

# The African Union and Human Rights:

Drawing from the European experience of human rights supervision, what impact might the African Union, and the consequent creation of an African Court, have on Africa with regard to human rights, African unity, and the issue of state sovereignty?

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**LLM 2003.**

**Submitted as the dissertation component in partial fulfilment of the requirements for the degree of Master of Laws in the Faculty of Law, University of Natal, Durban.**

## Abstract

The formation of the African Union (AU) holds great promise for Africa with regard to development. It also brings a new dimension to human rights in Africa, with the creation of the African Court. However, the OAU's legacy of human rights supervision and the development of democracy lacks in many areas. Europe, however, has manifested itself into an entity capable of trans-border cooperation and has been able to sustain this over a long period of time.

What the OAU has accomplished in this regard is not compatible with the current status of international law theory and practise. There is a need then for change in these areas, and what better opportunity is there, than for a new dispensation in regional governance to apply to relevant policies and programmes to effect this change?

This dissertation will endeavour to present a study of how the European legacy in Africa worked to the latter's detriment over the past five or six decades since decolonisation. Yet, there are lessons that may be learnt from Europe's unification that can be successfully implemented in Africa. Further, by analysing the weaknesses of Africa's current system of human rights supervision, and rectifying or reforming them, much may be accomplished in the advancement of the system. Therefore reformation of the system will be discussed at length. However, the success of the system will be evidenced by the commitment of its component members.

Thus far the status quo in Africa reflects unwillingness on the part of the state to surrender its sovereignty. This was one of the reasons for the impotence of the OAU. Will the AU be able to overcome this condition? The onus remains on the state to shore up their commitments to the treaties which they have ratified, and to deliver on the promises they have made, because there are solutions, and whether or not they are implemented ultimately depends on the AU.

I, Anshal Sing Bodasing, declare that the content herein is my own work, unless otherwise indicated. I declare further that this dissertation has never been submitted by myself for a degree at any other institution.

January 2003,  
Durban.

## ACKNOWLEDGEMENTS

When I decided to do the LLM degree I thought that writing the dissertation would be a much more pleasant, and much less demanding experience than the coursework because the entire project would be mine from start to finish. Certainly, it was more pleasant. Never less demanding. Gratitude then must be passed on to the people who have helped me deal with all the demands I have encountered along the way. Firstly, to my parents and family, who remain unrelenting in their support of all my efforts and always encourage me to accomplish further. To Max du Plessis, whose invaluable knowledge of the subject meant that I never veered off track, thank you for your openness and guidance. To Rocky Mabrey, who believes in my intellect, and who has shown me the value of perseverance, as well as all my friends and colleagues who have never let me give up: thank you – you are all very special.

Durban,  
January 2003.

*‘The first man, who, having fenced off a plot of land, thought of saying “This is mine” and found people simple enough to believe him was the real founder of civil society. How many crimes, wars, murders, how many miseries and horrors might the human race have been spared by the one who, upon pulling up stakes or filling in the ditch, had shouted to his fellow men, “Beware of listening to this impostor; you are lost, if you forget that the fruits of the earth belong to all and that the earth belongs to no one.” ’*

*Rousseau,  
Discourse on Equality.\**

## Contents

	Page Number
Introduction.....	1
Chapter 1: State, Sovereignty, Nation and Africa.....	4
Chapter 2: The European System of Human Rights Protection and Enforcement.....	11
Chapter 3: From OAU to AU.....	20
Chapter 4: The African System Of Human Rights Protection.....	27
Chapter 5: How Will Africa Be Affected by Its New Commitments?.....	32
Chapter 6: Lessons From Abroad.....	35
Chapter 7: The Question of Reform.....	41
Chapter 8: Reformation of Legal Mechanisms of the African System of Human Rights.....	45
Conclusion.....	51
Bibliography.....	57

## **Introduction**

The 'state' in Africa has been central in many ideological battles within various territories. Conflicts usually revolve around the domination by an ethnic group in a defined space choosing to nationalise the territory. Scant regard is given to the protection of the rights of other groups. It is for this reason, amongst others, that African countries have not been able to form lasting ties with each other: because they cannot do so amongst themselves in their own territories.

The formation of the Organisation of African Unity (OAU), which arose from the concept of pan-Africanism, and which was meant as a movement that freed Africa from its colonial oppressive past, appeared to be insufficient. Unity is difficult to achieve when conflict and strife seem to be endless and unstoppable. In Africa, this was just the scenario.

Sovereignty means power, and power means money, which is the ultimate release from hunger and want for anything. Control of the state in the aftermath of imperialism was not only counter-productive economically, but it also took a big step backwards for African human rights. The type of control in most African countries took the form of bastardised democratic rhetoric not only fooling the inhabitants, but also keeping them in line. Obviously, the centre could not hold. The forsaking of the rule of law in many parts of this continent has led to wars, revolutions and with it tremendous violations of human rights. Reckless disregard for the rights of fellow Africans was the only way most leaders could control resources in order to remain in power.

Even with a formal system of organisation in the form of the OAU, African politics has marginalised Africa from the world economically, and relegated African traders to mere spectators, rather than embracing the continent as a player on the global market. Much of this is credited to the complete lack of funding, and willingness of the different states to comply with international standards.

Europe, on the other hand has organised itself into a seemingly successful intergovernmental body, the Council of Europe, which takes an active role in the protection of human rights, where the civil and political rights of all individuals within its jurisdiction are enforced via an individual complaints procedure. The alleged violations of the protected rights can be heard by the European Commission and Court of Human Rights. The Council also works with OSCE, NATO, and various NGOs to help create democratic security within that region. The European Union, which is mostly a single political entity, continues to thrive and prosper. Europe then seems to have done well for itself since World War II.

The constituting of the African Union (AU) is therefore generally viewed as a positive step towards achieving what the OAU could not. The organs created by the AU are geared towards creating regional cooperation, and not the previously favoured state-centric form of governance. The perseverance by the Assembly of the OAU towards the creation of the AU marked the turning of a corner for Africa. However, signing multilateral agreements and



committing to the ideals of democratic governance does not - by any stretch – make a government or an organisation democratic. Nowhere has this been illustrated more than in Africa.

What is obvious from the creation of the AU is that it bases its various structures on the European Union system and has various structures in common with the latter, or structures of a similar nature. If the AU is going to succeed, and if the creation of a judicial enforcement mechanism is to become an active contributor to the protection of human rights, then it is clear that there should be a reform of the system. However, there is disagreement on the manner of reform. Should Africa fall in line with international standards without question? Or should more careful consideration be given to the way reform is structured?

The effort contained herein consists of a study of how Africa has evolved to its present status, and whether the African system of regional integration is optimally poised for emulation of the success the European system boasts thus far. Chapter 1 goes back to the beginning and focuses on a few important concepts which were introduced into various African societies through colonisation, and how they have impacted on the social, political and economic development of Africa. The legacy left in the aftermath of European domination in Africa proved destructive to Africans, yet in the wake of all this chaos, Europe had already organised itself and was well on the way to achieving the status of being pioneers in the field of human rights protection and enforcement. Therefore the focus of Chapter 2 is Europe. In that chapter all the essential details of the formation of the EU, its structures and the functions thereof, will be discussed. Its inclusion is intended as a template for what the ultimate African system of human rights protection should afford.

Chapter 3 explores the circumstances under which the OAU was formed and functioned, and traces its subsequent dissolution in order for the AU to replace it. This Chapter also shows how the AU was formed and illustrates its various intentions for the betterment of Africa. Chapter 4 extends the discussion to the treatment thus far of human rights in Africa, and contains discussions on the African Charter, Commission and Court on Human and Peoples' Rights as it presently stands and includes the new developments introduced by the AU. Chapter 5 proceeds to ask how Africa, and Africans will be affected by these new developments, and illustrates the response so far by African State Parties.

The focus shifts back to Europe in Chapter 6, and is concentrated on pointing out the lessons that can be learnt from Europe. Only a few examples are discussed as a matter of evidence that there is merit in borrowing the finer aspects of what makes Europe so successful in enforcing human rights where they have been violated. Consequently Chapter 7 ponders the question of reforming the current system both philosophically and normatively. Then in Chapter 8, the discussion concerns what the actual changes in the African system should be: what must occur to make the African system of human rights not only acceptable by international standards, but accepted and respected by Africans – who are the beneficiaries of the system, and are in need of it to function with efficacy.

It is doubtless that there is an enormous amount of work to be done by African leaders and scholars. It is anticipated that the result of the evidence presented allows the reader to see what degree of effort needs to be put in to obtain the results required. In the Conclusion a summation of the salient features of the discussion will be employed to show that the effort made must be single-minded in its pursuit in order for Africa to attain the unity it once proudly clung to. Further, having a system like the European one from which much knowledge may be gained, will be invaluable to Africa because of its experience as well the vast body of work it has accomplished in this area of law. Also, suggestions will be submitted as to how the goals and principles laid out by the AU can be achieved, and what practical impediments may be encountered. Ultimately, it is hoped that from the evidence presented herein, it will be clear why regional integration is a concept that can be successful in Africa.

## Chapter 1.

### State, Sovereignty, Nation and Africa

Africa has always, to its detriment, recoiled from the notion of surrendering its sovereignty. Why? Africa's modern existence largely consists of states struggling since their independence to come to terms with the alien concepts that it has inherited. The blatant distortion of the intended effects of some of these concepts by various African leaders post independence is well documented. In this chapter, these concepts will be defined, and their impact on African people will be discussed as a basis from which the rest of this paper will emanate.

#### *The Concept of "State"*

All the world's territory is organised into states – apart from the Polar Regions – and all the world's population belongs to one or another of over one hundred and eighty states.<sup>1</sup> The state has long been the highest form of social and political organisation. It is *the* central actor in international relations.<sup>2</sup> Of course, there is no single theory in International Relations that sums up exactly what a state is, and consequently, its essential features.<sup>3</sup> However, that debate is for another forum. The objective here is to define the state in terms of manner in which power is exercised by it in the majority of the world's states, ie what is a democratic state?

Universally, the state is recognised as a territory, defined by boundaries which are recognised by other states.<sup>4</sup> Another key element of the state is that it has a framework of norms (laws) which create order; and a government to keep order internally and, defend the territory as well as the population from external threat.<sup>5</sup> The use of force as a backup to ensure that order is maintained is also a feature of the state.<sup>6</sup> The matter of citizenship in a state is one of contention, because it is argued that citizenship can only exist in a democracy, since citizens have rights and duties.<sup>7</sup> This is a component of the legal (rational) relationship that exists between a state and the people that inhabit its territory.

Because a state exists as a framework of relationships (as described above) and agreements, it binds the population and justifies the exercise of public power by the government.<sup>8</sup> The 'agreements' mentioned in the previous statement, refers to the different social contract and democratic theories that are practised, which give the state legitimacy, and the government authority.<sup>9</sup>

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<sup>1</sup> I.L. Claude *States and the Global System* (1991) 1.

<sup>2</sup> C. Brown *Understanding International Relations* (1997) 67.

<sup>3</sup> Ibid 68.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Claude (note {n} 1 above) 2.

<sup>7</sup> Brown (n 2 above) 68-69.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

## *The Concept of Sovereignty*

Sovereignty is a dual notion in that it has an internal and external quality about it in relation to the state.<sup>10</sup> The concept of sovereignty appeared around the sixteenth and seventeenth centuries, when it first demonstrated its duality: a state is sovereign because it recognises no domestic superior, it is also sovereign because it recognises no foreign superior.<sup>11</sup> The concept is viewed as problematic in the realm of political science and in International theory, and Raphael asks, where is sovereignty to be found

(d)oes (sovereignty) reside in a legislature which is empowered to make statutes that can override rules of common law or repeal earlier statutes? Or in a supreme court that can determine whether an Act of the legislature is constitutional? Or does it reside in the constitution itself, or in the body that is empowered to amend the constitutions?<sup>12</sup>

There is also a blur in the line between legal sovereignty and political sovereignty.<sup>13</sup> The two are not mutually exclusive. Legal sovereignty refers to that feature of a state which makes its laws the final, and from which there is no appeal.<sup>14</sup> For example, in South Africa, the Constitution Act 108/1996 is the supreme law of the land, and the Constitutional Court is the final arbiter on any legal matter. Therefore, if the Court hands judgment down on a matter, there can be no further appeal.

Where the line becomes blurred, and politics enters the fray, is when states combine to make up another form of association, like the UN, EU, and AU. This kind of association is viewed as giving up sovereignty because it affects the legislature and the judiciary.<sup>15</sup> Brown submits that if a 'world government' were to form, then by definition it would undermine state sovereignty.<sup>16</sup> Again, South Africa is used as an example: South Africa has acceded to the treaties that make it a part of the African Union. The consequence of this is that in accepting the terms of the Constitutive Act of the AU, South Africa has also accepted that it is obliged to limit the exercise of its power over a variety of affairs. It also means that South Africa has agreed to allow the Court on Human and Peoples' Rights to be a court of appeal, (or one of first instance), beyond the realm of its own Constitutional Court. The loss of sovereignty is not total but partial; nonetheless, South Africa is not wholly sovereign. Of course, there is room for retraction from the treaty, but the consequences are too great within the current state of international law, and international relations.

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<sup>10</sup> Brown (n 2 above) 125-28.

<sup>11</sup> *Ibid.*

<sup>12</sup> D.D. Raphael *Problems of Political Philosophy* 2 ed (1990) 153.

<sup>13</sup> *Ibid* 154.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Brown (n 2 above) 125-28.

### *Nationalism and the Nation-State*

Nation and state do not, in theory, coincide, and technically have different characteristics from each other

(the) nation is a community, the state an association; membership of the nation is a matter of sentiment, depending on common experience and history, while membership of the state is matter of legal status.<sup>17</sup>

Yet the two concepts have dovetailed so that now they are almost always used together, or as 'synonyms of each other'.<sup>18</sup> Nationalism is an ideology, linked sometimes with ethnicity, which draws on peoples' identity, and binds them through it. Sometimes, like in Yugoslavia, it tears people apart. As Thamilmaran states, '(o)ver the past 200 years many new States have come into existence, not to create new nations nihilo, but to represent nations which were deemed to exist already, their people being until then under the rule of one or more other States.'<sup>19</sup> The incidents in the West, when figuring out what constitutes a state/nation, can be traced back to the French Revolution.<sup>20</sup> The consequence of this revolution is that the nation, made up of people, became the sovereign (thus replacing the monarch as sovereign).<sup>21</sup> Each citizen of that nation possessed rights and privileges as part of that nation, and the whole – which is the nation, 'had the right to determine its own destiny.'<sup>22</sup> This experience was copied in the creation of most Western societies; and ' by 1815 almost everywhere in western civilisation the nation in idea and institution had become the real or desired supreme unit of society.'<sup>23</sup>

This sentiment bred ideas of patriotism, and 'brotherhood', instilling a psychological or an emotive element into the conception of being a part of something, a nation, and being loyal to no other group.<sup>24</sup> The direction in which this concept grew and thrived was when the nation began evolving into a sovereign state.<sup>25</sup> Actions could then be carried out in the name of 'national unity'.<sup>26</sup> The nation came to rely on the state and not on 'older and replete institutions.'<sup>27</sup> However many attempts there are to separate the nation from the state in the twentieth century, they have remained intertwined.

