

**THE AFRICAN UNION (AU) HUMAN RIGHTS
AGENDA: THE PANACEA TO THE PROBLEM OF
NON-COMPLIANCE WITH HUMAN RIGHTS
NORMS IN AFRICA?**

**Submitted in partial fulfilment of the requirements for the LL.M
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DECLARATION

I, Ayinla Abiola, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Prof. J. Oloka-Onyango

Signature.....

Date.....

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DEDICATION

Other things may change us, but we start and end with the family...

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With utmost pleasure, I dedicate this dissertation to my treasured family and fan-club, whose faith in me, is my motivation for excelling in life.

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CHAPTER ONE

1.0 INTRODUCTION: THE DAWN OF A NEW ERA?

1.1 Background to the study

It is important to point out that when African leaders decided to establish the African Union [AU] when they adopted the Sirte Declaration and, subsequently, the Constitutive Act, they did not aim at establishing an organisation, which was going to be a continuation of the OAU by another name.¹

This statement, coming from the African political community, is loaded with optimism, and promises of a new dawn in Africa. This is because unlike the OAU Charter, the Constitutive Act has several novel and progressive provisions, including those that place human rights squarely on the agenda of the AU. With respect to the protection of human rights in Africa however, rather than similarly raising hopes, this statement raises eyebrows and stirs up academic curiosity,² given the history of human rights in the African political community.

Taking a walk back into the history of the African political community, first the Organisation of African Unity,³ and now the African Union,⁴ it is trite to state that it has never been characterized by a political commitment to human rights. When the OAU was founded in 1963, the question of human rights did not feature prominently on its

¹ Statement by the OAU Secretary-General at the Council of Ministers Session held in Lusaka, Zambia, in July 2001; see *Report of the Secretary-General on the Implementation of the Sirte Decision on the African Union*, para. 26, OAU Council of Ministers, EAHG/DEC. 1(V), CM/2210 (LXXIV).

² See e.g, G Naldi and K Magliveras 'The African Union – A new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly*; N .J. Udombana, 'Can the leopard change its spots? The African Union Treaty and Human Rights', 17 *American University International Law Review*; E Baimu, 'The AU: Hope for Better Protection of Human Rights?' (2001) 2 *African Human Rights Law Journal*.

³ Charter of the Organization of African Unity, reprinted in *Human Rights Law in Africa 1998* (2001) 117, (hereinafter the OAU).

⁴ Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 (July 11, 2000) (entered into force May 26, 2001) [hereinafter AU Treaty], available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Treaties_Conventions_&_Protocols.htm (last visited 12 Sept. 2003), (hereinafter the AU).

agenda.⁵ Rather, some of its principles eroded the very essence of the legal protection framework offered by the African Charter. These include the overriding consideration given to the principle of ‘domestic jurisdiction’ or ‘the reserve domain doctrine’,⁶ which has led to reluctance on the part of the OAU or any of its member states to criticize leaders who fail to protect, or violate human rights. The OAU was thus, not endowed, institutionally, or otherwise, to investigate human rights problems.⁷

Consequently, despite numerous ratifications of regional and international human rights instruments, the protection of human rights in Africa remains a chimera. The recommendations of the African Commission—the treaty monitoring body of the African Charter, have also largely been treated with disdain. This is despite the reporting mechanism established under Articles 52-54, and Articles 58-59 of the Charter, which impose a duty on the Commission to make an annual report of its activities to the OAU, suggestive of the latter’s involvement in the enforcement of human rights. Non-compliance with human rights obligations in Africa has, therefore, been unattended by sanctions of any form.

Doubtless, the proposed African Court on Human and People’s Rights will take the African human rights protection system, a step higher, and bring it at par with its Inter-American and European contemporaries. Its decisions are however, likely to also suffer the same fate of non-compliance as those of the Commission, as they can, and will also be flouted in its face, with no attendant consequences.⁸ Suffice it to say, the enforcement of human rights in Africa is faced with the “destructive brick wall” of a “lack of political will” of states, which was consolidated at the OAU level.

Although articulated over the years in a series of non-binding documents, such as the 1999 Algiers Declaration,⁹ the expression of the political commitment of African states to

⁵ G.J Naldi, ‘Future trends in human rights in Africa: The increased role of the OAU? ; in Evans & Murray (eds.), *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986-2000*, 1.

⁶ Art. 3(ii), (n3 above)

⁷ (n 5 above), 3.

⁸ See M. Mutua, ‘The African Human Rights Court: A two-legged stool? (1999) 21 *Human Rights Quarterly*, 363.

⁹ OAU Doc. AHG/Dec.1 (XXXV) (July 1999).

human rights has finally been consolidated in the AU Constitutive Act.¹⁰ The Act thus contains the first formal expression of political commitment to human rights in a binding instrument by African states. Curiously, it provides as prerequisites for membership and as core principles respectively, the concepts of human rights, democracy and good governance.

Even though this is a long-awaited stride by the OAU in relation to human rights, experience has shown that norms prescribing state conduct are not in themselves, meaningful unless they are anchored in functioning and effective enforcement institutions.

1.2 Statement of research problem

From the above, it can be deduced that the problem of human rights in Africa is not that of the non-existence of enforcement mechanisms, but rather, of a lack of political will on the part of African states to comply with human rights norms and decisions.

The African political community, in the form of the OAU, had failed to play an active role in the enforcement of human rights, by not bringing to bear on member states, the relevant political pressure needed to realize compliance. The African Union has departed from this trend by incorporating a human rights agenda in its Constitutive Act. There is, nevertheless, still a need to streamline the existing human rights protection framework into this agenda, not only so that we might arrive at a more coherent approach to human rights in Africa, but also to help in finding a solution to the problem of non-compliance. What's more, the protection of human rights in Africa will remain a chimera if the AU Constitutive Act is not interpreted widely enough to create an effective working relationship between the existing framework and the relevant organs of the AU.

¹⁰ (n4 above)

1.3 Objectives of the study

This study examines the norms and institutions developed under the auspices of the AU, in relation to human rights, and their implications for the enforcement of human rights in Africa. It seeks to discover if the adoption of the Constitutive Act and the change of nomenclature for the organisation,¹¹ will, in themselves, bring about greater respect for human rights in Africa, and focuses on the possibilities these norms and institutions offer to the AU to solve the nagging problem of non-compliance with human rights norms in Africa. In this respect, it depicts the potential political human rights enforcement mechanism offered by the Union structure, and further proposes and explores the possibility of an amalgam of political and legal frameworks (a hybrid) for human rights norms enforcement as the much-needed 'panacea' to the problem. i.e., a synergy of the emerging and existing frameworks. This is for the reason that a wholly legalistic approach has failed. The following reasons are submitted for this optimism:

1.3.1 The expression of political commitment to human rights in a binding instrument for the first time is a positive indicator of the gradual and possibly, final realization of the importance of human rights by African states, and to a degree, a compromise of their sovereignty. Commitment to human rights is expressed as a core for the functioning of the African political community.¹²

1.3.2 The concept of human rights has been placed in its proper perspective, having been linked to economic development.

- This vital linkage and inseparability of human rights and development can give human rights the necessary boost in African states.
- This linkage can also result in the re-conceptualisation of human rights by African states.
- The linkage can also serve as an effective tool of sanction within the AU structure. Notable also, is the potential positive effects of the African Peer Review Mechanism (APRM) under the New Partnership for Africa's Development

¹¹ (n1 above).

¹² This gradual realization and compromise is also reflected by the adoption of the protocol establishing the court, even though the ratification is taking unduly long.

- (NEPAD)¹³ program which serves to ensure (and assist) states' compliance with the Declaration on Democracy, Political, Economic and Corporate Governance.
- 1.3.3 The new trend tends towards the preventive, in contrast to the old trend, which was essentially remedial.
- 1.3.4 The tactic of mobilization of shame and peer pressure is most useful within this structure for ensuring compliance, as every state aims at measuring up among the community of states.

The proposed hybrid human rights norms enforcement mechanism will take the form of a dual and complementary set of mechanisms, similar to the charter-based and treaty-based mechanisms under the UN human rights enforcement system. This will be hinged on the politically orientated Constitutive Act-based human rights regime and the rule-orientated African Charter-based human rights regime.¹⁴

1.4 Focus of the study

This study does not provide an article-by-article analysis of the AU Constitutive Act, but is limited in scope, to its human rights content in terms of: Articles 3 (d), (g), (h) & (k); 4(h), (l), (m), (o)&(p); 9(1)(b)&(e); and 23(2).

In view of the fact that the scope and limitations of these provisions have also been severally examined,¹⁵ and in order to avoid reinventing the wheel, they will be examined primarily with a view to suggesting efficacious norm-enforcement approaches, possible under the extant Treaty.

While not delving into a detailed discussion of the Peer Review Mechanism or any other program of the AU, reference will be made to the human rights contents of the same.

¹³ New Partnership for Africa's Development (NEPAD), para 4, OAU, NEPAD Doc. (2001) (hereinafter NEPAD).

¹⁴ E. Baimu, 'Human Rights in NEPAD and its Implications', (2002) 2 *African Human Rights Law Journal*, 317.

¹⁵ Baimu (As above), Udombana (n 2, above), Kithure Kindiki, 'The normative & institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace & security: A critical appraisal', (2003) 3 *African Human Rights Law Journal*.

1.5 Significance of the study

The significance of this study lies in its contribution to the existing literature on the AU and human rights protection in Africa. Specifically, in its exploration for a solution of the problem of enforcement of human rights in Africa, within the framework of norms and institutions offered by the AU. In effect, an alternative approach to the problem is sought, in view of the fact that a wholly legalistic approach has failed.

1.6 Hypotheses/ Research Questions

The contentious questions dealt with in this paper are the following:

- 1.6.1 What are the wider implications of the (novel) African Union human rights agenda for the existing system of human rights protection in Africa?
- 1.6.2 How can the institutions and their mandates be synergized and made complementary?
- 1.6.3 What are the implications of the link of human rights to development as explicated in the AU Act and its NEPAD program?
- 1.6.4 What role can the AU play in the enforcement of human rights norms (including the decisions of existing human rights institutions) in Africa?

1.7 Literature survey

The literature available in relation to this study can be divided into the following categories: First, there are books, articles, statutes and websites dealing with the African regional human rights system and its impediments. Some of the leading

writers on this topic include Oji Umzurike,¹⁶ Frans Viljoen,¹⁷ Michelo Hansungule¹⁸ and Nsongurua Udombana,¹⁹ who have written extensively and critically on the existing human rights system, highlighting some of its deficiencies and suggesting ways forward. The golden thread that runs through all these articles is the problem of political will that has plagued the continent. Of particular relevance to this proposed study is the article by Christof Heyns,²⁰ where, while giving an overview of the existing legal framework, the author asserted that there are a number of determinants for the effectiveness of any regional human rights system. These include:

- ◆ The existence of the necessary political will, in the regional organization which the system forms part of.
- ◆ The regional organization is the primary body through which peer pressure must be channelled. Shame or Peer pressure can be mobilized against recalcitrant states. Peer pressure can change behaviour by inducing shame, or if that does not work, by mobilizing stronger forms of sanctions against states, and
- ◆ Trade and other links must exist between the state parties before a regional human rights system can be enforced effectively.

