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African Human Rights Law

Teaching Material

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Chapter I

Introduction

1.1 Historical Development of Human Rights

International law traditionally governs the relations between sovereign states and has therefore, not been considered responsible for regulating the relations between states and their citizens or those among citizens. The latter are part of the individual states sovereignty and, as such, are governed by national law (constitutional, administrative, penal and civil law). It is only since the Second World War, especially in reaction to the atrocities of National Socialism, that international law has come to regulate the rights of individuals in relation to their governments although many states still refuse to surrender their traditional part of their national sovereignty to international law. That is why the development of the international protection of human rights is an ongoing battle against national sovereignty.

Up until the Second World War, international law was not responsible for the rights of individuals unless the interests of more than one state were concerned. This was true in particular in the case of foreigners for whom the state they are citizens of, has protection power vis-à-vis the state that exercises defacto power.

Dear students, the protection of minorities is a further historical antecedent of international human rights protection, which is also closely related to the protection power of national states. Ethnic, linguistic and religious minorities traditionally developed as new borders were drawn between states in the aftermath of wars. The protection of minorities is also closely linked to the peoples' right of self determination. In the case of the former colonies of the Axis powers, the right of self determination supported by the League of Nations mandates system and the United Nations trusteeship system, eventually led to their independence.

In addition to bringing an end to the First World War and introducing provisions for the protection of minorities, the Peace Treaty of Versailles also created two international organizations which proved to be important for the development of protection of human rights:

the League of Nations as predecessor of the United Nations, and the International Labour Office as predecessor of the International Labour Organization, which today is one of the most effective specialized agencies of the United Nations for the protection of economic, social and cultural rights today.

Dear students, we will finalize the discussion of this section by discussing the International Bill of Human Rights which has been described as a milestone in the history of human rights, a vertible Magna Carta marking mankind's' arrival at a vitally important phase: the conscious acquisition of human dignity and worth . Since its inception, the United Nations has strived to secure the promotion and protection of human rights world wide. The first, and possibly the singularly most important, step taken by the United Nations in furtherance of the incumbent obligation to promote respect for human rights and fundamental freedoms was the General Assembly's adoption on 10 December 1948, of the Universal Declaration of Human Rights. Although not technically binding, the effect of the Universal Declaration has far surpassed the expectations of the drafters and it is widely accepted as the consensus of global opinion on fundamental rights. The original intention that it would be followed swiftly by a binding enforceable tabulation of rights was not to be realized; it was to be eighteen years before consensus was reached on the text of the International Covenants and a further ten years before the instruments attracted sufficient ratifications to enter in to force.

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and two Optional Protocols annexed there to and the International Covenant on Economic, Social and Cultural Rights. It has been referred to by the United Nations as the ethical and legal basis for all the human rights work of the United Nations, the foundation up on which the international system for the protection and promotion of human rights has been developed.

Dear students, before and after the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, the United Nations and its specialized agencies helped to formulate a number of other multilateral treaties which sought to implement specific rights or groups of related rights. These supplement the

protection afforded by the covenants and several of them contain implementation procedures of their own. Among the human rights treaties elaborated by, or under the auspices of, the United Nations are:

a) The Convention on the Prevention and Punishment of the Crime of Genocide
b) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.
c) Convention Relating to the Status of Refugee as Amended by the Protocol of 1966.
d) Convention on the Political Rights of Women.
e) Convention Relating to the Status of Stateless Persons.
f) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.
g) Convention on the Nationality of Married Women.
h) Convention on the Reduction of Statelessness.
i) Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.
j) International Convention on the Elimination of All forms of Racial Discrimination.
k) Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
l) International Convention on the Suppression and Punishment of the Crime of Apartheid
m) Convention on the Elimination of all forms of Discrimination against Women.
n) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
o) International Convention against Apartheid in Sports.
p) Convention on the Rights of the Child.
q) International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families

In addition to these international human rights developments, there are also others which grew up as body of regional human rights law. This regional development will be discussed in section 1.4.

1.2 The United Nations Human Rights System

The human rights provisions of the United Nations Charter have been described as scattered, terse, and cryptic. No comprehensive system for protecting human rights was enshrined in the charter. Rather, the goal of securing respect for human rights was specified with state pledging to encourage the promotion and observance of rights with in their territories. There was no real definition or articulation of human rights although reference was made to the concept of equality and the notion of the dignity and worth of the human person. It is unlikely that the drafters of the original Charter could have foreseen the development of international human rights law to its present form based on the Charter's references.

From the outset, the United Nations has placed great emphasis on the promotion of economic and social progress and development of all states. This has positive repercussions for international human rights, including political and economic stability, conditions more conducive to the realization of human rights.

The failure of national laws to protect citizens had been cruelly demonstrated, the responsibility thus lay with the global community, the new United Nations Organization. As the League of Nations had failed in its attempts to protect minorities from the states in which they find themselves, the new organization sought to approach the question of human rights from a different angle adopting the concept of equality for all in place of the idea of protection of minorities. The new organization was anxious to avoid the problems associated with minorities which has beset its predecessor, ultimately leading to its collapse. The United Nations system is based on a fundamental and irrevocable belief in the dignity and worth of each and every individual. Realization of this should *ipso facto* obviate the need for minority protection; every individual is entitled to the same fundamental rights and freedoms.

Having pledged to promote universal observance of and respect for human rights, the United Nations required an institutional framework to exercise responsibility thereof. Accordingly, Chapter IX of the Charter, International Economic and Social Cooperation, elaborates on the economic and social foundations of peace. Article 55 of the Charter aims at creating conditions

of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples … in furtherance thereof, the Charter then lists economic and social aims which the United Nations shall promote without distinction as to race sex, language or religion (Art 53(31)). Article 61 of the Charter created the Economic and Social Council. One of the functions of this body is making recommendations for the purpose of promoting respect for, and observance of , human rights and fundamental freedoms for all (Art 62/21) . To assist in this task, Economic and Social Council was to establish a commission for the protection of human rights. This commission has been supplemented by a number of other bodies. Today there is a comprehensive body of institutions, organs and committees which over see the implementation and realization of human rights at the international level. Six Committees, created by the principal human rights treaties, monitor the implementation of each treaty. These treaty monitoring bodies are the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of the Child. These Committees work with and report through the Economic and Social Council and the General Assembly of the United Nations.

Dear students, this new international organization very quickly established itself as a body which would actively fulfill its commitment under Article 55 of the Charter, promoting universal respect for, and observance of, human rights and fundamental freedoms. Progress in this area has been achieved in a number of ways: drafting Conventions and resolutions; applying political pressure to states; preparing and disseminating relevant information; and internationally condemning serious human rights violations.

1.3 Introduction to Regional human rights systems with particular reference to Africa

Dear students, parallel with the United Nations human rights systems, regional human rights systems have developed. In this section we are going to see these regional human rights developments.

There are three main regional systems that aim to protect and promote human rights: the Council of Europe; the Organization of American States, and the African Union. Of these, Europe has the oldest and most developed system with an established judicial mechanism for determining complaints brought by individuals. Like the United Nations, the Council of Europe was founded in the turbulent period after the cessation of hostilities in the Second World War.

Human rights were high on the agenda of the new organization. The founding states drew up a convention on human rights and fundamental freedoms which was opened for signature on 4 November 1950, entering in to force in September 1953. All member states of the Council have signed and ratified it. The drafters sought to provide a mechanism for realizing civil and political rights and freedoms as proclaimed in the Universal Declaration of Human Rights.

The European Convention on the Protection of Human Rights and Fundamental Freedoms is the prime instrument on human rights with in Europe. The rights enshrined therein are essentially drawn from the first half of the Universal Declaration. They are the right to life, freedom from torture and other inhuman , or degrading treatment or punishment, freedom from slavery and forced or compulsory labour, right to liberty and security of person, right to a fair trial, prohibition on retroactive penal legislation, right to private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of expression, freedom of association and assembly, right to marry and found a family , right to an effective remedy for a violation of the rights and freedom from discrimination in respect of the specific rights and freedoms. With a focus primary on civil and political rights, the Convention did not greatly expand the Universal Declaration. It did provide considerably more detail on many of the rights and, of course, it articulated a binding legal framework to ensure the realization of those rights.

When we come to the American system, the Americans host one major regional organization with a significant impact on human rights- the Organization of American States. The Organization of American States (OAS) was established in 1948 at the ninth inter American Conference (Bogota, Colombia).

The Bogota Conference adopted the American Declaration on Rights and Duties of Man. This Declaration is similar to the Universal Declaration of Human Rights. The rights included encompass civil and political (life, liberty, religious freedom, inviolability of home and correspondence, fair trial) as well as economic, social, and cultural rights (benefit of culture, leisure time, work, social security). However, it also sets out a number of duties incumbent up on the American citizens. The duties are varied ranging from civil and military service through the support, education, and protection of minor children to a duty to pay taxes.

The American Convention on Human Rights was signed in 1969 and entered in to force in 1978. The Convention restricts itself to a detailed tabulation of civil and political rights. Economic social and cultural rights are covered in a single Article (Art. 26) which cross refers to the charter of the OAS as amended by the Protocol of Buenos Aires. On this matter, it should be noted that in 1988, the OAS adopted an additional protocol in the area of Economic, Social and Cultural Rights. The Convention itself establishes the machinery to be employed in protecting the rights of all Americans. The OAS has also expanded the scope of its human rights protection with a number of further conventions.

Dear students, now let's focus on the African system. The youngest developed regional system is to be found in Africa. The African Union, formerly the Organization of African Unity (OAU) has played a prominent role in developing an African jurisprudence on human rights. The African system is in some ways considerably less developed than its American and European counterparts yet perhaps its greatest success lies on its very existence. It is the youngest system of the fully fledged (i.e. monitored and implemented) regional systems for the protection and promotion of human rights. Human rights were not the sole priority when the Charter was drafted although the OAU Charter provides that the constituent states will coordinate and intensify their collaboration and efforts to achieve a better life for the peoples of Africa. The

OAU Charter also stipulates that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples, acknowledging both the United Nations Charter and the Universal Declaration of Human rights in passing (Art II (1) (el).

In 1981, the OAU adopted the African Charter Human and People's Rights. It was designed to reflect African concepts of rights and thus is distinctive in its phraseology and underlying rationale. In 1998, a protocol to the charter was agreed - the Protocol on the Establishment of an African Court on Human and Peoples Rights.

The Charter (often referred to as the Banjul Charter) entered in to force in 1986. It enshrines the African concept of rights and aims to be accessible to African philosophy: it is striking among international and regional instruments in its emphasis on human and peoples' rights and its cataloguing of the duties the individual /group to the state. A further notable feature is that, unlike other international and regional instruments, states are not permitted to derogate from the articles of the Charter. The rights and duties thus apply during times of public emergency.

Dear students, in addition to the Banjul Charter, the African system has also adopted other human rights instrument. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) is one of these. With civil unrest, authoritarian rule, inter- faction fighting and natural disasters common place in African Society, there is a frequent displacement of peoples, whether to avoid hostilities or escape famine. Refugees are a major problem in some areas. It is thus perhaps inevitable that Africa should read the way in drafting an instrument aimed solely at regulating refugees. Many of the provisions in the convention reflect those of the United Nations Convention Relating to the Status of Refugees (1951).

The African Charter on the Rights and Welfare of the Child (1950) is the other instrument. This instrument entered in to force in 1999. In many respects, it reflects the scope and popularity of the United Nations Convention on the Rights of the Child. It recognizes that children in Africa need special support and assistance. 'The situation of most African children remains critical due to the unique factors of their socio -economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts , exploitation and hunger.'' (Preamble). The

rights of children are considered to impose duties on every one. Many of the provisions are similar to those included in the United Nation Convention, though in Africa the rights extend to all those below the age of eighteen with out exception.

A draft Protocol on Women's Rights has been adopted by the Commission on Human Rights. The draft seeks to respond to the Beijing principles (UN) and plan of action. The Protocol, if and when adopted, will most probably be part of the existing human rights machinery.

Dear students, before concluding our discussion on the African human rights system it is important to briefly discuss the institutional framework. The African Commission on Human and Peoples' Rights, a body of eleven independent experts, was created in 1987. The functions of the Commission include the promotion of human rights through collecting documents, undertaking studies on African problems in the field of human and peoples' rights, dissemination of information, organization of symposia, formulation of principles and rules aimed at solving legal problems relating to rights and freedoms, and cooperating with other African and international institutions concerned with the promotion and protection of human and peoples' rights, the protection of human rights in accordance with the Charter, and the interpretation of the Charter (Art 45) .

The other important institution is the African Court on Human and People's Rights. The Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (1997) seeks to create a court which will complement and reinforce the work of the Commission in furtherance of the protection of human and people's rights as enshrined in the Charter (preamble).

Dear students, the composition and functions, jurisdiction and competence of these institutions will be discussed in detail in the Fourth Chapter.

Review Questions

1. Discuss the historical development of international human rights before and after the Second World War.

2. What is the role of the United Nations human rights system for the development of regional human rights systems?

3. The American Declaration on Rights and Duties of Man sets out a number of duties incumbent up on the American citizens. But the same is not true in other regional human rights instruments. Do you think that it is proper to set out these duties as part of human rights? Why /Why not?

Chapter II

The General Protection: The Charter of the OAU /Constitutive Act of AU and the African Charter on Human and People's Rights (ACHPR)

Introduction

Human Rights instruments and the organs that they created were for many years on the periphery of the political institutions under which they fell. Further, human right as a discipline has evolved some what separately from international law, and international politics has been separated from international law. Thus, human rights have tended to have been dealt with by separate bodies created under distinct human rights instruments and it is only recently that there has been an increased convergence of human rights into the main stream of international organizations' thinking. Just as there has been a closer relationship between the European Convention on Human Rights (ECHR) and the European Union (EU), the American Convention and the Organization of American States (OAS), so the African political organization, OAU, which is now being transformed into the African Union (AU), illustrates this closer attention to human rights as falling within its remit.

Whilst a separate instrument was adopted under the auspices of the OAU in 1981 specifically to deal with human rights (the African Charter on Human and Peoples' Right (ACHPR)) hereinafter termed as the African Charter, it remained largely on the periphery of the OAU's attention until recently. Yet in later years the OAU organs developed an approach to human rights. Thus, this chapter will seek to chart the development of human rights within the OAU/AU from its inception in 1963 to the present day. Accordingly, investigation of the normative value of OAU/AU Charter/ Constitutive Act, analysis of the various rights guaranteed in the ACHPR and discussion of some distinguishing feature of the Charter will be the subject matter of discussion here.

Upon completion of this section, you should be ale to:

- Discuss the approach by OAU to human rights during its inception.
- Analyze any efforts made subsequently to remedy omissions of human rights principles in the OAU Charter.
- Identify the major human rights regimes of OAU/AU.