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<sup>17</sup> Raphael (n 12 above) 43.

<sup>18</sup> V.T. Thamilmaran 'What is a Nation? Limits of Self- Determination' (1995) 7 SLJIL 165, 165.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 166-67.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid 167.

<sup>24</sup> Ibid 168.

<sup>25</sup> Ibid 169.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

In Africa, the state was not conceived in quite the same way. The Berlin Conference (1885) from which the Berlin Act emerged allowed Europe to put aside its own quarrels and decide upon how to share Africa amongst them.<sup>28</sup> Colonisers imposed their societal structures on already existing societies, which had their own structures in place – ‘The imperialists forced communities that lived independently of each other to live together in a newly created colonial state.’<sup>29</sup> As a result, Africans were not able to identify with the different form of statehood with which they were presented.

### *What Impact Did These Concepts Have on Africa and Africans?*

The lives of Africans prior to the imposition of this new form of society were very much communal – their lives were based on community, or a collection of communities.<sup>30</sup> This does not mean that no hierarchy existed in terms of where power was centralised, because there was order, and definite leadership amongst African societies prior to colonisation.<sup>31</sup> Power and authority were very much present, but there was no ‘despotic and far-reaching control of the individual by the omnipotent state, first perfected in Europe’.<sup>32</sup> Instead, African societies were run in a manner different from that of the West’s (Europe’s) codified laws and objective impartiality.<sup>33</sup>

Most African societies comprised a more human medium of rule, where there was a clear absence of the notions that comprise states as society has now come to view them; instead the ‘state’ was not separate from the people within it.<sup>34</sup> There are still communities in Africa, mostly rural/pastoral, which practice their own form of order, where each group (usually ethnic) of people contain their own hierarchy through which they maintain order without any notions of Constitutions, administrations, or abstract notions of separation of power.<sup>35</sup>

The advent of the Western concept of state was not only thrust upon African people, but complete disregard was given to the fact that there are stark differences amongst these societies (including language, traditions, whether or not they were nomadic, hunting, or farming communities). The boundaries drawn, and the states ‘made’ as a result largely remained after decolonisation, and although colonialism was ‘a divisive factor, (it) created a sense of brotherhood or unity among different African nations within the same colonial state,

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<sup>28</sup> S Kwadjovie ‘The African Union: A New Beginning?’ [www.ngilegacy.com/african\\_union.htm](http://www.ngilegacy.com/african_union.htm) last visited, August 2002.

<sup>29</sup> P.J. Magnarella ‘Achieving Human Rights in Africa.’ 4(2): 2. URL: <http://web.africa.ufl.edu/asq/v4/v4i2a2.htm> at para 6

<sup>30</sup> R. Murray *The African Charter on Human and People’s Rights and International Law* (2000) 34.

<sup>31</sup> M.W. Mutua ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ (1995) 35 VJIL 339, 347.

<sup>32</sup> Ibid.

<sup>33</sup> Murray (n 30 above) 35.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

because they saw themselves as common victims of an alien, racist, and oppressive structure.<sup>36</sup> In Africa, the surge of nationalist movements was simultaneous with the wave of independence movements that flourished prior to decolonisation.<sup>37</sup> Crawford Young submits four alternative forms of community that may have arisen as a result:

- Pan-Africa
- Regional constellations sharing a common colonial legacy, eg Belgian Africa
- Territorial
- Ethno-regional.<sup>38</sup>

According to Smith, the type of nationalism that pervaded the African independence movements had three main features, these being territorialism, democracy and pan-Africanism.<sup>39</sup> He goes on to say that south of the Sahara, the territorial aspect proved to be the most enduring.<sup>40</sup> The significance of this is that it (territorialism) is a part of the success of colonialism in Africa – the colonisers were able to ‘(homogenise) diverse people into a single political community.’<sup>41</sup>

However, this display of ‘brotherhood’ and solidarity was not sufficiently strong to endure the decolonisation process, thus rendering the post-colonial African State easy prey for power-hungry dictators, both within the state concerned, and from abroad.<sup>42</sup> As Fanon wrote

National consciousness, instead of being the all-embracing crystallization of the innermost hopes of the whole people, instead of being the immediate and most obvious result of the mobilization of the people, will be in any case only an empty shell, a crude and fragile travesty of what it might have been. The faults we find in it are quite sufficient explanation of the facility with which, when dealing with young and independent nations, the nation is passed over for the race, and the tribe preferred to the state.<sup>43</sup>

The leaders that emerged from the process of decolonisation were often associated with a particular ethnic group, and believed that forcing ‘diverse cultural populations into a dominant ethnic mould’ could attain a sense of national unity.<sup>44</sup>

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<sup>36</sup> Mutua (n 31 above) 366.

<sup>37</sup> M. Crawford Young ‘Nationalism, Ethnicity, and Class: A Retrospective.’ (1986) *Cahiers d’Etudes africaines*, 103. 421. 422

<sup>38</sup> *Ibid* 424.

<sup>39</sup> A.D. Smith *State and Nation in the Third World* (1983) ch. 3 ‘Nationalism in Africa’ 50 (see also B. Anderson *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983) ch 1 Introduction.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*.

<sup>42</sup> Mutua (n 31 above) 366

<sup>43</sup> F. Fanon *The Wretched of the Earth* (1961) (trans C. Farrington, 1990) ch 3.

<sup>44</sup> Magnarella (n 29 above) para 9.

The sovereignty of nation-states in Africa as the decolonisation process progressed, became a central feature as the 'respect for borders principle' became a significant part of post-colonisation Africa. Basically this is akin to the 'Non-interference' clause in the OAU Charter, and Africans states were to keep out of the affairs of their fellow Africans, and respect their sovereignty: according to the Constitutive Act of the AU, the long-established concept of sovereignty is not the 'guiding principle' as it was with the OAU.<sup>45</sup> So-called 'cooperative sovereignty' is now conceived as being more beneficial for the resurgence of Africa. It is submitted that the Constitutive Act of the African Union contains all the rights words, which indicates to us that there will be regional cooperation.

The reason for the failure of the inherited Western conceptions of rule and self-determination is due to the haphazard manner of State creation in Africa, as well as numerous socio-anthropological factors which have led to massive abuses of human rights.<sup>46</sup> According to Magnarella, the general causes of disrespect for basic human rights are due to the following factors:

- Largely undeveloped economies, which inevitably leads to mass unemployment, and of course, poverty.
- A high birth rate competing for limited resources.
- Diverse and numerous ethnic groups who promote particular self-determination, not the success of the country as a whole.
- The consequence of the last point is that the leaders of the victorious group/faction are able to use whatever resources remain for those particular supporters or that particular group.
- Since there is limited support, this results in a serious lack of legitimacy in the regime, and force is then used to keep the dissidents at bay, all the while violating fundamental human rights under the guise of maintaining national security.<sup>47</sup>

The many restrictions on political as well as civil rights, fuelled by disjointed political processes had generated other social and political pressures which consequently produced irresponsible governance in most African countries.<sup>48</sup> This eventually led to the further marginalisation of Africa from the rest of the world.

The above discussion introduces the concepts of state, sovereignty, and nation in an attempt to create a background that is illustrative of how Africa has come to be so mistrusted, and so far behind in the realm of international human rights law, and in international relations in general. But, can Africa yet learn something from Europe that has a positive impact on the continent? This question will be attempted in proceeding chapters. In the next chapter, the European model of regional integration will be explored, not at length, but in a manner that will show

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<sup>45</sup> CAB/LEG/23.15 Entered into force 26 May 2001. Articles 3 & 4.

<sup>46</sup> Mutua (n 31 above) 341.

<sup>47</sup> Magnarella (n 29 above) para. 4.

<sup>48</sup> S.W.E. Goonesekere 'Human Rights: A Eurocentric Ethic or a Legal Foundation?' (1995) 7 SLJIL 87.



how it can be used as a template for the formation of an African system that works equally as well.

## Chapter 2.

### The European System Of Human Rights Protection and Enforcement

#### *Council of Europe*

The European experience regarding the protection of fundamental human rights came to the fore in the aftermath of the Second World War. The Council of Europe (COE), which formed in 1949, is the source of one of the oldest documents created for the purpose of protecting human rights.<sup>49</sup> It is doubtless that the devastations and cruel violations of rights and freedoms during the Second World War left Europe to reconsider intergovernmental as well as intercommunity relations.

The COE started with 10 member states, and is now a body of 41 States, or High Contracting Parties.<sup>50</sup> The Council operates its main organs from Strasbourg, and concerns itself with the protection of basic, but fundamental human rights.<sup>51</sup> The two main organs of the Council are, The Committee of Ministers, and The Parliamentary Assembly.<sup>52</sup> The former is comprised of the Foreign Ministers (or their representatives) of each Contracting Party, and has a vital role as policy-maker, as well as adopting measures and declaring on issues of an international nature.<sup>53</sup> The Committee also plays a supervisory role in the mechanics of the European Convention on Human Rights (ECHR).<sup>54</sup> A discussion about this function will be dealt with below. The Parliamentary Assembly is a body of representatives from the parliaments of the Contracting Parties, but it has no legislative powers.<sup>55</sup> Its mandate is of a consultative nature, and it makes recommendations to the Committee regarding international agreements.<sup>56</sup>

The aims of the COE are articulated in the first chapter of the Statute of the Council of Europe.<sup>57</sup> The aims revolve essentially around achieving ‘ “a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.” ’<sup>58</sup>

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<sup>49</sup> B. Dickson ‘The Council of Europe and the European Convention’ in B. Dickson (ed) *Human Rights and the European Convention* (1997) 1, 1.

<sup>50</sup> <http://www.humanrights.coe.int/Intro/eng/GENERAL/intro.HTm> last visited 6 August 2001.

<sup>51</sup> Dickson (n 49 above) 2-3.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Dickson (n 49 above) 3-4.

<sup>56</sup> Ibid.

<sup>57</sup> D. Gomien, D. Harris & Zwaak *Law and practice of the European Convention on Human Rights and the European Social Charter*. (1997) 12

<sup>58</sup> Ibid.

The work of the Council involves:

- The protection of human rights and pluralist democracy.
- Promoting awareness of human rights through education
- Protecting minorities, and quashing racial intolerance, xenophobia
- Promoting equality
- Working towards solutions to societies problems from racial to socio-economic issues.<sup>59</sup>

These needs are as pressing as ever, and have a direct bearing in the European situation today. Central and Eastern Europe have witnessed sweeping changes politically and socially over the last two decades, and the COE is central to the reparation process as well as playing the role of educator in inculcating a culture of respect for civil and political human rights and freedoms.<sup>60</sup>

Although human rights cannot be qualified in order of importance, it is safe to argue that the two most important documents emanating from the Council are ECHR, and the European Social Charter.<sup>61</sup> While the Convention has been entrenched in domestic law of most of the Contracting Parties, the various domestic Courts do not apply the rights enshrined in the Social Charter.<sup>62</sup> The Charter is of a complementary nature to the Convention, and the individual, who is so vehemently a part of the essence of the Convention, plays no part in the improvement or the enforcement of the Charter. Nonetheless, the Convention is a potent, and dynamic product of the Council, whose legal reach is deep, as it is wide.<sup>63</sup>

Therefore, the Council is a body that not only protects human rights and freedoms, but it also seeks to maintain and further realise the survival of new and other rights as they come into being. The COE operates alongside and together with a number of NGOs, intergovernmental and governmental organisations. It is the issue of the protection of democracy, and the maintenance of security, which also allows the COE to work with the European Union (EU), North Atlantic Treaty Organisation (NATO), as well as the United Nations.<sup>64</sup>

### *The European Union*

Article F of the Maastricht Treaty (Treaty on European Union - TEU), states that

The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms signed in

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<sup>59</sup> [www.humanrights.coe.int/intro/eng/GENERAL/intro.Htm](http://www.humanrights.coe.int/intro/eng/GENERAL/intro.Htm) last visited, 06/08/01.

<sup>60</sup> Ibid.

<sup>61</sup> Gomien et al (n 57 above) 14.

<sup>62</sup> Ibid.

<sup>63</sup> Dickson (n 49 above) 3; Gomien et al (n 57 above) 14.

<sup>64</sup> [www.humanrights.coe.int](http://www.humanrights.coe.int) (n 50 above).

Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.<sup>65</sup>

However, the Union has been criticised by some commentators for failing to incorporate a comprehensive human rights policy.<sup>66</sup> There have been references and intimations towards human rights, but this goes far back to the 1950s, when the EPC was proposed.<sup>67</sup> ‘Citizenship’ was used to include all people in the early treaties, and has been revived in the TEU, but as explained in Dickson, ‘(t)here was to be ‘an ever closer Union’ of the peoples’.<sup>68</sup> It was understood that if a greater level of integration resulted in a single European state being formed, then that state would require ‘European level protection’.<sup>69</sup> Nevertheless, the centrality of the Union has remained that of a political Union, while the particular nation states within the Union, has remained the protector of human rights.

This is not a new development, because since its inception, the Convention’s Bill of Rights has not been regarded as part of Community (now Union) law. The Community was more receptive to the rights enshrined in the UN Covenant of 1966, which enshrined economic, social and cultural rights.<sup>70</sup> This was a natural development, because the growing number of International Covenants promulgated by the UN belonged to a wave of International Law, which the Union was unable to resist becoming a part of. In fact, it seemed natural for the Community to accede to those documents.<sup>71</sup>

The advent of the Treaty of Rome created specific Community rights (i.e. economic/trade rights). When the European Court was called upon to adjudicate on these matters it finally became clear that the jurisprudence being developed pointed in the direction of Community law prevailing in areas of conflict with domestic law.<sup>72</sup> Consequently, more emphasis began to be placed on the individual. The Court has thus far been consistent in its principle that domestic Constitutional provisions could only be considered, or even applied if they were of a universal nature, and fall within the ambit of the aims of the Community. The Court has, as a result of this stance, been accused of accepting its role as protector, but ‘denying individual protection in practise.’<sup>73</sup>

It was then decided that the Convention would be the most appropriate document to consider, since the rights and freedoms protected there are universal, and fall within the ambit of

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<sup>65</sup> N. Burrows ‘The European Union and the European Convention’ in B. Dickson (ed) *Human Rights and the European Convention* (1997) 27,27.

