jamahiriya, on 9.9. 99, in which we decided to establish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organization and the Treaty establishing the African Economic Community;

HAVE AGREED AS FOLLOWS:

Article 1

Definitions

In this Constitutive Act:

"Act" means the present Constitutive Act;

"AEC" means the African Economic Community;

"Assembly" means the Assembly of Heads of State and Government of the Union;

"Charter" means the Charter of the OAU;

"Committee" means a Specialized Technical Committee of the Union;

"Council" means the Economic, Social and Cultural Council of the Union;

"Court " means the Court of Justice of the Union;

"Executive Council" means the Executive Council of Ministers of the Union;

"Member State" means a Member State of the Union;

"OAU" means the Organization of African Unity;

"Parliament" means the Pan-African Parliament of the Union;

"Union" means the African Union established by the present Constitutive Act.

Article 2

Establishment

The African Union is hereby established in accordance with the provisions of this Act.

Article 3

Objectives

The objectives of the Union shall be to:

- a. Achieve greater unity and solidarity between the African countries and the peoples of Africa;
- b. Defend the sovereignty, territorial integrity and independence of its Member States;
- c. Accelerate the political and socio-economic integration of the continent;
- d. Promote and defend African common positions on issues of interest to the continent and its peoples;
- e. Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;
- f. Promote peace, security, and stability on the continent;
- g. Promote democratic principles and institutions, popular participation and good governance;
- h. Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
- i. Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
- j. Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;

- k. Promote cooperation in all fields of human activity to raise the living standards of African peoples;
- l. Coordinate and harmonize policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
- m. Advance the development of the continent by promoting research in all fields, in particular in science and technology;
- n. Work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

Article 4

Principles

The Union shall function in accordance with the following principles:

- a. Sovereign equality and interdependence among Member States of the Union;
- b. Respect of borders existing on achievement of independence;
- c. Participation of the African peoples in the activities of the Union;
- d. Establishment of a common defence policy for the African Continent;
- e. Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
- f. Prohibition of the use of force or threat to use force among Member States of the Union;
- g. Non-interference by any Member State in the internal affairs of another;
- h. The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;

- i. Peaceful co-existence of Member States and their right to live in peace and security;
- j. The right of Member States to request intervention from the Union in order to restore peace and security;
- k. Promotion of self-reliance within the framework of the Union;
- l. Promotion of gender equality;
- m. Respect for democratic principles, human rights, the rule of law and good governance;
- n. Promotion of social justice to ensure balanced economic development;
- o. Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
- p. Condemnation and rejection of unconstitutional changes of governments.

Article 5

Organs of the Union

1. The organs of the Union shall be:
 - a. The Assembly of the Union;
 - b. The Executive Council;
 - c. The Pan-African Parliament;
 - d. The Court of Justice;
 - e. The Commission;
 - f. The Permanent Representatives Committee;
 - g. The Specialized Technical Committees;
 - h. The Economic, Social and Cultural Council;
 - i. The Financial Institutions;
2. Other organs that the Assembly may decide to establish.

Article 6

The Assembly

1. The Assembly shall be composed of Heads of States and Government or their duly accredited representatives.
2. The Assembly shall be the supreme organ of the Union.
3. The Assembly shall meet at least once a year in ordinary session. At the request of any Member State and on approval by a two-thirds majority of the Member States, the Assembly shall meet in extraordinary session.
4. The Office of the Chairman of the Assembly shall be held for a period of one year by a Head of State or Government elected after consultations among the Member States.

Article 7

Decisions of the Assembly

1. The Assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.
2. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Assembly.

Article 8

Rules of Procedure of the Assembly

The Assembly shall adopt its own Rules of Procedure.