2.1. The Charter of OAU and Constitutive Act of African Union

It is common knowledge that in Africa the issue of the protection of human rights and fundamental freedoms has long been considered not an issue of the first priority and in any case as the exclusive province of states. It is also well known that until recently states have systematically taken refugee behind the principles of national sovereignty and non-interference in internal affairs to avoid all discussion of the human rights situation in their territory. According to the view of Ougergouz, this marginalization by the African States of the question of the rights of individuals within their jurisdiction is first expressed in the Constituent Charter of the OAU adopted on 23 May 1963 at Addis Ababa (Ethiopia). This landmark legal and political document only refers expressly to human rights in its ninth preambular paragraph. This affirms the conviction of the African leaders that "the Charter of the *UN* and the Universal Declaration of Human Rights, to the principles of which [they] reaffirm [their] adherence, provide a solid foundation for peaceful and positive cooperation among states" and its article II (1(e)), where it is stated that one of the purposes of the OAU is "to promote international cooperation, having regard to the Charter of the United Nations and the Universal Declaration of Human Rights." Apart from these few references, the OAU Charter focuses solely on states. Articles V & VI devoted to the rights and duties of member states do not place any obligation on the state vis-à-vis the people or individual, where as the principles of national sovereignty and non-interference in the internal affairs of states are laid down forcibly in Art.III.

Therefore, according to the above assertion the initial question that must be considered is why the OAU for many years fail to address adequately the issue of human rights. To this end, Naldi contends that the principal objectives of the OAU have been to defend the sovereignty and

territorial integrity of its member states and to rid Africa of colonialism and racism. Conceived and born during the cold war and the liberation struggle, the OAU remained in that mind set for a generation. Thus, its provisions centre on issues such as the non-interference in internal affairs, sovereign equality of states, the fight against neo-colonialism, self-determination in the state context and the peaceful settlement of disputes.

Mathew summarizes the then position and attitude of OAU as follows:

> *The OAU Charter, for instance, does not contain any provision for the protection of the rights of the African masses . . . evidently the emphasis in 1963 was on the state rather than the peoples. As president Nyerere of Tanzania, one of the founding fathers of OAU, has pointed out, the OAU Charter spoke for the African peoples still under colonialism or racial domination, but the countries emerged to nationhood, the charter stood for the protection of their heads of state and served as a trade union which protected them. In other words, the OAU appears to be an institution of the African heads of state, by the heads of state and for the heads of state.*

Thus, R. Murray concludes that any concept of human rights within the OAU went little beyond the notion of self-determination in the context of decolonization and apartheid in South Africa and where other aspects of human rights are mentioned in the Charter,which are broad and general and related to the relationship among states. Further, any threats to human rights appeared to be reflected in the OAU Charter as coming from outside the continent, something which African unity may help to prevent. Thus, to Murray it was the two issues of self-determination and apartheid/racial discrimination in Southern Africa that were central to the OAU at its formation and which appeared to have guided its approach to human rights throughout its later years.

However, it is also important to note that some peoples such as Birame Ndiaye contends that the lack of significant allusion to human rights protection by the OAU Charter should not be readily criticized. His main reason for this suggestion is that the “constitutional instruments of the other regional organizations and the Untied Nations also contain relatively few references to human

rights". He, however, agrees that these other organizations go a step further in constructing a system for the promotion and protection of human rights, backed by legally binding instruments, which was not the case for the OAU. The OAU Charter's emphasis is on the rights of peoples to self-determination and struggle against racial discrimination in response to the ravages of colonialism. He further contends that the normative value of OAU Charter on matters of human rights can be inferred by looking at the preamble and the purposes and objectives of OAU Charter. The OAU Charter refers not only to the constitutional text of the UN Charter, but also mentions that the UDHR contains principles to which OAU states parties reaffirm their adherence . . . Preambles generally set the tone for positive provisions that might subsequently be embodied in the relevant instruments. Moreover, the current trends in the interpretation of international instruments attach considerable importance to the preamble of these instruments. The preamble to the Charter of the UN is often involved in interpreting that instrument. In particular, the phrase of the preamble of the OAU Charter makes reference to the universal Declaration which is to be observed as much as the UN Charter.

Therefore, making provisions in preambles of basic instruments and subsequent adoption of implementing instruments are all steps which form part of a growing legal system. Consequently, he concludes that by adopting the preambular provisions of the Charter, its member states have given indication of a desire to take steps in creating normative rules for the protection of human rights even if rights may not be effectively established if they remain only as preambular provisions.

The other area, where attempts have been made to bring out the human rights content of OAU Charter is the statement of the purposes set forth in the Charter under Article II. The Article provides, inter alia, as a purpose of the OAU, the promotion of international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights [Art. II (1) (e)].

Thus, the reference to the UN Charter and the Universal Declaration in article II of the Charter of OAU is an indication of the important source of the growing regional legal system. The incorporation of the UN instruments can be said to be unequivocal creation of the legal principle

emphasizing the importance of human rights in the African region along the lines of the UN Charter and the Universal Declaration, and the need for taking steps to interpret it and explain how it applies in a variety of circumstances in the region.

V.U. Nmehielle reminds us that the second paragraph of the preamble to the Charter of the OAU accentuated the fact that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples." It is further relevant that this paragraph was involved later in the second preamble of the African Charter on Human and Peoples' Rights, and that it was in the name of these human rights principles that the African peoples fought their battle for independence, and that it was due to non-observance of human rights by the colonial powers that other states come to their assistance. This was the reason why their main weapon at that time, the Universal Declaration, was mentioned twice in the Charter of the OAU. At that time, it was the African states' most cherished document, and at the first International Conference on Human Rights, held at Tehran in 1968, all the new African states supported the statement that the Universal Declaration constituted "a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of human family . . ."

Accordingly, Nmehielle concludes that the notion that the OAU Charter excluded human rights promotion and protection from the purview of its purposes and objective principles is not totally valid. Similarly, the view that allusions made to human rights in the charter were only reduced to a simple reference to the Universal Declaration, and thus can not be regarded as entailing an obligation for the member states, misses the point. This is because every state must observe the basic human rights if it wants to be a part of the world community. The obligation is therefore clear, even if international enforcement is limited to gross violations. It is also further contended that though the principle of sovereignty and non-intervention in the internal affairs of states have always stood in the way of human rights agenda in Africa(Art. III (2)), the effect of such principle is continuing to diminish recently.

Generally, it must be stressed that human rights protection was the main weapon against the colonial powers in African, and by accepting them wholeheartedly the peoples of Africa got the

support of other states against the violations of their human rights by those powers. The OAU, no doubt, originally failed to provide for early ways of dealing with home grown violations that accompany African self-rule. According to Eze, at the time the Charter was adopted, African states were not prepared to allow any organ other than their domestic institutions to deal with matters that touched on the protection of human rights. Their preoccupation was to stamp out colonialism in all its forms in Africa. African states might have objected to imposition on them of a global human rights commission, but as soon as they had a chance to concentrate on that issue, they established a regional one in furtherance of their obligations.

Therefore, it was stated that when independence was achieved and the regime of apartheid ended, it became difficult for African states to say human rights were just a domestic concern. As Clapham notes:

> *In bringing their outrage to the attention of external and especially Western audience, however, African governments and other anti-apartheid campaigners both explicitly breached the frontiers of juridical sovereignty and raised issues relating to the treatment of individuals which could equally be raised with reference to their own states. Once the human rights records of African ruled-states started to attract external attention, it was correspondingly harder to claim the protection of sovereign statehood*.

Therefore, a land mark development in the OAU's approach to human rights was the adoption of the African Charter on Human and Peoples' Rights (usually called as the Banjul Charter, after the capital of its adoption, Gambia) on 27 June 1981. With its coming into force in 1986, human rights were thus officially recognized in the OAU. This was later on followed by a series of declarations and conventions addressing particular areas and special categories of human rights such as on children, women, youth and so on. Detailed analysis of the general protection under the Banjul charter and other specialized human rights instruments will be in order in the subsequent sections and chapter.

The last point deserving a close attention is the position and emphasis given to protection of human rights under the organizational transformation of African states, that is, under the newly

established regime of African Union. The initiative to transform OAU into AU was started by the adoption of Sirte Declaration in Libya on 9 September 1999 by the Fourth Extraordinary Summit of OAU's Assembly of Heads of State and Government experts, parliamentarians and ministers of OAU member states, the Constitutive Act of the African Union was adopted in July 2000 in Lome, Togo.

The provisions of the resulting Constitutive Act suggest that human rights will indeed play a greater role in the work of the Union than they did in the OAU. Some of the shortcomings of the OAU Charter as a true normative human rights instrument are now addressed by the Constitutive Act of the new African Union. The Act has placed the promotion and protection of human rights in the agenda of the regional body.

Thus, the preamble of the Act recalls the heroic struggles waged by our peoples and our countries for economic independence, human dignity and economic emancipation. Human rights are mentioned specifically with states being determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law [preamble 9 of the Constitutive Act]. The central objectives, in Article 3, and principles, in Article 4, of the Union noted that the Union's aims include not only achieving greater unity and solidarity between African countries and the peoples of Africa and accelerating development but also the need to 'promote peace, security and stability on the continent [Art. 3 (f)]. It is recognized that there is a need to 'encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights' and promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments' [Art. 3 (e) (h)]. Hence, states should respect the need for 'peaceful co-existence of member states and their right to live in peace and security (Art. 4 (i)), promote gender equality, have 'respect for democratic principles, human rights, the rule of law and good governance', respect the sanctity of life and condemn unconstitutional changes of government [Art. 4 (1), (m), (0) & (p). Most importantly, the cherished policy of non-intervention in the interval affairs of member states, which was the creed of the OAU Charter ceases to be a principle of African States. It has rather become a principle of member states of the African Union to have the "right . . . 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 [Art.4 (h)].

On the face of it, therefore, the Constitutive Act of the AU appears to give an important place to human rights and an indication that they will play a significant role in the AU. However, according to R. Murray there has been considerable concern that institutions such as the African Commission and the African Court on Human and Peoples' Rights do not appear to feature in the Act. Whilst some fear that this meant these bodies were being sidelined or forgotten under these new structures, It perhaps indicates lack of coherence in the Act as a whole to the previous structures of the OAU, when other organs, such as the central organ, were omitted.

What is perhaps more concerning is that, despite being mentioned in the substantive provisions of the Act, in relation to the mandates of the various institutions within the Union, human rights are not listed under any of them expressly [See Arts.13, 18].

By reforming the OAU, there is no doubt that African has started responding to global reorganization and is making every effort to reposition itself in global politics and relations. The Constitutive Act of the African Union shows a departure from traditional Africa's fear of "freedom for the peoples" from their own home rule. While the practical application of the Constitutive Act is yet to be seen, it is a bold step, which will equip the peoples of Africa in pressing for good governance and accountability, respect of human rights, rule of law, democratization process, economic prosperity and respect for human rights.

Exercises

1. Do you agree with assertion that OAU founding members were totally disinterested with the promotion and protection of human rights in Africa?
2. What possible arguments can be raised to show the human rights perspective of OAU before the adoption of the 1981 Charter?
3. What are the added values of AU Constitutive Act vis-à-vis the OAU Charter and other preexisting instruments?

2.2. The African Charter on Human and Peoples' Rights (ACHPR)

Introduction

Our aim here will be to describe the movement to promote human rights in Africa, which served as a prelude to the adoption of the African Charter on Human and Peoples' Rights. While it is hard to assert that the efforts deployed in this field were decisive to the emergence of this piece of legislation-certain events playing the role of catalyst in this process-the favourable effects of these events can not be underestimated. The process of awareness set in motion and orchestrated by certain non-governmental organizations, including some African ones, as well as many UN initiatives, in fact contributed substantially to the creation of a favourable climate for nurturing the idea of regulating human rights in Africa. Therefore, from the late 1970s onwards, a number of important events define the OAU move to increased attention to human rights. Encouragement at the UN level for regional human rights mechanisms, NGO lobbying and a recognition by some African leaders themselves that human rights in another state were also their concern led into the adoption by the OAU of the ACHPR. Thus, it is noteworthy to highlight the historical background surrounding the codification and adoption of ACHPR before embarking on the detail examination of its normative contents and institutional mechanisms.

At the end of this section, students are expected to:

- Outline the background and drafting process of the ACHPR.
- Explain the respective role played by NGOs and inter-governmental organizations in the making of ACHPR.
- Identify the distinctive feature of ACHPR vis-à-vis the global and other regional instruments.
- Analyze the various catalogues of substantive rights recognized under the Charter.
- Discuss the propriety of incorporating all generations of rights under a single instrument.
- Identify the limits of obligations assumed by state parties under the Charter.
- Elaborate the essence of people's rights and duties under the Charter.

2.2.1 Historical Background and Drafting Process of ACHPR

Before going to the outlining of the stages of development in the drafting and adoption process of the ACHPR, a brief sketch of the underlying reasons leading to the formation of African human rights mechanisms is a question of priority. Scholars proffer different reasons behind such initiative. According to professor Umozurike, a one time chairman of the African Commission, development on the international plan at that time favoured an idea of an African human rights mechanism. These developments included the Helsinki Final Act of 1975, signed by the Untied States, Canada and thirty Western and Eastern European Countries, which emphasized respect for human rights, and the emphasis placed thereafter by the next United States president, Jimmy Carter, on human rights in the international relations of the United Sates.

The Carter administration used human rights as a criterion for allocating economic aid to third world countries. The attempt to make the allocation of such aid conditional on respect for human rights during the renegotiation of the Lome Agreement should be seen in the same light.

Okoth-Ogendo, on the other hand, contends the decision to establish the mechanism was taken not because there was a juridical void with respect to the promotion and protection of human rights at the continent or domestic level. He listed three reasons for the establishment of the mechanism. First, because the Charter of the OAU affirms commitment to the UN Charter and the Universal Declaration, the ratification by African states of those instruments in addition to other human rights instruments, imposed an obligation for the promotion and protection of human rights. Second, there was no existing machinery at the regional level for institutional coordination, supervision, or implementation of efforts towards the promotion and protection of human rights, despite international commitments to that effect. Thirdly, the need to develop a scheme of human rights, norms and principles founded on the historical tradition and values of African civilizations.

One may inclined to agree with the reasons given by Mr. Okoth-Ogendo, which confirm that there was in deed a juridical void in the promotion and protection of human rights in Africa. However according to another scholar, it was above all a series of events in the continent of

Africa itself which was to lead directly to the decision of African rulers to lay the foundations for regional human rights legislation. The focusing of international public opinion on the , to say the least, singular conduct of some of their colleagues meant that African leaders could no longer remain indifferent as they saw Africa's image in the world being tarnished still further. They were duty-bound to react to the many abuses of human rights, for e.g. in Uganda, Equatorial Guinea, Central African Empire, and so on.

Now the next step will be examining the role of various groups, especially non-governmental organizations (NGOs) and governmental organizations at the stage of preparatory works and the final adoption of the African charter.