These are all realizable within the AU structure, and it is the potentialities of these that the study seeks to explore.

Another category of literature deals with those who specifically examine the role of the African political community, the OAU, in the protection of human rights in the pre and post (African) Charter era. One of such is the article by Gino Naldi²¹ where he examined the role of the OAU in the pre and post charter eras, highlighting the gradual expression of the OAU's commitment to human rights in Africa.

¹⁶ U.O Umzurike, 'The Present state of Human Rights in Africa' *Calabar Law Journal*, 1986.

¹⁷ F. Viljoen, 'Overview of the African Regional Human Rights System', Christof Heyns (ed.) *Human Rights law in Africa*, 1998 (Kluwer 2001).

¹⁸ M. Hansungule, 'The African charter on Human & People's Rights: A Critical Review', A. Yussuf (ed.), *African Yearbook of International Law*, 265-331.

¹⁹ N .J. Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Late than Never', *Yale Human Rights & Development Law Journal*, vol. 3:45 (2000).

²⁰ C. Heyns, 'The African Regional Human Rights System: The African Charter', (The Spanish article) (*unpublished article*).

²¹ (n1 above).

While journal articles on this area are abundant, a very limited number, however, have dealt with the issue in view of the novel human rights provisions of the AU. Prominent among the few articles already found in this area include those by Udombana²² and Baimu,²³ who both critically analysed the human rights agenda of the AU/NEPAD, its implications for existing and future human rights institutions, and suggested ways forward. This study proceeds to examine the potential political human rights enforcement mechanism within the Union structure as a solution to the enduring problem of non-compliance by African states.

Statutes relevant to this study include: the Charter of the OAU, the African Charter on Human and Peoples' Rights,²⁴ the Constitutive Act of The African Union (particularly Articles 3 (d), (g), (h) & (k); 4(h), (l), (m), (o)&(p); 5e, 9(1)(b)&23(2)),²⁵ the NEPAD document²⁶ and the series of Declarations and Decisions of the AU on Human Rights.²⁷

1.8 Summary of chapters

The study is divided into five chapters. Chapter one provides the context in which the study is set, the focus and objectives of the study, its significance, and other preliminary issues including the hypothesis and literature survey. Chapter two first seeks to briefly portray the current state of human rights in Africa. In the second part, history and development of the African Union is traced, within the context of its predecessor-the OAU. Its third part extracts and analyses the specific human rights content of the AU Constitutive Act and other relevant provisions, both independently and collectively; while its fourth part progresses to examine the contribution of the AU to human rights so far, by gauging and scrutinizing the human rights content of its summits. The fifth and final part scrutinizes the implications of the linkage of human rights to development and hence, its re-conceptualisation or otherwise, in Africa. Chapter three seeks to examine

²² Udombana, (n2 above); also, Udombana, 'The institutional structure of the African Union: A legal analysis', 33 *California Western International Law Journal*, 69.

²³ (n10 above).

²⁴ OAU Doc.AHG/102/XVII, Nairobi, June 1981.

²⁵ Const. Act, (n4 above).

²⁶ NEPAD Doc. (n9 above).

²⁷ From the Durban (2002) & Maputo (2003) AU Summits.

the extant implications of the AU human rights agenda on the existing human rights protection framework. First, it provides a brief overview of the existing regional human rights protection system, while its second part elucidates the human rights enforcement mechanisms that have been developed under the African Charter system. Its third part seeks to examine the problem of enforcement of, and non-compliance with human rights in Africa, with a view to understanding the problem, and forging a way forward. Its fourth part looks at the relationship between the AU and the existing human rights institutions within the context of the AU Constitutive Act, while its concluding part addresses the latent risk of proliferation and redundancy that might attend the proposed creation of more human rights-oriented institutions under the AU/NEPAD; proposing rationalization of the same and the fusion of compatible mandates, with the view of avoiding unnecessary and expensive duplications. Chapter four seeks to present the probable picture of the fusion of the emerging and existing frameworks. Its first part sets out to describe, as well as explicate the justifications for the proposed human rights enforcement framework under the AU, citing models. Its second part seeks to explore the potentialities of trade as veritable tool of sanction within the proposed structure, while its concluding part seeks to do the same in relation to the device of peer pressure. The fifth and final chapter of the study seeks to draw some conclusions and further give recommendations on how the proposed hybrid framework can be achieved, while emphasizing the importance of such synergy as a feasible solution of the problem of human rights enforcement in Africa.

CHAPTER TWO

2.0 THE AFRICAN POLITICAL COMMUNITY: FROM UNITY TO UNION

2.6 Human Rights In the OAU: An Overview

The cherished dream of pan-African unity came alive in 1963, with the birth of the continental intergovernmental body-the Organisation of African Unity (the OAU) established by the OAU Charter,²⁸ and adopted by the first leaders of independent Africa in Addis Ababa, Ethiopia, in May 1963. Inspired by anti-colonial struggles, the OAU was primarily dedicated to the eradication of colonialism, and forging a regional approach to Africa's relationship with external powers. This phenomenon was also as a result of the trend in other regions, notably Europe and the Americas, where such bodies had been established. However, unlike these regional organisations, the importance of human rights was sparingly recognised under the OAU Charter, which only made references twice, to the United Nations (UN) Charter and to the Universal Declaration of Human Rights (UDHR). In the Preamble to the Charter where the OAU founders state that they are "persuaded that the Charter of the [UN] and the [UDHR] ...provide a solid foundation for the peaceful and positive co-operation among states",²⁹ and in the list of purposes, where it is stated that the OAU shall "promote international co-operation having due regard to the Charter of the [UN] and [UDHR]..."³⁰

The OAU Charter did not only fail to make a meaningful reference to human rights, but it also created an additional problem by enshrining the principle of 'non-interference in the

²⁸ (n3 above). Initially signed by representatives of 32 governments, a further 21 states have joined gradually over the years, with South Africa becoming the 53rd member in 1994.

²⁹ (n3 above), para 8.

³⁰ (n3 above), art 2(1)(e).

internal affairs of states'.³¹ Strict adherence to this seemingly innocent article, which was aimed at jealously protecting the newly-won sovereignty, would later prove a major stumbling block in the quest to enhance the protection of human rights on the continent over the four decades of the OAU's existence. States could mishandle torture and even butcher their own citizens, with the rest of Africa watching helplessly.³² Any comment on these barbarian and inhuman acts by other African states would be interpreted as interference in the internal affairs of the state concerned. Thus, human right abuses by independent African states, especially those involving their own citizens, was largely overlooked by the OAU. A long list of human rights abusers, were at best ignored and at worst, embraced by the OAU.³³

Scholars have considered the rationale behind the failure of the OAU to incorporate human rights in the Charter. Some have suggested that African states--most of which had just gained their independence--were not ready to yield sovereignty to a supra-national body.³⁴ It is perhaps also true that the human rights concept in the 1960s was still at its nascent stage, even at the global level. Besides, it could be argued that at least, the African domestic legal systems had not yet proven to be a failure so as to warrant a supra-national system, as most of the newly independent states had been bequeathed with independence constitutions, the majority of which enshrined a Bill of Rights.

However, despite the lack of a firm commitment to human rights, the first decade was not entirely a failure for the OAU. This is if we accept that the struggle for dignity, equality and social justice lies at the heart of the concept of human rights, as this will then indicate that the struggle for freedom from colonial domination in all its forms was a human rights struggle. However, human rights issues within independent African states

³¹ (n1 above), art. 3(2); see also, C.M Peter, 'Human Rights in Africa: A comparative study of the African Human & Peoples' Rights Charter & the new Tanzanian Bill of Rights', (1990).

³² According to Umozurike, (n16 above) some of the cases that struck the headlines of world newspapers included: Emperor Bokassa of Central Africa Republic, Idi-Amin of Uganda, Samuel Doe of Liberia and apartheid South Africa.

³³ Despite the excesses of president Idi-Amin, the OAU held a meeting at Kampala in 1975 and for one year, had the President as its Chairman.

³⁴ F. Viljoen, 'The realisation of human rights in Africa through sub-regional institutions' (2001) *African Yearbook of International Law* 185, 186.

were reduced to, and treated as a national affair, and often kept from the eye of the international community by oversensitive governments. With increased human rights violations in the second decade of independence, the principle of non-intervention came under questioning³⁵ with Tanzania's invasion of Uganda in 1979, which precipitated the fall of Idi-Amin's regime.

The third decade saw the emergence of the African regional human rights regime. The adoption of the African Charter on Human and Peoples' Rights³⁶ at the 18th Ordinary Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in Nairobi, Kenya, in June 1981, was an epoch-making event, not only to the over 400 million Africans but to peace-loving and democratic-minded people the world over. It was the crescendo of sporadic attempts by different interest groups in Africa to create a legal mechanism that would guarantee the fundamental rights and freedoms of the common people.

Though a welcome relief, this achievement, has however, proven largely to be a false dawn for the protection of human rights in Africa as states continue to disregard their human rights obligations. The OAU, it must be conceded, did not generally conduct itself in a manner to suggest that the protection of human rights was regarded as an overriding consideration.³⁷ Rather, the perception given to the whole world is one of slavish adherence to the offensive principle of domestic jurisdiction regardless of the human rights abuses that may exist within member states. What's more, the enforcement of human rights by the African Commission, was thwarted by the lack of a political will of African states to re-conceptualise human rights and comply with its recommendations. This is despite the reporting mechanism established by Articles 52-54, and Articles 58-59 of the African Charter, which imposes a duty on the Commission to make an annual report of its activities to the OAU (now AU), suggestive of the OAU's involvement in the enforcement of human rights. The fourth decade saw the accomplishment of another human rights milestone -the adoption of the protocol to the

35 Para 2 (b) 'Decision on Human & Peoples' Rights in Africa ', OAU doc. AHG/Dec.115 (XVI) Rev 1.

Reprinted in Human Rights Law in Africa 1999 (2002) 127.

³⁶ (n24 above).

³⁷ Naldi, (n5 above), 3.

African Charter on the establishment of an African Court on Human and Peoples' rights.³⁸

The OAU thereafter became particularly resolute in addressing some problems related to democratisation, which normally bore human rights implications. In its Algiers Decision on Unconstitutional Changes of Government³⁹ and the Lome Declaration on the Framework for an OAU Response to Unconstitutional Changes⁴⁰ adopted in 1999 and 2000 respectively, the OAU reiterated its determination to see Africa governed on the basis of democracy and by governments emanating from the will of the people expressed through transparent, free and fair elections. Similarly, in its 2000 Solemn Declaration on the Conference on Security, Stability, Development and Co-operation, OAU heads of State and Government agreed on fundamental principles to govern cooperation in security, and development and in the promotion of Democracy and Good Governance on the continent.⁴¹

Despite this rhetoric of democracy and good governance, the realization of human rights on the African continent remains illusive due to impunity, lack of respect of the electoral process, poverty and underdevelopment, globalisation, neglect of economic, social and cultural rights, racism, xenophobia, the HIV/AIDS pandemic, and neglect of the full realization of the rights of women, among others.

