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FUNDAMENTAL ISSUES AND PRACTICAL CHALLENGES OF HUMAN RIGHTS IN THE CONTEXT OF THE AFRICAN UNION

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I. INTRODUCTION

Since independence from colonialism, Africa has continued to bear witness to gross violations of human rights: from the Rwandan genocide, resulting in 1,000,000 deaths in less than 100 days, to the continued violence in the DRC, Northern Uganda, Darfur, and Kenya . Africa has more internally displaced people than the rest of the world combined, with over 13 million people forced to flee from their homes and 3.5 million crossing international borders as refugees. Additionally, as of 2005, an estimated 25.8 million people are living with the HIV/AIDS virus. Meanwhile access to food, health and information remains limited for some of the world's poorest people.

While the Charter of the Organization of African Unity (OAU) recognized and upheld the principles enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights (UDHR), the OAU was firmly rooted in the doctrine of non-interference between States established in 1960s when unity and solidarity against colonialism were the primary driving forces for the institutionalization of the pan-Africanism ideology. The concepts of sovereignty and independence that made the OAU an effective anti-colonial body were later used to stifle

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human rights protection by implying political apathy toward the abuse by African States against their own people.²

The Grand Bay Declaration was adopted at the first OAU Ministerial Conference on human rights.³ Attended by delegations from 47 of the OAU's Member States, this Conference was preceded by a meeting of experts who had finalized a Declaration and action plan to be approved by the Conference.

The Declaration contains provisions rarely or never found in human rights treaties and declarations. First, the preamble states that African NGOs have made a significant contribution to the promotion and protection of human rights. The Declaration also states that the strengthening of civil society is key to the process of creating an environment conducive to human rights in Africa. Article 17 of the Declaration also recognizes the importance of promoting an African civil society and calls on African governments to offer their constructive assistance civil society so as to consolidate democracy and development.

Another interesting provision in the Declaration (Art. 1) is the affirmation that human rights are universal, indivisible, interdependent, and inter-related. In this vein the Declaration urges African governments to give parity to all generations of rights.

The African regional human rights system is both universal in character and distinctively African in its scope and principles. Now under the auspices of the African Union (AU), Africa has a "corpus" of human rights mechanisms, laws and norms, at the center of which lies the African Charter on Human and Peoples' Rights (African Charter).⁴ Unlike other human rights treaties, the African Charter uniquely recognizes collective rights, individual duties and third generation rights, showing the interdependence between political, civil, economic, and socio-cultural rights. While the African Charter was approved in 1981, it was officially adopted in 1986. Since then, it has been adopted by all 53 African States and is widely recognized within Africa, at least theoretically, as setting the standard for human rights protection.

The Protocol for the Establishment of an African Court (The Protocol for the Court), adopted in 2004, is intended to complement the African

2. Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 *Human Rights Quarterly* 3pg. 310 (1987).

3. Mauritius *OAU Conference on Human Rights*, 36 *Africa Research Bulletin: Political, Social, and Cultural Series*, no. 4, pg. 135 (1999).

Commission on Human and Peoples' Rights (Commission), the body that has exercised continental oversight over African human rights since 1987.

For several years, legal scholars have stated that the African Charter and the Protocol for the Court need provisions reformed. The Constitutive Act of the African Union (2000) appears to give an important place to human rights which are mentioned specifically with states being "determined to promote and protect human's and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law" (para 10). Article 3(g) provides that the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments is an objective of the Union.

The New Partnership for African Development (NEPAD) emphasized that restoring stability to Africa is necessary for sustainable development, good governance, human rights and democracy. Specifically, NEPAD places particular importance on human rights, establishing a voluntary mechanism known as the African Peer Review Mechanism (APRM), which requires that States sign up to a review process of the governance practices. The benchmarks for the review process indicate a number of key indicators for democracy and political governance including economic, social, civil and political rights as well as the fighting of corruption and the protection of the rights of women, children and refugees.