Article 9

Powers and Functions of the Assembly

1. The functions of the Assembly shall be to:
 - a. Determine the common policies of the Union;
 - b. Receive, consider and take decisions on reports and recommendations from the other organs of the Union;
 - c. Consider requests for Membership of the Union;

- d. Establish any organ of the Union;
 - e. Monitor the implementation of policies and decisions of the Union as well as ensure compliance by all Member States;
 - f. Adopt the budget of the Union;
 - g. Give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace;
 - h. Appoint and terminate the appointment of the judges of the Court of Justice;
 - i. Appoint the Chairman of the Commission and his or her deputy or deputies and Commissioners of the Commission and determine their functions and terms of office.
2. The Assembly may delegate any of its powers and functions to any organ of the Union.

Article 10

The Executive Council

1. The Executive Council shall be composed of the Ministers of Foreign Affairs or such other Ministers or Authorities as are designated by the Governments of Member States.
2. Council shall meet at least twice a year in ordinary session. It shall also meet in an extra-ordinary session at the request of any Member State and upon approval by two-thirds of all Member States.

Article 11

Decisions of the Executive Council

1. The Executive Council shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.
2. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Executive Council.

Article 12

Rules of Procedure of the Executive Council

The Executive Council shall adopt its own Rules of Procedure.

Article 13

Functions of the Executive Council

1. The Executive Council shall co-ordinate and take decisions on policies in areas of common interest to the Member States, including the following:

- a. Foreign trade;
- b. Energy, industry and mineral resources;
- c. Food, agricultural and animal resources, livestock production and forestry;
- d. Water resources and irrigation;
- e.
- f. Environmental protection, humanitarian action and disaster response and relief;
- g. Transport and communications;
- h. Insurance;
- i. Education, culture, health and human resources development;
- j. Science and technology;
- k. Nationality, residency and immigration matters;
- l. Social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped;
- m. Establishment of a system of African awards, medals and prizes.

2. The Executive Council shall be responsible to the Assembly. It shall consider issues referred to it and monitor the implementation of policies formulated by the Assembly.

3. The Executive Council may delegate any of its powers and functions mentioned in paragraph 1 of this Article to the Specialized Technical Committees established under Article 14 of this Act.

Article 14

The Specialized Technical Committees

Establishment and Composition

1. There is hereby established the following Specialized Technical Committees, which shall be responsible to the Executive Council:

- a. The Committee on Rural Economy and Agricultural Matters;
- b. The Committee on Monetary and Financial Affairs;
- c. The Committee on Trade, Customs and Immigration Matters;
- d. The Committee on Industry, Science and Technology, Energy, Natural Resources and Environment;
- e. The Committee on Transport, Communications and Tourism;
- f. The Committee on Health, Labour and Social Affairs; and
- g. The Committee on Education, Culture and Human Resources.

2. The Assembly shall, whenever it deems appropriate, restructure the existing Committees or establish other Committees.

3. The Specialized Technical Committees shall be composed of Ministers or senior officials responsible for sectors falling within their respective areas of competence.

Article 15

Functions of the Specialized Technical Committees

Each Committee shall within its field of competence:

- a. Prepare projects and programmes of the Union and submit in to the Executive Council;

- b. Ensure the supervision, follow-up and the evaluation of the implementation of decisions taken by the organs of the Union;
- c. Ensure the coordination and harmonization of projects and programmes of the Union;
- d. Submit to the Executive Council either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provision of this Act; and
- e. Carry out any other functions assigned to it for the purpose of ensuring the implementation of the provisions of this Act.

Article 16

Meetings

1. Subject to any directives given by the Executive Council, each Committee shall meet as often as necessary and shall prepare its rules of procedure and submit them to the Executive Council for approval.

Article 17

The Pan-African Parliament

1. In order to ensure the full participation of African peoples in the development and economic integration of the continent, a Pan-African Parliament shall be established.
2. The composition, powers, functions and organization of the Pan-African Parliament shall be defined in a protocol relating thereto.

Article 18

The Court of Justice

1. A Court of Justice of the Union shall be established;
2. The statute, composition and functions of the Court of Justice shall be defined in a protocol relating thereto.