- **The Role of Non-governmental organizations**

The Role of Non-governmental organizations, both international and African-based in the initiative of African regional human rights development (for normative as well as institutional set up) was of some immense significance. The first Congress of African Lawyers was held in Lagos, Nigeria, from 3 to 7 January 1961 by the International Commission of Jurists. The Congress was attended by 194 lawyers from 23 African states and 9 states from other continents. The topic chosen for this first event, the "rule of law", was particularly interesting in the transitional phase through which the continent of Africa was then passing to self-rule from long years of colonial domination. The resolution was adopted at the end of the conference-widely known as the "Law of Lagos". The highly significant paragraph 2 of this law states that a government can only maintain adequately the "rule of law": if the legislature genuinely represents the majority of the people. It continues to state another crucial part of the resolution in paragraph 4 as:

> *"That in order to give full effect to the Universal Declaration of Human Rights of 1948, this conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the conclusions of this conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states".*

In another later Conference of Jurists from French-speaking African countries convened in Dakar from 5 to 9 January 1967, the participants adopted the "Dakar Declaration" in which they, inter alia, affirmed:

> *that once the problems resulting from heritage of the colonial era have been isolated, it becomes apparent that the basic requirements of the Rule of Law are not essentially different in Africa from those accepted elsewhere; that the economic, social and cultural difficulties African faces today can not justify the abandonment of the fundamental principles pf the Rule of Law, and that it is the duty of all jurists to make these principles the dynamic concept through which progress is achieved.*

The conference also stressed the independence of the judiciary for the best safeguard of legality and ensuring an equitable balance between the requirements of the public well-being and the rights of the individual. In another seminar held in Dares Salaam (Tanzania) in September 1976 by the International Commission of Jurists on the topic of human rights in one-party states, it was recognized that, under a single- party regime, the limitation of political activity to a single party implies restriction of the freedoms of association and expression.

The year 1978 may be regarded as a pivotal moment in the process of the conceptualization of human rights spearheaded by the African intelligentsia. A more comprehensive approach to human rights emerged. The conclusions of two conferences of African jurists are worth examining in this light.

The former of these was held at Butare (Rwanda) from 3 to 7 July 1978 on human rights and economic development in Francophone Africa. Two of the four topics considered were the relationship between human rights and economic development and the effectiveness and appropriateness of international initiatives for the promotion and protection of human rights. As regards the former, the majority of the participants recognized that the lack of economic resources in many Francophone African countries did not justify lack of respect for civil and political rights and that the guarantee of social and economic rights implies recognition of the right to development as a fundamental human right.

The Dakar Colloquium on Human Rights and Economic Development, held in September 1978, did reach a greater number of conclusions, some of them were more elaborate. The first of these relates to the development. Development was viewed as a right, whose essential content is the need for justice, in the national as well as international context. It was held to be both a collective and an individual right. As a second conclusion, the participants stated that human rights could not be reduced merely to political and civil rights, but also included economic, social and cultural rights. It is the recognition of the indivisibility and interdependence of human rights in Dakar in 1978 that African jurists turned a new corner in no longer being prepared to justify systematic human rights violations by the needs of economic and social development. Therefore, the participants finally recommended that a human rights convention shall be concluded at the pan-African level, that sub-regional human rights institutes should be set up to raise public awareness, and that one or more inter-African human rights commissions should be created composed of independent magistrates responsible for hearing all complaints relating to human rights violations.

What do you think is the role/significance of such NGOs in the process of conceptualization and codification of ACHPR? You may also make a reference to subsequent sections to reflect more, if any!!

- **The Role of Inter-Governmental Organizations (UN & OAU)**

When we talk about the role of governmental organizations in the process of development of African Charter, the contribution of UN and OAU attracts close attention. On the basis of two resolutions (GA Res. 926 (x) 4 ECOSOC Res. 605(XXIL) and the invitation of the Government of Senegal, the United Nations Secretary-General arranged a series of regional seminars in Dakar (Senegal) from 8 to 22 February) 1966 on human rights in the developing countries. The participants proceeded to examine the human rights situation in the developing countries and also to review the institutions and procedures for the promotion and protection and human rights in those countries. However, the emphasis on sovereignty and priority on the setting of the applicable law took away the success of this seminar. In 1967, the Nigerian delegation to the UN Commission on Human Rights initiated the possibility of creating regional commissions for the

protection of human rights where there were none at present. Yet here again a consensus was reached that the regional human rights commissions could only be established on the direct and exclusive initiative of the states in the region concerned and could not be imposed on them from outside. The matter was again raised in Cairo (Egypt) seminar of the commission on Human Rights in 1969. The participants attending the seminar unanimously supported the establishment of an African Commission on Human Rights with mainly promotional mandates. Similar efforts continued in the beginning of 1970s with the involvement of UN and its specialized agencies.

While the initial seminars and debates focus on institutional mechanism for the promotion and protection of human rights in Africa, the later phase of the initiatives in the 1970s stressed the need for the adoption of an African Convention on human rights. To this end, it was stated that the instrument to be set up should not be a mere carbon copy of existing international conventions, but should be flexible and pragmatic and reflect African's peculiar problems, of which economic underdevelopment was the most important. The last part of this sentence of itself summarizes the concerns of African leaders at the time and partly explains the OAU's lack of commitment in this attempt to institutionalize the protection of human rights throughout the continent.

As per the resolution of the UN Commission Human Rights (March 1978) and its approval by the General Assembly (December 1978) on the regional arrangement for the promotion and protection of human rights, a seminar of African leaders took place in Monrovia (Liberia) from 10 to 21 September 1979 and drew up some proposals which were noteworthy for being concrete. The Monrovia Proposal placed emphasis on structural issues than rules, that is, laid the foundations for an African Commission on Human Rights by stipulating its membership, its organization, the applicable standards and, above all, functions.

Therefore, it was on the basis of the above series of efforts that the creation of African human rights regime assumes its last phase of success. These involved two levels of development, according to Ouguergouz- the technical phase in which independent experts played a preponderant role, and the diplomatic phase, in which different categories of government representatives in turn considered the draft convention prepared by experts and finally adopted it.

In the Summit of African leaders which took place at Monrovia in 1979, the leaders declared themselves conscious of the fact that a political regime which protects fundamental human rights is indispensable for mobilizing the creative initiatives of the African peoples for economic development. However, it was the invasion of Ugandan territory by Tanzanian troops which prompted the conference to concern itself seriously with the question of human rights in Africa. More importantly, it was in this resolution (Res. AHG/Doc. 115 (XVI) that the Summit invited the OAU Secretary-General to organize as soon as possible in an African capital a restricted meeting of highly qualified experts to prepare a preliminary draft 'African Charter on Human and Peoples' Rights' providing, inter alia, for the establishment of bodies to promote and protect human and peoples' rights. In some measure, this resolution fixes position of the African leaders regarding the serious events recently experienced in the continent. The meeting requested was convened four months later in Dakar from 28 November to 8 December 1979. Some twenty African experts were invited to attend this meeting, presided over by the Senegalese Judge Keba Mbaye.

The opening address by President Senghor of Senegal merits consideration in as much as it lays down the philosophy which was to guide the experts' work. Having underlined the role played by the principle of sovereignty in the vicissitudes of the continent, he urged the experts to use their imagination and draw inspiration from African traditions, keeping in mind the values of civilization and the real needs of Africa. He then revealed what he meant by this. For him, the right to development deserved a particular place in that it embraces all economic, social and cultural rights as well as civil and political rights. And he unambiguously added that provision should also be made for a system of "duties of individual", in harmony with the rights granted to the individual by the society to which he belongs. In conclusion, he recommended that, if the "Homo africanus" of tomorrow was to be fashioned, then it would again have to be a case of "assimilating without being assimilated" and of borrowing from modernity only that which was compatible with the deep nature of African civilization; in the area of human rights, irresponsibility and immorality should carefully be avoided.

Dear students what do you infer from the statement of one of the then African's prominent leader? What do understand by the phrase "assimilating without being assimilated"?

Accordingly, the group of experts prepared and approved Draft African Charter on Human and Peoples' Rights in the meeting held in Dakar from 23 November to December 1979 keeping the legitimate expectations of African leaders as addressed in their opening meeting.

The diplomatic process was set in motion by a first Ministerial Conference held at Banjul (Banjul I) from 19 to 15 June 1980 to consider the draft Charter adopted by the meeting of independent experts. During this meeting, the government delegates only managed to agree on its preamble and the first eleven Articles. In its second session held in Banjul (Banjul II) from 7 to 19 January 1981, the delegates finally adopted a text consisting of 68 Articles which, apart from certain modifications of style and substance, was the same as the draft prepared by the independent experts. This accelerated work of government delegates was attributable, according to Ouguergouz, to the two events surrounding the meeting: the assassination of the Liberian Leader, Dr. William Tolbert, the then president of OAU and the news of arrest of the delegates from Upper Volta shortly after attending the Banjul meeting.

The draft text was transmitted to the OAU Committee of Ministers, which considered it at its 37th session, held in Nairobi, Kenya, from 10 to 21 June 481. The Ministers were unable to agree on the document as finalized especially on the mandate of the African Commission on Human and Peoples' Rights granted under Article 45 of the Draft Charter. Nevertheless, the document was submitted as it stood to the Summit Conference due to be held a few days later in the same city. It was therefore, in Nairobi, from 24 to 28 June 1981, at the 18th Assembly of OAU Heads of Sate and Government that the final phase of a process begun 20 years earlier was played out. Thirty one African leaders attended the Summit. A the conclusion of its meeting, the Gambian President, Dawda Jawara proposed the adoption of the final version of the African Charter. Then, the Summit with no debate or formal vote on any resolution, adopt the African Charter on Human and Peoples' Rights (ACHPR).

The African Charter on Human and Peoples' Rights, a product of the OAU, has been ratified by all African States and is the premier African human rights instrument. The charter in many ways reflects the norms which underlie international human rights law, but in some respects-notably peoples' rights, the inclusion of socio-economic rights and the emphasis on the recognition of

duties- the Charter is uniquely African. Therefore in what follows, the focus is mainly on the rights guaranteed and some unique features of African Charter.

2.2.2. The Distinctive Feature of the African Charter

Dear students, can you identify the distinguishing feature of ACHPR vis-à-vis the international and other regional human rights systems (both normative and institutional features)?

Our purpose here will be to identify the general characteristics of the African Charter through examination of its content. At the same time, we will assess its originality in light of the international human rights law and more particularly certain universal and regional instruments.

The African Charter according to Davidson differs considerably from other regional counterparts, both in the catalogue of rights protected and in the means of implementation and protection. This is because it was drafted to take account of African culture and legal philosophy, and is specifically directed towards African needs which can be easily observed from the preamble. Ouguergouz, on the other hand, tells us a remarkable resemblance between the African Charter and the Universal Declaration. The preamble to the African Charter reaffirms the pledge of African states to promote international cooperation "having due regard to the Charter of the UN and the UDHR". Both also incorporate the civil and political and that of socio-economic rights in the single instrument. Nonetheless, such approach was not followed in the same line in the subsequent binding UN human rights instruments [ICCPR & ICESCR). Therefore, the first area in which the African Charter differs from others is that not only does the Charter seek to protect individual civil and political rights, it also seeks to promote and protect within the single instrument, economic, social and cultural rights and a category of certain third generation rights. Close scrutiny of the African Charter shows us that both categories of rights are indissociable from one another in both conception and universality [preamble, Para. 7].

The civil and political rights which are protected by Articles 2-15, comprise the traditional range of rights that are included in the ICCPR and the other regional instruments. One particular freedom that represents a particular African concerns is article 12, which prohibits the mass

expulsion of non-nationals and is aimed at national, racial, ethnic or religious groups. This provision was included after the experience of a lot of events of mass expulsions in many African countries in the 1970s. Moreover, the African Charter alone lays down the principle of personal punishment [Art. 7 (2) and the right of all to equal access of all public property and services [Art. 13 (3).

The economic and social rights contained in the Charter also largely reflect the range of such rights in other international instruments. However, there are a number of additions which are worthy of note. The right to education, for example, in article 17, is supplemented by a duty upon the state whose obligation is to promote and protect the 'morals and traditional African values recognized by the community.' Article 18 of the Charter also reflects similar African concerns. Art 18 (3) also contains one of the most comprehensive clauses concerning the prohibition of discrimination against women by providing that 'the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

The African Charter is the only regional human rights instrument to incorporate what are called third generation rights or 'rights of solidarity.' In protecting the right to self-determination, the Charter not only traverses the familiar ground of the UN covenants it also includes rights such as the right to economic, social and cultural development with due regard to their freedom and identify and in equal enjoyment of the common heritage of mankind [Art. 22]. The Charter also includes the right of peoples to national and international peace and security (Art. 23) and to a general satisfactory environment favourable to their development (Art. 24). Clearly, these rights impose obligations on states not only to order their internal affairs in such a way as to preserve to improve environmental factors, but they also require that they pursue particular forms of foreign policy calculated to achieve such and end. Therefore, by devoting six articles to the rights of the people in general, the African Charter thus seems to reflect a very special conception of human rights, according to which "the reality and respect of peoples' rights should necessarily guarantee human rights." We will come back with some more details on the scope and contents of the rights of peoples' under the African Charter.

The African Charter is also known for its incorporation of the concept of individual duties. This concept was first included in the non-binding American Declaration of the Rights and Duties of Man of 1948 and to some extent under article 29 (1) of the UDHR. However, it is only in the African Charter that duties are imposed on individuals as a matter of international legal obligation. This begins with the preambular paragraph 6 which mentions that "the enjoyment of rights and freedoms also implies the performances of duties on the part of everyone. Though open to debates and criticisms, the reason for this is that the African sense of family and community places great emphasis upon the individual's responsibility to both groups. Most of the rights contained in the Charter thus have a correlative duty attached to them.

Another distinguishing feature of the Charter relates to its shortcomings and imperfections vis-à-vis other human rights instruments. It is said that the substantive provisions of the African Charter are equivocally phrased or uses very general terms which may give rise to varying interpretations and avoidance of the obligations under the Charter. Moreover, extensive use is made of 'claw back' clauses that seem to make the enforcement of a right dependent on municipal laws or at the discretion of national authorities. Articles 8-13 all provide for enjoyment of rights within certain limitations such as 'subject to law and order' (Art. 8), 'with in the law' (Art. 9 (2), provided that the individual abides by the law (Art. 10 (1) and Art. 11-13 continue in similar vein. However, the recent interpretation of the African Commission on such limitation clause in a communication against Nigeria (1993-96) is highly innovative in asserting the supremacy of international human rights.

Dear students, how, does the ACHPR grants, more power to national authorities to evade their responsibility or encroach upon the rights protected under the Charter?

Another distinguishing feature of ACHPR is the absence of provisions permitting derogation from (suspension of) the rights protected in exceptional circumstances. Is this event a simple oversight by the authors or a desire to unequivocally stress the fundamental nature of all rights guaranteed? According to one author, it is hard to imagine that the intention of the authors of the African Charter was to deprive the African states of any means of suspending the rights recognized. It would, therefore, have been more prudent to consider placing strict restrictions on

this power and asserting, for example, the non-derogable nature of certain rights considered to be fundamental. The practice of African Commission on the same issue will be considered later on. Last, but not least, when we come to the differences relating to international aspect, the African system is known for long absence of judicial safeguard, that is, unlike other regional systems, there has been no court system to settle disputes between states or to rule on individual grievances of human rights violations. The reason for this, according to one African jurist, is that Africans tend to focus on reconciliation and consensus as a means of setting disputes, rather than upon contentious procedures. One writer (Ouguergouz) adds nearly the same reason in that the promoters of a mechanism for safeguarding human rights and freedoms in Africa were therefore duty bound not to totally ignore the rule of the principle of sovereignty and its direct corollary, the predilection of African States for political settlement of their disputes. Therefore, the preference to African conception of dispute settlement based on negotiation and conciliation rather than an adversarial or confrontational system and the widespread reluctance among OAU member states to subordinate themselves to supranational judicial organ were the reasons for long absence of judicial mechanisms. Nevertheless, the long waited judicial system has recently put in place by an additional protocol to ACHPR which established the African Court of Human and Peoples Rights. This and other issues relating to means of protection under ACHPR will be dealt with in detail under chapter 4.