In 1965, AU, the third ordinary session of the Assembly of Heads of State and Government of the OAU adopted a Declaration formulating core principles governing democratic elections in Africa. In September 2002, under the AU, the Ministerial Council approved the text of the "Convention on Preventing and Combating Corruption," which acknowledges and formally addresses corruption as a facilitator of impunity and an obstacle to the enjoyment of human rights in Africa. The Convention announced the creation of another regional supervisory mechanism to be known as the Advisory Board on Corruption in Africa.

Meanwhile, institutionally, the African Committee of experts on the rights and welfare of the children was eventually inaugurated and met for the first time in May 2002, while the Durban Summit of the Head of States established the African Peer Review Mechanism.

How effective are all these instruments and these institutions in the promotion and the protection of human rights for the African people?

What are the main reforms needed/suggested in order to make the African regional human rights system more coherent and more protective. As an attempt to reply to these questions, this paper starts with an overview of the legal issues of the African human rights system. Then, it discusses the main human rights issues and challenges which confront the African system, as democracy, human rights during conflict and development issues. It ends with a brief discussion on a minimal core approach to social and economic rights.

2. Overview of the normative provisions and the enforcement mechanisms

The Charter entered into force in 1986 after its adoption in 1981. Its normative provisions and enforcement mechanisms are original but there is a need for reform.

2.1. The normative provisions of the Charter

The African Charter is an innovative human rights document of 68 Articles, including the three generations of rights as well as the groups and peoples' rights. In respect of the substantive human rights, few issues will be considered here.

There are several internationally recognized civil, political, and socio-economical rights that are not included in the African Charter, or are not explicitly or fully recognized. For instance, the African Charter does not include a right to privacy, nor does it include the right against forced labor. Although the right to free association is included, the right to form trade unions is not explicitly recognized. While the African Charter includes socio-economical rights, it is surprising that it excludes housing, food and social rights.

The African Charter links the concept of human rights, peoples' rights, and individual duties. While the inclusion of duties has been welcomed, not all duties can easily be given meaning in a legal context. Christof Heyns wonders, for example, how the duty to "preserve the harmonious development of the family should be interpreted and given practical application by a court of law⁵ (Art 29(1)).

The African Charter's most controversial provision concerns the "claw back" clauses which require that the States restrict basic human rights to

5. Christof Heyns, "The African regional human rights system: In need of reform", Volume 1, no. 2 African Human Rights Law Journal, p.160 note 20 (2001).

the maximum extent allowed by domestic law. For example, Article 9(2) provides that “Every individual shall have the right to express and disseminate his opinions within the law.” According to Makau wa Mutua:

*“These fundamental civil and political rights are severely limited by clauses like “except for reasons and conditions previously laid down by law ”subject to law and order”, “within law”, “abides by the law”, “in accordance with the provisions of the law” and other restrictions justified for the “protection of national security”.”*⁶

The word “law” was commonly understood as referring to the domestic law before the Commission ruled that in fact it should be understood as a reference to international law.⁷

In emergency situations, rights will be and should be limited. However, the Charter does not include provisions addressing the limitation and derogation of rights. Another problem is that it does not contain any reference to derogation in times of emergency, what has been interpreted by the Commission as meaning that the Charter does not allow derogation under any circumstances, even during a properly declared, genuine state of emergency.⁸ The “bad thing” is that as argued by Christof Heyns:

*“States facing real emergencies could in practice be expected to ignore the Charter rather than succumb to the emergency, if those are the only two options available. Under such circumstances the Charter will exercise no restraining influence on States in respect of the way in which the operation of the rights in question is suspended, and the Charter will be discredited”*⁹

A further controversial question in the Charter concerns its language of duties. In the view of the Charter, individual rights cannot make sense in the African context, unless they are coupled with duties on individuals. Thus, the Charter provides individual duties to “the family and the

6. Makau wa Mutua, “*The African System in a Comparative Perspective*,” Rev. Afr. Comm. Hum. and Peoples Rights 5, 7 (1997).