Article 19

The Financial Institutions

The Union shall have the following financial institutions, whose rules and regulations shall be defined in protocols relating thereto:

- a. The African Central Bank;
- b. The African Monetary Fund;
- c. The African Investment Bank.

Article 20

The Commission

1. There shall be established a Commission of the Union, which shall be the Secretariat of the Union.
2. The Commission shall be composed of the Chairman, his or her deputy or deputies and the Commissioners. They shall be assisted by the necessary staff for the smooth functioning of the Commission.
3. The structure, functions and regulations of the Commission shall be determined by the Assembly.

Article 21

The Permanent Representatives Committee

1. There shall be established a Permanent Representatives Committee. It shall be composed of Permanent Representatives to the Union and other Plenipotentiaries of Member States.
2. The Permanent Representatives Committee shall be charged with the responsibility of preparing the work of the Executive Council and acting on the Executive Council's instructions. It may set up such sub-committees or working groups as it may deem necessary.

Article 22

The Economic, Social and Cultural Council

1. The Economic, Social and Cultural Council shall be an advisory organ composed of different social and professional groups of the Member States of the Union.
2. The functions, powers, composition and organization of the Economic, Social and Cultural Council shall be determined by the Assembly.

Article 23

Imposition of Sanctions

1. The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments therefrom.
2. Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

Article 24

The Headquarters of the Union

1. The Headquarters of the Union shall be in Addis Ababa in the Federal Democratic Republic of Ethiopia.
2. There may be established such other offices of the Union as the Assembly may, on the recommendation of the Executive Council, determine.

Article 25

Working Languages

The working languages of the Union and all its institutions shall be, if possible, African languages, Arabic, English, French and Portuguese.

Article 26

Interpretations

The Court shall be seized with matters of interpretation arising from the application or implementation of this Act. Pending its establishment, such matters shall be submitted to the Assembly of the Union, which shall decide by a two-thirds majority.

Article 27

Signature, Ratification and Accession

1. This Act shall be open to signature, ratification and accession by the Member States of the OAU in accordance with their respective constitutional procedures.
2. The instruments of ratification shall be deposited with the Secretary-General of the OAU.
3. Any Member State of the OAU acceding to this Act after its entry into force shall deposit the instrument of accession with the Chairman of the Commission.

Article 28

Entry into Force

This Act shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States of the OAU.

Article 29

Admission to Membership

1. Any African State may, at any time after the entry into force of this Act, notify the Chairman of the Commission of its intention to accede to this Act and to be admitted as a member of the Union.
2. The Chairman of the Commission shall, upon receipt of such notification, transmit copies thereof to all 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 Chairman of the Commission who shall, upon receipt of the required number of votes, communicate the decision to the State concerned.

Article 30

Suspension

Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

Article 31

Cessation of Membership

1. Any State which desires to renounce its membership shall forward a written notification to the Chairman of the Commission, who shall inform Member States thereof. At the end of one year from the date of such notification, if not withdrawn, the Act shall cease to apply with respect to the renouncing State, which shall thereby cease to belong to the Union.

2. During the period of one year referred to in paragraph 1 of this Article, any Member State wishing to withdraw from the Union shall comply with the provisions of this Act and shall be bound to discharge its obligations under this Act up to the date of its withdrawal.

Article 32

Amendment and Revision

1. Any Member State may submit proposals for the amendment or revision of this Act.
2. Proposals for amendment or revision shall be submitted to the Chairman of the Commission who shall transmit same to Member States within thirty (30) days of receipt thereof.
3. The Assembly, upon the advice of the Executive Council, shall examine these proposals within a period of one year following notification of Member States, in accordance with the provisions of paragraph 2 of this Article.
4. Amendments or revisions shall be adopted by the Assembly by consensus or, failing which, by a two-thirds majority and submitted for ratification by all Member States in accordance with their respective constitutional procedures. They shall enter into force

thirty (30) days after the deposit of the instruments of ratification with the Chairman of the Commission by a two-thirds majority of the Member States.