Exercise

Read closely and carefully the preambles and provisions of the African Charter and then relate to some basic universal and regional human rights instruments! What basic similarities (convergences and divergences) do you observe?

2.2.3. Rights Guaranteed under the Charter

Introduction

In considering the African charter, one's attention is easily captured by its more unusual aspects: the concept of 'peoples' rights' and individual and state 'duties', and the inclusion of all three 'generations' of rights in the same supranational human rights instruments. Nonetheless, it

should also be noted that the African Carter guarantees a number of rights, which must be discussed and interpreted if they would ever mean anything to anybody. The interpretation of these rights would normally be geared towards translating them into practical realities that would serve the purpose they were meant to serve. Therefore, attempt will be made here to touch briefly on some aspects of the rights recognized and guaranteed vis-à-vis the other universal and regional instruments whenever necessary to do so. For convenience, the analysis will be made under different headings representing the different clusters of rights guaranteed in the charter: civil and political rights; economic, social and cultural rights and group or collective rights. However, before embarking on the discussion of specific rights under each categories above, it merits to say something on the obligation assumed by the members states to the Charter and secondly the well known principles of human rights: the principle of non-discrimination and the principle of equality as provided in ACHPR.

2.2.3.1 State Obligations under the ACHPR

Article 1 of the African Charter describes the obligation of states in respect of the rights recognized in the Charter as follows:

> *The member states of the organization of African unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this chapter [chapter I] and shall undertake to adopt legislative or other measures to give effect to them.*

Dear students, from your previous knowledge on general human rights law, can you identify the scope of duties assumed by the state parties to the Charter? Please also make a comparison with two UN covenants of 1966 and the remaining regional instruments!

The primary duty created by the Charter is consequently the obligation placed on state parties to recognize and give effect to the rights in the Charter. The obligation placed on the state by a human rights instruments such as the African Charter is normally considered to have four components, namely to respect, to protect, to promote and to fulfill the rights recognized. First, 'respect' refers to the negative obligation on the state not to interfere with the right itself. Most classical civil and political rights possess such feature though we may have cases of overlapping.

To ‘protect’ refers to the positive duty on the state to ensure that other individuals do not violate one’s rights. Of course, this is the horizontal effect of rights which aims to avoid human rights violations by private persons. For example, in one communication against the government on Chad (1992), the African Commission has held that “if a state neglects to ensure the rights in the Charter, this can constitute a violation, even if the sate or its agents are not the immediate cause of the violation.” Thus, it is an imputed liability for the inaction on the part of the state or its officials.

? Dear students how far is a state expected to protect the right of persons within its territory? Discuss in groups!

‘Promote’ refers to the positive obligation on the state to advance a culture of human rights. Promotional duties are discharged basically through human rights education to create awareness in the general public and thereby fighting anti-human rights attitudes and customs such as against certain groups of persons (minorities, women, children, and disabled). Lastly, to ‘fulfill’ relates to a positive obligation on the state to create an environment in which people actually have access to the social goods. This dimension of the obligation requires active state participation in the realization of the right concerned either by creating favourable conditions for the individuals or groups to realize the right guaranteed by him/her self (role of facilitating) or ultimately by direct provision of certain basic necessities when the individual/group is unable to realize it. Thus, it has a resource or financial implication on the states concerned. Most socio-economic rights are said to demand this aspect of state obligation. Yet, some civil and political rights have manifested in resource implication. A failure by the state to establish an independent and well-functioning court, necessary to ensure a fair trail, would be an example of a breach of this obligation.

? Dear students, can you tell us more illustrations of resource- intensive category of civil and political rights?

Hence, from the above discussion, member states to the African Charter are expected to give recognition and effect to rights stipulated in the Charter. This requires the incorporation of the

African Charter into their domestic legal system by an appropriate constitutional means. They are also expected to take further measures with a view to effectively enforcing and realizing the rights in the Charter. Of course, one unique feature of the Charter is that it does not incorporate the languages of 'immediate application' and 'progressive realization' as figured out in the two UN Covenants. So what do you think is the effect of absence of such terms/phrases? Does it imply that all rights incorporated in the Charter are required to be applied immediately? Or should we interpret in light of the jurisprudences/approaches developed under the two UN Covenants? The former line of interpretation will be unrealistic given the level of economic development and social reality of many African nations. Therefore, what will be plausible is weighing the level of developments and socio-economic situation of a country and corresponding efforts made by the state concerned in the realization of the socio-economic and some civil-political rights with financial/economic implication. As regards those categories of civil and political rights which can be realized by mere forbearance of states, their immediate nature goes unquestionable.

? Dear students, what is the extent of obligation of states in realizing those collective rights under the Charter? Discuss!

2.2.3.2 The Principles of Non-discrimination and Equality

The principles of non-discrimination and equality are very closely linked In fact that the latter may be said to be a positive expression of the former. They are the two fundamental principles of the protection of human rights. In the words of the UN Human Rights Committee, non-discrimination, together with equality before the law and the equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Their fundamental character is also given recognition under the UN Charter (Articles 1 (3), 55 (6) & 76 (c), ICCPR (Art.2 (1), European Convention (Art.14) and American Convention (Art.1).

Similarly, the African Charter does not diverge appreciably from the provisions of the above quoted instruments. Non-discrimination is the first substantive right listed in the Charter, even before life. Both are among the categories/list of rights which must not be restricted.

Article 2 provides:

> *Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or others status.*

As in the case of Article 2 (1) of ICCPR, this is the non-autonomous provision, as it can only be invoked in relation to the implementation of a right protected by the African Charter. However, in Article 3, the Charter adds that "every individual shall be equal before the law" and that "every individual shall be entitled to equal protection of the law." Unlike non-discrimination, the scope of application of equality before and in the law extends to all human rights and ,therefore, goes beyond the strict bounds of those rights guaranteed by the African Charter. Article 2 of the African Charter provides a detailed but not exhaustive list of the prohibited bases of discrimination. The open-ended nature of the list is reinforced by the words 'or other status' at the end of the article. The following grounds are 'for example, not explicitly listed: gender, age, disability and sexual orientation; while the usual ground of 'fortune' (as opposed to 'property' in the ICCPR) is included.

Like the ICCPR, the African Charter does not contain any definition of discrimination which according to some writers such as Christof Heyns reinforced the width of the article. However, as regards a definitional issue, a useful pointer can be made to Article 1 (1) of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. Indeed not every distinction is necessarily discriminatory and equality of treatment is not synonymous with identicality of treatment. During the elaboration of Article 2 of the ICCPR for instance, it was emphasized that the adoption of special measures for the advancement of a particular disadvantaged social groups should not be considered as a form of distinction within the meaning of this provision. The UN Human Rights Committee in its General Comment stated

that not all different treatment necessarily constitutes discrimination if the criterion for such discrimination is reasonable and objective and if the aim is legitimate under the covenant. Thus, in order to redress past wrongs, effect equity and make up for ingrained disabilities, it may be just to apply affirmative action i.e. reverse or positive discrimination in order to confer benefit to persons who justly deserve but would otherwise be denied.

Therefore, the principles of non-discrimination and equality as formulated by the African Charter should also be interpreted in the same way, thus permitting state parties to treat the individuals under their jurisdiction differently, yet not in a discriminatory fashion within the meaning of that instrument. Hence, measures which benefit a particular category of persons traditionally disadvantaged such as women, indigenous and minority peoples, etc should not be regarded as contrary to the principles of non-discrimination and equality proclaimed by articles 2 and 3 of the African Charter. It is the purpose of these measures i.e. establishing true de facto equality which would make them non- discriminatory.

The reference of 'ethnic' criterion is also taken as an interesting addition by the African Charter, which thus takes due account of an important sociological aspect of virtually all African states. Furthermore, it should be noted that the African Charter reinforces the basic prohibition of non-discrimination under Article 2 by additional statements under Articles 18 (3) and 28 of the Charter. Even the interpretation of Article 12 (4) (5) of the Charter by the African Commission in the context of expulsion of foreigners covers the principle of non-discrimination. In these two cases, one involving Zambia and the other Angola, the Commission found that mass expulsion of foreigners without access to the courts constituted a violation, inter alia, of Articles 2 and 12 (4) & (5).

In another case which alleged the expulsion from Rwanda of Burundian nationals who had been refugees in Rwanda for many years, the Commission held that there was "considerable evidence . . . that the violations of the rights of individuals had occurred on the basis of their being Burundian nationals or members of the Tutsi, ethnic group and . . . this clearly violated article. 2. A similar decision was also given in the allegation by a Senegalese non-governmental organization on behalf of 517 nationals of West African countries who had been expelled from

Zambia because of their illegal presence in the territory of that state. None of them had any opportunity to appeal against the decision to expel them [Communication 71/92].

In a more recent decision relating to a number of communications lodged against Mauritania, the Commission pointed out that the elimination of all forms of discrimination was a common objective of Article 2 of African Charter and of the Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities (General Assembly res. 47/135 of 18 December 1992), concluding that:

> *"for a country to subject its own indigenes to discriminatory treatment only because of the colour of their skin is an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and of the letter of its Article 2 [See communications 54/91, 61/91, 98/93, 167/97 to 196/97 210/98]."*

2.2.3.3 The Civil and Political Rights

The African Charter on Human and Peoples' Rights guarantees virtually all the established civil and political rights referred to by Karel Vasak as "the first generation of rights'. Can you distinguish between the concepts of generation of rights' from your knowledge of general human rights course?

Generational classification of rights must not be understood to mean that the earlier generation of rights fall into disuse giving place to a later generation, but that the earlier ones were recognized first, in point of time, before the later ones. The first generation rights are so firmly established and for so long that no serious government can claim to be unwilling or unable to enforce them. They incorporate the primordial rights of man and in the main, require governments to abstain from undue interference with them.

Behind some more exotic features of the African Charter, for instance peoples "rights and individual duties, lie the more 'traditional' civil and political rights which constitute the daily staple of regional, and in deed domestic, human rights mechanisms. It is also important to see that the lion's share of the works of African Commission is devoted to the area of civil and

political rights. This is not because the civil and political rights are more important than socio-economic rights. Rather civil and political rights do lend themselves more easily to supranational enforcement: their content is more clearly defined and demands of their remedies involve less infringement on the cherished concept of state sovereignty than socio-economic or peoples' rights.

Dear students, what is the yardstick to classify rights as civil and political?

It is difficult to draw a hard and fast distinction between these two categories of rights. The only essentially political rights are those which enable an individual to participate in the exercise of political power and to gain access to public office in a country. As a rule these rights are enjoyed solely by nationals. Only the rights set out in the first two paragraphs of Article 13 of the Charter should therefore be included in this category. Other, purely civil rights are, nevertheless, also closely involved in the effective exercise of political rights. These include the rights to freedom of conscience, expression, assembly and association. Hence, a classification of the rights of the individual based on their civil or political nature can but be arbitrary. Therefore, with this caution in mind, we would rather prefer to discuss the scope and nature of specific rights generally recognized and guaranteed under this category. However, you should also be aware that this material will not go to the in depth analysis of the nature and scope of each rights recognized in the Charter for pragmatic reasons.

- **The Right to Life and Integrity of Person (Article 4)**

This is the first substantive right guaranteed in the Charter. Article 4 provides that:

> *Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of is person. No one may be arbitrarily deprived of this right.*

All international instruments emphasize the fundamental nature of the right to life, and its preeminence among other rights. The right to life has been observed to be characterized not only by the fact of being the legal basis of all other rights, but also by forming an integral part of all

human rights that are essential for guaranteeing access for all human beings of all goods, including legal possession of those necessary for the development of their physical, moral and spiritual existence.

According to one writer, the individual's right "to respect of his life" may be considered both as a civil right and an economic and social right. As a civil right, its sole counterpart will be a negative obligation of the states to refrain from any infringement of this or to prevent its possible infringement by a third party (duty of diligence). As an economic and social right, it will, on the contrary, entail a positive obligation of the state to ensure that the individual has an adequate standard of living by providing him, for example, with adequate food and medical care. Legally speaking, the right to life would thus appear to be a hybrid. However, the second aspect of the right can be adequately addressed under Article 16 of the Charter.

As regards the exact content or subject of the right to life, there are some open-ended issues in the ACHPR such as the expression 'human being', 'arbitrary deprivation', and 'derogation' aspect of the right. The African Commission has so far only ruled on the existence of violation of the rights under Article 4 without specifying the content of the right and the issue remains to be open. How the word 'human being' be used specially in determining the beginning and end of human life? The reply to this question has some important consequences for the legislation of such practices as abortion and euthanasia. Article 4 of the American Convention on Human Rights clearly guarantees the right to life "in general from the moment of conception." So the position of African Charter seems not embark on this thorny topic and to leave the task of setting such matters to national legislation.

Article 4 is also some how different from the other instruments as regards its formulation of the permissible infringements of this right. It does not mention some exceptions to the right to life as capital punishment for serious crimes except the prohibition of arbitrary deprivation of the right. The Charter does not also define what constitutes arbitrary taking of life, neither has the commission yet given such definition. Does it refer to illegality, illegitimacy, injustice or inequity, unreasonableness, rule of law, due process of law or else? Therefore, it will be the task

of the commission to clarify the limits of such terms of the Charter. One writer summarizes the prevailing international norm as:

> *It appears that the general understanding of arbitrary deprivation of life is extra-judicial killing which is well established in international law. The general consensus in the interpretation of the right to life in human rights instruments is that it is not derogable, except in certain circumstances judicially recognized or resulting from lawful acts of war or self-defense.*

Therefore, though not mentioned in the African Charter, the right to life is not an absolute right given the internationally recognized norms on the interpretation of the right.

The African Commission has ruled on in a number of cases on the violation of the right concerned. It was in relation to three communications lodged in 1991 and 1992 against Malawi that for the first time, the African Commission concluded that there had been a violation of that right by a state party to the Charter. One of the communications alleged among other things that peacefully striking workers had been shot and killed by the police. The commission held that violation of Article 4 occurred when 'peacefully striking workers were shot and killed by the police.'

In the communication lodged against Chad (1992), the Commission held that "The African Charter specifies in Article 1 that the state parties shall not only recognize the rights, duties and freedoms adopted by the Charter, but they should also 'undertake . . . measures to give effect to them'. In other words, if a state neglects to ensure the rights in the Charter, this can constitute a violation even if the state or its agents are not the immediate cause of the violation. Thus, the Commission held that the actions could still be imputed to the state, it being responsible for ensuring the protection of the rights of those in its territory. Chad is, therefore, responsible for the violations of Article 4 for several accounts of killings and also disappearances which the government did not attempt to prevent or investigate afterwards.

This decision of the Commission is interesting. It recognizes the theory of Drittwirkung der Grundreht developed by German lawyers, according to which a state party to an instrument for

the protection of human rights is responsible not only for violations of rights committed by its agents, but also for those committed by individuals (natural or judicial persons).