<sup>66</sup> P. Alston & J.H.H. Weiler ‘An “Ever Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’ (1999) <http://www.ejil.org/journal/vol9/no4/art3-02.html>, ch 2, 1.

<sup>67</sup> Ibid.

<sup>68</sup> Burrows (n 65 above) 28.

<sup>69</sup> Ibid.

<sup>70</sup> Burrows (n 65 above) 31.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid 32.

<sup>73</sup> Ibid 33.

Community law. Nonetheless, accession to the Convention by the Union, has never doggedly been sought after.

The Amsterdam Treaty certainly reinforces a commitment to human rights:

- Internally, the European Union certainly acknowledges and respects the fundamental principles entrenched in the Convention.
- Externally, the Union is a strong player in the field of international law and politics that can exert significant force, especially when entering into agreements with other countries.<sup>74</sup>

Yet, adequate measures have never been adopted at administrative or legislative level, to incorporate the Convention as part of Union law.

### *The European Convention on Human Rights (ECHR)*

As mentioned above, traditional public international law is based, in theory, on equality of states, and between states, whereas modern public international law emphasises the relationship between the state and the individual.

It is in the mould of the latter that the ECHR is founded. The Convention was entered into force on 03 September 1953, and consists at present of 11 protocols, and a number of sections. The preamble pays homage to the UDHR, and sets out what the Convention is intended for, and what it aims to achieve, which is a greater unity between High Contracting Parties, and ‘a common understanding and observance of...Human Rights’.<sup>75</sup>

The COE (as mentioned above) formulated the Convention, and is its defining document. It is not merely a document that seeks to protect fundamental human rights and freedoms; it also has mechanisms in place to enforce the protection and to prevent further violations of these rights.

The rights protected are recognised as universal. They include: Protocol 11, under which Article 2 protects the right to life; Article 3 prohibits torture; Article 4 prohibits slavery and forced labour; Article 5 secures the right to a liberty and security; Article 6 entrenches the right to a fair trial; and Article 10 protects the freedom of expression. Protocol 11 also articulates property, socio-economic, and trade rights. Article 1 of Protocol 6 abolishes the death penalty. (These are merely some of the rights entrenched in the Convention, a full illustration of them is not relevant for the purposes of this paper).<sup>76</sup>

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<sup>74</sup> Alston & Weiler (n 66 above) ch 3, 1.

<sup>75</sup> Dickson (n 49 above) 6-9; Gomien et al (n 57 above) 17-19.

<sup>76</sup> See generally Dickson, and Gomien et al.

As far as legal instruments go, the Convention is the oldest document of its kind. Logically, therefore, it has been written about the most, and has had the longest time to get its house in order.<sup>77</sup> It doesn't mean, however that the Convention is a perfect document, giving rise to ideal solutions. It is a system based on common law, and turns on the principle of *stare decisis*.<sup>78</sup> The body of case-law precedents binds both the Commission and the Court.<sup>79</sup> The Commission is bound by the decisions of the Court.<sup>80</sup> It is also a self-referential system, which means that the Commission and the Court are independent of any domestic systems of any of the High Contracting Parties.<sup>81</sup> The mandate therefore is to test the law that is challenged against and find out whether or not it is compatible with the Convention.<sup>82</sup> Gomien stresses that in order for the system to remain legitimate, the above mentioned organs of the system must endeavour to create a coherent body of law and jurisprudence that will be respected and followed by all the contracting parties, and on a larger scale be recognised globally as an effective approach to creating a "universally" acceptable standard.<sup>83</sup> The most effective way to understand the Convention is to keep in mind that the Commission and the Court INTERPRET the Convention, unlike most judicial systems (based on English law), where judges APPLY law that is passed by legislature.<sup>84</sup>

According to the Council's Human Rights Web, all Contracting Parties have integrated the Convention into their domestic law, except The Republic of Ireland, and Norway.<sup>85</sup> However, it has to be stressed that the Strasbourg organs are not a substitute for domestic courts; it comes into effect when all domestic remedies are exhausted and an alleged breach of the Convention still exists.<sup>86</sup>

Despite the highly legal aura and the structured jurisprudence surrounding the Convention, and its organs, it seems to proceed fairly informally, since there is no requirement of State reports, except in Article 57.<sup>87</sup>

*a. The Applicability of the Convention – Articles 1, 63 and 64.*

Having ratified the convention, High Contracting States automatically enter into a dual obligation, determined by Article 1:

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<sup>77</sup> Gomien et al (n 57 above) 18.

<sup>78</sup> Ibid 18-19.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> <http://www.humanrights.coe.int/intro/eng/GENERAL/ECHR.HTM>, last visited July 2002.

<sup>86</sup> Gomien et al (n 57 above) 18-19.

<sup>87</sup> Ibid. The Sec Gen of the COE may require any High Contracting Party to "furnish an explanation of the manner which its internal law ensures the effective implementation of any of the provisions of this Convention.

- The State must endeavour to make compatible existing domestic law, with Convention law.
- States newly ratifying, must correct any breach of substantive rights that are protected under the Convention.<sup>88</sup>

Further, Article 64 prevents a Contracting State from ratifying by making reservations of a general nature.<sup>89</sup> Unless these obligations are met from the moment of entering into force of the Convention, a state may not ratify.<sup>90</sup> Of course, this flies in the face of what is traditionally perceived to be International law, where the State is the subject of protection.<sup>91</sup> Here, the State is told to alter its laws according to an objective standard, premised on protecting the individual.<sup>92</sup> (The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.)

In other words, the Convention protects the rights of anyone within the jurisdiction of the High Contracting States.<sup>93</sup> (It doesn't matter if the individual is not a citizen, is a citizen of no State, or has no legal capacity). The universal nature of human rights is expounded by the Convention. However, it must be established that a legal relationship exists between the State involved and the individual wishing to exercise the right.<sup>94</sup> The concept of jurisdiction under Article 1 has been considered by the Court, and has been held to be 'not (just) restricted to national territory'.<sup>95</sup> In other words, High Contracting States are able to define their individual jurisdictions, but must do so within the limitations that imposed upon them by international law, and or the Convention.<sup>96</sup> This would also include areas outside the national borders of the High Contracting State, where that state is involved in military action, and exercises control over that area.<sup>97</sup>

#### *b. Organisation of the Convention:*

The Convention consists of trilateral system of organs that make up the system of enforcement it uses to keep the Contracting States in check. These are:

- The European Commission (1954);
- The European Court (1959) and

<sup>88</sup> Gomien et al (n 57 above) 20-21.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid 21.

<sup>95</sup> Ibid, Loizidou case, 23 March 1995, Series A no.310, 24 para. 62 – preliminary objections 21; see also the Bankovic case (2000), where the Court discussed the issue of jurisdiction at length.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

- The Committee of Ministers.

The treaty, as amended, has a very specific procedure, which consists mostly of written submissions and where oral submissions are kept to a minimum.<sup>98</sup>

### The Commission

Section III of the Convention provides for the constituting of the Commission and sets out its mandate. The Committee of Ministers elects members of the Commission, who must in all instances be of ‘high moral character’, must have qualifications as officers of high judicial standing, or have recognised competence in international law. Members have a term of office fixed at 6 years.<sup>99</sup>

### The Court

The introduction of Protocol 11 resulted in the forming of a new Court in 1998, but has not changed the essence of its make-up. This Protocol amended the Convention to the extent that the two organs, the Court and the Commission are combined to form a single court. Judges sit in their individual capacities and not as representatives of any State.<sup>100</sup> The number of judges is equal to the number of High Contracting States. (At this time, 41). By virtue of their position, no judge may become involved in any activities or actions which may bias his/her position or office.<sup>101</sup>

#### *c. Procedure and Enforcement*

Applications may be made by Contracting States or individuals (this includes NGOs and any party with standing).<sup>102</sup> The allegation must be that of a violation or violations of the Convention, where the alleged breach is by a Contracting State.<sup>103</sup> Legal representation for individual applications is recommended, but individuals may submit applications without representation.<sup>104</sup> The Council makes legal aid available. Proceedings before the Court are public, unless the Court decides that exceptional circumstances exist.<sup>105</sup> The Chamber or Grand Chamber sections of the Court make this decision.<sup>106</sup>

<sup>98</sup> Dickson (n 49 above) 10-13; Gomien et al (n 57 above) 31-35.

<sup>99</sup> Dickson (n 49 above) 10; Gomien et al (n 57 above) 32.

<sup>100</sup> Gomien et al (n 57 above) 33.

<sup>101</sup> Ibid, The intricate details of elections and composition are discussed in detail in Dickson, Gomien as well as other relevant literature. Useful information is also available on the COE website.

<sup>102</sup> Dickson (n 49 above) 11-13.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.



Complaints are usually placed in a provisional file, and a screening process occurs.<sup>107</sup> This determines whether the application is suitable for consideration. It is the Commission that considers each suitable application.<sup>108</sup> Currently, nine grounds exist that would preclude applications from being admissible:

- Neither the applicant, nor the next of kin were victims;
- The right being claimed falls out of the ambit of the Convention;
- All the remedies that the Contracting State could have provided hadn't been exhausted;
- The six month prescription period has lapsed from the date of the final decision taken against the Contracting State;
- The application is anonymous;
- The matter has come before the Court on a previous occasion, or has been dealt with via another procedure;
- There is a clash between the application and the Convention's provisions;
- The allegation is unsubstantiated;
- The applicant has abused the process.<sup>109</sup>

Decisions on admissibility are taken by majority vote and must be made public.<sup>110</sup> The Commission has a duty to bring the Applicant and the Contracting State together with a view to a friendly settlement, because the Convention's aim is not to penalise human rights violators, but to ensure exoneration to the victims of the violation.<sup>111</sup>

Once it is decided that a hearing will take place, written observations, legal opinions, further evidence etc, may be invited by the Court. Judgment is taken by a majority vote, and may be dissented or concurred upon in an appended judgment to the main one.<sup>112</sup> If, before three months have lapsed from the date of judgment, any party may request that the judgment be referred to the Grand Chamber.<sup>113</sup> The basis for referral must be that questions of interpretation, application, or a general issue of vital importance are in dispute.<sup>114</sup> If the three months have lapsed, the issue becomes final, as does the judgment.<sup>115</sup> The judgment also becomes final if the parties declare that they have no intention of contending the decision.<sup>116</sup> Final judgments are binding.<sup>117</sup> It is then up to the Committee of Ministers to oversee that the State, if found in violation, takes adequate measures to rectify such violation.<sup>118</sup> The

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<sup>107</sup> Ibid

<sup>108</sup> Ibid.

<sup>109</sup> Dickson (n 49 above) 12-13.

<sup>110</sup> COE website as above.

<sup>111</sup> Ibid.

<sup>112</sup> Dickson (n 49 above) 14-15; Gomien et al (n 57 above) 53-60.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

Committee has been criticised for not taking seriously its role as supervisor of execution of the judgment.<sup>119</sup>

In the next few chapters the development of the African system of regional integration and human rights will be charted, and it will be apparent how differently it evolved from the European one. Also, it will become apparent that the issues discussed in Chapter 1 are very relevant to illustrating how differently politics and law have evolved in Africa.

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<sup>119</sup>Ibid.

## Chapter 3.

### From OAU to African Union

#### *Introduction*

South Africa is one of the founding members of the African Union (AU).<sup>120</sup> The Constitutive Act of the African Union came in force on 26 May 2001.<sup>121</sup> The document was ratified by South Africa a month earlier.<sup>122</sup> The establishment of the Union was a result of numerous gatherings of the now defunct Organisation of African Unity (OAU), which the Union succeeds.<sup>123</sup>

Before tackling the aims of the AU, it is important to understand the background it emanates from, ie the OAU. It must be emphasised that some of the political and administrative details of the following discussion is important, but not crucial to a paper of this nature, therefore the finer details of the historical overview have been precluded.

#### *The OAU*

The Organisation of African Unity (OAU) was formed in Addis Ababa, Ethiopia, on 25 May 1963, where one will also find the Headquarters of the General Secretariat (Africa Unity House).<sup>124</sup>

The main organ of the OAU (and AEC – African Economic Community), was the Assembly of Heads of State and Government, which as the name suggests, comprises all the Presidents or Prime Ministers of Member States.<sup>125</sup> The directive of the Assembly was to consider policy issues and any matter deemed vital for Africa, and take decisions relating thereto. Other important organs include the Council of Ministers and the General Secretariat.<sup>126</sup> The Council was comprised of Ministers of Foreign/External Affairs of Member States.<sup>127</sup> The Council dealt with administrative and financial matters, as well as preparations for any forthcoming meeting of the Assembly.<sup>128</sup> The General Secretariat's mandate was to serve in the daily affairs of the OAU. The tasks included ensuring implementation of decisions and storing archives.<sup>129</sup>

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<sup>120</sup>[http://www.au2002.gov.za/docs/background/oau\\_to\\_au.htm](http://www.au2002.gov.za/docs/background/oau_to_au.htm) Last visited August 2002.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

The reasons for the creation of the OAU are many, but essentially, it was created to bring Africa together, thereby making the continent less susceptible to external influences.<sup>130</sup> In doing so, this would rid Africa of its colonial past and move it forward as continent of sovereign nation-states with the ability to solve its own conflicts and internal problems.<sup>131</sup>

The driving force behind the creation of the OAU was the philosophy of pan-Africanism, ie the idea of a unified Africa where through unity and independence, Africa could develop peacefully, and so prosper.<sup>132</sup> This concept is not confined to the parameters of the author's description. Instead, it operates in various spheres of human interaction. This includes economic, social, political, cultural and spiritual interaction, where the ideal is attainment of African unity.<sup>133</sup> This thinking prevailed in the 1960s, prior to and in the euphoria after the creation of the OAU. The primary goal of the OAU at its inception was to rid the continent of its colonial legacy, and this goal was achieved.<sup>134</sup>

By the onset of the 1970s, the focus of the body shifted to supporting liberation movements, by providing the necessary resources and encouragement.<sup>135</sup> The 1980s brought to the fore a vociferous campaign against apartheid, by ensuring a continued effort for supporting sanctions against South Africa.<sup>136</sup> These were all successful endeavors.