7. Communication 101/93, *Civil Liberties Organization in respect of the Nigerian Bar Association v Nigeria*, Eight Annual Activity Report para. 16.

8. Communication 70/92, *Communication Nationale des Droits de l’Homme et des Libertés v. Chad*, Ninth Annual Activity Report para 21.

9. Heyns at p.162.

society, the State and other legally recognized communities, to “respect and consider his fellow beings without discrimination”, and “to preserve the harmonious development of the family, to respect his parents at all times, to maintain them in case of need” (Art. 27-29). Makau wa Mutua noted that:

*“A valid criticism of the language of duties should rather focus on the precise meaning, content, conditions of compliance, and application of those duties. More work should be done to clarify the status of the duties in the Charter, and define their moral and legal dimensions and implications for enforcement.”*¹⁰

Finally, while Charter Article 18 addresses the women’s rights, it has several shortcomings, since it does not adequately define discrimination, and its emphasis on traditional rights are seen as justifying violations of women’s rights. However, opinions on the impact and efficacy of the African Charter with respect to the situation of women on the continent are divided.¹¹

2.2. The enforcement mechanisms of the Charter

Since 1987, the Commission has been the sole supervisory body for the African Charter, but the African Court on Human and People’s Rights comes in existence in 2004.

2.2.1 The Commission

The Charter charges the Commission with three principal functions: examining State reports, considering alleged violations, and expounding the Charter.

Every two years, States must submit a report on the normative measures taken to give effect to the individual and group rights and the obligations of the States. The Commission has drawn up guidelines for this national periodical report supplemented by general directives on what kind of information the report must furnish.

10. Makau Wa Mutua, *“The African human rights system: A Critical Evaluation*, UNDP, p.12 (2001).

11. Adetoun Ilumoka, *African Women's Economic, Social and Cultural Rights-Toward a Relevant Theory and Practice*, in Rebecca J. Cook (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, pp.307- 325 at p.313 (1994), and Florence Butegwa, *Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa*, in Cook, *Id.*, pp.495-514, especially at p.504.

While the examination of States' reports has served as a forum of discussion with NGOs and normative understanding of the Charter through interpretation of its provisions, many critics have been addressed to the process of examination.

The Commission does not issue concluding remarks or a 'concluding evaluation' of state reports. Individual commissioners express views in the course of examining state reports but no uniform position is taken by the Commission on the various issues raised. The examination of state reports usually ends with profuse thanks or encouragements to the state representative. The Commission does not adequately advise state parties on how to improve their human rights situation.¹²

The Commission's primary mission is considering communications alleging violations. The Charter places no restriction as to who is able to seize the Commission with individual complaints. Thus, any individual, group or NGO can lodge a petition, whether or not they are the direct victims of the violation complained. However the complaints should be sent after the petitioner exhausts local remedies, unless they are unduly prolonged or are ignored.

Since its inauguration in 1987, the Commission has published a body of case law through the "Commission Annual Activity Report." Over the years, a wide range of substantive and procedural issues, including economic, social and cultural rights have been discussed before the Commission.¹³

Unfortunately, the decisions are not binding and attract a little attention from governments, the human rights community and the academic journals. A very controversial provision of the Charter is Article 59(1) that provides "all measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of States shall otherwise decide". In practice, the Assembly did block publication of reports which have not been yet released.¹⁴

Another big constraint to the Commission's effectiveness is the principle of non-interference between States seems still entrenched. To this day,

12. George William Mugwanya "Examination of state reports by the African Commission: A critical appraisal" *African Human Rights Law Journal* (2001) 2 p. 268 -284 sp P.278.

13. Chris Anselm Odinkalu "The role of case and complaints procedures in the reform of the African regional human rights system" *African Human Rights law Journal* (2001) 2 pp.225-246 sp.239.