It was also in the tragic massacre/genocide of the Rwandans that the Commission found serious violation of Article 4. In its recent decision in the well known Ogoni case and its leaders including Ken Saro-Wiwa, the Commission held that there had been a violation of Article 4 of the African Charter by a state party (Nigeria) in relation to four communications alleging a number of violations to the detriment of two persons sentenced to death and eventually executed by the Respondent State despite the fact that the Commission had indicated provisional measures. Here is some important part of the Commission's reasoning:

> *"Given that the trial which ordered the executions itself violates Article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of Article 4. The violation is compounded by the fact that there were pending communications before the Commission at the time of executions, and that the commission has requested the government to avoid causing any 'irreparable prejudice' to the subjects of the communications before the Commission had concluded its consideration. It is a matter of deep regret that this had not happened. The protection of the right to life in Article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victims lives was seriously endangered by the denial of medication during detention. Thus there are multiple violations of Article 4."*

In another recent decision (May 2000) against Sudan, the commission held that "denying people food and medical attention, burning them in sand and subjecting them to torture to the point of death point to a shocking lack of respect for life [and]… constitutes a violation of Article 4."

Another important initiative of the African Commission regarding the right to life was the adoption of resolution in which it, inter alia, urged all states.

> *that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure the persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African charter.*

and called upon all state parties

> *"that still maintain the death penalty to: a) limit the imposition of the death penalty only to the most serious crimes; b) consider establishing a moratorium on executions of death penalty; c) reflect on the possibility of abolishing the death penalty.*

When we come to the right to integrity of the person (both physical and moral), it is also given protection together with the right to life under single provision, article 4.The right of every individual to physical integrity is generally interpreted as a right to the protection of the body from any violation not freely consented to, such as the removal of an organ from a living person or a mutilation as punishment. The recognition of this right is of particular importance in the African context given the prevalence of certain traditional practices such as clitoridectomy, excision or infibulations. These three types of female circumcision involve a painful procedure with sometimes grave, if not fatal, physiological and psychological consequences for the infant or adolescent undergoing it. Thus it constitutes the violation of physical integrity protected under Article 4.

There may be an apparent contradiction between this individual right and the practice of female circumcision as part of the tradition of African peoples as falling under Articles 20 (1), 22 & 18 (2) which makes it an obligation of the state to assist the family as the custodian of the traditional values recognized by the community. However, such conflict should be resolved in favour of protecting individual rights. This is what can be observed from the widespread practices, policies and laws of different African countries prohibiting such harmful practices. Article 61 of African Charter also refers to African practices consistent with international norms on human and peoples' rights. Indeed, Article 21 (1) of the African Charter on the Rights and welfare of the Child shows firm stand of African states against harmful social and cultural practices. The same position is also held under the Protocol on the Rights of Women in Africa (Art. 5). Nonetheless, the challenge is the persistence of such practice in certain far from negligible parts of the African continent including Ethiopia.

- **The Right to Dignity and Prohibition of Torture and Inhuman Treatment/ punishment (Art. 5)**

Article 5 provides:

> *Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, in human or degrading punishment and treatment shall be prohibited.*

Dear students can you go through this provision and identify those basic protections guaranteed? This provision essentially protects dignity- the only right in the African Charter described as 'inherent in a human being'- and then lists certain examples of exploitative practices which would constitute violations of this right. Guaranteeing the right of every individual to the respect of the dignity is an expression of the fundamental idea on which the concept of human rights is based. The expression of such guarantee which is now self-evident carries high significance in a continent which experienced colonization and slavery, the later still a reality in certain regions.

The individual's right to recognition of his legal status may be considered as the first expression of his dignity, legally recognized as a subject-not as an object- of rights and obligations.

The second part of Article 5 prohibits in general all forms of exploitation and degradation of the individual. The list of prescribed forms of treatment is not exhaustive. The usual reference to 'forced or compulsory labour' is not included. Forced labour, like servitude, is akin to the exploitation of man and falls under this prohibition. Moreover, this provision should also be understood in light of ILO convention No. 105 on the Abolition of Forced Labour adopted on 25 June 1957 to which a significant number of African states have acceded. It should also be read in conjunction with Article 29 (2, 4 and 6) of the African Charter which lays down the individual's duty to serve his national community, to strengthen social and national solidarity and to work to the best of his abilities.

As regards physical or moral torture and cruel, in human or degrading treatments, they are expressly prohibited by the African Charter. Like the other general human rights instruments, the Charter does not define them, the reason usually being the difficulty of defining them certainly. Amnesty International provides the following on the point of difficulty of defining torture:

> *There is a good reason why the concept of torture resists precise and scientific definition; it describes human behaviour and each human being is unique, with his own pain threshold, his own psychological make up, his own cultural conditioning. Furthermore, torture is a concept involving degree on a continuum ranging from discomfort to ill treatment, to unbearable pain and death, and a definition must resort in part to qualitative terms which are both relative and subjective.*

Still, we can seek for some assistance from the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (Art.1 (1)). The African system can also take some inspiration from the jurisprudence of European Court of Human Rights.

The African Commission has found the violation of Article 5 from a number of communications against member states. Certain aspects of imprisonment have constituted violations of Article 5 such as overcrowding, beatings, torture, excessive solitary confinement, shacking within a cell, extremely poor quality of food and denial of access to adequate medical care. In another case the Commission held that article 5 prohibits not only torture, but also cruel, in human or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his/her will or conscience. Nonetheless, in none of the above findings, the Commission did attempt to give meaning to those crucial terms used under Article 5. Therefore, it yet remains for the commission and now the newly established court to articulate as to what amounts to torture, cruel, in human and degrading punishments or treatment. There is nothing wrong to take lesson from the experiences of the other regional systems on the same topic from the point of view of universality of human rights.

- **The Right to Liberty and Security of Person (Art. 6)**

Under Article 6 of the African Charter "every person shall have the right to liberty and to the security of his person. No one may be deprived of his freedom, except for reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested and detained."

The right to liberty and security of the person implies physical liberty of the individual in the society in terms of prohibiting unnecessary arrests and detention. In other words, no one should be dispossessed of his or her liberty in an arbitrary fashion. To the extent that infringements are justified, they may also be done only in terms of legal rules established in advance. Therefore, this provision requires the two conditions for limiting the right: the requirements of legality and absence of arbitrariness. This manner of understanding, which is also recognized under Article 9 of the ICCPR, limits the extensive application of the claw back clause under Article 6 of African Charter. However, unlike Article 9 (sub articles 2 to 5) of the ICCPR, Article 6 of ACHPR does not make it clear what the rights of the person arrested or detained are, and does not provide for any right to reparation in the event of illegal arrest or detention. Neither does it regulate the conditions of detention nor prohibit imprisonment for failure to perform a contractual obligation. Hence, once again there is a need to refer to international human rights standards as to the level of procedural guarantees of detained or arrested person.

The African Commission has, though suffers from particular reasoned argument, ruled on the violation of Article 6. In one of its decision, it indicated that a detention without any charge being brought was to be regarded as arbitrary. In a communication against Nigeria alleging a number of violations by the Government of Nigeria, the Commission held that ' a decree that allows the government to arbitrarily hold persons critical to the government for up to three months without bringing them before the court violates the right protected in Article 6.' By this decision, the Commission indicated that a 'lawful measure, or taken under a law, can, nevertheless, prove to be 'arbitrary' by virtue of its content. When considering the length of detention without trial, the Commission held that 'three years' detention without trial or even three months may be sufficient to violate Article 6. Similarly holding individuals indefinitely will also breach the article.

- **The Right of Fair Trial [Article 7] 426**

Article 7 of the African Charter provides that:

1) *Every individual shall have the right to have his caused heard. This comprises:*
    a) *The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.*
    b) *The right to be presumed innocent until proved guilty by a competent court or tribunal;*
    c) *The right to defense, including the right to be defended by counsel of his choice;*
    d) *The right to be tried within a reasonable time by an impartial court or tribunal.*
    e) *No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committees. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.*

Dear students what are the basic guarantees you infer from the above provision? What is also its inadequacy in light of some international instruments (ICCPR)? Compare also with Article 26 of African charter!

The concept of the right to fair trial is inevitably bound up with the concept of justice. It is also a fundamental right which guarantees the judicial protection of rights. It has also some link to the concept of rule of law. According to European Court of Human Rights 'it is the only human rights whose effective respect is itself a condition for effective monitoring of the implementation of all the other rights established by international instruments concerned.'

The right to fair trial consists, as envisaged under Article 7 (a) of ACHPR, first and foremost, of the right of all individuals to appeal to competent national courts or tribunals. An important issue here is the actual meaning of the world 'appeal'. Does it guarantee a right of appeal to a superior court from the decisions of lower courts or tribunals or merely the right to simply seek a judicial remedy at a first instance? The nature of the right and decisions/practices of the Commission is

inclusive of both rights. Please read a lot of communications lodged against Nigeria alleging the violation of this right in the 1990s!

Article 7 (1) (b) lays down the right to be presumed innocent until proved guilty . . . Presumption of innocence as an aspect of the right to fair trial is a concept applicable only in criminal proceedings. It means that the general burden of proof must lie with the prosecution, or in terms more appropriate for civil law system, that the court, in its inquiry into the facts, must find for the accused in case of a doubt. Nonetheless, the practice in most African countries, according to Nmehielle, contradicts the concept culminating in the reverse principle whereby it becomes the burden of the accused persons to prove their innocence. The Charter also requires that the guilt of the accused be determined by a competent court or tribunal. Though not yet determined in the jurisprudence of the Commission, 'competent court' means one in which the judges must be duly qualified, meeting all the natural and legal qualifications; and one, which is adequate, suitable and capable of administering law. The reasoning is that the court must be independent and impartial, as well as separate from the other branches of government.

Article 7(1) (c) recognizes the right to defense, including the right to choose a counsel of his choice.' The purpose of the guarantee of the right to representation is to ensure that proceedings against an accused person will not be taken place without adequate representation of the case for the defense. In addition, it ensures the equality of arms between the accused and the prosecution. The problem here is that the Charter does not make any provision in terms of state-provided legal assistance which is one of the avenues through which indigent persons can have access to legal representation. What do you think would be the reason for this and how it would be remedied?

Article 7 (1) (d) guarantees the right of a person to be tried within a 'reasonable time'. The purpose here is to protect all parties to court proceedings against excessive delays. As can be seen from the experience of other regions, the guarantee underlines the importance of rendering justice without delays, which might jeopardize its effectiveness and credibility. The reasonableness of the length of time of the proceedings both in criminal and civil cases depends on the particular circumstances of the case. There is no absolute time limit. Factors that are always taken into account are the complexities of the case, conduct of the applicant and the

conduct of the competent administrative and judicial authorities. From the decisions of the Commission, this impartiality under Article 7 (1) (d) is in close relationship with independence. Thus, a court or a tribunal must be independent of the executive and also of the parties to the case.

Finally, Article 7 (2) prohibits ex-post facto laws, and also makes provision against retroactive punishments. It further outlaws transferred punishment to any other person who is not the offender. Such prohibitions are clearly important in ensuring due process in criminal proceedings. The second arm of Article 7 (2) dealing with the personal nature of punishment is very relevant to the situations in Africa which is known for its customary rule of collective liability. Thus, it will go a long way to address the victimization of the relatives (immediate or extended) of alleged offenders if the later cannot be reached.

Here something to be raised in relation to the right to fair trial under the Africa Charter is that unlike other human rights instruments, the Charter fails to guarantee some other pertinent aspects of that right. For instance, the Charter does not make any provision regarding the right to public hearing (or in camera as the case may be) or the public pronouncement of the judgment. One writer notes the danger of this in that 'dictatorial African governments are not unknown to establish secrete courts or tribunals, which conduct secret proceedings and pass secret judgments, the outcomes of which are usually predetermined'. In addition, the Charter does not make any provision on the right of an accused person to be assisted by an interpreter. This right may be very relevant in Africa where majority of the peoples are indigenous with languages different from the official language of many African states. Furthermore, the African Charter does not guarantee the right against self-incrimination, or freedom from double jeopardy, nor the right to compensation in violation of the right to fair trial or miscarriage of justice.

Being aware of the deficiencies of the Charter, the African Commission adopted a Resolution on the Right to Fair Trial on March 1992. The resolution goes beyond Article 7 of the Carter to provide for the guarantee of the right to legal aid for indigent persons, the right to assistance of a free interpreter, and the right to appeal to a higher court. Once again the resolution did not include the right to compensation for miscarriage of justice, freedom from double jeopardy and

the right against self-incrimination. Therefore, on such and other areas of insufficiencies, it will be responsibility of the African Commission to apply international standards via the power vested in it under Articles 60 and 61 of the charter.

Dear students, having the above discussion in mind, would you refer to some of the case laws of the commission as to the how the right is being implemented?

- **Freedom of Conscience and Religion [Article 8]**

Article 8 previous as follows:

> *Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of those freedoms.*

Dear students, read Article 18 of the ICCPR and compare with the above African Charter provision.

Unlike Article 18 of ICCPR, Article 8 of the African Charter does not expressly recognize freedom of thought. It is stated that thought is to some extent a process, whereas conscience or opinion, is the result of this process. There are two approaches on the protection of thought. The first line of approach is that freedom of thought does not need to be protected and that it is only when thought is expressed that such protection is necessary (downstream protection). This is ensured under Article 9 of the African Charter. The second approach asserts that freedom of thought needs to be protected for itself (upstream protection) quite apart from the question of its possible subsequent expression. To permit the free operation of thought process means authorizing the free expression of thought. Freedom of expression is thus the corollary of freedom of thought; the two freedoms are inherently indissociable as the effective enjoyment of them is the fruit of the dialectical relationship between them.

Therefore, the right of freedom of conscience includes freedom of thought. It generally means the right to hold a belief. This belief may be religious or otherwise. The essence of the freedom

of conscience is to enable an individual to hold a thought or belief that is independent of a state's or other entity's control per se.

Although Article 8 formally guarantees the right to freedom of conscience and religion, it does not specify what is meant by the profession and free exercise of religion. Article 18 of the ICCPR is quite exhaustive on this point as it sets the possibility for the individual" either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." It also recognizes the liberty of parents to ensure the religious and moral education of their children in this field in conformity with their own convictions. Freedom to profess and practice one's religion could include freedom to maintain or change one's religion or beliefs.

The last point relates to the scope of the freedom laid down under ACHPR. The freedoms of religion and conscience may only be subject to limitations when they are envisaged in their external dimension; in their internal dimension, on the other hand, they would appear to be guaranteed absolutely. Thus, their limitation will be made based on law and order. Though this forms part of the 'claw back clause', it seems to balance between freedom to profess and practice one's religion on the one hand, and the protection of individuals or society from religious or pseudo-religious practices. The African Commission has not yet passed any ruling on the content of the law as embodied by Article 8 except few declarations of the violations of the right. In its decision concerning communication 56/91c alleging the persecution of the Jehovah's witnesses by the Government of Zaire (arbitrary arrests, appropriation of church property, and exclusion from access to education), it merely stated that such harassment constitutes a violation of Article 8. In dealing with a case against Sudan, the Commission has held that freedom of religion- in that case, freedom to apply Sharia law has to be exercised in away that does not violate the equal protection of the laws. Sharia trials may not be imposed, and everyone should have the right to be tired by a secular court if they wish.

In virtually all the cases actually decided, the Commission failed to define what constitutes violation of conscience, or of the right to freely profess and practice one's religion.

- **The Right to Information and Freedom of Expression (Art. 9)**

Dear students, what do you understand by the right to information and freedom of expression'? What importance is attached to these rights and freedoms? Please read Article 19 of ICCPR and Article 9 of ACHPR and then make a comparison!