During its thirty-eight year history, the OAU can be commended for displaying a positive outlook and reinforcing the idea and ideals of pan-Africanism.<sup>137</sup> However, it can also be criticised for a distinct lack of backbone, because there certainly seemed to be more rhetoric than actual attainment of objectives.<sup>138</sup> What happened as a result still went on until the early millennium, and continues today.<sup>139</sup> There seems to be an endless amount of conflict, and civil strife leaving many Africans in dire need of aid.

Many critics of the OAU believe that the 'Non-Interference' clause in the OAU Charter allowed power hungry dictators to get away with gross human rights violations without ever having to answer for them.<sup>140</sup> This clause, the 'Non Interference in the Internal Affairs of Member States', was included in the Charter simply to appease states that were unconvinced by the objectives of the OAU, or suspicious of its advocates.<sup>141</sup> It is submitted that in order to get those states to sign, the clause was included as a serious compromise of power, and this deprived the OAU system of much needed influence over many Member states.

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<sup>130</sup> [www.oau-creation.com/Part%20One.htm](http://www.oau-creation.com/Part%20One.htm) Last visited 30 October 2002.

<sup>131</sup> Ibid.

<sup>132</sup> [www.oau-creation.com/Part%20Five.htm](http://www.oau-creation.com/Part%20Five.htm) Last visited 30 October 2002.

<sup>133</sup> Ibid.

<sup>134</sup> See n 120 above.

<sup>135</sup> [http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_1430000/1430504.stm](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_1430000/1430504.stm) in an article titled 'Q & A: African Union' Last visited 9 July 2002.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> For example, the recent atrocities in the Ivory Coast.

<sup>140</sup> See n 132 above.

<sup>141</sup> Ibid.

State sovereignty was therefore protected over the civil liberties of the citizens within these states. As a result, the liberalisation of Africa from its 'colonial masters' opened the way for ambitious rulers who guarded their rule without fear of interference. The OAU could only stand by. Kwadjovie captures the situation best when he writes

The parasitic and exploitative character of the nation-state flourished on African soil. The unbridled power of the state was utilized to terrorize the masses especially during the heyday of the military dictatorships favored by the cold war. Irresponsible polity triggered civil wars, coups, ethnic and religious mayhem.<sup>142</sup>

The legitimacy of regional authorities when an issue of state sovereignty is involved has long been debated in international law. Inis Claude astutely asks, '(w)e all know, do we not, that sovereignty (whatever that is) is the root of all international evil and the obstacle to global salvation?'<sup>143</sup> It seems, in hindsight, as if the OAU only saw freedom and independence from imperialism as the ultimate goal. Moreover, at the height of the cold war, these states were easily courted by the Western and Eastern alliances, and fed the ammunition they needed to emphasize their might as independent states.<sup>144</sup>

The consensus now is to make the new African Union more of a representative body. The replacement of the OAU does not wipe out any good or positive achievements by the former, it builds on it. The African Union must serve not only to protect states from each other, but also to protect the persons within those states from being victims of human rights violations and atrocities. Of course, this is not the focus of the AU. The AU seeks to be more of an economic union, along the lines of the European Union.

In his speech at the opening of the 76<sup>th</sup> Ordinary Session of the OAU ministers (4 July 2002), Deputy President of South Africa, Jacob Zuma said

It is important to note that the birth of the AU represents continuity in the pan –African movement towards unity... (w)hile the twin processes of globalisation and liberalisation have brought about unprecedented changes in the global economic environment, our experiences of these phenomena to date is that if they are left to their own devices, they will increase the divide between the developed North and the developing South.<sup>145</sup>

Mr. Zuma goes on to champion the values of NEPAD.<sup>146</sup> However, while the focus is on development on the economic stratum, he maintains that

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<sup>142</sup> Kwadjovie (n 28 above).

<sup>143</sup> Claude (n 1 above) 1.

<sup>144</sup> Ibid; see also n 135 above.

<sup>145</sup> <http://www.au2002.gov.za/docs/speeches/zuma047a.htm> Last visited July 2002.

<sup>146</sup> Ibid.

The AUs mechanisms for peer review and conflict resolution reflect commitment to democratisation, good governance, peace, and security as being in the interest of Africans, irrespective of relations with industrialised countries.<sup>147</sup>

The value of NEPAD is however, not to be underestimated. It is a programme with enormous potential for development and if properly implemented, it will be able to facilitate some of the more substantial work done in Africa towards the alleviation of the many crises Africans face. The following discussion takes a closer look at what NEPAD offers.

### *NEPAD*

NEPAD was formed on 23 October 2001 as a programme of action that ensures the progress towards achieving the complete renaissance of Africa.<sup>148</sup> At the AU summit in July 2002, the Declaration on Democracy, Political, Economic, and Corporate Governance and the African Peer Review Mechanism (APRM) was adopted.<sup>149</sup> This Declaration seeks to codify rules and procedure that Member States must abide by. The focus of NEPAD is primarily on the economic sector, the financial sector and on governance.<sup>150</sup>

NEPAD does recognise the centrality of good governance, democracy and human rights as an outline as well as a conduit for a ‘new partnership with the rest of the world’.<sup>151</sup> The APRM is supported fully by the Executive Council of the AU, as it is a device for Members to institute self-monitoring.<sup>152</sup> However, membership to this body is voluntary.<sup>153</sup> It is submitted that on the one hand, while it is good that Member States are respected enough to be given this choice, should it not be compulsory that they belong to this body in order for it to achieve its full purpose?

Despite this, the Declaration includes the following proposed reformations regarding good governance:

- Respect for the rule of law.
- Freedom of expression and opinion.
- The right to association and peaceful assembly.
- The right to vote and be elected.<sup>154</sup>

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<sup>147</sup> Ibid.

<sup>148</sup> [www.nepad.org](http://www.nepad.org) ‘What is NEPAD – The New Partnership for Africa’s Development?’ Last visited 10 October 2002.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

It is further submitted that the APRM should not, under any circumstances, endorse varying standards of good governance and respect for human rights. The rules must be applied uniformly.

From the stance that Africa has undertaken thus far in its advancement, one can but hope that the stance taken by the AU is a firmer one than that taken by the OAU, and that any chances that the past afflictions would not be repeated, but nipped in the bud when warning signs are apparent.

### *The Evolution to Union*

The Sirte Declaration of 1999 paved the way for the constituting of an African Union.<sup>155</sup> Consequent to this event, an Extraordinary Summit took place in Sirte again in March 2001, to declare the establishment of the Union.<sup>156</sup> The evolution to Union was taken by unanimous will of the Member States of the OAU.<sup>157</sup>

The OAU had anticipated the changeover to a Union circa 1979.<sup>158</sup> The need to change had been apparent for a long time, because it was obvious that the mechanisms of the OAU were not apposite for the changing face of international relations.<sup>159</sup> The Sirte Declaration, where the theme was ‘Strengthening OAU capacity to enable it to meet the challenges of the new millennium’, proposed to meet the objectives of unifying Africa on social, economic and political levels; thereby meeting and perhaps beating global challenges.<sup>160</sup> In order to rise to these millennial challenges, one of the most pertinent ambitions of the Summit was to ‘establish an African Union in conformity with the ultimate objectives of the Charter of the Continental Organisation and the provisions of the Treaty establishing the African Economic Community.’<sup>161</sup>

The OAU/AEC Summit of 2001, was held in Lusaka, and sought to come to a conclusion on how the Union would be implemented, and what organs, rules and procedures should and must be included to ensure proper efficacy of the Union.<sup>162</sup> The First Summit of the Union was held in Durban in July 2002.<sup>163</sup>

The set-up of the Union is ‘loosely based on the European Union model’.<sup>164</sup> For example, the AU has various similar organs and committees, and has created the Court working with the

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<sup>155</sup> See n 120 above.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

Commission. This implies that there is a concerted effort to move away from the dated state-centric mentality of international relations. The OAU displayed a distinct deficiency of civil participation and cooperation. Moreover, while it has been decided that the EU model would be followed, it was emphasised that the AU have an African theme running through it.<sup>165</sup> The circumstances under which Europe came together to form the EU bears resemblance to the formation of the AU, although there has been no single defining moment in Africa, like World War II, the constant civil wars, the endless civil strife, and the continuing HIV/Aids pandemic is sufficient to constitute the salience of Africans finally coming together, to work discerningly towards reviving the continent.

The swift progress made in past few months since the Constitutive Act came into force (April 2001, after Algeria became the thirty-sixth state to ratify the Act<sup>166</sup>), has not left enough room in between then and the July 2002 summit for Africans to be educated as to what the Africa Union means for them and the protection of their rights. It is imperative that all inhabitants of affected African states be made aware of the implications this has for their lives.

### *Organs of the Union*

For the purposes of this paper, the most relevant organs created by the Constitutive Act are the Commission, and the Court. The Commission will be headed by the Chairperson of the Union, and based at Union Headquarters.<sup>167</sup> The establishment of the Court, its jurisdiction, and proper functions is elaborated upon in the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol).<sup>168</sup> Other organs of the AU include:

- The Assembly of the Union
- The Executive Council
- The Pan-African Parliament
- The Permanent Representatives Committee
- The Specialised Technical Committee
- The Economic, Social and Cultural Committee
- The Financial Institutions<sup>169</sup>

The Assembly may establish other organs if it so decides.<sup>170</sup>

The AU also has numerous plans for civil society, and South Africa has taken an active role in contributing towards these plans. The Renaissance South Africa Outreach Programme, which

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<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> OAU/LEG/MIN/AFCHPR/PROT (III)

<sup>169</sup> See n 120 above.

<sup>170</sup> Ibid.



was part of a series of meetings prior to the Summit in Durban (2002), considered some of the more salient steps that need to be taken in order for Africans to realise the goals of the AU and NEPAD.<sup>171</sup> Amongst the recommendations made were the following:

- African leaders must expeditiously implement plans of action to ‘popularise the AU and NEPAD’ in civil society by involving civil society.
- African leaders must create an atmosphere conducive to democracy and good governance.
- Africa must be reached through education. School systems at all levels should instill the values of respecting and protecting human rights.
- Africa’s ‘best and brightest’ should use their prowess in order to assist in the creation of sustainable development.<sup>172</sup>

Such meetings and resolutions deserve the backing of African states, and the people involved in these programmes should be relentless in securing the necessary resources to hurl these recommendations into action.

In the next chapter, the African system of human rights protection and enforcement will be discussed as an expository prelude to the questions of what is wrong with the system and how it may be changed, if there should be change.

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<sup>171</sup> ‘Civil Society Plans for the Union’ *The African Union Summit 2002*, 7. Produced by the Dept of Foreign Affairs, SA and appeared as a supplement to the Daily News in September 2002.

<sup>172</sup> *Ibid.*

## Chapter 4.

### The African System Of Human Rights Protection

The African system of human rights is based on the African Charter, which establishes the African Commission and more recently, includes the adoption of an African Court. In this chapter the discussion will focus on how these three components function.

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

The Charter was entered into force in 1986, and enjoys the support of all states which were Member States of the OAU.<sup>173</sup> The Charter is the main proponent in the regulation of human rights in Africa, and its introduction simultaneously introduced an enforcement mechanism, ensuring respect for the range of human rights it protects.<sup>174</sup> Presently, however, the creation of the OAU, and the adoption of the Protocol to the African Charter establish a two-pronged system which is made up of the African Commission and the African Court on Human and Peoples' Rights.<sup>175</sup>

The Charter has long been the touchstone of the African human rights domain. Its success or distinct lack thereof, has often been slated.<sup>176</sup> The overhaul of the OAU and the introduction of a court have opened the way for change in the Charter system. Of course, change can take place, but in the light of Africa's human rights record, the question is, 'How can the situation be improved with all state parties being in agreement as to the change?' The possible remedies and approaches will be explored in chapters to come. In this chapter an exploration into human rights in Africa thus far will be reviewed so that a premise can be established as to why there should be change if at all change is necessary.

#### a. Substantive Rights in the African Charter

The Charter contains most of the fundamental, universally recognised human rights.<sup>177</sup> The framers of the document obviously did their best to provide Africa with an instrument that embraced and protected fundamental rights and freedoms.<sup>178</sup> The backdrop of the creation of the OAU and Charter was not an amicable exercise.<sup>179</sup> However, that a protective document was needed which illustrated a commitment to human rights could never be questioned.

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<sup>173</sup> E.F. Baimu 'Commission and the Court' Conflict Trends – No. 3/2001 at <http://www.accord.org.za/web.nsf>

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

The Preamble to the Charter recognises that African people have been besieged by human rights violations.<sup>180</sup> It goes on to call for the rebuilding of Africa by starting with the expulsion of colonial domination, as well as the liberation of South Africa from apartheid.<sup>181</sup> The Preamble also recognises that ‘freedom, equality, justice and dignity’ are the crux of the attainment of the promotion and protection of human rights.<sup>182</sup> The idea of Africa being free and rid of imperial domination is a definite theme of the Preamble.

Articles 2 and 3 of the Charter govern the area of non-discrimination and equality respectively, providing that everyone enjoys equal protection of the law, and everyone deserves the right not to be discriminated against.<sup>183</sup> Article 4 states that ‘human beings are inviolable’, entrenching the right to bodily integrity; while Article 5 prohibits any violation of human dignity.<sup>184</sup> Article 6 supports every individual’s right to freedom, and the right not to be arbitrarily deprived of it through arrest/detention, and to have their cause heard if arrested/detained.<sup>185</sup> Article 7 articulates the rights to have one’s cause heard, as well as the right to be presumed innocent prior to the cause being heard.<sup>186</sup> These are the core rights of the Charter.

The balance of rights afforded by the Charter is no more or no less important than the ones mentioned above. Articles 8 to 26 deal with civil, socio-political and socio-economic rights that are comparable with international standards, but not near enough as effective.<sup>187</sup> On closer examination, some of the rights afforded are weakly constructed, thereby limiting the right in question, and denying the individual his/her right, which by UN standards, or even national standards he/she may enjoy. (Examples of possible areas of reform in this regard will be dealt with below).

Another point is that unlike other human rights instruments, the Charter does not include a provision allowing the suspension of rights during a time where a state of emergency has been declared (war, civil strife, any other condition that could threaten the sovereignty of the state). This is a precarious omission, especially at present with the Court soon to be active.

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<sup>180</sup> Ibid.

<sup>181</sup> OAU Doc OAU/CAB/LEG/67/3/Rev 5.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> See n 171 above.