At the close of the millennium, the OAU Assembly made a decision to transform the OAU into the African Union (hereinafter the AU) in order to create a new intergovernmental body, which is better equipped to address challenges facing the continent in the new millennium.

2.2 The history and development of the African Union

³⁸ OAU Doc. OAU/LEG/MIN/AFCHPR/PROT (III). Reprinted in Human Rights Law in Africa (2002) 279.

³⁹ (n9 above).

⁴⁰ Available at http://www.africa-union.org/official_documents/Decisions_Declarations/Decisions_&_Declarations.htm (accessed, 13th Sept. 2003).

⁴¹ See also, para 15, The Durban Declaration in tribute to the Organization of African Unity and on the launching of the African Union, Ass/Au/Decl. 2 (I), (accessed, 13th Sept. 2003).

The African political community recently transited from the unity structure to that of a union. The AU was carved out of the previously existing OAU. The charter of the OAU had to be changed to meet with the challenges of a constantly changing world and a growing realisation that the need for greater efficiency and effectiveness of the Organisation required urgent action.⁴² The Durban Summit of 9-10 July 2002 wound down the business of the OAU as the AU was launched.

During the Council of Ministers Session held in Lusaka, Zambia, in July 2001, the OAU Secretary-General emphasized the novelties of the AU by stating that the AU was designed to be a new institution, completely different from the OAU.⁴³ In general, the African Union objectives are different and more comprehensive than those of the OAU. The OAU had served its mission,⁴⁴ and was due for replacement by a structure geared towards addressing the current needs of the continent.

Article 2 of the Act establishes the AU. The AU is more comprehensive in its objectives than the OAU. It has fourteen objectives, nine more than those of the OAU aimed to

⁴² A summit was held in Sirte, Algiers on the 9th of September 1999 to address the issue. The theme of the summit was "Strengthening OAU capacity to enable it to meet the challenges of the new millennium." This Summit concluded with the Sirte Declaration, whereby:

Having discussed frankly and extensively on how to proceed with the strengthening of the unity of our continent and its peoples, in the light of...proposals, and bearing in mind the current situation on the continent, [the OAU] decide[d] to:

- (I) Establish an African Union, in conformity with the ultimate objectives of the Charter of our continental Organization and the provisions of the Treaty Establishing the African Economic Community.

See para 8(1), Sirte Declaration Fourth Extraordinary Session of the Assembly of Heads of State and Government, 8-9 September 1999, Sirte, Libya. EAHG/Draft/Decl. (IV) Rev.1. Available at http://www.au2002.gov.za/docs/key_oau/sirte.htm.

⁴³ (n1 above).

⁴⁴ The OAU mainly pursued the goals of promoting African solidarity and the eradication of colonialism in Africa, to the neglect of other equally important needs.

achieve. It is also to be guided by sixteen principles, again, nine more than those of the OAU. Of these principles and objectives, only a few of those of the OAU found their way into the Act.

The change of nomenclature was thus attended by novel provisions in the African Union's founding instrument,⁴⁵ which includes statements of commitment to human rights by the community. This is one of the salient differences between the OAU and the AU.

Significantly, the rhetoric of democracy, good governance, and sustainable development also emerged in the 1999 Algiers Declaration⁴⁶, in which the OAU reiterated its commitment to:

[T]he protection and promotion of human rights and fundamental freedoms, emphasize[d] the indivisibility, universality and inter-dependence of all human rights, be they political and civil or economic, social and cultural, or even individual or collective... convinced that the increase in, and expansion of the spaces for freedom and the establishment of democratic institutions that are representative of our peoples and receiving their active participation, would further contribute to the consolidation of modern African States underpinned by the rule of law, respect for the fundamental rights and freedoms of the citizens and the democratic management of public affairs.⁴⁷

2.3 The human rights provisions of the AU Constitutive Act

The new AU clearly departs from the regime of the OAU in the area of human rights. In theory, the AU Treaty "integrates political, economic, and human rights priorities." Both its preambular⁴⁸ and substantive provisions show this integration in very clear terms. Member States, for example, pledge and express their determination "to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law."⁴⁹ There is a further determination "to take all necessary measures to strengthen our common institutions and provide them

⁴⁵ (n4 above).

⁴⁶ (n 9 above).

⁴⁷ As above, paras 17-18.

⁴⁸ See Vienna Convention on the Law of Treaties, May 23, 1969, art 31, (providing that the context for the purpose of the interpretation of a treaty shall comprise, inter alia, its preamble).

⁴⁹ AU Act (n4 above) preambular para 9.

with the necessary powers and resources to enable them [to] discharge their respective mandates effectively,"⁵⁰ an admission that all is not well with existing institutions.⁵¹

The substantive provisions-both the principles and objectives of the Treaty are equally rich in the polemics of human rights. Its fourteen objectives⁵² include, for example, the AU's encouragement of "international cooperation, taking due account of the Charter [U.N] and the [UDHR]"⁵³; promote peace, security, and stability in Africa; and "promote democratic principles and institutions, popular participation and good governance."⁵⁴

The AU Treaty does not incorporate the regional human rights instruments. However, it seeks to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments".⁵⁵ The guiding principles of the AU include the promotion of gender equality;⁵⁶ respect for democratic principles, human rights, the rule of law and good governance;⁵⁷ and respect for the sanctity of human life⁵⁸. The Act also condemns and rejects unconstitutional changes of government.⁵⁹

Other objectives of the Act that have human rights colorations are the promotion of "democratic principles and institutions, popular participation and good governance"⁶⁰ and "co-operation in all fields of human activity to raise the living standards of African peoples".⁶¹ The AU hopes to "work with relevant international partners in the eradication

⁵⁰ As above, para 10.

⁵¹ Udombana (n2 above).

⁵² (n4 above) art 3 (listing the Treaty objectives).

⁵³ (As above) art 3(e).

⁵⁴ (As above), art 3(g).

⁵⁵ (As above), art 3 (h).

⁵⁶ Art 4(l).

⁵⁷ Art 4 (m).

⁵⁸ Art 4 (o).

⁵⁹ Art 4 (p).

⁶⁰ (As above), art 3 (g).

⁶¹ (As above), art 3 (k).

of preventable diseases and the promotion of good health on the continent”.⁶² These are refreshingly innovative provisions, when compared to the OAU Charter.

An optimistic look at the Act will prompt an impression of what is described by Udombana⁶³ as a death knell on the doctrine of reserve domain or domestic jurisdiction, which has been discussed above, as the Act provides for "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity".⁶⁴ Udombana notes that African leaders are possibly being haunted by their past failures to intervene in such "grave circumstances", particularly the Rwandan genocide. Similarly, the Act gives Member States the right "to request intervention from the Union in order to restore peace and security",⁶⁵ even though it does not provide for the tools or mechanisms that will implement, monitor or advance these lofty ideals. However, with the recent amendment to this provision extending this right of intervention to include situations where there is a serious threat to legitimate order for the purpose of restoring peace and stability in a member state, doubts have been expressed as to what the aim of the provision will eventually mean in practice-human security or regime security?⁶⁶

Further relevant provisions of the Act are those with specific bearing on the enforcement of human rights. These comprise Article 9(1) which spells out the powers and functions of the Assembly, and provides for its power to receive, consider and take decisions on reports and recommendations from the other organs of the Union⁶⁷ and to monitor the implementation of policies and decisions of the Union as well as ensure compliance by all Member States.⁶⁸ Article 23(2), while vesting the AU with the power impose of sanctions, provides that any member state that fails to comply with the decisions and

⁶² (As above)s, art 3 (n).

⁶³ Udombana, (n2 above), 1193.

⁶⁴ AU Act (n4 above), art 4(h).

⁶⁵ (As above), art 4(j).

⁶⁶ See E. Baimu & K. Sturman, 'Amendment to the African Union's right to intervene: A shift from Human Security to Regime Security?' (2003) *African Security Review* 12:2.

⁶⁷ AU Act (n4 above), art 9(1)(b).

⁶⁸ (As above), art 9 (1)(e).

policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

Read alongside the relevant provisions of the New Partnership for Africa's Development (hereinafter NEPAD)--which puts human rights at the centre of democratic governance, the rule of law, the creation of enabling environments for sustainable economic development, and the attainment and maintenance of peace and security⁶⁹--the AU Treaty reinforces the economic, social, and cultural rights as well as the right to development in the Banjul Charter.

2.4 From Durban to Maputo: Human Rights in the AU so far...

Taking stock of the human rights accomplishments of the Union so far, it will be trite to begin from the 1st ordinary session of the AU Heads of State and Government--the Durban Summit of 9-10 July 2002, when the AU was formally launched, marking an end to the existence of the OAU.

Clearly, conflict resolution is a top priority for the Union.⁷⁰ As a consequence, conflicts that have been raging for many years are being tackled with increased determination and many African countries are committing their own resources to conflict prevention, management and resolution.⁷¹ The Protocol relating to the establishment of Peace and Security Council of the AU⁷² (the Protocol) was adopted at the Durban Summit, seeking to establish an African Peace and Security Council, the objectives of which will include the anticipation and pre-emption of armed conflicts, and the prevention of massive

⁶⁹ See NEPAD, (n25 above), para 202.

⁷⁰ AU Act (n4 above), arts 3(f) & 9(2).

⁷¹ See Opening statement by H.E President TM Mbeki, outgoing Chairperson of the African Union, at the 2nd Ordinary Session of the Assembly of Heads of State & Government, 10 July 2003, Maputo Mozambique, Available at <http://www.africa-union.org/official/documents/speeches&Statements.htm> (accessed, 13 Sept. 2003).

⁷² Protocol Relating To The Establishment Of The Peace And Security Council Of The African Union, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol_peace%20and%20security.pdf (accessed, 13 Sept. 2003).

violations of human rights. It will also aim at the promotion and encouragement of democratic practices, good governance, the rule of law, human rights, the respect for the sanctity of human life and international humanitarian law⁷³.

In theory, this focus is commendable, as conflicts within and between African countries have brought about death and human suffering, engendered hate and divided nations and families. Conflicts have forced millions of our people into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope. Conflicts have gobbled-up scarce resources, and undermined the ability of our countries to address the many compelling needs of our people.

Also, after a year of uncertainty about the relationship between the AU and the existing human rights institutions-the African Commission and the Committee of Experts on the Rights and Welfare of the Child, the Assembly of Heads of State and Government, at the Durban Summit, incorporated the institutions into the AU structure under article 5(2) of the AU Act.⁷⁴ Kithure Kindiki has contended that on a literal interpretation of Article 5(2), the Assembly could not have acted under this provision because the institutions in question already existed. Instead, the institutions should have been integrated into the AU through article 3(h) of the AU Act, which provides that the AU will promote and protect human rights “in accordance with the African Charter and other relevant human rights instruments”-under, which these institutions were created⁷⁵.