14. Rachel Murray, "The African Commission on Human and Peoples' Rights and International law," *Human Rights Law Journal* 16, pg. 283 (2000).

the Commission has heard only one inter-State complaint since its establishment. The main reason why so few complaints have been lodged is because there is a lack of political will on the part of African State or Government to hold one another accountable for violations of fundamental freedoms.¹⁵

The Commission's shortcomings are mostly practical and political matters. These include matters such as the funding of the system, the absence of compliance and supportive political will on the part of State parties.

2.2.2. The African Court

The background for the establishment of a human rights Court for Africa is well known.¹⁶ The scholars were initially divided on the establishment of the Court as a likely solution for the inefficiencies of the Commission.¹⁷ But a general opinion was to accept that Africa needs a fully functioning Commission as well as a Human Rights Court ("the Court").¹⁸

Adopted in June 1998 by the OAU Assembly, the Protocol for the Court became effective in 2004. The Court's eleven judges have been appointed but the Court is still not functional. Also, the Court is severely underfunded, thus compounding the Court's ineffectiveness. One of the objections to the idea of a Court was due to the scarcity of resources, leading few scholars to recommend prioritizing the promotion of human rights.¹⁹

Two very important issues about the Protocol for the Establishment of the Court relates to the jurisdiction of the Court and its sources of law. The jurisdiction of the Court is not limited to cases or disputes that arise out of the African Charter. The Protocol for the Court provides that actions could be brought before the Court on the basis of any instrument, including international human rights treaties, which are ratified by the state party in question. Furthermore, the Court can apply any relevant

15. Hakima Abbas, "Africa's long road to rights, Pamabuzka, edited by Fakhamu, pg. 11-13 (2007).

16. J. Mubangizi and A. O'Shea "An African Court on Human and People's Rights" South African Yearbook of International Law 24 (1999) 256 257-258; M. Mutua " The African Human Rights Court: A two-legged stool" Human Rights Quarterly 21, 342-352 (1999); A. O'Shea "A critical reflection on the proposed African Court on Human and Peoples' Rights" African Human Rights Law Journal 2, 285-298 (2001).

17. Heyns at p.166.

18. Heyns at p.166.

19. J. Mubangizi and A. O'Shea, *An African Court on Human and People's Rights* at pg. 289.

state-ratified human rights instrument, including UN and regional instruments, such as the ECOWAS treaty.

Some scholars worry that allowing broad jurisdiction to the Court may cause chaos in the courtroom, meaning that all human rights treaties ratified by a State party to the Protocol in the past will become justifiable. Thus, future ratification of treaties will have the same consequence. According to Article 34(6) of the Protocol, individuals and NGOs do not have standing to seize the Court on behalf of States that have ratified the Protocol, unless such a State has made a declaration accepting the jurisdiction of the Court to hear such cases. Unless a State issues a declaration, individuals and NGOs will remain unable to address problems to the Court.

However, if a State has accepted jurisdiction, then individuals and certain NGOs, particularly those one that have special-observer status, will have Court access to seek redressability. The Court may consider cases or transfer them to the Commission where the matters require an amicable settlement, not adversarial adjudication.

The Court embraces challenges by examining the approach taken with the European Court of Human Rights and the Inter-American Court of Human Rights, as it is useful in the issues related to legal reasoning and degree of independence from political authorities; issues to which the African domestic Courts are already confronted.

While there are several reasons for the caseload disparity, the budgetary differences between the two commissions is striking: The African Commission has a budget of \$200,000 for each session held biyearly, whereas the Inter-American Commission has an annual budget of \$2.78 million and an additional \$1.28 million from external contributions .

3. Linking African human rights to few extra-legal Issues

Besides the legal issues, the African human rights system is confronted with crucial issues of democracy, conflict resolution and development.