Article 9 of ACHPR provides that "every individual shall the right to information. Every person shall have the right to express and disseminate his opinions within the law". Unlike the ICCPR provision, Article 9 of African Charter is drafted in general terms which misses some detail formulation of the right. The right of freedom of expression, while not above any other right by degree, has been identified as forming an essential basis for the existence and functioning of a healthy democracy in any society. The statement of the Inter-American Court of Human Rights in the Compulsory Membership Case on this right is persuasive. According to the court:

> *Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion . . . It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed . . . consequently, it can be said that a society that is not well informed is not a society that is truly free.*

In one communication alleging the violation of this right by Nigeria, the African Commission stated:

> Freedom of expression is a basic human rights, vital to an individual's personal development and political consciousness, and participation in the conduct of public affairs in his country. Under the African Charter, this right comprises the right to receive information and express opinion.

The right to be given detailed references under Article 19 of ICCPR, namely, the freedomsd "to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

Therefore, effective application of Article 9 of ACHPR needs its correlation to the more elaborate universal instrument.

The other area of vagueness of Article 9 is the clause limiting the right, which only appears to apply to the individual's freedom to express and disseminate his opinions, thus rendering ones right to receive information absolute. Nonetheless, this can not be logical interpretation as the right to information could be subject to limitation. The close correlation between freedom of expression and freedom of information points to the conclusion that the limitation laid down in Art.9 (2) logically applies to the whole Article.

Thus, the rights must be exercised 'within the law.' There is no further qualification in such limitation unlike the ICCPR (Art.19 (3)).

In this respect, the Commission invoked Article 27 of the Charter in support of its strict interpretation of the rights limitation clauses. In its view:

> *The only legitimate reasons for limitation to the rights and freedoms of the African Charter are found in Article 27 (2), that is, the rights of the Charter shall be exercised with due regard to the rights of others, collective security, morality and common interest.*

Moreover, the African Commission found the violation of Article 9 of the Charter in a number of communications against Nigerian Military government- imprisonment of journalist, proscription of publication and confiscation of newspapers.

In relation to Article 9 (2), the Commission said:

> *According to Article 9 (2) of the Charter, dissemination of opinions may be restricted by law. This does not, however, mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level; this would make the protection of the right to express ones opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.*

The outline of the above and some other case-law of African Commission reveals that the Commission has sought to denounce all unwarranted violations of freedom of expression and freedom of the press in particular which without any doubt are crucial vehicles for the promotion and protection of human rights in African continent.

- **Freedom of Association and Assembly [Articles 10 & 11].**

Dear students, is there any rationale to discuss these two rights under the same heading?

Freedom of association and freedom of assembly are twin rights that are separately guaranteed by the African Charter. The nature of these rights make them interrelated. They share the objective of allowing individuals to come together for the expression and protection of their common interests.

Article 10 provides "every person shall have the right to freely form associations with others provided he/she abides by the law. No one may be compelled to join an association, subject to an obligation of solidarity provided for in Article 29".

Freedom of association involves the freedom of individuals to come together for the protection of their interests by forming a collective entity which represents them. These interests my be of political, economic, religious, social, cultural, professional or labour union nature.

Article 10 recognizes the two inseparable aspects of the same freedom, that is, the right to free association and the freedom not to join an association. But the right against forced association is made to be supplemented by obligations of solidarity under Article 29. Does this relate to all grounds under article 29 or to the concept of social and national solidarity which uses the same term? C. Heyns argues that article 10 (2) refers to Article 29 (4), in view of the explicit use of the word 'solidarity' in Articles 10 (2) and 29 (4) and the fact that reference is made to the 'obligation of solidarity' in the singular form in Article 10 (2). Do you agree with this line of interpretation?

Finally, the scope of the individual's right to free association is guaranteed "provided that he abides by the law".

Dear students what will be the test of such restrictive law? Make a reference to the formulation under Article 22 (2) of ICCPR? Again read the 1948 ILO Convention concerning Freedoms of Association and Protection of the Right to Organize (Conv. No. 87/48).

Nonetheless, it remains for the African Commission to clarify the content of the right under Article 10: working definition of association, whether this right includes professional associations and trade unions.

As has been observed, the right to freedom of assembly complements the right to freedom of association. Freedom of assembly, however, goes beyond the meeting of formal associations, and includes individuals associating to assemble in their right as individuals. Freedom of assembly envisages holding of public meetings, mounting of demonstrations through marches, picketing and processions. One limitation that is of international acceptance is that the assembly must be peaceful. The other grounds of limitation are expressly stated under Article 11 'which are to be determined by law.' But the question remaining open is how far such laws will restrict the exercise of this right (issue of manner, time, and place)?

- **Other Rights**

Dear students, you are now invited to read those remaining rights of civil and political nature under the ACHPR and compare their substantive content with the ICCPR and other regional human rights documents. These rights include: freedom of movement and allied rights (article 12), the right to political participation (article 13), right to property (article 14), and other family rights (article18).

2.2.3.4 The Economic, Social and Cultural Rights

Dear students what do you think is the unique feature of ACHPR in the area of ESC rights?

Unlike other international and regional human rights instruments, the African Charter spearheaded the holistic approach to human rights by including civil and political rights and economic, social cultural rights in a single human rights document. In addition, the preamble to the Charter clearly demonstrates stipulating that it was essential to pay particular attention to the right to development, and civil and political rights can not be dissociated from economic, social and cultural rights. In fact, the Charter sees the satisfaction of economic, social and cultural rights as constituting the guarantee of civil and political rights (preamble, Para. 7). However, unlike other instruments, the Charter contains no express guarantees of the right to social security, food, adequate standard of living or housing, or prohibition of forced labour.

Dear students, what is the status of implementation of socio-economic and cultural rights? Read Article 2!

- **The Right to work in Equitable and Satisfactory Conditions (Articles 15)**

Article 15 provides: Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work. Read Articles 6-9 of ICCPR! What shortcomings you notice in the African Charter? As you can see from this provision, African Charter leaves out a lot of guarantees and details adequately set out under ICCPR.

Article 15 of the African Charter does not per se task state parties to provide work for every person. It rather presumes a situation where there is or will be work to do, and lays down obligations of state parties in such situations. On the other hand, it obligates states to adopt measures and programs that will not only lead to job creation, but also ensure a conducive work environment. Though not expressly stated in the Charter the concept of right to work under equitable and satisfactory conditions generally implies fair and equal wages, the right to promotion where appropriate, the right to follow one's vocation and to change employment,

reasonable work hours, right to paid vacation (leisure and rest) and the likes. The interpretation of Article 15 should necessarily include these guarantees internationally recognized. Do you agree?

The other deficiency in the Charter is the non-recognition of trade union rights as relating to the right to work. So what will be the place of this right? Can we say that it can be invoked under the freedom of association and assembly provisions? The African Commission has elaborated in one of its Guidelines for the Submission of State Reports (1988). Under the Guidelines, "states are obliged to provide information on laws, regulations and court decisions that are designated to promote, regulate or safeguard trade union rights . . . of course, the relevance of ILO Conventions in this area should also be considered.

The African Commission has had few instances to rule on the right under consideration. In its decision on a communication alleging violations of the Charter by Angola on the occasion of the expulsion of nationals of western African countries, the commission stated, that this type of expulsion "calls into question a whole series of rights recognized and guaranteed in the Charter, such as the right [. . .] to work". In another case concerning the imprisonment of one Cameroon's magistrate and the refusal of reinstatement after being released, the Commission found violation of article 15. Because, it had prevented him from working as a magistrate even though others condemned in similar circumstances had been reinstated.

- **The Right to Health (Article 16)**

Article 16 of ACHPR on the right to health states:

> *(1) Every person shall have the right to enjoy the best attainable state of physical and mental health, and*
>
> *(2) States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.*

According to the above provision, what is the right recognized and the undertaking assumed by the states (obligation of means or result)? Compare with Article 12 of ICESCR!

Expecting any state to directly provide for the medical cost of every person within its territory would be unimaginable even if that state enjoys a rich economy. The provisions of Article 16 speak to health care rather than health as a concept of well-being of every individual. A state can not guarantee the physical and mental well-being of every individual. But a state can and should provide a conducive atmosphere that would enhance the enjoyment of good health care than undermine it. States must adopt measures in the field or primary health care and a comprehensive program of universal immunization against infectious diseases plus the prevention and treatment of endemic, occupational and other diseases. Article 12 (2) of ICESCR, would be a good guideline for the precise objectives to the measures the state must take. In addition, states have to undertake educational programs on the prevention and treatment of health problems.

However, the approach of the African Commission to the right to health is violation-oriented, that is with out inquiry into claim of financial inability. On allegations of mismanagement of public finances and the failure of the government of Zaire to provide basic services and shortage of medicines, the Commission found that "the failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicines" constitutes a violation of Article 16 [communication 100/93]. The Commission also found Nigeria in violating the right when it prevented detainees under its custody access to medical care [Com. 152/96].

- **The Right to Education [Article 17]**

Article 17 of the African Charter states:

> *(1) Ever individual shall have the right to education*
>
> *(2) Every individual may freely take part in the cultural life of his community.*
>
> (3) *The promotion and protection and protection of moral sand traditional values recognized by the community shall be the duty of the state*.

What do you get from the above provision? Is the right to education adequately addressed under African Charter compared to Articles 13, 14 and 15 of the ICESCR?

The right to education has become of great importance in international human rights law to proponents of both generations of rights. Under European Convention, it is treated as a civil and political right [Article 2, First Protocol to the European Convention]. Under the Inter-American Human Rights mechanism, it is one of the economic, social and cultural rights treated as hybrid rights, which are subject to the individual complaint procedure contained in Article 44 of the American Convention [Article 13 of Protocol of San Salvador).

ICESCR and other regional instruments contain elaborate provisions on the extent of the right to education. Article 17 of the African Charter lacks specificity on the contents of the rights such as compulsory nature of primary education, freedom of choice of parents, freedom to establish private educational institutions, protection of intellectual property and so on. The African Commission has identified some contents of the rights in its Guidelines for the Submission of State Reports. The Guidelines show that the right to education comprises the right to primary education, the right to secondary education, the right to *po*st-secondary education, the right to fundamental education, the right to choice of schools, and the principle of free and compulsory education for all. However, still the contents of the above enumerated rights need to be understood in light of universally accepted standards such as under ICESCR. Nmehielle says that the African Commission will have to consider still such broader issues in the right to education as the right to receive education, the right to choice of education and the right to teach. The right to choice of education includes the right that allows parents to make inputs to the kind of education they think is best for their children. Thus, it will be through the choice of education that one may freely take part in the cultural life of his or her community, with a view to promote and protect the moral and traditional values recognized by the community.

The right to teach raises some questions as: Is a teacher limited to a set-out curriculum? To what extent can a teacher go outside the prescribed curriculum to impart knowledge? These questions bring out issues of freedom of expression, freedom of conscience, academic freedom, and to a relative extent, the right to work. Teachers may not go outside or below the prescribed standards,

but there should be enough flexibility to allow them to use their expertise to the maximum benefit of the students. The right to education under the Charter should be read to include the freedom of individuals and entitles to establish and direct educational institutions in accordance with the provisions of national legislation on education that establish minimum curricular requirements and other standards.

Oguergouz criticizes article 17 of African Charter in that it does not impose a precise obligation on the state i.e. the individuals have no any claim against the state. Do you agree with him? When we come to the case law, the African Commission ruled, in the communication against Zaire, that the closures of universities and secondary schools constituted a violation of Article 17. It also reached at similar finding in the mass expulsion of nationals of western Africa by the Angolan Government. From a number of communications against Mauritania, the Commission in one case stressed the importance of linguistic freedom in the following terms:

> *Language is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and its activities. To deprive a man of such participation amounts to depriving him of his identity.*

- **Protection of the Family and Other Vulnerable Groups (Arts.18)**

What do you think is the distinguishing feature and drawbacks, if any, of this article?

Article 18 of the African Charter uniquely guarantees protection for five different subjects: the family, women, the child, the aged and the disabled. Thus, the provision covers the broader concept of family and those vulnerable groups. This feature of the Charter also contrasts to Articles 10 and 11 of ICESCR and 23 and 24 of ICCPR.

Article 18 (1) & (2), while underscoring the importance of the family as the basic unit of the society, place obligations on state parties not only to protect it and take care of its physical and moral health, but also to assist family members in fulfilling their duties. In addition to the obligations and duty of state to the family, Article 27 (1) and 29 (1) recognize individual duties

to the family. Nevertheless, the Charter does not specify exactly what this state duty consists of in order to protect and assist the family [For your comparison see Art. 11 of ICESCR). In affording protection to the family, the state must not only create a legislative framework which will allow the family to develop to its maximum potential, but must also work actively to create societal conditions in which families might flourish. Dear students, can you refer to article 15 of the Additional Protocol to the American Convention on Human Rights, for itemized matters of state obligation vis-à-vis family?

One last point, but not least, to be mentioned in relation to rights of family is that the Charter does not contain any provision on the right of every person to marry or establish family.

Third paragraph of Article 18 obligates states to ensure the elimination of every form of discrimination against women and to also ensure the protection of the rights of women and child as stipulated in international declarations and conventions. There are some criticisms that the African Charter grants inadequate protection to the rights of women by inserting one subparagraph under the family provision. Of course, this was anomalous given that it is the continent hosting widespread violation of women's' rights from different angles and by different causes. But some say that the Charter has provided wide coverage by making a cross-reference to international declarations and conventions. Articles 60 and 61 of the Charter have also legitimatized resort by way of interpretation. Whatever, the arguments may be, African states have expressed their serious commitment by adopting a separate Protocol to ACHPR on the Rights of women in Africa. We will briefly address OAU/AU initiative in the protection of women's' rights in the upcoming unit.

The second part of Article 18 (3) ensures the protection of the rights of the child as stipulated in international declarations and conventions. Similarly the protection of the rights of the child is made to be pursuant to instruments outside the African Charter. These may include: UN Declarations on the Right to Child (1959), UDHR (Art. 16), ICCPR, ICESCR, CRC (1989), OAU Charter on the Rights and welfare of the Child (1990), ILO Conventions and so on. We will discuss some of the basics of child rights instruments in the next chapter.

Article 18 (4) of the Charter stipulates that the aged and the disabled shall have the right to special measures of protection in keeping with their physical or moral condition. This is a very sensitive area of human rights, especially in African where disabled persons for instance, have not been known to be given adequate protection against discrimination, nor opportunities and measures that take their situation into consideration.

Coming to the few case laws of the African Commission (esp. on family), in the aforementioned case of deportation by the Angolan Government, the Commission stressed that "by deporting the victims, thus, separating some of them from their families, the Defendant state has violated and violates the letter of this text [Article 18 (1)].

In connection with another communication alleging, among other things, the illegality of the expulsion by the Zambian Government of two political figures, William Steven Banda and John Luson Chinula, the Commission held that:

> *by forcing Banda and Chinula to live a stateless persons under degrading conditions, the government of Zambia has deprived them of their family and is depriving their families of the men's support, and this constitutes a violation of the dignity of a human being, thereby violating Article 5 and Article 18 (1) (2).*

Economic, Social and Cultural Rights

Poverty poses major threats to human rights in Africa. Not surprisingly; socio-economic rights play a central role in current discussion about human rights in Africa.

Dear students, would you go through the following extract to understand more the importance of ESC rights in the discourse of human rights in Africa?