At the 2nd Ordinary Session of the Assembly of Heads of State & Government in July 2003, in Maputo Mozambique (the Maputo Summit), another landmark was made in the sphere of human rights protection accomplished through the adoption of the protocol to the African Charter on Human & Peoples’ Rights on the Rights of Women in Africa.⁷⁶

⁷³ Art. 3(f), Protocol.

⁷⁴ See AU ‘ Decision on interim period’, 1st ordinary session of the AU Assembly of Heads OF state and Government AU DOC ASS/AU/Dec 1(1) para 2(XI); available at http://www.au2003.gov.mz/key_documentation/audecis1.htm (accessed on 13 Sept. 2003).

⁷⁵ Kindiki, (n15 above), 103.

⁷⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa-Assembly/AU/Dec.4 (II); available at http://www.africa-union.org/Official_documents/Treaties_%

The Protocol will enter into force thirty days after it has been ratified by fifteen states.⁷⁷ Happily, this shows that the AU recognises the pivotal role and equality of women in Africa.

The Commission also continued the role of the OAU, having assumed its rights and obligations⁷⁸ in the appointments of members of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child,⁷⁹ and in the adoption of the annual activities of the Commission.⁸⁰

Also of human rights content were the Assembly's decisions on the Operationalisation of the Protocol Relating to the Establishment of the Peace and Security Council;⁸¹ the Report of the Interim Chairperson on the Conference on Elections, Democracy and Good Governance;⁸² and on the amendments to the AU Act, including the protocol extending the Union's right of intervention to situations of threat to a legitimate order.⁸³

2.4 The AU, NEPAD and the linkage of human rights to development: an expression of a political will or a political tool?

As earlier emphasized, the AU is supposed to be a more robust regional system for political, economic and social progress as well as for social justice for all, "integrat[ing]

20Conventions_%20Protocols/Protocol%20on%20the%20Rights%20of%20Women.pdf (accessed on 13 Sept. 2003).

⁷⁷ Art 29(1), Protocol.

⁷⁸ By Art 33 AU Act, the AU "shall replace the Charter of the [OAU]". See generally P.R. Myers, *Succession Between International Organisations* (1993).

⁷⁹ Assembly/AU/Dec.18 (II), Doc. /EX/CL/57(III) & Assembly/AU/Dec.19 (II), Doc./EX/CL/58 (III), at http://www.africa-union.org/official_documents/Decisions_Declarations/Decisions_&_Declarations.htm (accessed, 13th Sept. 2003).

⁸⁰ **Doc.Assembly/AU/7(II), (as above).**

⁸¹ **Doc.Assembly/AU/11(II) (as above).**

⁸² **Doc.Assembly/AU/13(II) (as above).**

⁸³ See Baimu & Struman, (n66 above).

political, economic, and human rights priorities.”⁸⁴ Accordingly, another salient difference between the OAU and the AU is the linking of human rights to development. In sum, the AU Treaty is committed to the promotion and protection of human and peoples' rights, the consolidation of democratic institutions and culture, the promotion of good governance and the rule of law.

This commitment is reinforced by the NEPAD project, an initiative which came a year after the adoption of the Constitutive Act of the AU in conformity with the ultimate objectives of the AU Act.⁸⁵ This project constitutes a framework upon which the African continent intends to interact with the rest of the world, particularly the industrialised countries and the multilateral global institutions such as the World Bank, the International Monetary Fund and the United Nations. It is in a nutshell, the blueprint for Africa's development program.

Reiterating that development is impossible in the absence of human rights, peace and good governance,⁸⁶ ensuring these is a central feature of NEPAD, which seeks to address Africa's underdevelopment through a number of ways. These include promoting and protecting democracy and human rights in African countries, as well as developing clear standards of accountability, transparency and participatory governance at the national and sub-national level.⁸⁷ It acknowledges that African leaders have learnt this from their own experiences,⁸⁸ and in this regard, they pledge to pursue individual “democracy and political governance initiative,”⁸⁹ while giving support to one another.⁹⁰

⁸⁴ Chidi Anselm Odinkalu, 'African States Make Human Rights Priority in New Treaty for African Union' (2001)13 *InterightsBulletin* 90; cited in Udombana (n 2 above).

⁸⁵ ... And that of the African Economic Community Treaty. See A. Adedeji, 'From the Lagos Plan of Action to the New Partnership for African Development and from the Final Act of Lagos to the Constitutive Act: Whither Africa?' in Nyong'o et.al. (eds.), *New Partnership for Africa's Development (NEPAD): A New Path*. The NEPAD document started off as the Millennium Africa Recovery Plan (MAP) conceived by Presidents Mbeki of South Africa, Obasanjo of Nigeria and Bouteflika of Algeria in the year 2000. MAP merged with the OMEGA plan developed by President Wade of Senegal to form the New African Initiative (NAI) in July 2001. The title NAI was later changed to NEPAD in October 2001:para 5(b) of the Communiqué issued at the end of the first meeting of the HISC, Abuja, Nigeria, 23 October 2001.

⁸⁶ Para 79, NEPAD doc., (n9 above).

⁸⁷ Para 49, NEPAD doc.

⁸⁸ Para 71, NEPAD doc.

Among other mechanisms and structures being set up by NEPAD for the administration of its programme, the one that is likely to have the most far-reaching implications on human rights is the African Peer Review Mechanism (APRM).⁹¹ The APRM is an instrument voluntarily acceded to by members of the AU for the purpose of self-monitoring.⁹² The mandate of the APRM is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards, contained in the Declaration of Democracy, Political, Economic and Corporate Governance.⁹³ In the words of President Mbeki, one of NEPAD's initiators, the provisions of the APRM are "aimed at foreseeing problems and working to prevent their spread—rather than just censuring and punishing when things go wrong".⁹⁴

This seeming re-conceptualisation of human rights by African leaders is highly commendable, and generates a surge of optimism for African human rights; yet, there are some question marks on this sudden outburst and revival. It is possible that this rhetoric on democracy, good governance and human rights could be a mere cosmetic exercise by the OAU's Member States to impress Western donor countries and international financial institutions in order to attract more development assistance and receive some debt palliatives. This may or may not be the actual explanation; but it certainly indicates a possibility.

⁸⁹ As above.

⁹⁰ Para 82, NEPAD doc.

⁹¹ Baimu, (n14 above), p307. See also, 'The African Peer Review Mechanism' 10 June 2002. Available at <http://www.nepad.org/Doc006.pdf> (accessed 23 September 2003).

⁹² Baimu, (as above).

⁹³ The Declaration of Democracy, Political, Economic and Corporate Governance, available at <http://www.nepad.org/Doc004.pdf> (accessed 23 September 2003); see in particular, paras 4,7,10, 12, 15, 16, 17, 19, 20, 23 & 24.

⁹⁴ See T. Mbeki, 'Africa's new realism', *New York Times* (24 June 2002), as cited in Baimu (n14 above), p307.

This interpretation is reinforced by the NEPAD project, in which African governments have pledged democracy and good governance in exchange for international cooperation.⁹⁵ Earlier in 1996, the OAU Assembly pleaded their cause thus:

We hope our efforts in embarking on macro-economic and political reforms geared towards achieving greater equilibriums and creating an enabling economic environment for both local and foreign direct investments would be supported by a substantial reduction in debt and a major inflow of debt-free financial assistance.

The combination is not accidental.⁹⁶

These doubts notwithstanding, it is conclusive to say, that the AU certainly has a more explicit and elaborate human rights focus than the OAU. Its progressive nature is clearly explicated in its Constitutive Act and the NEPAD programme of Action. Furthermore, the linkage of human rights to development as explicated in these instruments offer a re-conceptualisation of human rights in Africa, and a conducive milieu for a political human rights enforcement mechanism, the possibilities of which this study explores.

⁹⁵ Udombana (n2 above) ; See NEPAD Doc. (As above) para. 203 ("We affirm that the New Partnership for Africa's Development offers an historic opportunity for the developed countries of the world to enter into a genuine partnership with Africa, based on mutual interest, shared commitments and binding agreements").

⁹⁶ Udombana (n2 above), 1198.

CHAPTER THREE

3.0 THE AFRICAN UNION AND THE EXISTING REGIONAL HUMAN RIGHTS PROTECTION FRAMEWORK

3.1 An overview of the existing regional human rights protection framework

The African regional human rights system, created under the auspices of the OAU, is constituted primarily of the following instruments: The African Charter on Human and Peoples' Rights,⁹⁷ which in turn, created the African Commission on Human and Peoples' Rights;⁹⁸ the OAU Convention Governing the Specific Aspects of Refugee problems in Africa of 1969;⁹⁹ and the African Charter on the Rights and Welfare of the Child of 1990,¹⁰⁰ which in turn, created the Committee of Experts on the Rights of the Child.¹⁰¹

The African Charter is the main human rights instrument in Africa and the most interesting of all regional instruments, demonstrating a uniqueness illustrated by, for example, the inclusion of civil and political rights, economic, social and cultural rights and peoples' rights in one document treating them as indivisible. The African Commission is at the centre of the existing legal mechanism and has constituted the

⁹⁷ (n24 above), hereinafter-the African Charter.

⁹⁸ As above, art 30.

⁹⁹ OAU Doc CAB/LEG/24.3

¹⁰⁰ OAU Doc CAB/LEG/153/Rev.2

¹⁰¹ As above, art 32.

sole level of control for the protection of human rights in Africa. It monitors compliance by the state parties with the Charter, *inter alia* through the communications¹⁰² and state reporting mechanisms.¹⁰³

Among¹⁰⁴ the weaknesses of this body is the fact that it has no enforcement mechanism and though it receives communications, it only makes recommendations. It is up to the state to which these recommendations are directed to decide whether it will implement them or not. The decision to establish an African Court on Human and Peoples' Rights was therefore a long overdue one though it would seem that states are not too eager to ratify the protocol establishing the Court. Once in force, the Protocol on the Establishment of an African Court on Human and Peoples' Rights of 1998¹⁰⁵ will create an African regional Human rights court, making binding decisions.

3.1 Enforcement mechanisms under the African Charter

From the foregoing, it is apposite, despite the number of years in which it has been in existence, to describe the African Commission as a regional body still under construction. However, caught between hard African realities and the soft African Charter, the Commission has achieved more than could be expected. For instance, over the years, it has issued a number of decisions regarding individual communications alleging violations of the Charter, which now form an important case law, supplementing and considerably developing the original treaty text.¹⁰⁶

¹⁰² Arts 45 & 55 of the Charter (n35 above)

¹⁰³ As above, art 62.