## b. Enforcement of Rights under the African Charter

### 1. The African Commission

An African Commission on Human and Peoples' Rights (Commission) was set up under the auspices of the OAU.<sup>188</sup> The mandate of the African Commission is similar to that of the European Commission.<sup>189</sup> Established in 1987, the Commission has a composition of eleven members, and is mandated under Article 30 to 'protect' and 'promote' human rights in Africa.<sup>190</sup>

The Commission receives and considers complaints alleging violations as part of its protective mandate. State parties or individuals may lodge applications of complaint. Recommendations made by the Commission are non-binding, and no mechanisms exist for a follow up of the matter.<sup>191</sup>

The promotional mandate concerns the role of the Commission as educator. This function requires the Commission to inspire a culture of human rights in Africa, similar to the work done by the Council of Europe.<sup>192</sup> However, on this continent the traditional African culture which differs from region to region in Africa must also be considered when encouraging a human rights culture.<sup>193</sup> It is submitted that this is a very significant feature of the Charter, and if Africa must embrace universal norms (which it has), then somehow traditional values must be inter-woven in and amongst these norms to create an acceptable standard of human rights for Africa, which is also recognised globally.

The final function of the Commission is that it is required by the Charter to receive progress reports from Member States every two years.<sup>194</sup> Most states do not oblige.<sup>195</sup> There has also been some doubt as to the competence of the Commission to receive these reports.<sup>196</sup>

Despite some progress, the Commission on its own distinctly lacks an enforcement mechanism that works. Therefore after years of wrangling, a protocol was drafted and tabled for ratification in 1998 to establish a Court on Human and Peoples' Rights.<sup>197</sup>

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<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> Mutua (n 31 above) 346

<sup>194</sup> Baimu (n 173 above)

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

## 2. The African Court

The Court is governed by the Protocol. Its main function is to complement the protective mandate of the Commission.<sup>198</sup> The Court does, however have the power to make binding decisions where there is a violation of the Charter, or ‘any other’ relevant human right instrument ratified by a State Party.<sup>199</sup> Since the Commission’s role is limited, Africa is surely in need of a body that can legitimately enforce the protection of human rights in Africa.<sup>200</sup>

The idea of a Court is of course not a new concept. The roles and complementarity between a Commission and a Court are a functioning part of the European and the Inter-American systems of human rights law.<sup>201</sup> In these systems, the Commission acts as a filter mechanism through which allegations of abuse pass, and are considered for a hearing before the Court.<sup>202</sup>

The jurisdiction of the proposed Court extends to disputes concerning the interpretation and applications of human rights instruments, including the African Charter.<sup>203</sup> The Court also has so-called ‘advisory jurisdiction’, which empowers it to ‘provide an opinion on any legal matter relating to the Charter or any African human rights instruments’ (Article 4(1)). Where there is a dispute as to whether the Court has jurisdiction, the matter will be settled by decision of the Court.<sup>204</sup>

Ratification of the Protocol means that the State accepts the general jurisdiction of the Court over inter-State disputes over matters referred to by the Commission, and to the receiving of advisory opinions from the court.<sup>205</sup> There are no conditions to accepting jurisdiction.<sup>206</sup> Advisory opinions can extend to requests from State Parties.<sup>207</sup> The utility of this is that African States will be able to test domestic/national law with the Charter.<sup>208</sup>

Since the jurisdiction of the Court is not limited to the Charter, but extends to ‘any other relevant Human Rights instrument ratified by the States concerned’ (Art 3(1)), it gives the Court broader coverage with respect to the standard of human rights law.

The Court is composed of eleven judges, who are elected by the AU assembly. The judges serve the Court on a part-time basis, for a six-year term each.<sup>209</sup> Normally, individuals, NGOs,

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<sup>198</sup> Ibid; see also J. Mubangizi & A. O’Shea ‘An African Court on Human and Peoples’ Rights’ (1999) 24 SAYIL 256, 258.

<sup>199</sup> Mubangizi & O’Shea (n 198 above) 262.

<sup>200</sup> Mubangizi & O’Shea (n 198 above) 268.

<sup>201</sup> Ibid 258.

<sup>202</sup> Ibid. Note, that in Europe, a declaration is required by a Member State accepting the competence of the Commission to receive inter-State complaints.

<sup>203</sup> Mubangizi & O’Shea 262.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid 263.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid 263-64.

<sup>209</sup> Ibid 261; see also Baimu n 173 above.

and states would submit their grievances to the African Commission. The Commission, any Member State, or African Inter-governmental institution can bring allegations before the Court. NGOs and individuals do not have direct access to the Court unless the Member State that is a party to matter has made a special declaration in terms of Article 34(6), which permits the individual or NGO to go to Court without having to go via the Commission.<sup>210</sup>

Important features of the Court system include:

- Proceedings in Court are open to the public.
- Parties involved are entitled to legal representation.
- Evidence may be led.
- Enquiries may be held
- Provisional measures may be taken in order to avoid irreparable damage.
- The Court will take action it deems appropriate to compensate the victim.
- The execution of Court orders will be overseen by the Council of Ministers.
- If a Member State has not complied with a judgment, the Court should include this in its annual report to the AU Assembly.<sup>211</sup>

It seems that measures that are more robust have been adopted in order to reinforce the African system. If the introduction of the Court is to have the desired affect, then the AU and all Member States must ably support it. There are questions about the Court drawing attention and funds away from the Commission.<sup>212</sup> Nevertheless, it is clear to the author that the Court's place in the system is justified, and relevant. Besides the invaluable protection of human rights such a system would afford, Africa may finally be taken seriously on an international level, so strengthening relations abroad.

The system is flawed, as mentioned above, and drastic as well as minor changes need to be made to the satisfaction of the rights the AU purports to protect. The matter of how African states might be affected by the system will be discussed in the following chapter.

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<sup>210</sup> Ibid 264.

<sup>211</sup> Baimu (n 173 above).

<sup>212</sup> Ibid; see also A. O'Shea 'A critical reflection on the proposed African Court on Human and Peoples' Rights' (2001) 2 AHRLJ 285, 285-87.

## Chapter 5.

### How Will Africa Be Affected by Its New Commitments?

African states will be affected by their commitments made in respect of acceding to the AU and ratifying the Protocol to the Establishment of an African Court on Human and Peoples' Rights (the Protocol). However, not all states are willing to ratify the Protocol entirely, because it will affect their constitutionality. South Africa is one such example.

South Africa has approved ratification of the Protocol, and Parliament decided that 'if the Executive at any stage makes a declaration in terms of article 34(6) of the Protocol accepting the competence of the Court to receive cases under article 5(3), such a declaration shall first be tabled in Parliament for approval.'<sup>213</sup> Thus far, Burkina Faso, The Gambia, Mali, Senegal, and Uganda have ratified the Protocol, with only Burkina Faso doing so under article 34(6).<sup>214</sup>

It is submitted that the slow ratification process, despite Member States adopting a resolution to establish a court of this nature, could possibly be indicative of the unwillingness of states to surrender their sovereignty and open their actions, and their legal systems up to scrutiny, and possible legal action. This seems inane, since it is not compulsory to ratify article 34(6). The concept and disposition of sovereignty in Africa was discussed in Chapter 1. It is also mentioned in Chapter 3 how sovereignty was an issue in the reluctance to form the OAU. It is clear then, why the notion is doggedly clung to.

The Court's creation does have the impact of infringing on national legal systems. The legal sovereignty of a state means that its highest courts decisions are final and binding (as explained in Chapter 1). Accession to a supra-national document means that the state will have to succumb to those laws, and will be included within the jurisdiction of that judicial mechanism. (These processes have been explained above).

Stemmet submits that with the establishment of the Court, an overruling of the 'highest court in the jurisdiction of a state party to the Protocol on a human rights violation suffered by an individual, such a ruling could throw the domestic legal regime into disarray.'<sup>215</sup> In a contrasting statement, Barney Pityana believes that 'the Court would not grant South African citizens any lesser rights than they currently enjoy.'<sup>216</sup> Barney Pityana makes this statement on the belief that the South African Constitution offers 'a more solid and higher protection of human rights' than the current African Charter does.<sup>217</sup>

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<sup>213</sup> <http://www.justice.gov.za/protocol.htm>

<sup>214</sup> As per telephonic communication with the Dept of Foreign Affairs, 1 July 2002.

<sup>215</sup> A. Stemmet 'A future African court for human and peoples' rights and domestic human rights norms' (1998) 23 SAYIL, 233, 235.

<sup>216</sup> N. Barney Pityana 'Re: Ratification of the Protocol To the Establishment of an African Court on Human and Peoples' Rights' at [www.sahrc.gov.za](http://www.sahrc.gov.za)

<sup>217</sup> Ibid.

Stemmet offers some examples of when SACC decisions can be overturned by the African Court.<sup>218</sup> The first example is the right to equality. Stemmet argues that since the South African Constitution has a special mechanism in the equality clause (s9 (2)) that allows for measures to be taken 'to protect or advance persons or categories of persons disadvantaged by previous unfair discrimination', and the Charter does not, it could have repercussions.<sup>219</sup> So, as it stands, an individual who feels hard done by may well find a remedy at the African Court. He also cites the right to property as a potential area of conflict.<sup>220</sup> Whereas property rights are vigorously protected in the African Charter, room is made in the South African Constitution, s25, for land redistribution and equitable access to land in order to redress situations that resulted from unfair apartheid practices.<sup>221</sup> Therefore if one's land is taken away because of a redistribution programme, and one cannot find a remedy in the domestic legal system, again, it is possible that the regional Court will grant a remedy.<sup>222</sup>

Thus, although South Africa has been instrumental in moving the development, drafting and adopting of the Protocol, it might not consider the ratifying of individual and NGO standing before the African Court. If it is true that the African Union has undertaken to '(weaken) sovereignty where (it) is associated with unilateralism and unlimited discretion and (strengthen) sovereignty where (it) is identified with continent wide solidarity and the common interest of the continent as a whole in peace, development, and universal dignity', then perhaps there is a fair chance that African states will begin to participate in the enforcement of human rights on this continent.<sup>223</sup>

Baimu explains how optimal functioning of the new system is best exploited

Experience has shown that treaties and regional institutions by themselves do not necessarily translate into better protection of human rights unless accompanied by political will... of the states to give effect to those ideals, (and will depend on) the progressive interpretation of the (Constitutive) Act by the African Court of Justice and the leadership by the Commission and Union organs in championing the human rights cause on the continent.<sup>224</sup>

It is necessary that African states are able to give effect to the ideals by which they claim to value. It is also vital that there is realisation that ratifying the Protocol does not derogate in any negative way from the manner in which African states are governed, because states should be governed justly, and if that is so, then there should be no reluctance or hesitation from any Member of the AU.

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<sup>218</sup> Stemmet (n 215 as above) 236-38.

<sup>219</sup> Ibid 237.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Nagan, W.P. 'Charting a New Course: Globalisation, African Recovery, and the New Africa Initiative' (2001) SAIIA 31, at 22.

<sup>224</sup> Baimu, E. 'The African Union: Hope for better protection of human rights in Africa?' (2001) 2 AHRLJ 299, at 314.



It is submitted that African states might respond better to the new system if there was a restructuring thereof. Therefore, in the following three chapters the issue of change will be highlighted, initially with the lessons that could be learnt from Europe, then proceeding with whether or not reform is viable at present, and how it might be implemented.

## Chapter 6.

### Lessons From Abroad

In Chapter 1 the discussion was a conceptual one, with the theme being concepts that have come to Africa through colonisation. It was shown how these importations worked to the detriment, rather than to the benefit of African countries. It is submitted that Africa's present commitment, as espoused in Article 3 of the Constitutive Act of the African Union, to promote democratic principles and institutions, defend the sovereignty of its Member States, accelerate political and socio-economic integration of the continent, and promote and protect human rights, is indicative of the fact that the African elite wish to emulate their European counterparts in the creation of a single entity, and making it work. The creation of the AU is based on the European model.

Chapter 2 illustrated briefly how the European system of promoting and protecting human rights, functions. In the previous chapter, the clash between national law and regional law was discussed. How has Europe managed to incorporate with having to deal at length with this issue, and what are the dilemmas faced there? The purpose of this chapter is to discover whether Africa can learn from the experience of Europe, or whether there are dangers in directly importing ideas to fit into the African system, the latter continent having a vastly different social and political climate.

This chapter is a brief explanation of the concepts and theories that have worked for Europe, as well as a demonstration on how some of these ideas may not work in Africa. So, there will be both positive and negative European notions discussed.

#### a. Margin of Appreciation

The European Commission and Court raise the principle of 'strict interpretation' where the interests of an individual is balanced favourably as against those of the state complained against.<sup>225</sup> These organs do however allow a certain amount of discretion for the states to decide whether a given course of action is compatible with European Convention requirements, and this discretion is referred to as the 'margin of appreciation'.<sup>226</sup> According to Gomien, this doctrine originates from the understanding that 'it is beyond the capability of the Court and the Commission to exercise complete practical or political control over the implementation of the Convention.'<sup>227</sup> Thus, it means that the ECHR will put up with a certain degree of derogation from Convention rights so that the state complained against will not have its political and cultural ethos affronted. Gomien submits, by illustration of cases, that under the Convention, the balancing of interests depends on the facts of a specific case before the

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<sup>225</sup> Gomien (n 57 above) 215.

<sup>226</sup> Ibid; see also Stemmet (n 215 above) 242.

<sup>227</sup> Gomien (n 57 above) 215.

judicial body, as well as the nature of the right/s in issue.<sup>228</sup> Therefore the ambit of the margin of appreciation is not fixed or rigid, but must be justifiable.

Benvenisti, suggests that margin of appreciation is based on the idea that ‘ each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions.’<sup>229</sup> The doctrine is viewed as a response to concerns that the national security of governments could be endangered by international policies.<sup>230</sup>

He further suggests that a liberal approach to interpretation could result in the negation of the enforcement of human rights on an international scale, and may even undermine the credibility of the international organ involved in the application of the margin of appreciation.<sup>231</sup> The rationale for this is that it could result in the inconsistent application of the doctrine, because it raises concerns about ‘judicial double-standards’: if the doctrine is applied inconsistently among states, in cases where similar facts exist, then this would be an example of double-standards.<sup>232</sup> Although the doctrine has triumphed as an interpretive mechanism in the European system, it has not really been applied elsewhere.<sup>233</sup>

An example where a state will not be allowed ‘appreciation’ is minority protection: it is clear from the gross violations of human rights heard about daily, that national democratic institutions are not immune to such incidents. Sometimes, there are inherent deficiencies in democracies that may lead to a minority group being sidelined, and ‘whereas “national” interests often prevail in national courts, they maybe deemed less compelling when reviewed by detached external decision-makers’.<sup>234</sup> Stemmet illustrates the two-fold test developed by the European Court: firstly interference of the national authority must be relevant and sufficient; secondly the inquiry is whether interference was necessary – is it a ‘pressing social need’?<sup>235</sup>

The doctrine of margin of appreciation is a tool that could well be useful in new system of human rights in Africa. However, caution as to its liberal application must be noted in order for it to work as well in Africa as it has in Europe. Stemmet provides a feasible manner for the African Court to best adopt the ‘margin of appreciation’, using South Africa as an example

In considering contentious issues which a South African Court has already interpreted, it will take into account the domestic situation in South Africa, its peculiar history, the

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<sup>228</sup> Ibid 216.