3.1. Human rights and democracy

Democratic change in Africa began to take shape in the early 1990s and engendered an amount of analyses in the social science community. However, little research has been done on the interactions between democracy and human rights

In fact, democracy and human rights are linked but are not the same. As noted by Aidoo :

*“Democracy has to do with structures of participation (electoral and procedural), provisions for separation of powers, and mechanisms of accountability. Human rights on the other hand, have to do with basic freedoms (individual or collective) principles of equity and equality, and the preservation of human life and dignity.”*²⁰

Therefore, the issues of political leadership changes, the election process and ethnicity deserve a deeper analysis in this discussion about democracy and human rights in Africa.

3.1.1. The contentious change of government

There are underlying commonalities that can be discerned transcending contingent elements and may prove determinative of whether the so-called new democratized States successfully make it through the creation of the state of law, which guarantee citizens a broad range of rights, social and economic as well as civil and political.

So far, few African leaders have left office through electoral defeat, while some leaders voluntarily retired. Once in power, the Head of States in Africa try by any means necessary to remain in office. For example, President Bongo of Gabon has been in power more than three decades while others as the President of Egypt intends for his relatives to eventually assume office after he retires or dies.

Over the last few decades, both the OAU and the AU have focused on unconstitutional changes of government. This issue has received an increasing amount of attention and the 1997's Decision on the Unconstitutional Changes of Government in Africa. The Decision listed the unlawful changes to “constitutional” government but the list does not include the usual constitutional “coup d’Etat” by which, using the rule of mechanical majority, Parliament obey the desire of the Heads of State to remove provisions limiting the presidential mandate, in order to remain in power.

20. A. Aidoo, *Africa: Democracy Without Human Rights*, Human Rights Quarterly 15, 703-15 (1993).

Actually the issue of “coup d’Etat’ remains important in the AU agenda with the recent changes occurred in Mauritania, Guinee, Guinee Bissau, Madagascar.

3.1.2. The election process

In the 2002 Declaration on the Principles Governing Democratic Elections in Africa, the AU stated that election should be free choice of those who will governs a State, in full recognition of voting rights.

The AU has also recognized the need to protect human rights, as well as freedom of expression, association, and movement rights during elections. Furthermore, the Declaration also provides all parties and relevant stakeholders free media access. However, the last elections in Kenya and Zimbabwe show that the Declaration’s enumerated rights have not been implemented as there have been no sanctions against the unlawful practices of the governments and the ruling parties.

3.1.3. Ethnicity Issues

Some scholars have claimed that multi-party elections will endanger national unity and rehabilitate ethnic conflicts. In fact, Kenyan President Moi used this argument as his reasoning for not implementing a multi-party system. However, the last presidential elections in Kenya show that even though ethnic groups are not basically political groups, they can be politicized for different reasons to serve different interests of politicians

The respect of universal human rights is one of the first measures to fight against ethnic conflicts, for individuals from different ethnic origins will be treated as equal citizens and have equal rights before the law.

3.2. Human Rights and Conflicts

The dichotomy between humanitarian and human rights law has been noticed in the AU approach: where the former is considered, the latter is often forgotten. Yet, there has been an increasing trend to recognize the relationships between conflicts and human rights. The 1993 OAU’s Declaration on the Conflict Mechanism took human rights as a central issue and a tool to prevent conflicts and massive violence against civilians

The AU Constitutive Act also provides for a Peace and Security Council and its Protocol was adopted in July 2002. In March 2004, the AU Executive Council elected the first States to be members of the Peace and

Security Council. These State members have power to anticipate events that may lead to genocide and crimes against humanity, to impose sanctions on unconstitutional changes of governments and to monitor possible human rights violations. In this regard, it would seem important that the early-warning system as the conflict prevention mechanism takes account of human rights violations

Despite the number of decisions and meetings adopted or organized by the AU on African conflicts, it is difficult to ignore the failures of the present system as we observe the tragedies in Darfur, the crisis in Northern Uganda, the widespread violations of women's rights, the systematic use of torture and other cruel and degrading punishment by State actors, among other violations that continue to be widespread in Africa.