¹⁰⁴ See articles on the Commission's shortcomings. E.g. C. Heyns, 'The African regional human rights system: In need of reform?', (2001) 2 AHRLJ; J. Harrington, 'The African Court on Human & Peoples' Rights', in Evans & Murray (eds.), (n5 above), 137-177; N.J Udombana, 'Towards the African Court on Human And Peoples' Rights: Better Late Than Never', *Yale Human Rights & Development. Law Journal*, vol. 3:45;

¹⁰⁵ OAU Doc CAB/LEG/MIN/AFCHPR/PROT (III)

¹⁰⁶ See 'Compilation of Decisions on Communications of the African Commission on Human & Peoples' Rights: 1994-2001', *Institute for Human Rights & Development*; On the Special Rapporteurship mechanism, see V. Dankwa, 'The Promotional Role of the African Commission on Human & Peoples' Rights', in *Evans & Murray* (eds.) (n5 above), 335-352.

As is obvious from its jurisprudence, the Commission has been very inventive with respect to each step it takes in its consideration of a communication. This is also true, in the least, with respect to the last step in which the Commission, after having found a state guilty of one or more violations of the Charter, typically recommends different measures to be taken by the state in order to remedy the wrongs committed.¹⁰⁷ There are numerous instances of decisions in which the Commission has included recommendations to the state party. The Commission has become more inclined over the years to make recommendations, which are becoming more and more numerous and detailed.¹⁰⁸ These are sometimes combined with imaginative and original suggestions for resolutions to the dispute and offers of help on the part of the Commission. Unfortunately, the states do not always put the recommendations into effect; indeed, it is only exceptional that they do so. This of course, is a problem for the Commission and has been described as “one of the major factors of the erosion of the Commission’s credibility”.¹⁰⁹

Österdahl¹¹⁰ makes an important point by noting that there is nothing in the Charter that suggests that the Commission may make recommendations to the states as a result of its consideration of individual communications.¹¹¹ The term, “recommendation”, is however mentioned in the context of the in-depth study that the OAU Assembly may ask the Commission to undertake after it has drawn the attention of the Assembly to special cases revealing serious and massive violations of human and peoples’ rights. It is also mentioned under its promotional mandate.¹¹² Österdahl therefore, submits that the issuance of recommendations by the Commission is an innovative way of fulfilling its protective mandate.

¹⁰⁷ See Compilation (n101 above).

¹⁰⁸ Julia Harrington, Preface to Compilation (n101 above), para 7. Notable also is the landmark case of Comm. 155/96 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria*, in which the Commission expanded the scope of the socio-economic rights in the Charter.

¹⁰⁹ Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A legal approach, 24th Ordinary Session, 22-31 October 1998, DOC/OS/50b, para. 2 cited in I. Österdahl, ‘Implementing Human Rights in Africa: The African Commission on Human & Peoples’ Rights and Individual Communications’, (2002) 15 *Swedish Institute of International Law Studies in International Law*.

¹¹⁰ As above, 152.

¹¹¹ African states vested with the Commission with neither judicial nor quasi-judicial powers, their original intent being to create a body for promoting rather than protecting human rights.

¹¹² Articles 58(2) & 45(1)(a) of the Charter (n32 above).

It is undisputed that under the Charter, the Commission has no enforcement powers¹¹³ and that its decision is not 'formally' binding irrespective of its stated opinion.¹¹⁴ It is not possible to execute it in the African State concerned, unless of course, the state agrees to execute it 'voluntarily'.¹¹⁵ The powers of implementations of its reports and recommendations lay with the Assembly of Heads of States and Government of the OAU.¹¹⁶ Accordingly, it functioned at the mercy of states and the tardiness and lack of enthusiasm of state bureaucracies encumbered its operations.

Österdahl has, on the other hand, argued severally on the binding nature of the Commission's recommendations.¹¹⁷ This debate, however, is not the subject of this study. This is in view of the fact that the binding nature or otherwise of the decisions of an international body is not sufficient to ensure compliance if the appropriate mechanisms are not in place to ensure compliance.¹¹⁸ Rather, in emphasis, this study proceeds to explore the political enforcement mechanism the AU has to offer to ensure

¹¹³ C.A. Odinkalu, 'Proposals for Review of the Rules of Procedure of the African Commission on Human & Peoples' Rights', (1992) 21 *Human Rights Quarterly*, No.2, 543.

¹¹⁴ It is true that the Commission proudly states that '[a]s the only existing body with power to examine communications, mandated by art.45(2) to ensure the protection of human and peoples' rights under the conditions laid down by the present Charter, the Commission considers that its decisions with regard to these communications are legally binding upon the state parties'. See Decisions of the ACHPR 1986-1997 (Pursuant to Art 55 of the ACHPR) *Law Reports of the African Commission*, Series A, Vol.1, ACHPR/LR/A/1, Banjul, 1997, 5. Reprinted in Österdahl (ed.) (n104 above), 155. A fine example of this enforcement problem is Comm. 137/94, 145/95 *Constitutional Rights Project, Civil Liberties Organisation & Interights (On behalf of Ken Saro Wiwa Jnr. /Nigeria)*; whereby the subjects of the petition were killed, despite the Commission's interlocutory injunction.

¹¹⁵ This has been justified on the ground that African traditions favour negotiations rather than a "winner takes-all" situation-See C.M. Peter, 'The Proposed African Court of Justice-Jurisprudential, Procedural, Enforcement Problems & Beyond', in (1993)1 *East African Journal of Peace & Human Rights* 2, 132. However, the present author argues that since states still find it hard to condone, and comply with these soft judgements/recommendations, the problem is actually one of the lack of political will on the part of the states for any form of accountability.

¹¹⁶ Arts 52-54, African Charter, (n24 above).

¹¹⁷ Österdahl (n109 above), 155.

¹¹⁸ See page 2, para 4 above. Without an efficient enforcement mechanism, the prospective binding decisions of the proposed Court will also be flouted.

compliance with the Commission's seemingly non-binding recommendations, and the prospective (binding) decisions of the proposed African Court.

3.2 An analysis of the problem of non-compliance with human rights in Africa

The record of most African states in or before regional and international implementation and enforcement fora where compliance is recorded has been described, in a clear understatement, as appalling and shameful in the eyes of most right thinking African peoples.¹¹⁹ Shadrack Gutto has attributed this to the fact that the institutions, which ought to check and balance each other, are ineffectual.¹²⁰ It has also been emphasised, that this problem of non-compliance with human rights, has been the major setback of the African regional human rights system, as it erodes the credibility and efficacy of the Commission.¹²¹

Gutto, in addressing this problem, has sought to analyse the factors that tend to affect compliance with international human rights agreements.¹²² Most relevant to this study are the factors of irresponsibility by the political leadership and other managers of State affairs because of corruption, negligence, lack of patriotism and the pressure of a culture of lawlessness, which is applicable at the national levels, and; the lack of existence or efficacy of external enforcement mechanisms and effective sanctions. The problem therefore comprises both the lack of political will on the part of states (subjective factor), and a weak regional/non-binding regional mechanism (objective factors).

It is apt therefore to state that the lack of commitment of the OAU to human rights, even in the post-charter era, is largely responsible for the stunted growth of the regional human rights protection system. Saddled with an impotent instrument and mandate, the anticipated political pressure implied by articles 53, 54 and 58 of the Charter has never occurred.

¹¹⁹ S.B.O Gutto, 'The compliance to regional and international agreements and standards by African governments with particular reference to the rule of law and human and peoples' rights', in Nyong'o et.al (eds.), (n85 above) 94.

¹²⁰ (As above), 96.

¹²¹ (n 109 above).

¹²² (n119 above) 96.

One example of this non-cooperative attitude of States Parties toward the Commission is in the submission of periodic reports. The Banjul Charter provides for each State Party to submit a bi-annual report “on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the ... Charter.”¹²³ Only few states have been faithful in this simple routine matter of state reporting.

3.3 The Constitutive Act of the African Union and the existing regional human rights protection framework

Although Article 30 of the African Charter asserts that the African Commission is created within the OAU, the AU Act did not incorporate the existing human rights institutions, namely the African Commission, the Committee of Experts on the Rights and Welfare of the Child, and the proposed African Court. They are conspicuously missing in Article 5, which provides for the organs of the Union, even though the Act makes reference to the Charter in its objectives¹²⁴. They were however, subsequently absorbed by the AU Assembly, to “operate within the framework of the African Union”.¹²⁵

This provision raises the question of the status of these bodies, vis-a-vis the African Union. Kofi Quashigah, for example,¹²⁶ argues that notwithstanding that the Commission is ‘established’¹²⁷ within the OAU, it is not *stricto sensu*, an organ of the OAU, but “a non-political and independent institution”.¹²⁸ It is designed to operate within the structure of the OAU and collaborate with the Assembly of Heads of State and Government in the execution of its function to promote and protect human rights in Africa.¹²⁹ Article 45(1)(c) of the Charter, which requires the Commission to “co-operate with other African and international institutions concerned with the promotion and protection of human and

¹²³ Art 62, African Charter (n24 above).

¹²⁴ Art 3(h) Constitutive Act, (n4 above).

¹²⁵ (n74 above). See also, Kindiki’s jurisprudential argument (n15 above), 103.

¹²⁶ K. Quashigah, ‘The African Charter on Human & Peoples’ Rights: Towards a more effective reporting mechanism’, (2002) 2 *African Human Rights Law Journal*, 284.

¹²⁷ Art 30, African Charter, (n24 above).

¹²⁸ (n126 above), 284-285.

¹²⁹ Arts 45(4) & 59, African Charter, (n35 above).

peoples' rights", also emphasizes a relationship of co-operation and collaboration with all the relevant organs of the AU.

Sustaining this view, the present author emphasizes the independence of the Commission and other existing human rights institutions from the AU.¹³⁰ The subservience of the Commission to the OAU has previously been a clog in its wheel of progress. Consequently, what this study proposes is not an outright fusion of the legal and political mechanisms of human rights enforcement, but collaboration between the AU, the Commission, and other existing institutions. Article 45(1)(c) is a general provision, which if given a liberal interpretation, should cover any collaboration with any institution of the AU for the promotion and protection of human rights.¹³¹ The anticipated modes of co-operation will be discussed later in this study.¹³²

3.4 Rationalising the institutions

Another issue that needs to be addressed in terms of the novel AU/NEPAD human rights agenda is the risk of a proliferation of human rights institutions under the AU, especially considering that the 'developmental arm' of the AU—the NEPAD, envisages the creation of other human rights institutions. In a recent study, Baimu has warned that such proliferation will constitute a problem rather than a solution to human rights challenges on the African continent.¹³³ Magliveras and Naldi also rightly warn that '[t]he number of organs in the Union appear to be very large and in the long run it could not only result in the cumbersome operation of the Union but also present a financial burden'.¹³⁴

¹³⁰ Arts 31, 38, 42(2), 45(4), 46, 53 of the Charter buttress this point.

¹³¹ Arts 45(1)(c) provides that the functions of the Commission shall be to 'co-operate with other African and international institutions concerned with the promotion and protection of human rights'.

¹³² See Chapter 4, post.

¹³³ Baimu, (n14 above).