<sup>229</sup> E.Benvenisti ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 JILP 843, 843-4.

<sup>230</sup> Ibid 845.

<sup>231</sup> Ibid 844.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid 850.

<sup>235</sup> Stemmet (n 215 above) 243.

negotiated nature of the Constitution and the Bill of Rights, and the specific balances struck between competing rights.<sup>236</sup>

Stemmet thus illustrates the potential of the doctrine being a functioning part of the consideration of complaints by the Court. It is submitted that too liberal an approach would be inappropriate in Africa. Proportionality, as is utilised in many constitutional courts around the world and in South Africa, is a preferable approach. Also, the idea of subjectivising an objective test may bring a balance to the situation, because the necessity of interference can only be gauged once it has been contextualised.

The doctrine of margin of appreciation is an appropriate measure to be incorporated in a system that functions on a regional level. If the African Charter is amended then it should include as one of the reforms, this doctrine. However, the inclusion of the doctrine must be articulated in a manner that leaves no room for misuse, or wrongful application.

#### b. Effectiveness of the Judicial Approach

The setting up of a judicial enforcement mechanism was first seen in the ECHR.<sup>237</sup> International law (theory and practise) indicates a 'clear separation' on the 'dichotomy' between friendly settlements and judicial hearings where there is a contested matter.<sup>238</sup> Murray writes, 'approaches amicable were synonymous with African ineffectiveness, and judicial with Western and effectiveness.'<sup>239</sup> It is not surprising then, that the African system with its 'friendly' approach – which is regarded as a weakness – is en route to the establishment of a court similar to the European one.<sup>240</sup>

Murray adds that there is a lack of respect for the friendly settlement approach because its ineffectiveness in Africa has meant that Africa, in reconsidering its human rights enforcement mechanisms, has had to follow the judicial approach in order to bring Africa in line with all other regional and international mechanisms.<sup>241</sup> Murray argues that 'the success of the organ in the promotion and protection of human rights depends on its status and the political respect accorded to it, than its amicable or judicial nature.'<sup>242</sup>

It is submitted that a more appropriate path to achieving the ideal of both promotion and protection of human rights is to find concord between the two methods, making neither more viable than the other, but both just as effective as the other. Evidence to this effect is apparent in the ECHR's recent stance in favour of third party intervention and out of court settlement.<sup>243</sup>

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<sup>236</sup> Ibid.

<sup>237</sup> See Chapter 2 above.

<sup>238</sup> Murray (see n 30 above) 200.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

Whereas Africa stands to gauge a wealth of wisdom from the approach taken by European Convention and Court, as Murray postulates, there is merit in embracing a standard that comprises the more salient contributions to law made by both approaches in the realm of human rights law.<sup>244</sup>

Again, balance should be favoured at all the stages of development. The benefit of balance is always to find the value in all sides. It is evidenced that if one of the approaches is not going to solve an issue, naturally the other approach may be sought for resolution. There is a political value in favouring the 'friendly settlement' approach. However, it has been taken advantage off in Africa, because states in valuing their sovereignty, had to reciprocate by not interfering in another state's affairs. The powerlessness of the African Commission to enforce judgments often meant that no attention was paid to whatever contribution was made by the Commission towards the resolution of the issue. Therefore, there is merit in both approaches, and the idea of utilising both is probably the most beneficial for African human rights supervision.

### c. The ECHR as Authority in African Human Rights Law

Heyns states that the European Convention and Court undoubtedly serve as templates for other supra-national conventions and treaties, including African ones.<sup>245</sup> Thus, it is 'one of the most authoritative sources of human rights jurisprudence in the world today.'<sup>246</sup> Historically, Africa and Europe have ties through colonialism, and it has been discussed above how this has influenced African politics and law.

Heyns argues that Nigeria's use of the idea of protecting minority groups by guaranteeing individual rights introduced Western notions of human rights in African society.<sup>247</sup> He goes on to say that many other African countries have used the Nigerian Bill of Rights as a model for their own constitutions, and that it is a 'conduit', because it brought more of the West into Africa thereby embracing ideology from sources other than the 'motherland'.<sup>248</sup> He then poses the question: does the infiltration of European human rights jurisprudence into so many English speaking African countries, mean that a 'common common law' exists to the extent that where a dilemma in law arises, the authority would be the European Convention?<sup>249</sup> He proceeds to answer his question by saying that human rights are universal, but their 'particular expression' in the various African constitutions reflects mostly European jurisprudence.<sup>250</sup> This can be used to Africa's advantage, because then the African system can 'be built on the same foundation', and this will lead to 'coherence and depth to developments in Africa.'<sup>251</sup>

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<sup>244</sup> Ibid 201.

<sup>245</sup> C.Heyns 'African Human Rights Law and the European Convention' (1995) 11 SAJHR, 252, at 252-53

<sup>246</sup> Ibid 253.

<sup>247</sup> Ibid 256-58.

<sup>248</sup> Ibid 258.

<sup>249</sup> Ibid 259-61.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid 259.

However, he concedes that there is a distinction in the basic ideological orientation between Europe and Africa, and the role that such values play in such instruments.<sup>252</sup>

Heyns argues further, that in Africa, laws that govern society must be based on the values and norms of these societies.<sup>253</sup> These laws must also show that the 'collective wisdom of the people' prevents further conflict, and allows for self-determination.<sup>254</sup> It would not be an innovation to use European jurisprudence because all African countries have legal systems based on law foreign to their original systems of rule.<sup>255</sup> However, in Uganda, the belief lies fully in the idea that 'the European type of state (is) alien and the old set-up of kingdoms and chieftainships (is) more organic.'<sup>256</sup> It is submitted that functioning entirely in that manner is not in keeping with the state of international law and international relations. African states must be able to see that whereas it is important to remain true to African heritage, and incorporate those values into society and government, it is manifest in world affairs to incorporate the so-called 'alien' concepts. The AU, of which Uganda is a member, endorses this balance in the Constitutive Act.

#### d. Hierarchy of Norms<sup>257</sup>

The European Convention is flexible in that State Parties do not have to incorporate the treaty into their laws, instead states are supposed to give effect to the rights protected by the Convention, and have a 'free choice in how to achieve this.'<sup>258</sup> This achievement could range from incorporating the Convention as part of the national constitution, to revising legislation and also, enforcing the Court's judgments directly in national law.<sup>259</sup>

If South Africa incorporates the Charter and Protocol as part of national law, it will have to be via legislation.<sup>260</sup> While the Charter provides that this may be done the Protocol is silent in this regard. However, according to Stemmet, an agreement of the nature of the Protocol is not self-executing.<sup>261</sup> There will however be consequences of incorporation: an asylum seeker wishing to seek asylum in South Africa under article 12(3) of the Charter, can seek protection from a domestic court, rather than having to go to the African Court.<sup>262</sup> A positive consequence is that if the Charter is incorporated, and a dispute arises between supra-national and national

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<sup>252</sup> Ibid.

<sup>253</sup> Ibid 260.

<sup>254</sup> Ibid.

<sup>255</sup> See Chapter 1.

<sup>256</sup> E.P. Skinner 'African Political Cultures and the Problems of Government' 2(3):3. URL: <http://web.africa.ufl.edu/asq/v2/v2i3a3.htm>

<sup>257</sup> Stemmet 243.

<sup>258</sup> Ibid 244.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> Stemmet (n 215 above) at n 54.

obligations, South Africa will have ample opportunity to reflect on how to come to the best resolution of the issue.<sup>263</sup>

It is suggested that if national protection of human rights exists at a level comparable with international standards, then it can be expected that the same sort of results which many European states have had regarding incorporation of Convention law, will be achieved.

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<sup>263</sup> Stemmet (n 215 above) 245.

## Chapter 7.

### The Question of Reform

The ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people<sup>264</sup>

The submission made in the above statement can be viewed as summing up what any system of law ought to do. Whether it succeeds in doing so can only be evidenced in the mechanisms it has in place to enforce the rights protected within the social order. It is clear from what has been stated above that loopholes and shortcomings exist in the current system of human rights in Africa. With the change over to Union, and the establishment of various organs to oversee the renaissance of Africa, is it not appropriate for Africa to begin with reviewing the weaknesses of the current system, and enhance it both substantively and procedurally? Many scholars doubt that significant changes should be made, or disagree on the type of changes that should be made, but there is consensus that change is necessary.<sup>265</sup>

Heyns suggests that if reform was to occur, it could involve changing one, or some, or all of the treaties, or the work (mandate) of the Commission and Court. He argues that since the record of human rights is so atrocious, there must be some kind of reform, and that one of two approaches may be followed:

#### 1. *The case for stability*

Here, the argument is centered on introducing a minimum amount of change to the African system. The thinking behind this is that the Charter system, being flexible by construction, contains its own self-correction devices, and does not require revamping.<sup>266</sup> Should any question of interpretation occur, then there are already mechanisms in place to ensure that interpretation takes place in accordance with international standards.<sup>267</sup> (The Commission has created a stable body of jurisprudence which can be referred to in situations of uncertainty, where a question of the law arises.)<sup>268</sup>

Heyns also makes a valuable point, in that every Member State of the now defunct OAU has ratified the Charter. Therefore, any amendments may provide some Member States with an opportunity to desist with Member status.<sup>269</sup> This will unravel all the work that went into getting some of these states to ratify in the first place.<sup>270</sup>

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<sup>264</sup>C. Heyns 'The African Human Rights System: In need of Reform?' (2001) 2 AHRLJ, 156.

<sup>265</sup>Ibid.

<sup>266</sup>Ibid 157

<sup>267</sup>Ibid.

<sup>268</sup>Ibid.

<sup>269</sup>Ibid.

<sup>270</sup>See n 133 above.



## 2. *The case for change*

Whereas the Organization of African Unity was justly perceived as a syndicate of heads of state, the new union has the ambition to be representative of African societies and give voice to civil society.<sup>271</sup>

When the Charter was drafted, it was not done at a time in history that was conducive to a progressive human rights document to being produced.<sup>272</sup> Today, however, the standards of international law have been raised.<sup>273</sup> If Africa is serious about its full acceptance into the international community, and being embraced as an equal, then the region must be able to recognise and respect those norms and values as its own. A *prima facie* glance of the Charter reveals that the document does not fully support the movement in international law towards more robust protection of human rights.<sup>274</sup>

It can be argued that contrary to the above statement, that the body of jurisprudence built up by the Commission is compatible with international standards, and relevant to contemporary society. On the other hand, if the future Court had a case before it that required it to apply Charter law, it would have to apply the law as it is read. Also, the party alleging a violation would not be able to use the interpretation that was given by the Commission.<sup>275</sup>

Furthermore, in order to achieve the ideal, which for now is a system that is efficient, impartial, and effective, it is not ambitious to identify the most glaring faults of the system, and submit possible changes. There certainly is no lack of awareness of the failings of the OAU, and it been written about in great detail elsewhere, and has been touched on in a previous chapter. There is no intention here to embark on a campaign to knock the vital work the OAU has achieved. Instead, this is meant to build on the accomplishments and ensure that Africans are able to co-exist knowing that their basic rights and freedoms as human beings, if ever violated, are justiciable in an impartial forum. Moreover, Africans must be able to recognise that they have a duty to respect the rights and freedoms of others.

Although it is vital for Member states of the AU to strictly stand by their commitments to democratise Africa, it could - in the end - be fatal to ignore (partially or completely) the diverse aspects of traditional African society that still remain at the core of many indigenous ethnic groups in Africa. The author agrees with Mutua's submission that, '(t)he transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa.'<sup>276</sup> Further, it is submitted that in the spirit of the AU's objective to promote respect for democratic principles, human rights, the rule of law and good governance, the Pan-African Parliament should consider African philosophies and values so that the civil society which it seeks to look after feel that

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<sup>271</sup> Kwadjovie see n 28 above.

<sup>272</sup> Heyns (n 264 above) 157.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid 157-158

<sup>275</sup> Ibid 158

<sup>276</sup> Mutua (n 31 above) 341.

they are a part of this great African renaissance. The mere copying of liberal democratic principles may well work on a theoretical level, but if too many African people cannot identify with these principles, what chance is there that they will respect it?

The author concedes that the AU is correct in its stance in wanting to achieve a greater solidarity through promoting the above-mentioned ideals of democracy and good governance. However, the revitalising of the spirit of Pan-Africanism, as is the will of the AU, cannot be achieved without re-connecting Africans to ethics which had predominated pre-colonial Africa.<sup>277</sup>

As explained above (in Chapter One), the development of African societies was not a natural one, with the intrusion of the colonialists impeding their growth. In addition, the concept of human rights, although not formulated in the same way as the Western conception thereof, did exist. Mutua explains that Africa's future lies in the balancing of the rights AND duties, because it is not only rights that have a place in human rights law, but duties have an equally important place therein.<sup>278</sup> Further, 'duty' is a valid concept with which to articulate a more holistic approach in contemporary African human rights law.<sup>279</sup> On the other hand, it is submitted that the use of concepts and ideologies inherited from Europe's legacy in Africa can very definitely be used for the furtherance of the objectives espoused in the Constitutive Act. The most glaring reason why non-African aspects be imported to the reforming of the African system is that these concepts are considered universal. After all, '(r)atification of international instruments and linking international standards to national constitutions seems to be essential for working towards a global ethic on human rights.'<sup>280</sup>

It is the author's submission that Mubangizi and O'Shea's postulation, which really is a logical one, is also correct when the learned academics state that 'much will depend on the political climate and the attitude of African States in general.'<sup>281</sup> No matter how seemingly liberal and embracing the Charter, the Protocol, and Constitutive act may be regarding the respect for and the protection of human rights and freedoms, States must still be willing to ratify and accept those documents into their law. They must allow it to become a part of that society, and permeate all structures of that society. Then only will it have the intended effect.