Given that the State is primarily responsible for guaranteeing human and peoples' rights, the AU needs to closely monitor human rights violations by the States as a useful indicator of conflicts and a way of preventing them.

Finally, it is worth to mention the AU Convention on the Prevention and Combating of terrorism which entered in force in December 2002, and provides a definition of terrorism as "a serious violation of human rights and, in particular, the rights to physical integrity, freedom and security"

3.3. Human Rights and Development

Human rights and development have been increasingly linked and the relationship between the two concepts has occupied a prominent place in the international discourse of human rights.

The "right to development" is considered as a specific African contribution to the international human rights discourse. Keba Mbaye, the former Senegalese jurist, has been credited with having first propounded the concept in 1972 before it was formally and officially recognized.²¹ While the existence of this right has been questioned by many scholars²², the AU has stated that the right to development is the right by which every human being is entitled to participate in, contribute to and enjoy the economic, social and cultural and political development of the society." The AU has gone further suggesting the focal role of

21. Issa Shivji, "The Concept of Human Rights in Africa", p. 29 (1989).

22. J. Donnelly, "The Right to Development in International law: How to link Human Rights and Development" in Welch and Meltzer (eds), *Human Rights and Development*, 261-83 (1984).

man be objective and supreme beneficiary of development, and that there is a need to entrench the human dimension in all policies seeking the economic development of our countries.

The concept of good governance has also consistently stressed as an important element of the development process leading to the adoption in the 2001 African Peer Review Mechanism (APRM). There are now 29 countries that have acceded to the APRM. To date, the APRM process has exceeded the expectations of many observers. However, there are lessons learned in the review of governance practices that (have been done).

The APRM process needs a stronger connection to three critical constituencies: (1) to the African citizens in whose name it is being undertaken; (2) to the political society and (3) to the wider African and international community.

4. The promotion of socio-economic rights

An equally important context in which the reformation of the Charter should be posited is the general understanding that all human rights are universal, interdependent and indivisible. The Preamble of the AU Constitutive Act states that “the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.” However, the Charter itself provides for only few socio-economic rights. Specifically, the Charter (Article 15-18) provides:

1. the right to work under equitable and satisfactory conditions,
2. the right to receive equal pay for equal work
3. the right to enjoy the best attainable state of physical and mental health including medical care for the sick
4. the right to education
5. the right to freely take part in the cultural life of one’s community and
6. the right of women, children, the aged and the disabled to special measures of protection in keeping with their physical or moral needs.

Despite these provisions, little attention has been paid by the Commission to such economic, social and cultural rights when compared with civil and political rights.²³

Over the past 20 years, The United Nations Committee on Economic, Social and Cultural Rights has been developing an understanding of the content of social-economic rights, and the obligations these rights impose upon States.

Among the most important socio-economic rights considered under the AU is the “right to sustainable preservation and protection of health” “the ‘right to adequate nutrition’ and the right to access to food.”

But Africans need to profit from a minimum core approach to these rights that would provide a guaranteed safety net to those individuals who are unable to access rights through their own means, making them able, at least to acquire sufficient means to be free from general threats to their survival.

II. CONCLUSION

The first aim of the African regional human rights system is protecting rights to sustain human development in Africa. From the creation and dissolution of the OAU to the formation of the AU, the process of encouraging the States to recognize human rights and to engage in the democratization process has been an arduous journey.

As the ‘African renaissance’ of the new millennium is framed with the self-determined precept of African solutions to African problems, it is crucial that regional human and peoples’ rights protection are strengthened. Indeed, the African Charter provides a solid foundation, though not without inherent weaknesses, to guarantee the protection of these rights. Africa is still facing the long road to promote human rights all Africans.

23. Rachel Murray, “A feminist perspective on reform of the African human rights system” vol. 1 n 2 *African Human Rights Law Journal*, pp. 205-224 sp.215.