¹²⁵ Naldi & Magliveras, (n2 above), 421. The President of the ICJ has added his voice to these concerns:

The proliferation of international courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases A dialogue among judicial bodies is crucial. The International Court of Justice, the principal judicial organ of the United Nations, stands ready to apply itself to this end if it receives the necessary resources.

Particularly bothersome in this regard is the prospective relationship of the African Human Rights Court (hereinafter HRC), and the proposed African Court of Justice (hereinafter ACJ).¹³⁵ This long-unresolved relationship has provoked a heated debate as to the duplication or otherwise of the African Court system.¹³⁶ On the one hand is the argument against such duplication, and in effect, for the integration of the two courts. Arguments canvassed in this regard include the possibilities of jurisdictional conflict and litigant's forum shopping, in view of the role that the ACJ could play in the enforcement of human rights obligations;¹³⁷ the risk of creating an incoherent human rights jurisprudence in Africa-as a result of two courts interpreting similar legal instruments.¹³⁸ It is also argued if the HRC was to form a separate chamber of the ACJ the same objectives would be achieved at a lower cost and greater benefit in terms of efficiency. The argument for merger is greatly strengthened if a separate chamber of the court is taken to mean that the HRC acts for all intents and purposes as if it were an independent court, and the only benefits of merger are administrative.

Furthermore, a *caveat* that the chamber's decisions are final would be justifiable since it would be a specialized court. As such chamber, from within the AU, it is conceivable that

President of the ICJ Gilbert Guillaume, Statement to the U.N. General Assembly (Oct. 26,2000), available at http://www.icj.org/presscom/SPEECHES/ISpeechPresident_Guillaume_GA55_2001026.htm, cited in Udombana, (n137 below).

¹³⁵ Article 5(1)(d), Constitutive Act, (n2 above). It should be noted that the African Economic Community (AEC) Treaty also creates a court, similar in mandates and functions with the ACJ. However, in view of the apparent conflict between the AEC Treaty and the AU Act, the AEC Court will be subsumed in the AU Court. This interpretation is fortified by the fact that the AU Act establishes the AU "in conformity with the ultimate objectives of the Charter of (the OAU) and the provisions of the Treaty Establishing the African Economic Community." Sirte Declaration, OAU, Assembly of Heads of State, 4th Extraordinary Sess., 8(i), EAHG/Draft/Decl. (IV) Rev.1, available at http://www.au2002.gov.za/docs/key_oau/sirte.htm. See Udombana (n2 above), for more on the AEC cf. the ACJ.

¹³⁶ Udombana (n2 above) & (n149 post), Baimu (n14 above), Naldi & Magliveras (As above).

¹³⁷ Art. 26 of the Constitutive Act vaguely defining the ACJ's mandate provides that it "shall be seized with matters of interpretation arising from the application or implementation of th[e] Act." Its European equivalent-the European Court of Justice, has played a significant role in the development of human rights in Europe. See Robertson & Merrills (eds.), 'Human Rights in Europe: A study of the European Convention on Human Rights', (3rd ed.), for more information about the European human rights protection system.

¹³⁸ Udombana (n2 above), 1246-1247.

member states might feel a sense of 'ownership' and commit themselves to the HRC's success. In other words, it would benefit from its proximity to the ACJ, ultimately accruing in the better protection of human rights. The reverse side of the coin in the argument that a court under the AU would benefit from political will is the argument that such a court would actually be prone to political interference and manipulation and have its power diluted. A court that is proximate to the member states would be more at risk of manipulation than one at the periphery.¹³⁹ This other school of thought also argues that the unified court is unlikely to give priority to human rights and that political and economic issues which African states are more interested in are likely to overshadow human rights.¹⁴⁰

In my view, the issue that trumps the rest is one of resources.¹⁴¹ It would be logical to assume that if the ACJ started functioning it would be better resourced, in which case the human rights cause would be better served by a court that is merged with the ACJ. Gladly, the Draft Protocol¹⁴² is designed along the above suggestions. Drawing inspiration from Article 26(1) of the Statute of the International Court of Justice,¹⁴³ the Draft Protocol creates "Special Chambers." It provides that the Court may from time to time form one or more chambers for dealing with particular categories of cases, including violations of the Constitutive Act and human rights.¹⁴⁴ More significantly, it provides that the African Human Rights Court shall be constituted as a Chamber of the AU Court, upon entry into force of the Protocol to the African Charter or the adoption of the Draft Protocol, "whichever may be sooner."¹⁴⁵

¹³⁹ As above, 1243.

¹⁴⁰ The present author's view.

¹⁴¹ Note that one of the OAU, and hence, the African Commission's foremost problems, is that of funding. The duplication of institutions under the OAU will only result in overstretching its meagre resources. See Udombana, (n2 above), 1249-1256.

¹⁴² Draft Protocol Relating to the Statute, Composition and Functions of the Court of Justice of the African Union, CAB/LEG/23.20/45/VOL.II (2003) (hereinafter Draft Protocol).

¹⁴³ ICJ Statute, Established pursuant to the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 (hereinafter ICJ Statute), art 26(1).

¹⁴⁴ (n142 above), art 60(1).

¹⁴⁵ As above, art 60(2).

The Draft Protocol also allows for other category of chambers to be created annually "with a view to the speedy dispatch of business."¹⁴⁶ Such chambers may, at the request of the parties, "hear and determine cases by summary procedure."¹⁴⁷ A judgment given by any of these chambers, including those to deal with particular category of cases "shall be considered as rendered by the Court."¹⁴⁸

In view of the arguments earlier advanced in this article, a realistic approach would be for the AU to establish and strengthen one judicial institution, which should be the AU Court, with the HRC as a chamber but an autonomous institution, capable of addressing the myriad of problems confronting the continent. It should either urge its member states to ratify the Human Rights Protocol to the African Charter in order to bring the Human Rights Court on board or immediately adopt the Protocol on the AU Court and set the process of ratification in motion.¹⁴⁹ It makes inordinately good sense that one court should give way for the other because a divided house cannot stand.¹⁵⁰ From a pragmatic perspective, it is better to have one African court that is normatively and structurally strong than having two weak institutions that exist only on paper. The ICJ's approach has shown that it is not the number of courts at the international level that matters but the quality of the court's output. Size never determines usefulness.¹⁵¹

In conclusion to the overall discourse on rationalization, there is a serious need for enhanced dialogue among the existing human rights institutions on *inter alia*, who does what, how the human rights work could be better distributed among them, as well as how to establish effective coordination and cooperation mechanisms among such

¹⁴⁶ As above, art 61.

¹⁴⁷ As above.

¹⁴⁸ As above, art 62.

¹⁴⁹ Udombana, 'An African Human Rights Court And An African Union Court: A Needful Duality Or A Needless Duplication?' 28 *Brooklyn Journal of International Law* 811, available at <http://www.westlaw.com>.

¹⁵⁰ **Besides, Africans cannot afford the climate of uncertainty regarding what and which judicial institution should and will be created to serve their needs.**

¹⁵¹ In fact, there are already many sub-regional courts that could compliment and supplement the work of a single African judicial institution.

institutions. The AU has to adopt a cautious approach in relation to the establishment of new institutions, and should, instead, focus on how existing institutions can be made to work more effectively. New institutions can only be added after a careful consideration of the calculated added value of such.

CHAPTER 4

4.0 POSSIBLE NORM ENFORCEMENT MECHANISMS UNDER THE AFRICAN UNION: RECOMMENDATIONS

In the preceding chapters, the human rights provisions of the AU Constitutive Act have been examined, particularly with relevance to the enforcement of human rights norms. This chapter elaborates the political enforcement mechanism afforded by the AU framework, and further, considers the proposed relationship of co-operation between the AU and existing human rights institutions.

By the term 'political enforcement' is meant the self-initiated enforcement measures taken by the AU itself, within the scope of its powers as defined by the Constitutive Act and in fulfilment of its human rights objectives. The proposed hybrid enforcement mechanism implies, on the other hand, enforcement measures taken by the AU in complementing the human rights protection mandate of the existing human rights institutions established under it. This power is derived not only from its Constitutive Act, but also from the African Charter and other human rights treaties establishing such bodies.

4.1 Justifications for the proposed framework for human rights enforcement under the AU

A point of departure will be to describe first, the present author's conception of the term 'enforcement'. This is in order to emphasize that a human rights enforcement regime is yet to be established in Africa. What the existing human rights regime has done is to

merely promote and protect human rights, with the necessary cooperation of concerned states rather enforce human rights.¹⁵² Enforcement has been defined as comprising all measures intended and proper to induce respect for human rights.¹⁵³ Enforcement therefore involves securing compliance by all necessary means. The only use of the term 'enforcement' in the UN Charter occurs in relation to the enforcement under Chapter VII of decisions of the Security Council.¹⁵⁴ This has led some international lawyers to equate enforcement with the use of, or threat of use of economic or other sanctions or armed force.¹⁵⁵ Compliance with international law generally takes place within a State and depends on its legal system, on its courts and other official bodies,¹⁵⁶ but as with other international obligations, the international system can exert influence on the state to comply.

A salient point to note is that, unlike the UN Charter, the OAU Charter made no provision for the enforcement of its principles.¹⁵⁷ It merely emphasized cooperation among member states and peaceful settlement, and included as earlier noted,¹⁵⁸ the doctrine of non-interference, as one of its central creeds. That doctrine has contributed to the subsequent reluctance of member states to criticize one another about human rights violations.¹⁵⁹ This creed is discarded under the AU Act, which gives the Union the right of intervention in respect of grave circumstances of human rights violations.¹⁶⁰ This provision is relevant in terms of the cooperation between the AU and the African

¹⁵² As was earlier stated, the Commission's enforcement powers and that of other relevant bodies lay with the Assembly of Heads of State & Government of the OAU; which power was not used. (n113 & 116 above).

¹⁵³ Rudolf Bernhardt, General Report, in Bernhardt & Jolowicz (eds.), *International Enforcement of Human Rights*, 5 (1985).

¹⁵⁴ Art.45, Charter of the United Nations, 1945.

¹⁵⁵ Steiner & Alston, 'International Human Rights in Context: Law, Politics & Morals', 347.

¹⁵⁶ (As above), 350. States observe international law from developed habit and from commitment to order generally. However, this general culture of compliance is less effective for human rights law, particularly in Africa

¹⁵⁷ (As above), 690.

¹⁵⁸ (n6 above).

¹⁵⁹ A prominent case in point was the failure of most African states, the single exception being Tanzania, to denounce the abusive regime of Ugandan dictator-Idi Amin during the 1970s.

¹⁶⁰ See (n64 above). This change in principle is however, long overdue, because, in complementing the (post-OAU) Article 58 of the African Charter, the OAU should have long endowed itself with the right of intervention, for the purpose of playing the Charter-implied role of human rights enforcement.

Commission anticipated under Article 58 of the African Charter. With this provision, situations of gross human rights violations, such as the Rwandan genocide of 1994, can possibly be forestalled. This provision marks a clear departure from the OAU's passivity and the emergence of a political mechanism that can be deployed for the protection of human rights on the continent.