The road to reformation is one filled with obstacles, but they are not insurmountable. Such obstacles, like funding, bias, non-commitment, can only be overcome if the political will of the Member States is concomitant with the AU's resolution to strengthen the democratisation of Africa.<sup>282</sup> It would really be pointless to change the form and substance of the Charter and relevant mechanisms if there is no will from Members to aid the process from within. Subsequent to the entry into force of the Protocol, nothing substantial has been embarked upon

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<sup>277</sup> Mutua (n 31 above) 343; see also the Preamble to the Constitutive Act of the African Union.

<sup>278</sup> Ibid 344.

<sup>279</sup> Ibid.

<sup>280</sup> Goonesekere (n 48 above) 88.

<sup>281</sup> Mubangizi & O'Shea (n 198 above) 268.

<sup>282</sup> Articles 3-4 of The Constitutive Act Of the African Union.

regarding the set-up of the Court. Although the concept of a Court of this nature is by no means unprecedented, the fact that African States are slow to recognise, and ratify this mechanism, does not speak volumes about their actual commitment to the process of rectifying the system.

The focus of the next Chapter will be on the actual legal mechanisms that should or must be altered in order for the system to function on a practical level as well as for it to be legally sound in terms of internationally accepted standards. Reform of the system should include reforming philosophy, both legal and political, as well as reforming the gears on which the system turns. Human rights enforcement will then be able to occur at a level where civil society can actually feel the benefit of the difference.

## Chapter 8.

### Reformation of Legal Mechanisms of the African System of Human Rights

As mentioned above the question of reforming the system of human rights in Africa has no scientific formula, there has to be a profusion of summits and negotiations at executive levels in order to gain acceptance from all, or the majority of the Member States.

The need for reform was high on the OAU's agenda because the protection offered by the African Commission was largely ineffective.<sup>283</sup> In fact the need was so great that the Draft Protocol was completed only a year after the decision was reached to create the Court. Now that the finished Protocol to the African Charter for the Establishment of a Court of Human and Peoples' Rights is open for ratification, there are several calls from African scholars to change aspects about the Charter, the Commission, as well as for the amending of the Protocol. For example, Odinkalu suggests that reform occur via inter-state negotiation so that states have control over *how* reform occurs and *what* is reformed.<sup>284</sup>

The following discussion is concerned with what sort of changes and alterations (mostly substantive) should occur, which might well put the operation of the African system of human rights into gear; and a brief illustration of how they may aid in the system being more effective.

#### *Reforming the Charter*

Heyns and Acheampong note that there are several internationally recognised rights that are absent from the Charter, and that some of the rights afforded by the Charter are exclusive of fundamental principles that would make them more holistic and less restrictive.<sup>285</sup> All possible affected rights will not be discussed. As a matter of choice, only certain examples will be used to illustrate the direction which it is intended the Charter should reform.

Among the more notable exclusions, are:

- Life.
- Privacy.
- Certain labour law rights, like the right to form trade unions, and the right against forced labour.
- Criminal procedure or 'due process rights'.<sup>286</sup>

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<sup>283</sup> See O'Shea AHRLJ article in general (n 212 above).

<sup>284</sup> K.A. Acheampong 'Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights' (2001)2 AHRLJ 185, 185-87.

<sup>285</sup> Acheampong (n 284 above) 185-87; Heyns (n 264 above) 159.

<sup>286</sup> Acheampong (n 284 above) 194-202; Heyns (n 264 above) 160-62.

The above-mentioned rights are deemed cogent enough to warrant a place in most if not all Bills of Rights. They are an intrinsic part of every-day life, and affect all human beings. And as Acheampong avers, '(a)ny attempt to reform the substance of the African Charter, as with any other human rights instrument, should be posited upon or set against the backdrop of the principles of the concept of human rights.'<sup>287</sup>

Then there are those rights that have not been afforded to society in their fullest effect: First is the right to equality, which is provided for in the Charter, in articles 2 and 3. However, 'sameness of treatment does not always ensure true equality'.<sup>288</sup> In South Africa's Constitution, equality is qualified so that provision is made for special measures regarding a variety of persons, and this is located in s9(2). This ensures that full equality is achieved through an examination of the circumstances, rather than just applying a strict measure that might not achieve the purpose of an equality provision.

Women's rights are grouped with children's rights, and the plight of women in Africa has not been recognised. Women have been and continue to be a disadvantaged group, yet the African Charter fails to give this group any further association other than to merge their rights with that of children.<sup>289</sup>

Socio-economic rights are also not fully catered for. Acheampong states that '(i)n respect of the rationale for the provision of socio-economic rights, it has been asserted: '(t)he main purpose of socio-economic rights is to place the state under a legal obligation to utilise its available resources maximally to correct social and economic inequalities and imbalances.'<sup>290</sup>

Acheampong attempts to convey the perception that social and economic development is essential for strengthening a democracy especially where the society is divided.<sup>291</sup> He asserts that this is a support for the 'indivisibility, interdependence and interrelatedness of all human rights'.<sup>292</sup> Although the Charter does provide for a few socio-economic rights, like the right to work under satisfactory conditions (Art 14), the right to receive medical treatment and care (Art 16), and the right to education (Art 17), it is submitted that more effort has to be made so that African people can exist in an environment that can sustain a democracy and foster a respect for the rights of one's fellow human beings.

Other problems with the Charter include the fact it does not suitably deal with the limitation of rights.<sup>293</sup> There is no general limitation clause. However, Article 27(2) states that every person shall exercise their rights 'with due regard to the rights of others, collective security, morality and common interest.'<sup>294</sup> Heyns is of the opinion that the Commission's application of this so-

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<sup>287</sup> Acheampong (n 284 above) 186.

<sup>288</sup> Ibid 195.

<sup>289</sup> R Murray 'A feminist perspective on reform of the African human rights system' (2001) 2 AHRLJ 205, 207.

<sup>290</sup> Acheampong (n 284 above) 201.

<sup>291</sup> Ibid.

<sup>292</sup> Ibid.

<sup>293</sup> Heyns (n 264 above) 160.

<sup>294</sup> Ibid 161.

called limitation clause – only when it is ‘absolutely necessary’, is unreasonable, and posits that if the charter is going to be reformed, then a complete and comprehensive limitation clause must be in place.<sup>295</sup> There are ‘claw – back’ clauses in the charter, which act as internal modifiers that limit the extent to which rights could be claimed.<sup>296</sup> Still, the language is sometimes vague or ambiguous.<sup>297</sup>

Further, the Charter does not include a provision allowing for the suspension of rights during a time where a state of emergency has been declared (war, civil strife, any other condition that could threaten the sovereignty and security of a state).<sup>298</sup> Heyns submits that this issue must be seriously reconsidered, and perhaps be brought more in line with the stance taken in international law.<sup>299</sup>

It is submitted that if the Commission and Court are to function by interpreting and applying Charter laws, then surely for it to function effectively, all salient judicial mechanisms that ensure justice is properly achieved must be adequately in place.

### *Reforming the African Commission*

Being the only supervisory body and enforcement mechanism in the African system of human rights, the Commission has been extensively analysed and written about. Mostly, as mentioned above, only negative aspects of the Commission’s work have been elaborated upon.

This negativity is largely due to the way in which the Charter was formulated. The process from which it emerged has been slated as ‘reflecting the will of undemocratic governments’, and therefore not commensurate to the concept of human rights.<sup>300</sup> In addition, the elected commissioners are not independent, since most of them still hold office in their respective governments.<sup>301</sup> To add to this tainted picture, the OAU could not, or did not provide sufficient resources to enable the Commission to carry out its work, and ‘until 1992, there was no lawyer at the Commission’s Secretariat other than the Secretary, and since then staffing has been erratic at best.’<sup>302</sup> Harrington goes on to mention the issue of the ‘textual confusions’ that the Charter presents, and the disinclination the commissioners have to stand up to defaulting Member States.<sup>303</sup> As a result, the Commission concentrates on its promotional mandate, forsaking its duty to protect.

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<sup>295</sup> Ibid

<sup>296</sup> Ibid 160.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid 161.

<sup>299</sup> Ibid 162.

<sup>300</sup> J. Harrington ‘Special rapporteurs of the African Commission on Human and Peoples’ Rights’ (2001) 2 AHRJ 247, 250.

<sup>301</sup> Ibid; also Heyns (n 264 above) 164.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

Heyns offers that it is the Charter which fails to comprehensively set out, and he notes that it is the individual complaints system and the state reporting procedure which are the most affected by this lack of clarity.<sup>304</sup> He submits that the doubt surrounding the Commissions power to receive individual complaints has meant that it has been left by the wayside.<sup>305</sup> Moreover, the OAU Assembly of Heads of State and Government has ignored its duty to consider requests under Article 58s special procedures when there has been ‘a series of serious or massive’ human rights abuses.<sup>306</sup> The issue, according to Heyns, can be improved by reproducing a situation that makes sense, rather than relying on the vague wording as it stands presently.<sup>307</sup>

Another area that should be considered for revision is the lack of independence that the Commission has. Instead of the Assembly having to approve publication of reports and the like, made by the Commission, the Commission should be able publish reports as it deems fit.<sup>308</sup> Furthermore, the issues of Member States submitting reports to the Commission, and the Commission’s authority to appoint special rapporteurs are ambiguous, since these functions are not specified in the Charter, but are carried out nonetheless.<sup>309</sup>

Although, the Commission has done good work, and has tried to give a semblance of being effective, it is apparent that its function and mandate must be altered through amendments and reformation of the Charter, and the Commission’s Rules of Procedure.<sup>310</sup>

### *Determining the Role of the Court: Troubleshooting*

The African Court of Human and Peoples’ Rights has yet to be established. However, much has been written about it already.<sup>311</sup> The intention is not to shoot it down before it has had a chance to function, rather, it is to find effective ways for the Court to establish itself as being an organ that truly protects and enforces respect for human rights, and remedies for their violations.

There are many objections to the Court, and the one voiced the loudest is the fact that there is simply a lack of monetary resource for Court to be a permanent part of the human rights enforcement mechanism in Africa.<sup>312</sup> Among other objections, is that Africans solve their problems amicably (by friendly settlement), therefore the role of a judicial mechanism is redundant; and that ‘adequate’ measures for the protection of human rights exist at domestic

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<sup>304</sup> Heyns (n 264 above) 163.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> Heyns (n 264 above.) his n 47, 167.

<sup>312</sup> O’Shea, AHRLJ (n 212 above) 287.

levels, therefore again, there is no need for a Court at regional level.<sup>313</sup> Still, the Constitutive Act shows a commitment for the establishment of such a Court. (Article 5).

As mentioned elsewhere in this document, African States, the Commission, and inter-governmental organisations will be allowed to bring alleged violations before the Court. (Art 5 of the Protocol). Individuals and NGOs are not allowed to file a complaint unless the State Party involved has ratified the Protocol in terms of Article 34(6). Under the Charter system, no Member State has filed an alleged human right violation against another State, and it seems that they are now reluctant to allow their citizens to do the same.<sup>314</sup> According to the South African Department of Foreign Affairs, only Burkina Faso has deposited ratification in terms of Article 34(6). O'Shea argues, and the author agrees, that the individual complaints system is central to the effective protection of human rights, yet neither the Court nor the Commission has direct competence to receive individual complaints, with the Commission not being able to pass a binding decision over that issue.<sup>315</sup>

A further hindrance to the development of the Court is the vision of it sharing a complementary role with the Commission.<sup>316</sup> According to O'Shea, the establishment of the Court 'must be accompanied by a radical revision of the provisions of the African Charter, and a clear division of labour that completely removes the protective function from the mandate of the Commission.'<sup>317</sup> He adds that the reasons for doing so are obvious: the first being that if both organs have a judicial mandate, and one is ineffective, what is the purpose of having both, and why should resources be allocated so lavishly?<sup>318</sup> Also, a two-tier system would result in endless delays, and a complainant who is entitled to have the matter expeditiously resolved, would wait for periods of up to five years or so. (O'Shea points out that in the former European dual system, some complainants had to wait up to five years for their case to be heard).<sup>319</sup>

Lastly, the judges who are supposed to preside at this Court hold only a part-time position. Not only will this affect the status of such a position, but it will also create uncertainty as to the reliability and independence of the Court.<sup>320</sup> It is submitted that the position of judge at any Court proceeding be considered more seriously than just appointing persons who are already in full-time employ elsewhere, or have other interests elsewhere.<sup>321</sup>

O'Shea comments that it is in no doubt that there is a need for a judicially effective organ in the African system of human rights, however there was no need to rush into the drafting of the

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<sup>313</sup> Ibid.

<sup>314</sup> Magnarella (n 29 above) para 27

<sup>315</sup> O'Shea (n 212 above) 292.

<sup>316</sup> Ibid 290.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid 291.

<sup>319</sup> Ibid.

<sup>320</sup> Ibid 294.

<sup>321</sup> See Chapter 2. The discussion of the European Court reveals that the Judges there value their role greatly, and must be fully committed to their terms of office.



Protocol, and leave it lacking in so many crucial areas.<sup>322</sup> He comments further that there is a vast body of jurisprudence and practical experience to draw from the European system of human rights promotion and protection.<sup>323</sup> This was discussed above and as such requires no further comment other than to note that Europe also has diverse cultures, including, some of which have engaged in conflicts over long periods of time. Despite differences in language, religion, culture and tradition, the ECHR has managed to successfully implement the different tools, legal and political mechanisms etc. necessary for the proper and effective functioning of that human rights system.

Although Mutua's warning regarding the direct importation of concepts into the African system, it is not inconceivable that such concepts can work in Africa, with South Africa being the most significant example of the success of these concepts, since South Africa does have a democratic state, with fair elections and an effective justice system that protects human rights, and upholds the principles contained in the South African Constitution.

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<sup>322</sup> Ibid 297-98.

<sup>323</sup> Ibid.

## Conclusion

An African saying goes along the lines of ‘the beautiful generation has yet to be born’.<sup>324</sup> The impact of this saying on a continent ravaged by poverty, brutality, disease and misadministration, is indeed poignant. African people have rarely experienced freedom and equality. In theory it seems as if finally after all the years of infighting, and tyrannical rule, there is substance that has emerged from African leaders meeting with each other and forming a new partnership.