AGBAKWA, SC 'RECLAIMING HUMANITY: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS AS THE CORNERSTONE OF AFRICAN HUMAN RIGHTS' (2002)
5 Yale Human Rights and Development Law Journal 177

A point very often missed in human rights praxis is that economic, social and cultural rights (ESC) 'are the only means of self-defense for millions of impoverished and marginalized individuals and groups all over the world'. Despite the international rhetoric on the equal relevance, interdependence, and indivisibility of all human rights, in practice states have paid less attention to the enforcement and implementation of ESC, and their attendant impact on the quality of life and human dignity of the citizenry, than other rights. African states, still living with the nightmares of slavery and colonial exploitation, are perhaps unsurpassed in this dreamy, rhetorical exercise.

African states ought to take the lead in enforcement of ESCR, given African's deplorable socio-economic conditions. They ought not to emulate the industrialized states of the North which can afford the luxury of hollow rhetoric in the implementation of ESCR. Regrettably, African states have so far failed to match their words with appropriate, sufficient action. Where African leaders have asserted the importance of satisfying ESCR as part of protecting other rights, some have done so with the intention of using this rhetoric as a ploy to suppress civil and political rights.
Africa's worsening socio-economic conditions, and resulting exacerbation of civil and political strife coupled with the current lack of interest in the enforcement of ESCR, renders the effective realization of human rights on the continent a remote possibility. Even if largely unintended, the neglect of ESCR, a substantial part of an indivisible whole, has brought about this sad state of affairs. This article contends that there is an urgent need for a change of attitude and a relocation of emphasis from neglect and discriminatory enforcement of human rights to respect and balanced, holistic enforcement. Given the prevailing socio-economic circumstances in Africa, ESCR remain the cardinal means of self-defense available to the majority of Africans.

. . .

In the 1993 Vienna Declaration, the consensus opinion recognized the futility inherent in entrenching civil and political rights without the corresponding ESCR. This consensus emerged despite the bipolar (East-West) ideological differences, which then dominated international

relations, and led to the implementation of the Universal Declaration of Human Rights (UDHR) by means of two international covenants, and continue to have grave implications for ESCR. Long before the Vienna Declaration, the UDHR set the parameters for evaluating the legitimacy of governmental actions by codifying 'the hopes of the oppressed, [and] supplying authoritative language to the semantics of their claims'. The euphoric 'Never Again' declaration by the victorious powers after World War II was intended to encapsulate humanity's resolve to banish human misery in all its ramifications, whether arising from physical abuse or from want.

If the purpose of government is provide for the welfare and security of all citizens, governments fail to fulfill this purpose when they commit to enforcing only civil and political rights. Such an ostrich-like posture denies the various forms of state abuse against which the citizen must be protected: Above all, the state's neglect of its citizens. Even opponents of enforceable ESCR recognize this axiom. The de facto commitments of many Western states to a welfare ethos, despite, despite their official opposition to ESCR, assures a high degree of compliance in protecting the rights of their citizens.

Modern governments are active participants, not passive spectators, in events that fundamentally impact the ability of the people to lead a meaningful and dignified life. Governance ceases to be meaningful when the majority of the people is put in a situation where it cannot appreciate the value of life, let alone enjoy its benefits, and where it lacks the appropriate mechanisms to compel change. Where human survival needs frequently go unmet, as in Africa, protection of human rights ought to focus on 'preventing governments from neglecting their citizens'.

A point that is often overlooked in contemporary human rights discourse and practice is that the greatest benefit of guaranteeing enforceable rights is the assurance it gives to people that effective mechanisms for adjudicating violations or threatened violations of their rights are available. As events in many parts of Africa have shown, the absence of such as gives the impression that resort to extra-legal means, such as armed rebellion, is the only way to improve one's condition or challenge governmental abuse and neglect. Most current African conflicts consist of people who are fighting not against themselves but against poverty and governmental inaction in the face of destitution. This conflict usually is due to many years of impoverishing

neglect and to the absence of other viable ways of compelling meaningful change. Because governments are increasingly expected to meet the basic needs of their citizens, there is growing tendency to demand results in militant terms, particularly in the absence of a proper forum to compel governmental action. As Callisto Madavo, World Bank Vice President for the African region, observes, 'Africa's wars are not driven . . . by ethnic differences. As elsewhere, they reflect poverty, lack of jobs and education, rich natural resources that tempt and the sustain rebels and [ineffective and insensitive] political systems . . .'

These are, for the most part, socio-economic and political conflicts among ethnically differentiated peoples. Although holistic protection of all rights will not prevent every conflict, it will defuse the majority of conflicts that are triggered or sustained by those who exploit abject socio-economic conditions. Scholars have demonstrated a casual link between these conflicts, which can be seen as a people's violent resistance to their deplorable socio-economic conditions, and the absence of perceived modes of effecting a peaceful change.

...

This relationship between deprivation and conflict underscores the fundamental link between protection of human rights and stability. The intimate relation between stability and human rights, in turn, reinforces the necessity of guaranteeing the enforcement of all human rights without exception. Since the different rights are interconnected and operate in support of each other, it logically follows that the full realization of one set remains dependent on the realization of the other. In a state of instability resulting from the denial of basic ESCR, it becomes difficult, if not impossible, to realize civil and political rights, and vice versa.

Apart from the instability it causes, the non-realization of ESCR creates insurmountable obstacles to the enjoyment of civil and political rights. People can only be free from abuse and exploitation when they have what it takes to assert their rights and free themselves from exploitative rule. Because the majority of Africans are illiterate and poor, they lack the requisite knowledge and means to assert their rights, let alone enjoy them. As UO Umozurike observes:

> *A great impediment to the attainment of civil and political rights is constituted by illiteracy, ignorance and poverty. To the many rural dwellers in any African state, and*

> *indeed to the urban poor, the lack of awareness or means make it impossible for them to assert their rights. They are very much at the mercy of their rulers.*

Thus, even a society interested in protecting only civil and political rights should give equal priority to ESCR as a practical means to achieving the former. An absence of the latter commitment deepens a collective feeling of injustice. The majority, comprised of the more vulnerable members of society, cannot but feel that it has been denied an accepted forum for the recognition and redress of injustices. Moreover, the non-enforcement of ESCR ridicules the so-called autonomy of the individual, a concept that is the linchpin of civil and political rights. Adequate socio-economic conditions must exist as a precondition to personal autonomy.

…

African states have not failed to recognize the dangers of selective- as opposed to holistic-recognition of human dignity. The African Charter remains a testament to the collective recognition of the indivisibility of human rights and dignity. As parties to the Charter, African states apparently appreciate the necessity of a holistic approach to enforcement. While this must be pursued at the international and regional levels-as the African Charter seeks to do-the locus of active enforcement must be the domestic arena where the mechanisms of enforcement will be within easy reach of aggrieved citizens and thus more widely utilized. Moreover, international protection or mechanisms are designed to complement the domestic protection of human rights.

…

Anything short of a holistic enforcement of human rights at the domestic level belies the African Charter's recognition that 'the satisfaction of economic, social and cultural rights is guarantees for the enjoyment of civil and political rights'.

…

The excuse of impossibility of performance due to underdevelopment, often put forward by African leaders and some scholars, does not represent the whole truth. It is too often a rationalization for lack of political will and the continued elevation of luxury over necessity.

2.2.3.5. The Rights of Peoples (Group Rights)

One unique aspect of the African Charter is its inclusion of group, collective or peoples' rights as distinct rights in addition to civil and political rights and economic, social and cultural rights. The notion of peoples' rights seems controversial, and raises a number of questions in the minds of international human rights scholars. Such questions include: what point is Africa trying to make? What is the definition of "people"? Does it mean that the rights of the individual have become subordinated to peoples' rights?

In trying to answer the questions above in the context of African human rights concept, some African scholars have canvassed African traditional way of living in which communal relationship is emphasized. According to one view, "living in Africa means abandoning the right to be an individual, particular, competitive, selfish, aggressive, conquering being . . . in order to be with others, in peace and harmony with the living and dead, with the natural environmental and the spirits that people it or give life to it." The predominant sentiment apparent in the above statement is that in Africa, the individual is totally taken over by the archetype of the totem, the common ancestor or the protective genius, and merges into the group. There is no doubt that the diverse cultures of Africa significantly identify group influence over the individual. The statement of the African Charter, however, goes further than this group identity. By providing for group rights, the Charter does not subordinate individual rights to group rights, neither does it remove the individual from being the subject of the human rights concept. What the Charter tries to do is to establish a link between the inalienable rights of the human person and of peoples in a contextual manner.

The contextual approach to human rights raises the issue of safeguarding, promoting and preserving universal rights and human values in societies with different political, social and cultural backgrounds. It touches upon the question of recognizing the very identity of diverse cultures, civilizations and peoples with due respect for fundamental and universal values of humanity. Similarly, the following preambular paragraph of the African Charter reinforces the relationship between peoples' rights and human rights: "Recognizing, on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their

national and international protection, and on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights." Second, peoples' or groups rights are not in conflict or in competition with human rights, as they are complementary concepts.

Some aspects of the notion of collective rights enshrined in the African Charter are strongly amplified by the U.N. Declaration on the Right to Development. Such endorsement of the principle of collective rights is indicative of their importance rather than their destructive tendencies. While it may be true that recent experiences and actual practices in different parts of the world have revealed what happens when a misconceived concept is misinterpreted and vehemently enforced, the concept of collective rights cannot be said to be fraught with such dangers as apartheid, or such others concepts that degrade the status of the human person. Van Boven rightly points out that the principle of the right to development, for example, is a notion of peoples' right that is not destructive of individual human rights, but one that places peoples' rights and human rights in mutual relationship as complementary concepts.

One does not contend the fact that there is no generally accepted definition of people, neither does the African Charter offer one. However, there is consensus among jurists that some working characteristics of "peoples" have emerged from studies made under the auspices of UNESCO. Such characteristics, among others, include:

1. *An enjoyment by a group of individuals of some or all the following common features:*
   (i) Common historical tradition;
   (ii) Ethnic group identity;
   (iii) Cultural homogeneity;
   (iv) Linguistic unity;
   (v) Religious or ideological affinity;
   (vi) Territorial connection;
   (viii) Common economic life.
2. *The group on a whole must have the will to be identified as a people or the consciousness of being a people.*

By choosing to create legal obligations out of peoples' rights, the point that Africa is trying to make is that, just like other leading instruments, such as the American Declaration of Independence, the French Declaration of the Rights of Man and of the Citizen, the Universal Declaration of Human Rights, the African Charter is more than a legal instrument. It is also an instrument of liberation; and embodies human aspirations and goals, reflecting constitutive elements of justice. According to van Boven, this is more so, because the struggles for human rights and peoples rights are not only settled in the courts, but also and perhaps more decisively in political fora. Thus, instruments on human rights and peoples rights may function in an extra-legal dimension as a guarantee and as mechanisms to defend freedom. Particularly in the third world, they also serve as tools of the liberation for the deprived, the oppressed, the have-nots and victims of discrimination.

Peoples' rights under the Charter span from Article 19 to 24. Article 19 guarantees the equality of all peoples and prohibits the domination of a people by another. Article 20 provides for the right of all peoples to self-determination. Article 21 guarantees the right of all peoples to freely dispose of their wealth and natural resources and to exercise several related rights. Article 22 deals with the right to development, while Article 23 deals with national and international peace and security. Finally article 24 guarantees the rights of all peoples to a satisfactory environment favorable to their development. Though the scope of each rights and the beneficiaries under each categories of the rights are broad and some times debatable, we will briefly discuss the basic feature of some of them.

- **The Right of Self-determination**

The right of self determination is conceptually provided for in Article 19 of the Charter, while specifically enumerated in Article 20. Article 19 provides that "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."

Article 20 reads as follows:

1. *All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social; development according to the policy they have freely chosen.*
2. *Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination of resorting to any means recognized by the international community.*
3. *All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.*

The above Charter provision on the right of self-determination underscores the colonial experience and domination of Africa with a view of eliminating all vestiges of colonialism. The fact, however, that the Charter is a document enacted in post-independent Africa leaves one to wonder on the perceived application of the concept in the future. While Article 20 (2) and (3) reinforce opposition to all forms of colonialism, Articles 19 and 20 (1) are general guarantees against domination of any kind of peoples. Article 20 (2) not only emancipates colonized people, but also "oppressed peoples." As has been rightly observed, the above provisions have left commentators wondering whether the principle of self-determination of "peoples" would apply to groups within sovereign African States who may wish to secede as was the experience in Biafra, Western Sahara, Katanga and Eritrea.

The African struggle for decolonization was essentially a struggle for the right of self-determination of African people to freely determine their political status and freely pursue their economic, social and cultural development. With the attainment of *de jure* independence of African States the quest for self-determination became reinforced as experiences in the above cited examples have shown. African States have individually, and under the auspices of the OAU, taken the position that self-determination does not apply outside the colonial context, because such post-colonial application of the concept will undermine African unity. The International Court of Justice (ICJ) in a case between Burkina Faso and Mali has endorsed this

theory of African unity as a basis for not applying the principle of self-determination to groups within post-colonial Africa. The ICJ stated that

> *"the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by the peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice."*

There is no disputing the fact that African unity is indispensable to African development and would be the preferred option of all well meaning Africans. However, events all over African have shown that the domination experienced during colonialism, on basis of which Africa fought for independence, still pervades the continent. Eritrea, Rwanda, Western Sahara, Katanga, Anglophone Cameroon and post-Biafra domination in Nigeria are glaring examples. Some of these cases have shown that there are certain exigent circumstances where the principle of self-determination should be allowed to apply rather than a preference for the human carnage that went on (and still goes on) in most of these examples.

The African Commission is yet to find its bearing on the challenges posed by several of these collective rights. The Commission's position on the right of self-determination is not different from the views expressed by African States on the issue. The first test case on self-determination that came before the Commission was *Katangese peoples' Congress v. Zaire.* In that case, the people of Katanga submitted a communication under the auspices of Katangese Peoples' Congress in 1992 requesting the African Commission to recognize the Katangese Peoples' Congress as a liberation movement entitled to support in the achievement of independence for Katanga; recognize the independence of Katanga; and help secure the expulsion of Zaire from Katanga. The complaint alleged that the history of the Katangese people showed that its territory is separate from Zaire. The communication, therefore, called on the Commission to find that the people of Katanga were entitled to an independent and separate State.

In its deliberations on the communication, the African Commission identified Article 20 (1) of the African Charter as the applicable provision, as there were no allegations of specific breaches of other human rights. The Commission agreed that all peoples have a right to self-

determination, but that there may be a controversy as to the definition of the peoples and the content of the right. The Commission identified that the issue in the case was not self-determination for all Zaireans as a people but specifically for the Katangese, but that whether the Katangese consisted of one or more ethnic groups was, for that purpose immaterial, and that no evidence to that effect had been adduced.

The Commission agreed that self-determination may be exercised in a number of ways, such as independence, self-government, federalism, confederalism, unitarism or any other from of relations that accords with the wishes of the people, but that it must be fully cognizant of other recognized principles, such as sovereignty and territorial integrity. The Commission vehemently maintained that it was obliged to uphold the sovereignty and territorial integrity of Zaire as a member of the OAU and a party to the African Charter. It ruled that in the absence of a concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question, and in the absence of evidence that the people of Katanga were denied the right to participate in government as guaranteed by Article 13 (1) of the African Charter, Katanga was obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire. For the above reasons, the Commission declared that the case held no evidence of violations of any rights under the African Charter; and that the request for independence, therefore, had no merit under the African Charter on Human and Peoples Rights.