It is remarkable that the suggested AU political enforcement mechanism has been tested, for example, in Madagascar, which was barred from the African Union inauguration summit last year because of doubts over the legitimacy of its president, in accordance with Article 4 (p) of the Constitutive Act of the African Union on the condemnation and rejection of unconstitutional changes of Government.¹⁶¹ Notable at this juncture is the fact that the controversial head of state of Madagascar—Mark Ravalomanana did not have similar problems with the United Nations, leaving the AU out on a limb as the only organisation not to recognise his legitimacy.¹⁶² It has however been re-admitted this year, during the second AU summit in the Mozambican capital Maputo, in July.¹⁶³ In the same vein, the coup attempt of June 8 2003 in Mauritania has been condemned by the Union.¹⁶⁴ On 12 February 2003, the AU appointed a special envoy to the Central African Republic (CAR), in consistence with its efforts aimed at enhancing peace, stability and concord in the CAR, and the normalisation of Chad-Central African relations.¹⁶⁵ The AU has however not proven infallible in these tests of its commitments to human rights and democracy, as the notorious government of Robert

¹⁶¹ R. Cornwell, 'Madagascar: First Test for the African Union', (2003) 12 *African Security Review*, 1.

¹⁶² See (n64 above). This change in principle is however, long overdue, because, in complementing the (post-OAU) Article 58 of the African Charter, the OAU should have long endowed itself with the right of intervention, for the purpose of playing the Charter-implied role of human rights enforcement.

¹⁶³ Decision On The Situation In Madagascar - Ass/Au/Dec. 7 (I), available at http://www.au2003.gov.mz/key_documentation/audecis1.htm (accessed on 13 Sept. 2003).

¹⁶⁴ Statement by Amara Essy, Interim Chairperson of the AU, available at <http://archives.econ.utah.edu/archives/marxism/2003w23/msg00168.htm> (accessed on 3 October 2003).

¹⁶⁵ This was pursuant to the 89th ordinary session of the central organ of the Mechanism for Conflict Prevention, Management and Resolution held in Addis Ababa on 15 Jan. 2003, which was devoted to consideration of the situation in the CAR and the relations between the CAR and Chad. See IRIN@irinnews.org, (accessed on 3 October 2003).

Mugabe in Zimbabwe, remains a huge challenge facing it. From records, the AU has been silent on this issue, causing accusing fingers to be pointed at it by civil society.¹⁶⁶

The AU further departs from the OAU's ineffectual status, by incorporating in its Constitutive Act other provisions with specific bearing on the enforcement of human rights norms. These comprise Article 9(1), and 23(2). Article 9(1) spells out the powers and functions of the Assembly, and provides that it has the power to receive, consider and take decisions on reports and recommendations from the other organs of the Union¹⁶⁷ and to monitor the implementation of policies and decisions of the Union as well as ensure compliance by all Member States.¹⁶⁸ Article 23(2), while providing for the imposition of sanctions, states that any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

Although no direct reference is made to human rights in the enforcement provisions,¹⁶⁹ the implementation of these provisions can be broadened to cover the enforcement of human rights, the promotion and protection of which is one of the main objectives of the AU.¹⁷⁰ For instance, the powers of the AU Assembly to receive, consider and take decisions on reports and recommendations from the other organs of the Union,¹⁷¹ should be interpreted to include the reports and recommendations of the African Commission,¹⁷² the Committee of Experts on the Right and Welfare of the Child¹⁷³ and the Human Rights Court,¹⁷⁴ submitted to the Union. This is in order that the AU might intervene to ensure compliance where these bodies have failed¹⁷⁵ by applying the necessary measure of

¹⁶⁶ *Zimbabwe casts shadow over AU launch*, IRIN news, 10 July 2003, at IRIN@irinnews.org, (accessed on 3 October 2003).

¹⁶⁷ AU Act (n4 above), art. 9(1)(b).

¹⁶⁸ (As above), art.9 (1)(e).

¹⁶⁹ Human rights might, inadvertently not have been intended to be covered by the provision.

¹⁷⁰ (n52 above).

¹⁷¹ (n9 above).

¹⁷² Arts 52-54 & 58-59, African Charter.

¹⁷³ Art 45(2), African Children's Charter, (n100 above)

¹⁷⁴ Art 28, Protocol to the African Charter on the establishment of a Court, (n105 above).

¹⁷⁵ In terms of ensuring state reporting, obtaining remedies for victims of human rights violations, et.al.

political pressure. The provisions for monitoring the implementation of policies and decisions of the Union as well as ensuring compliance by all Member States,¹⁷⁶ including sanctioning¹⁷⁷ recalcitrant states, should also be extended to cover such decisions and policies that the Union might make on human rights on its own initiative, as well as upon recommendations by the African Commission or other relevant bodies.

Consequently, it is submitted here, that these above-listed provisions, clearly provide a political framework for the enforcement of human rights norms within the AU structure. Nonetheless, the AU human rights mechanism is latent and has to be activated by the Commission and other existing human rights institutions. In this respect, it is proposed that the mandates of relevant organs of the Union be expanded to broadly cover human rights monitoring and enforcement, while at the same time, the AU should cooperate and collaborate with the African Commission and other relevant bodies in delivering their mandates: a synergy of the existing legal protection mechanism with the potential political mechanism under the AU is proposed. This proposed human rights protection framework will be similar to the dual structure under the United Nations' (UN) system: namely: the Charter and the Treaty-Based Systems.

4.1.1 The UN Model

The UN employs a 'two-track' approach in relation to the UN's enforcement machinery. That is:

1. The Charter-based organs whose creation is directly mandated by the UN Charter (such as the General Assembly, the Economic and Social Council and the Commission on Human Rights) or has been authorized by one of those bodies (such as the Sub-Commission on the Promotion and Protection of Human Rights, and the Commission on the Status of Women; and
2. The treaty-based organs (such as the Human Rights Committee formed under the ICCPR, and those that have been created by six other human rights treaties originating in UN processes and that are intended to monitor compliance by states with their obligations under those treaties). These are the Committee on

¹⁷⁶ (n67 & 68 above).

¹⁷⁷ Article 23(2), Constitutive Act, (n4 above).

the Rights of the Child, the Committee Against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of all forms of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, and the recently-established Committee on Migrant Workers.

Global enforcement of human rights has therefore, followed two principal tracks.

Within the overall framework, the treaty-based organs are distinguished by a limited clientele, consisting of only States Parties to the treaty in question; a clearly delineated set of concerns reflecting the terms of the treaty; a limited range of procedural options for dealing with matters of concern; caution in terms of setting precedents; consensus-based decision-making to the greatest extent possible; and a non-adversarial relationship with states Parties based on the concept of a 'constructive dialogue'.¹⁷⁸ By contrast, the political organs generally focus on a diverse range of issues; insisting that every state is an actual or potential client or respondent, regardless of its specific treaty obligations; work on the basis of constantly expanding mandate, which should be capable of responding to crises as they emerge; engage, as a last resort, in adversarial actions vis-à-vis states; rely more heavily upon NGO inputs and public opinion generally to ensure the effectiveness of their work; and take decisions by often strongly contested majority voting.¹⁷⁹

It is, of course, easy to overstate the differences between the two types of organ and to underestimate the ability of each type to emulate certain characteristics of the other. Thus, a Charter-based organ might choose to play down its political character and devote some of its efforts to a systematic clarification of the normative content of a specific right while a treaty-based organ might play down its constructive dialogue to indicate its strong disapproval of a state's behaviour.¹⁸⁰ Nevertheless, the differences of mandate, content and style between the two types of organs are sufficiently clear and

¹⁷⁸ P. Alston, 'Appraising the United Nations Human Rights Regime', in Steiner & Alston (eds.), (n155 above), 354.

¹⁷⁹ As above, 354-355.

¹⁸⁰ As above, 355.

consistent as to justify using this as the principal distinction for purposes of the present analysis.

In the UN, it is difficult to assess which of these 'tracks' has been more successful: surely they have both contributed to compliance, though they work differently. A monitoring body created by a human rights covenant or convention addresses only compliance by States Parties to that agreement and only with the norms established by that agreement. The mandate, authority and procedures of the monitoring body are defined by the agreement. United Nations' [political] bodies on the other hand, often address human rights issues as part of their general mandate as defined by the UN Charter and by General Assembly resolutions. They are not themselves, monitoring bodies, but have sometimes, condemned violations.¹⁸¹ In principle, they might address human rights violations by virtually any State, since nearly all States are parties to the UN Charter.¹⁸² One cannot appraise these activities with precision or with confidence. Clearly, they have served as some inducement to terminate or mitigate violations, perhaps even as some deterrent. Examples include the activities of the General Assembly (GA) in the area of human rights-in making declarations and resolutions, which though not binding *per se*, are of persuasive effect on UN member states, and have the capacity to crystallize into Customary International Law.¹⁸³ The apex organ of the UN--the Security Council--although it maintains the stance of non-involvement with human rights issues¹⁸⁴, has many examples of taking up such issues. A case in point would be its involvement in the condemnation of the Government of apartheid South

¹⁸¹ L. Henkin, 'International Law: Politics, Values and Functions', in Steiner & Alston (eds.), (n155 above), 352. Enforcement of law in the inter-State system is heavily political. Therefore, the political influence brought to bear in the organs of the UN determined the enforcement machinery that found its way into covenants and conventions.

¹⁸² As above, 353. On the other hand, the treaty- bodies usually address isolated cases that might not find audience before such political bodies. Note however, that, in general, political bodies have attended to only to the enforcement of norms of extraordinary political significance such as the law of the Charter on the use of force; n160 above.

¹⁸³ D.J Harris 'Cases & Materials in International Law', 5th ed., (1998). Note however, that, there have been instances where the GA resolutions have crossed the borderline between exhortatory recommendations and enforcement.

¹⁸⁴ As above, 353. On the other hand, the treaty- bodies usually address isolated cases that might not find audience before such political bodies.

Africa. The Council complemented the General Assembly's efforts in this regard, by imposing a sanction - an arms embargo on the country upon the latter's recommendation.¹⁸⁵

4.1.2 The proposed framework for human rights enforcement under the AU

Drawing from the UN's experience, a 'two-track' enforcement mechanism can also emerge for the African human rights enforcement system, based on the politically orientated Constitutive Act human rights regime and the rule orientated African Charter human rights regime. This will involve a relationship of collaboration, as distinguished from that of control, between the existing human rights institutions in Africa, and the relevant organs of the African Union. By the nature of their objectives and functions, the Assembly of the Union, the Pan African Parliament and the Specialized Technical Committees should be institutions with the most inherent interest in this regard.