Article 33

Transitional Arrangements and Final Provisions

1. This Act shall replace the Charter of the Organization of African Unity. However, the Charter shall remain operative for a transitional period of one year or such further period as may be determined by the Assembly, following the entry into force of the Act, for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto.
2. The provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community.
3. Upon the entry into force of this Act, all necessary measures shall be undertaken to implement its provisions and to ensure the establishment of the organs provided for under the Act in accordance with any directives or decisions which may be adopted in this regard by the Parties thereto within the transitional period stipulated above.
4. Pending the establishment of the Commission, the OAU General Secretariat shall be the interim Secretariat of the Union.
5. This Act, drawn up in four (4) original texts in the Arabic, English, French and Portuguese languages, all four (4) being equally authentic, shall be deposited with the Secretary-General of the OAU and, after its entry into force, with the Chairman of the Commission who shall transmit a certified true copy of the Act to the Government of each signatory State. The Secretary-General of the OAU and the Chairman of the Commission shall notify all signatory States of the dates of the deposit of the instruments of ratification or accession and shall upon entry into force of this Act register the same with the Secretariat of the United Nations.

IN WITNESS WHEREOF, WE have adopted this Act.

Done at Lomé, Togo, this 11th day of July, 2000.

APPENDIX 2

The African Charter on Human and Peoples Rights

African [Banju] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

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 and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights ia 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 instrument 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 people' 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 Chapter 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 obligation of solidarity provided for in 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 ensure 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 practiced 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 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 favorable 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 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. . . .

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 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 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 States 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 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 deliberations 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 Chairman of 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 Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide. . . .

2. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

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 by 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 people's 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

APPENDIX 3

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

The Member States of the Organization of African Unity hereinafter referred to as the OAU, States Parties to the African Charter on Human and Peoples' Rights:

Considering that the Charter of the Organization of African Unity recognizes that freedom, equality, justice, peace and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples;

Noting that the African Charter on Human and Peoples' Rights reaffirms adherence to the principles of human and peoples' rights, freedoms and duties contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, and other international organizations;

Recognizing that the twofold objective of the African Charter on Human and Peoples' Rights is to ensure on the one hand promotion and on the other protection of human and peoples' rights, freedoms and duties;

Recognizing further, the efforts of the African Commission on Human and Peoples' Rights in the promotion and protection of human and peoples' rights since its inception in 1987;

Recalling resolution AHG/Res.230 (XXX) adopted by the Assembly of Heads of State and Government in June 1994 in Tunis, Tunisia, requesting the Secretary-General to convene a Government experts' meeting to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African Commission and to consider in particular the establishment of an African Court on Human and Peoples' Rights;

Noting the first and second Government legal experts' meetings held respectively in Cape Town, South Africa (September, 1995) and Nouakchott, Mauritania (April, 1997),

and the third Government legal experts' meeting held in Addis Ababa, Ethiopia (December, 1997), which was enlarged to include Diplomats;

Firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.

HAVE AGREED AS FOLLOWS:

Article 1

ESTABLISHMENT OF THE COURT

There shall be established within the Organization of African Unity an African Court on Human and Peoples' Rights (hereinafter referred to as "the Court"), the organization, jurisdiction and functioning of which shall be governed by the present Protocol.

Article 2

RELATIONSHIP BETWEEN THE COURT AND THE COMMISSION

The Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") conferred upon it by the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter");

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 4

ADVISORY OPINIONS

1. At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.
2. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting decision.

Article 5

ACCESS TO THE COURT

1. The following are entitled to submit cases to the Court
 - a. The Commission;
 - b. The State Party which has lodged a complaint to the Commission;
 - c. The State Party against which the complaint has been lodged at the Commission;
 - d. The State Party whose citizen is a victim of human rights violation;
 - e. African Intergovernmental Organizations.