From what has already been established, it is clear that the Constitutive Act is firm in its commitment to the pursuance of socio-economic and political integration. The value of such a commitment cannot be overstated. However, caution must be taken to guard against the eternal plagues of corruption and greed. It has been mentioned elsewhere in this document, and is publicised in other literature as well, that prior to independence freedom fighters were intent on ridding Africa of poverty, and oppression. However, post independence, when these freedom fighters emerged as leaders, they were lured by the new found power. The result of this was that they perpetuated the strife by using resources for their own gain, and thus lost the trust of civil society. The danger of this occurrence was noted by the Executive Council, and that was how NEPAD was formed. NEPAD, however, is a voluntary association.

There remains a massive lack of responsible governance (or good governance) in many African countries. In January 2003, Kenya held elections the result of which saw the end the rule of the despotic Daniel arap Moi, and ushered in the new president, Mwali Kibali. At his inauguration, Kibali promised to revive Kenya through political and economic reform, and to finally bring democracy to the Kenyan people.<sup>325</sup> He has much to achieve, because the legacy left by Daniel arap Moi is a dismal one. There are many more African counties led by such persons. Whether Kibali is going to succeed is yet to be seen, but it gives hope to many other societies who have not had an opportunity to participate in the election of their governments. It is mostly perceived externally that Africa will continue to churn out the type of governments that purport to be democratic, but are authoritarian in practice. In Africa, the idea of government as order-keeper has been often distorted to fit the ruling regime’s idea of order.

The lamentations are not new. The need for stability has never diminished. Africa is wrought with all kinds of impediments holding the land back from progression. It took World War II to bring Europe to the realisation that despite the idyllic connotations loaded in ‘unity’, it could be attained and subsequently maintained. This is well copied in other regions and sub-regions. Further, the need to close the gap between governments and their respective civil societies is vital because the only way in which a government may be trusted by the governed is if the people are aware of what occurs at that level and can see the results of those efforts. The instability of many African states usually means that the state will be unwilling to support any

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<sup>324</sup> A corruption of the novel title ‘The Beautiful Ones Are Not Yet Born: a novel’, A.K. Armah 1969.

<sup>325</sup> See generally any news media publication in the first week of January 2003.

organisation which might threaten its fragile existence. The AU Executive Council must make it imperative for AU members to be involved in NEPAD. It is only through institutionalised change that a difference will be felt. Again, the AU has committed itself to a greater openness and a willingness to succeed in governance where the OAU has failed.

The rule of law, is a critical aspect of any true democracy. Its worth is inestimable, but can be shown by the level of economic, political and social stability in a state. The concept should be taught at all levels of government, and established as a crucial aspect of society. African people – both civil society, and those in government - need to relearn the concepts that make up a democratic state. This is not intended as a patronising remark, but more as one borne out of concern. Education is a key tool for the way forward. More about this will be discussed below.

In an earlier chapter, it was noted that AU members are slow in ratifying the Protocol that establishes the Court on Human and Peoples' Rights, because of their unwillingness to give up some of their sovereignty. At the seventy third Ordinary Session of the Council of Ministers of the OAU, Gaddafi expressed in his opening address, 'we are henceforth our own guardians', saying also that African countries were progressing with the set up of the AU in a civil and legal manner.<sup>326</sup> He added that all processes in the establishment of the AU and its organs will be done in a speedy manner so as not to impede the expectations African people have of freedom and development.<sup>327</sup> Yet African states continue to dandle on their promises. This behaviour is not new. Only after nine years did fifteen African states ratify the African Charter on the Rights and Welfare of the Child so that it could enter into force.<sup>328</sup> This cannot be continued, because the only way forward from here is to get the entire of Africa involved. Making a success of the AU cannot be accomplished with only a few states making an effort. The preference to cling to total sovereignty is dangerous. The danger lies in the assumption that belonging to or agreeing to the establishment of institutions means that there could be outside intervention. There is also fear in having to give up sovereignty. Here fear lies in the possibility that if ever there was interference or intervention, it would be found out that the democracy is not what the structures it is composed of make it out to be. Democratic states do not always engage in good governance, and injustice will more than likely occur in a democracy.<sup>329</sup>

It was explained in Chapter 1 that African leaders have always viewed sovereignty as something that meant they have to answer to no other state. It is conceded that that this had been the original idea of sovereignty. However this notion was modified to fit in with the changing exigencies of international relations, and public international law. It is therefore submitted that Africa has to also relearn the concept of sovereignty. Nagan refers to the new sovereignty as 'cooperative sovereignty', and adds

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<sup>326</sup> CM/Rpt (LXXIII) paragraphs 8 and 11.

<sup>327</sup> Ibid.

<sup>328</sup> Magnarella (n 29 above) paragraph 31.

<sup>329</sup> Nagan (n 223) 9.

A new African conception of sovereignty must be reformulated in terms of continent-wide obligations – thereby subordinating African sovereignty to the continent’s constitutional and public order priorities and values... (t)he reformulation of the doctrine in these terms is to first recognise the common interest of African governance in strengthening state and society through principles of cooperation in the common interest of peace, human rights and development, and that these interests must be shared on a continental basis.<sup>330</sup>

What Nagan is expressing is what many scholars have criticised Africa for lacking: the recognition that there are greater issues at stake. These issues, mostly ‘bread and butter’ ones, far outweigh having to surrender sovereignty. Perhaps Africa has to learn from its own failures. This did not have to be the case however, because the League of Nations chose to favour the idea of absolute sovereignty over obtaining the political and legal goals that it had initially set out to achieve.<sup>331</sup> Of course this was the downfall of the League. Similarly, the ‘non-interference clause’ of the OAU, gave African states an outlet for not adhering to certain political and legal principles.<sup>332</sup> The vision of the AU to strengthen regional relations, consolidate on socio-economic issues on a regional level and be of the same mind as to what defending and protecting human rights are on a regional level, must be realised on the foundation that states must accept and ratify all related treaties without a view to renege, or to find ‘out’ clauses.

Human rights must not take a back seat in the pursuance of political and socio-economic issues. The structures currently in place are in dire need of resources, both financial and human. It is imperative upon the AU to ensure that its commitment to protect Africans against human rights violations is carried out to its fullest abilities. It is submitted that the AU’s structural disposition allows it to properly meet the challenges posed by defaulting states not only does it have the Commission and Court at its disposal, but it has the Peace and Security Council as well as a standby peacekeeping force with a mandate to be deployed in armed conflict, mass murders (genocide), and gross human rights violations.<sup>333</sup> While this is evidence of structural adequacies, the ability of the Council to intervene on matters can only be commented on once it has been active in its role. The author submits that there has been opportunity since conception in 2002 for this Council in whatever makeshift capacity it exists to function, because there has not been any alleviation to the human rights violations occurring on a large scale in Africa.<sup>334</sup>

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<sup>330</sup> Ibid 12.

<sup>331</sup> Ibid.

<sup>332</sup> This clause is explained in Chapter 1 of this document.

<sup>333</sup> ‘AU Spearheads African Renaissance’, *The African Union Summit 2002*, 1. Produced by the Dept of Foreign Affairs, SA and appeared as a supplement to the Daily News in September 2002.

<sup>334</sup> The Council replaces the OAU’s Mechanism for Conflict Prevention Management and Resolution, so the Council does not have any major overhauling to complete before it functions.

There's not much about the structural and institutional qualities of the Au that can be faulted when one measures it up against international standards. As a result the formation of the AU, NEPAD and the Court, are well received by overseas counterparts

The EU attaches special importance to the NEPAD principles of democracy, human rights, the rule of law and political and economic good governance, as well as conflict prevention as cornerstones for the creation of a more conducive environment for peace stability and development in Africa.<sup>335</sup>

The European Commission said that the ' creation of a Pan-African level of governance holds great development potential. In a context of globalisation stronger integration in Africa is a precondition to enhance overall political and economic integration of Africa in the world economy.'<sup>336</sup>

The AUs principles and visions are indeed commendable. In fact the desire to emulate the EUs success is proved in the fact that the AU has committed itself to unifying and consolidating inter-African relations, to be on a par with international standards. It is hoped that proper and effective human right supervision is not lost in the ultimate aim of achieving economic prowess and social and political stability. The reason for this comment is that the EU itself is internally criticised for not having a stronger human rights policy. As mentioned in Chapter 2, the EUs primary concern is politics and economics ie the EU is in the business of running Europe. It is the COE that regulates the European Court and human rights related matters. The Council can therefore dedicate all its time, effort and resources for human rights protection, enforcement, and education. The AU does not have the luxury of an organisation of this nature. NEPAD has made a commitment to this kind to human rights, but this is not its primary objective.

It is hoped that the obligations undertaken by the AU and NEPAD can be fulfilled by them given the amount of work that must be done in order for the system to function optimally. The most telling act of the AU with regard to its commitments, will be to establish the Court and ensure that it is not just a symbolic structure which exists to show the world that the Africa is a defender and protector of human rights. The Court should play a role worthy of its title and should be fully able to carry out its mandate. It must be the place where justice is for the people (not just people of Africa, but also all who traverse this continent). It will also be evidence to the effective fulfilment of principles of upholding good governance. If the international community can see this process occurring, then it would be easier to secure economic and trade relations abroad; it would also be easier to secure food aid, and debt relief.

Democracy, rule of law, human rights, economic upliftment, education are interdependent. Focusing on one or another too much means that other aims which are just as effective, will suffer causing the whole system to collapse. Striking a proportional balance, which depends on the urgency of the matter is submitted as a preferable route to attaining these goals. For

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<sup>335</sup> 'International Reaction to AU Launch', *African Union Summit 2002*, 5.

<sup>336</sup> Ibid.

example, much needs to be done in order for the AU to accomplish its goal of educating and involving civil society in the inculcation of respecting and protecting human rights. However, the AU needs to be frugal with its budget. Further, as much as it is necessary to spend in education, there are organs like the Commission and the Court that need to be urgently funded so that human rights matters may be expeditiously taken care off. The only way to reduce the number of matters that appear before the Commission and Court is to ensure that civil society recognises the respect human rights deserves, and therefore education is vital. Perhaps then programmes such as Street Law, which is a worldwide programme, may be introduced at school level, and even through adult education. This programme is mostly run through universities, and students of law who complete the course as part of their degrees do the actual teaching. The other benefit, besides finding the human resources, is that there will be a saving of funds because the schools are not required to remunerate the students. In some cases, finance is required to cover the travel expenses, but this doesn't amount to much because the schools are usually not too far out. The programme does not only have to be restricted to schools, if big business is willing to be a part of the evolution, then perhaps they will be able to fund a similar programme in the workplace. It is not uncommon to find labour relations and other such workplace activities, so including a curricular of human rights education will not be wasted. It is the only way in which large sections of society may be reached, and it will demonstrate to them how to report violations, enforce their rights, and in general respect the rights of others.

Regarding the mechanisms of the actual legal aspects of the AU, it was discussed in Chapters 7 and 8 that reform of these mechanisms is necessary because of the constraints that exist on the present system, and because of the insufficiency of protection within the treaties. The conclusion that the author reaches in this regard is that it is once again better to borrow the best and most effective doctrines, and amend them according to what the objectives of the organisation are. The best way forward for Africa then is to find a compromise between the implementation of European or Western concepts, and the ethos espoused in African traditional norms and values. Where a conflict exists, it is submitted that bias be offered in favour of international standards. It is not realistic then, to revert completely to the traditional methods of governance, as effective as they may be. The African Charter, the AU, and the Court, are all bound by and through rules and procedures that are rooted in the West. Conforming to predominantly Western ideology does not mean that Africa is still the lapdog of the West. Africa can make a meaningful contribution to human rights, firstly because it recognises peoples' rights and secondly because it purports to practise the concept of duty. The Charter, although up for review in 2003, will do well to remain unchanged in these two areas. Nowhere else in international accords and agreements, is the determination of peoples recognised, nor are there such documents that articulate the concept of human beings and people having to reciprocate rights with a corresponding duty.

Furthermore, the question of individual complaints must be properly reviewed, and addressed. If the AU wants to involve civil society in the process of developing human rights and allowing true justice to occur, then the evidence of this will lie in the ability of the African system to protect the individual. The crux of international human rights protection means that an individual must be able to have his/her rights vindicated if they are violated. There is no

advantage to barring individuals from accessing the Court. South Africa has not ratified to include individual complaints. Human rights are *the* basis of the South African democracy, and South Africa is one of the driving forces of the AU. The idea that it will hold back on allowing individuals direct access seems to indicate that South Africa has no confidence in the system it declares to support so vigorously. It also seems that South Africa too is afraid of giving up some of its sovereignty and allow another court jurisdiction over its Constitution. There must be a commitment to honour the principles that one fights for. One should not renege from this commitment later. It does reflect poorly on one's resolve. This applies to every actor in the process of reforming Africa, claiming to be committed to the process.

There are also numerous practical impediments to the realisation of the goals that have been set out for achievement. For one, there is a vast cultural divide on the continent, as well as legal and institutional disparities.<sup>337</sup> Yet Europe has been able to mobilise people despite the same obstacles. It is not insurmountable. Secondly, it was mentioned in the discussion in Chapter 8, that there must be political will from states in order for the process of change to begin. African states must now undertake to locate all their efforts into the implementation of these plans, and not continue to form illusory ties with each other. States must be willing to assist by way of fund allocation, implementation of decisions and recommendations, and must be able to fulfil all human rights obligations to the best of their abilities. Thirdly, the elite within the legal realm, both academics and practitioners, must be able to network across borders and exchange ideas. There is very little consultation and interaction amongst lawyers in Africa; instead there is a tendency to go abroad, usually to the USA or to Europe.<sup>338</sup> Finally, it is clear that for the system to function with efficacy, then the business elite must ably support it. Many large corporations exploit the lack of decent human rights conditions in Africa, and should know that this cannot persist. Business must facilitate economic recovery in Africa to create a platform from which further infrastructure may be accomplished.

The AU cannot afford to allow a repeat of the OAU, which for all its endeavours, failed where it mattered the most: it let Africa slip into chaos and discord. The AU must evolve Africa into a free, and stable region – one that is able to endure adversity. Certainly it must become a place where human beings are not paralysed by ineffective and unwilling bureaucracy, but encouraged to assert and vindicate their fundamental rights. The question of whether state sovereignty is an obstacle to the development of international legal principles, rules and executive processes as a foundation for international governance may be answered as yes. Although, states will remain the key actors in global and regional governance, the impact of the latter is that restrictions in the exercise of sovereignty are inevitable. The author opines the need for states to compromise on the issue so that the eloquently worded legal documents and treaties will serve a purpose in the regulation and enforcement of human rights, and will not be unvoiced any longer.

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<sup>337</sup> Heyns (n 245 above) 260.

<sup>338</sup> *Ibid.* Heyns notes that few African scholars spend their sabbatical in other African countries.

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