- The Assembly of the AU

The Assembly, which is composed of the Heads of State and Government of the African Union, is the supreme organ of the Union.¹⁸⁶ Among its powers and functions are:

- ◆ To receive, consider and take decisions on reports and recommendations from the other organs of the Union;¹⁸⁷ and
- ◆ To monitor the implementation of policies and decisions of the Union as well as to ensure compliance of all member states.¹⁸⁸

¹⁸⁵ L. Sohn, 'Interpreting the Law', in Steiner & Alston (eds.) (n155 above), 365-369. The GA's recommendation was in recognition of the Council's primary jurisdiction to enact binding sanctions. (Consequently, Apartheid in South Africa became transformed through interpretations in the UN from a social evil, to a repugnant practice, to a crime under international law, to a threat to peace that cannot be tolerated by the international community and which warranted the imposition of mandatory economic sanctions against the deviant government).

¹⁸⁶ Art. 6 (1)&(2), Constitutive Act.

¹⁸⁷ Art. 9(1)(b).

¹⁸⁸ Art. 9(1)(e).

As earlier argued, one of the functions of the Assembly of the Union will be to receive and consider reports on the activities of the African Commission.¹⁸⁹ The Assembly has a duty to work for the promotion and protection of human and peoples' rights as stated in the principles objectives of the AU Act, and will be failing in its responsibilities if it does not consider and act on the reports of the African Commission.¹⁹⁰ Failure to respect any decision of the Assembly on a matter relating to the promotion and protection of human rights would be such a grievous breach against the principles and objectives of the AU as should warrant the sanctions of the Assembly under Article 23(2), which article holds the main key to the infusion of the necessary bite into the human rights enforcement system. The power of the Assembly to sanction in this manner could be compared with that under Article 8 of the EU Treaty that confers on the European Council of Ministers the power to sanction non-compliant member states. This ever existent, although remote possibility of expulsion from the Council of Europe provides some modicum of compulsion within the European system.

The relevant Article 8 of the Statute of the Council of Europe provides that:

Any member of the Council of Europe, which has seriously violated Art 3, may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Art 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a Member of the Council as from date as the Committee may determine.

The Article 3 mentioned therein provides that:

Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter 1.

Although the Constitutive Act of the AU did not go as far as the Statute of the Council of Europe in its prescription of expulsion as a sanction, it is argued that that a pro-human rights interpretation of article 23(2) of the Act will Achieve the similar results.¹⁹¹

¹⁸⁹ Page 41 above. See also, Quashigah, (n126 above), 287.

¹⁹⁰ As anticipated under arts. 52-54 & 58-59 of the African Charter. See also, art. 3(h), Constitutive Act.

¹⁹¹ (n126 above), 271. In contrast to the Inter-America and African systems, the European system has put in place, a remarkably well-structured political supervisory system.

- **The Pan-African Parliament**

The Pan-African Parliament is one of the principal organs of the Union.¹⁹² In accordance with Art 17(2) of the Constitutive Act of the AU, a protocol has been put in place defining the composition, functions, powers and organisation of the parliament.¹⁹³ An analysis of the objectives, functions and powers of the Pan-African Parliament will show that human rights is very high on the list of its concerns.¹⁹⁴ The first objective for instance, is wide enough to encompass the function of promoting and protecting human rights as guaranteed under the African Charter.¹⁹⁵ The said provision reads that the Parliament shall *facilitate the effective implementation of the policies and objectives of the OAU/AEC and, ultimately, of the [AU]*.¹⁹⁶ With respect to the AU, the relevant objectives that complement the principles already mentioned above include:

- (f) to promote peace, security, and stability on the continent;
- (g) to promote democratic principles and institutions , popular participation and good governance;
- (h) to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant instruments.

The Parliament will therefore, have the all-important responsibility of monitoring the promotion and protection of human rights in Africa. The functions and powers under article 11 of the Protocol are wide enough to enable it perform similar functions as those carried out by the European Parliament in respect of, among other things, the state reporting process.¹⁹⁷ Even though it doesn't possess the power of sanction as does the Assembly, the most potent regulatory mechanism at its disposal would be the elements

¹⁹² Articles 5(c) & 17 of the AU Act.

¹⁹³ The Protocol relating to the Treaty establishing the African Economic Community relating to the Pan African Parliament was adopted by the 5th Ordinary Summit of the OAU in Sirte, Libya, on 2 March 2001. By art 22 of the Protocol, it shall come into force 30 days after ratification by a simple majority of member states.

¹⁹⁴ (n126 above), 289.

¹⁹⁵ As above.

¹⁹⁶ Art 3(1) Protocol, (n32 above).

¹⁹⁷ (n126 above), 289.

of publicity and pressure that it can bring to bear on non-conformist governments through the members representing the particular state in the Pan–African Parliament.

- **The Specialized Technical Committee**

The Specialized Technical Committee (STC) anticipated by the Constitutive Act, will become relevant in assessing states' compliance to human rights obligations.

These committees, which are to be composed of representatives of each member state, has, among its various functions, the mandate to “submit to the Executive Council, either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provisions of this Act”. These, should, of course, include reports on the human rights obligations of states, as forwarded to it, or conducted on its own discretion. This will apply to almost all the technical committees, since every other objective of the AU is inextricably linked to human rights. If the reports are not explicitly on human rights issues, it will entail looking at the particular committee's mandates, through human rights lenses. i.e. the rights-based approach to reporting.

4.2 Trade and development links as a tool of sanctioning within the AU structure

It has been argued that the successful enforcement of human rights in Africa will depend, in large part, on the development of economic integration among states on the continent.¹⁹⁸ The AU structure offers the highest level of economic integration that African states could aspire to. This incentive alone could justify the welcoming of the establishment of the AU by the human rights community.¹⁹⁹ Viewed together with the provision for sanctions under Article 23(2) of the Constitutive Act, trade and other

¹⁹⁸ C Heyns & F Viljoen 'An overview of international protection of human rights in Africa' (1999) 15 *South African Journal of Human Rights* 425 433; cited in Baimu, (n2 above), 310. These authors argue that as a general rule, the international enforcement of human rights depends for its success on the existence of, among other factors, a web of trade relations between the respective states because only where these exist can their potential severance in cases where human rights violations come to light constitute a real threat to coerce the states to adhere to human rights principles. See also, Heyns, (n20 above).

¹⁹⁹ (As above). The trade component is vital as the human rights agenda of the AU is not self-sufficient.

economic activities come within the purview of the *other measures of a[n]...economic nature to be determined by the Assembly* as tools for sanctioning recalcitrant states.

4.3 The tactic of shame as an enforcement tool

It has been acknowledged that the most effective weapon in the arsenal of human rights activists is still the marshalling of shame.²⁰⁰ Having worked to a large extent in the hands of the civil society, this tool of ensuring compliance will undoubtedly thrive more within the AU structure.

Christof Heyns, also, while listing some of the determinants of an effective human rights enforcement system,²⁰¹ submits that the regional organization is the primary body through which peer pressure must be channelled. Shame or Peer pressure can be mobilized against recalcitrant states. Peer pressure can change behaviour by inducing shame, or if that does not work, by mobilizing stronger forms of sanctions against states.

From the analyses in this chapter, it is evident that the AU does not merely 'concern' itself with human rights, but it latently provides a political framework for its enforcement. Furthermore, it provides a structure and mandates that can be explored by the existing legal institutional framework in the protection of human rights.

²⁰⁰ D. Padilla, 'An African Human Rights Court: Reflections from the perspective of the Inter-American system', (2002) 2 *African Human Rights Law Journal*, 192.

²⁰¹ Heyns, (n20 above).

CHAPTER FIVE

CONCLUSION

This study has largely examined the norms and institutions developed under the auspices of the AU, dealing with human rights challenges on the continent. Focused on its implications for the existing human rights protection system in Africa, the possibilities these norms and institutions offer to the AU in fulfilling its latent mandate of human rights enforcement are analysed. The present author has expressed optimism that the norms and institutions developed under the AU in relation to human rights protection in Africa are more progressive than those that existed under its predecessor, the OAU. If broadly interpreted and effectively employed, these will pose a solution to the nagging problem of non-compliance with human rights norms by African states, hence, significantly enhancing human rights protection in Africa. With this understanding, this study has proposed, with accompanying principles and models, recommendations for a hybrid human rights enforcement mechanism under the Union: a synergy of the emerging political and the existing legal frameworks for human rights enforcement.

Further reasons for optimism include the optimal level of economic integration in Africa offered by the AU, an acclaimed feature of an effective human rights regime. This is to be implemented through NEPAD, which is a people-centred African development

program, an offshoot of which also, is the African Peer Review Mechanism, which, *inter alia*, monitors states' compliance with democratic and good governance principles. Prior to this, no such self-monitoring mechanism existed in the African political community.

The study has, in effect, shown through the proposed framework, that any regional human rights system worth its name requires strong in-built control systems to encourage states to honour their human rights obligations. This can be inferred from the European experience. The success of the AU political enforcement mechanism, and the proposed collaboration, will therefore largely hinge on the publicity and the possibility of sanctions that are incorporated within it. The AU structure offers the opportunity for that publicity and some degree of sanction through its various organs. Still, there is a need to develop in the member states, the realisation of the necessity, responsibility and benefits of compliance. The AU thus not only has the responsibility to sanction for non-compliance with human rights, but also through its regular policies and deliberations, to aid its member states in the realisation of the necessity, responsibility and benefits of compliance with human rights.

Even though the proposed hybrid enforcement framework is feasible under the Union structure, as a possible solution to the problem of non-compliance with human rights in Africa, its utilization remains largely an aspiration. This is because in order for these AU human rights norms to have the desired impact, there is a need to equip its relevant organs, structures and mechanisms to effectively implement these provisions so as to realize the goal of fully integrating the human rights framework in its activities-- the responsibility of which depends heavily on the shoulders and brains of those who manage the affairs of Africa states, and all the progressive sectors of civil society in Africa.²⁰² Thus, the question of political will comes to the fore once again. Experience has shown that treaties and regional institutions by themselves do not necessarily translate into the better protection of human rights unless accompanied by the

²⁰²A point to stress is that the promising norms and institutions developed under the auspices of the AU should offer opportunities to the NGO community and the civil society in general to lobby for a stronger human rights regime under the Union, than it was able to achieve under the Charter regime. That is the only way to ensure that the human rights mandate of the AU is not pushed to the back burner. See also, C.A.A Parker & D. Rukare, 'The New African Union And its Constitutive Act', (2002) 96 *American Journal of International Law*, 365.

necessary political will. Thus, the actualisation of the proposed framework is largely hinged, on the sincerity or otherwise of the architects of the AU--whether the political will finally and formally expressed is genuine or not; i.e., substantive as contrasted with formal political will.

In the final analysis, the expressed political commitment of African states to human rights protection is still largely suspect. This study and many others already done on the AU and human rights enforcement in Africa will serve as blueprints for the Union, only if the political will expressed is genuine and enduring. This will be the most important determinant of whether the AU Secretary-General was not merely romanticising when he stated that the AU is not a reincarnation of the OAU,²⁰³ and that the AU, is not merely an old wine in a new wineskin, but indeed, a new dawn for human rights protection in Africa.

WORD COUNT: 16, 357 (excluding title page and annexures).

²⁰³ See AU Secretary-General's statement, (n1 above).

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