2. When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join.
3. The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.

Article 6

ADMISSIBILITY OF CASES

1. The Court, when deciding on the admissibility of a case instituted under article 5 (3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.
2. The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.
3. The Court may consider cases or transfer them to the Commission.

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.

Article 8

CONSIDERATION OF CASES

The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.

Article 9

AMICABLE SETTLEMENT

The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.

Article 10

HEARINGS AND REPRESENTATION

1. The Court shall conduct its proceedings in public. The Court may, however, conduct proceedings in camera as may be provided for in the Rules of Procedure.
2. Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.
3. Any person, witness or representative of the parties, who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.

Article 11

COMPOSITION

1. The Court shall consist of eleven judges, nationals of Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.
2. No two judges shall be nationals of the same State.

Article 12

NOMINATIONS

1. States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State.
2. Due consideration shall be given to adequate gender representation in the nomination process.

Article 13

LIST OF CANDIDATES

1. Upon entry into force of this Protocol, the Secretary-General of the OAU shall request each State Party to the Protocol to Present, within ninety (90) days of such a request, its nominees for the office of judge of the Court.
2. The Secretary-General of the OAU shall prepare a list in alphabetical order of the candidates nominated and transmit it to the Member States of the OAU at least thirty days prior to the next session of the Assembly of Heads of State and Government of the OAU hereinafter referred to as "the Assembly".

Article 14

ELECTIONS

1. The judges of the Court shall be elected by secret ballot by the Assembly from the list referred to in Article 13 (2) of the present Protocol.
2. The Assembly shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions.
3. In the election of the judges, the Assembly shall ensure that there is adequate gender representation.

Article 15

TERM OF OFFICE

1. The judges of the Court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.
2. The judges whose terms are to expire at the end of the initial periods of two and four years shall be chosen by lot to be drawn by the Secretary-General of the OAU immediately after the first election has been completed.
3. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term.

4. All judges except the President shall perform their functions on a part-time basis. However, the Assembly may change this arrangement as it deems appropriate.

Article 16

OATH OF OFFICE

After their election, the judges of the Court shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 17

INDEPENDENCE

1. The independence of the judges shall be fully ensured in accordance with international law.
2. No judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court.
3. The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law.
4. At no time shall the judges of the Court be held liable for any decision or opinion issued in the exercise of their functions.

Article 18

INCOMPATIBILITY

The position of judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the office, as determined in the Rules of Procedure of the Court.

Article 19

CESSATION OF OFFICE

1. A judge shall not be suspended or removed from office unless, by the unanimous decision of the other judges of the Court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court.
2. Such a decision of the Court shall become final unless it is set aside by the Assembly at its next session.

Article 20

VACANCIES

1. In case of death or resignation of a judge of the Court, the President of the Court 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. The Assembly shall replace the judge whose office became vacant unless the remaining period of the term is less than one hundred and eighty (180) days.
3. The same procedure and considerations as set out in Articles 12, 13 and 14 shall be followed for the filling of vacancies.

Article 21

PRESIDENCY OF THE COURT

1. The Court shall elect its President and one Vice-President for a period of two years. They may be re-elected only once.
2. The President shall perform judicial functions on a full-time basis and shall reside at the seat of the Court.
3. The functions of the President and the Vice-President shall be set out in the Rules of Procedure of the Court.

Article 22

EXCLUSION

If a judge is a national of any State which is a party to a case submitted to the Court, that judge shall not hear the case.

Article 23

QUORUM

The Court shall examine cases brought before it, if it has a quorum of at least seven judges.

Article 24

REGISTRY OF THE COURT

1. The Court shall appoint its own Registrar and other staff of the registry from among nationals of Member States of the OAU according to the Rules of Procedure.
2. The office and residence of the Registrar shall be at the place where the Court has its seat.

Article 25

SEAT OF THE COURT

1. The Court shall have its seat at the place determined by the Assembly from among States parties to this Protocol. However, it may convene in the territory of any Member State of the OAU when the majority of the Court considers it desirable, and with the prior consent of the State concerned.
2. The seat of the Court may be changed by the Assembly after due consultation with the Court.

Article 26

EVIDENCE

1. The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case.
2. The Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.

Article 27

FINDINGS

1. If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

Article 28

JUDGEMENT

1. The Court shall render its judgement within ninety (90) days of having completed its deliberations.
2. The judgement of the Court decided by majority shall be final and not subject to appeal.
3. Without prejudice to sub-article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure.
4. The Court may interpret its own decision.
5. The judgement of the Court shall be read in open court, due notice having been given to the parties.
6. Reasons shall be given for the judgement of the Court.

7. If the judgement of the Court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.

Article 29

NOTIFICATION OF JUDGEMENT

1. The parties to the case shall be notified of the judgement of the Court and it shall be transmitted to the Member States of the OAU and the Commission.
2. The Council of Ministers shall also be notified of the judgement and shall monitor its execution on behalf of the Assembly.

Article 30

EXECUTION OF JUDGEMENT

The States parties to the present Protocol undertake to comply with the judgement in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

Article 31

REPORT

The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgement.

Article 32

BUDGET

Expenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court.

Article 33

RULES OF PROCEDURE

The Court shall draw up its Rules and determine its own procedures. The Court shall consult the Commission as appropriate.

Article 34

RATIFICATION

1. This Protocol shall be open for signature and ratification or accession by any State Party to the Charter.
2. The instrument of ratification or accession to the present Protocol shall be deposited with the Secretary-General of the OAU.
3. The Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited.
4. For any State Party ratifying or acceding subsequently, the present Protocol shall come into force in respect of that State on the date of the deposit of its instrument of ratification or accession.
5. The Secretary-General of the OAU shall inform all Member States of the entry into force of the present Protocol.
6. At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.
7. Declarations made under sub-article (6) above shall be deposited with the Secretary General, who shall transmit copies thereof to the State parties.

Article 35

AMENDMENTS

1. The present Protocol may be amended if a State Party to the Protocol makes a written request to that effect to the Secretary-General of the OAU. The Assembly may adopt, by simple majority, the draft amendment after all the States Parties to

the present Protocol have been duly informed of it and the Court has given its opinion on the amendment.

2. The Court shall also be entitled to propose such amendments to the present Protocol, as it may deem necessary, through the Secretary-General of the OAU.
3. The amendment shall come into force for each State Party which has accepted it thirty days after the Secretary-General of the OAU has received notice of the acceptance.

LIST OF ACRONYMS

Act	-	Constitutive Act of the African Union
AEC	-	African Economic Community
AMU	-	Arab Maghreb Union
APRM	-	African Peer Review Mechanism
AU	-	African Union
Charter	-	Charter of the OAU;
COMESA	-	Common Market of Eastern and Southern Africa
Committee	-	Specialized Technical Committee of the Union;
Court	-	Court of Justice of the Union
CSSDCA	-	Conference on Security, Development and Cooperation in Africa
DRC	-	Democratic Republic of Congo
ECB	-	European Central Bank
ECCAS	-	Economic community of Central African States
ECOWAS	-	Economic Community Of West African States
ECSC	-	European Coal and Steel Community
EEC	-	European Economic Community
EFTA	-	European Free Trade Association

EMU	-	Economic and Monetary Union
EU	-	European Union
Member State	-	Member State of the Union;
NEPAD	-	New Partnership for Africa's Development Cooperation in Africa
NGO'S	-	Non-governmental organizations
PRM	-	Peer Review Mechanism
OAU	-	Organization of African Unity
RSA	-	Republic of South Africa
SADC	-	Southern African Development Community
UDHR	-	Universal Declaration of Human Rights
UCT	-	University of Cape Town
UDW	-	University of Durban Westville
Union	-	African Union
WITS	-	University of Witwatersrand

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