It is clearly evident from this case that the African Commission does not intend to interpret the right of self-determination as long as there is the right to participate in the government of one's country under Article 13 (1) of the Charter. Any other claim would appear to a majority of members of the Commission to be a threat to the territorial and sovereign integrity of an African State.

In view of the above decision, scholars may continue to wonder without end, the actual purport of Article 20 of the Charter. Interpreting the Article to apply only to foreign domination is contradictory of the clear language of the Article. The second and third paragraphs of the Article specifically identify colonized peoples, and to that extent could be said to apply to foreign

domination. Paragraph 2 on the other hand, does not only identify colonized people, but also oppressed people. Oppressed people could well be within sovereign African states. In addition, paragraph 1 applies to all peoples, without specific reference to colonized people or foreign domination. In this regard, there is growing consensus that the right of self- determination is not limited to freedom from colonial domination, but extends also to contemporary post-colonial realities.

Be the above as it may, one would agree that there is a need for cautious application of the absolute principle of self-determination in view of the territorial and sovereignty issues at stake. Rather than dismiss every claim of the right to self-determination, the implementing machinery of the African system should adopt strict standards on the right, which would ensure that frivolous claims are not allowed to demean its procedure. The African Human Rights Commission ought to be open-minded enough to consider genuine complaints by genuinely oppressed groups within sovereign African states.

- **Right over Wealth and Natural Resources (Art.21)**

Article 21 provides:

1. *All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*
2. *In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as an adequate compensation.*
3. *The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.*
4. *States Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.*
5. *States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation, particularly that practiced by international*

> *monopolies, so as to enable their peoples to fully benefit from the advantages derived from national resources.*

The right over wealth and natural resources is a component right of self-determination, and has been so regarded since the adoption of the UN Resolution on Permanent Sovereignty Over Natural Resources. One could say that the drafters of the African Charter were inspired by the above resolution. In the 1952 resolution, the General Assembly recognized "that the under-developed countries have the right to determine freely the use of their natural resources . . . in order to be in a better position to further the realization of their plans of economic development in accordance with their national interests . . . ." This principle was one of the early marks of decolonization. During this period, developing countries asserted sovereignty over their natural resources during their struggle for political self-determination and economic development. They argued that sovereignty over natural resources was an essential prerequisite for economic independence and development, and therefore a cardinal component of State sovereignty. Today, the principle has become established as "a fundamental principle of contemporary international law.

A close reading of Article 21 of the Charter reveals that "peoples" and States are guaranteed this right to their wealth and natural resources. While it is the right of all peoples freely to use, exploit, and dispose of their natural wealth and resources, states have the right to exercise control over their natural wealth and resources, and in such a way that will eliminate the excesses of multinational corporations. This interpretation brings back the argument already made in the previous discussion on the right of self determination as to whether "peoples" here could be extended to groups within sovereign African States. It has been observed that the doctrine of permanent sovereignty arose in the context of relations between host States and transnational enterprises engaged in the exploitation of natural resources. As a result, the right of the State to legislate for the public good with respect to the natural resources and economic activities in its territory has become the most common construction given to the doctrine of permanent sovereignty.

The African Commission is yet to decide a case that borders directly on article 21 of the Charter. Some of the cases dealing with violation of personal freedom may have arisen from circumstances that could be construed as having their root in that provision. It is hoped that, when the commission or other adjudicative body gets the opportunity, it will take into consideration the reality of the times. The process of economic reforms that will follow in African countries in the millennium will definitely lead to legal reforms that ought to take into consideration the notion of the rights of people (groups within sovereign states) to enjoy the wealth and natural resources on their land, subject to reasonable state control. To be considered also, is the role of multinational corporations in state violation of human rights based on the exploitation of natural resources and similar activities.

- **The Right to Economic, Social and Cultural Development (Art.22)**

Article 22 of the African charter provides that:" 1.all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind; and 2. State shall have duty, individually and collectively, to ensure the exercise of the right to development."

The right to development has acquired the status of an internationally recognized right since the early eighties. The right has grown as a branch of international law. Keba M'Baye, the first president of the Supreme Court of Senegal and a judge of the International Court of Justice, is credited with first formulating the right to development as a human right in the early seventies during the 1972 Strasbourg Inaugural Lecture in which he elaborated upon the economic, legal, moral and political justifications for the existence of the right to development. The emerging recognition of the right was confirmed by the United Nations General Assembly Declaration on the Right to Development in 1986. This Declaration followed the adoption of the right to development by the general assembly as a human right in 1979.

As is normal in international law, the right to development has been a controversial subject, provoking lengthy debates as to its existence. For proponents of the right like M'Baye, there can be no human rights without development and vice versa. It is further argued that there is higher

propensity to violate human rights in underdeveloped countries than in developed ones, thus drawing a correlation between positive protection of human rights to a higher level of economic development. In the other side of the coin, the argument is that the right to development is a mere expression of sentiments devoid of any legal validity.

The right to development has already come to stay as a human right, and therefore has to be developed, albeit progressively, to serve the general purpose of development. Generally, the right to development consists of the right of individuals to benefit from a development policy based on material and non material needs and to participate in the development policy. It also involves the collective right of a developing country to the establishment of a new international order. The general interpretation to be given to this dimensional approach is that in the end, the human being is viewed as the subject and not the object of the development process. On a practical level, there is a natural translation of the right to development into the right of communities, especially those of indigenous peoples, to develop their culture and maintain possession of their land and cultural resources in the face of economic development policies that threaten their extinction.

There is no doubt that the concept is quite controversial and its precise definition extremely complex. However, it is clear that the notion of solidarity, or international cooperation and shared responsibility for the welfare and prosperity of all, is the central basis for the realization of this new right. To this end, the Charter implies a progressive obligation of member states to ensure that while individual freedom is emphasized, economic, social and cultural development will be promoted.

The African commission has not had a chance to decide any petition on the right to development.

- **The Right to Peace (Art.23)**

On the right to peace, article 23 of the Charter states:

> *1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by*

the Charter of the United Nations and reaffirmed by that of the Organization of Africa Unity shall govern relations between states.
2. For the purpose of strengthening peace, solidarity and friendly relations, states parties to the present Charter shall ensure that:
(a) Any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against the country of origin or any other state party to the present Charter.
(b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any other state party to the present charter.

Article 23 (1) restates the principle of the preservation of international peace and security, as well as the principle of friendly relations among states, which the UN Charter provides for as some of its main objectives, and which also forms a basic foundation of the OAU. Apart from the restatement of the principle of international peace and security, the paragraph also makes it the rights of all peoples. Similarly Article 23 (2) prescribes two specific ways by which states parties would ensure peace and strengthen solidarity and friendly relations.

The question of peace as a human right, into which some obligations can also be read, is entirely novel, and began with the African Charter. Generally, the law of peace is part of the classical subdivision of the subject matter of international law. Thus, the principle of peaceful coexistence, peaceful change, and prohibition of coexistence, peaceful change, and prohibition of coercion – all find expression in a variety of national and international legal instruments. Apart from the provisions of Article 1 of the UN Charter, the right to peace has been the subject of debates and study by the UN Commission on Human Rights. These debaters culminated in UN General Assembly Resolution, which reaffirmed the right of individuals, states and all mankind to a life in peace.

According to Alston, despite the significant of the above instrument on the right to peace, the elements of the right have never been determined, and that, no effort has yet been undertaken to elevate the term beyond the level of generalities, or to allow it to develop into practical usefulness. While this observation may be correct, in terms of the practical realization of the

right to peace, we must recognize the efforts at the UN level to define and develop the content and elements of the right. For practical purposes, however, it is difficult to see how Article 23 (1) of the African Charter can be properly articulated in terms of enforcing the right of all peoples to national and international peace and security. It is true that in Africa, peace and security have become increasingly of grave concern. The Charter does not contain enough contents to aid the enforcement of the right. The two situations in which states are obliged to ensure the achievement of peace, solidarity and friendly relations are not adequate. They limit the whole question of peace to ensuring that an asylee does not engage in subversive activities against his or her own country, or any other state party to the Charter; and provide a prohibition of the use of the territory of a Member State for subversive or terrorists activities. While these are inherent in the whole agenda of peace, they serve the notion of state sovereignty and non-intervention in the internal affairs of a member state of the OAU, which has been a long standing principle of the regional body, but which has stood in the way of human rights enforcement.

The African commission has not yet had a chance to consider a communication based on Article 23 of the Charter. The Commission has, however, adopted a number of resolutions on situation in Africa that threatened peace and security in various Member States and the continent at large. By the nature of Article 23, it would appear that states are in a better position to enforce a violation of the right than individuals, through the inter-state communications procedure.

The principle that the right to peace, and the right to live in peace, entail more than the obligation of states not to engage in aggressive war, is already firmly established international law. There are other possible extensions of the right to peace which involve related rights, duties and obligations, many of which are already implied in existing rights and guarantees. For example, the right of all peoples to participate in the decisions of their government regarding war and peace is implicit in recognized rights of political participation. Furthermore, the right of conscientious objection is already contained in the guarantee of freedom of thought and conscience.

- **The Right to Environment (Art.24)**

Article 24 of the Charter provides that "all peoples shall have the right to a general satisfactory environment favorable to their development." The first international large scale formulation of concern for the environment in a right- related posture was at Stockholm in 1972. Since then several efforts have been made to achieve international recognition for a clean and healthy environment. After more than two decades, the Stockholm conference was followed by the Rio Declaration. At the time of the Stockholm Declaration, environmental action was understood to be principally a matter of preventing pollution; and in developing countries was seen as a luxury to be afforded only after industrialization. As environmental issues became increasingly stressed, several national constitutions began to incorporate the right to the environment.

The concept of a healthy environmental is therefore, not new. However, the link between a healthy environment and human rights is a recent development. It has been observed that the suggestion to link human rights and the environment was made by Rene Cassin, who opined that human rights protection should be extended to include "the right to a healthful and decent environment, that is, freedom from pollution, and the corresponding right to pure air and water." It was, however, the African Charter that gave the right to a healthy environment its international codification in a human rights instrument.

What exactly does the right to a general satisfactory environment as formulated in Article 24 of the African Charter mean? Ankuma has criticized the provision as vague, and thus subject to divergent interpretations. She, however, notes that the broad formulation of states' obligations leaves room for flexibility, in such a way that it may be possible for states to adhere to their human rights obligations in accordance with their particular situation. There is no doubt that the manner in which the right to environment is formulated in the African Charter does not guarantee a definite interpretation in terms of the contents of the right. This may, however, be a blessing in disguise, if any interpretation to be given to the right takes cognizance of the realities of the situation in accordance with prevailing international law principles. In addition, the right to environment by nature cuts across civil and political rights and economic, social and cultural rights. It is said to have the characteristics of civil and political rights in so far as it requires states

to refrain from activities that are harmful to environment, while on the other hand, it has a feature of economic, social and cultural rights in that it requires states to adopt measures to promote conservation and improvement of the environment. In all, the right to environment has different dimensions. The individual dimension is the right of any victim or potential victim of an environmentally damaging activity to obtain reparation for harm suffered, while the collective dimension involves the duty of the state to assist in cooperating internationally to resolve environmental problems.

The Africa Commission has not yet been given the opportunity to deal with Article 24 of the Charter as no complaints have been submitted, which allege the violation of satisfactory environment per se, neither has the commission taken any independent initiative to promote the right. Despite the lack of action on this right at the Commission, it is increasingly becoming important and relevant to Africa, especially after the toxic waste dumping of 1988 in some African countries by international corporations. After the discovery of the toxic waste dumps, the OAU took quick action to forestall future occurrences. The same year the OAU Council of Ministers passed a resolution condemning the export of toxic wastes to Africa, and emphasizing that it is a crime against Africa. This resolution was followed by an OAU Convention banning the importation of toxic waste into Africa. In addition, the African Economic Community Treaty concluded in Abuja, Nigeria on 3 June 1998 requires states parties to improve the environment and take steps against the dumping of toxic wastes.

It follows, therefore, that in interpreting the obligations enshrined in Article 24 of the African Charter, the primary responsibility lies with states parties to adopt measures that will effectively address environmental degradation. The right of the individual against the state is contingent upon the existence or otherwise of these measures, and where a demand for such measures results not in assistance but in the violation of other fundamental human rights of the individual. Individuals, in addition, should have the right in domestic law of private action against a direct violator of his or her right to a healthy environment.

One of the African Charter that has attracted considerable interest from observes has been the concept of 'peoples' rights'.

Therefore, here follows some brief extract for your more reading and understanding of the concept

KIWANUKA, RN 'THE MEANIG OF "PEOPLE" IN THE AFRICAN CHARTER ON HUMAN AND PEOPLES' (1988)

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*... **Human rights vs Peoples'***

The full title of the Banjul Charter raises the controversial question of the difference and relationship between (individual) human rights and (collective) peoples' rights. The relationship between the two must clearly be appreciated to avoid compromising either. In this connection, Roland Rich's three-premise approach could be a particularly helpful starting point:

1) *The individual remains the primary subject of international human rights law.*
2) *International human rights law recognizes the existence of groups.*
3) *The enjoyment of individual human rights requires certain human right to devolve directly upon groups.*

The first is now generally accepted and does not require detailed examination. The individual is the cardinal subject of international human rights law. The second premise is rapidly becoming a well-settled principle, as international human rights law has already extended recognition to groups of persons as such. These include minorities, colonized peoples and indigenous populations. It is the third that requires a closer look, for it is the raison d'etre of collective rights.

Karel Vasak referred to collective rights, similar to those covered in the Banjul Charter, as belonging to the third generation of human rights and termed them 'solidarity rights'. According to him, rights under this umbrella:

> *Seek to infuse the human dimension into areas where it has all too often been missing, having been left to the state or states ... [T]hey are new in that they may both be invoked against the state and demanded of it; but above all ... they can be realized*

> *only through the concerted efforts of all the actors on the social scene: the individual, the state, public and private bodies and the international community.*

Here we can detect elements of peoples' sovereignty, not only in the political, but in the economic sphere as well. In addition, and perhaps more importantly, Vasak emphasized the need for concerted action in the effort to deliver certain rights-hence the solidarity tag.

The basic question, however, remains: Are collective rights human rights or not? Part of the problem lies in the terminology itself. This evident, for example, in the following comment:

> *Can human rights, as opposed to obligations, be vested in states? ... [T]here is no precedent in international law for the vesting of human rights in states. Human rights are vested in the individual. Certain collective rights derive from those individual rights, especially from the right to freedom of association. But does that mean that these rights extend to states or Governments?*

On the surface, it appears logical to state that a human right can only be enjoyed by a human being. Louis Sohn perhaps would respond to this observation by reminding us that because collective rights are always ultimately destined for individual, they are ipso facto human rights:

> *One of the main characteristics of humanity is that human beings are social creatures. Consequently, most individual belong to various units, groups, and communities; they are simultaneously members of such units as a family, religious community, social club, trade union, professional association, racial group, people, nation, and state. It is not surprising, therefore, that international law not only recognizes inalienable rights of individuals, but also recognizes certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. These rights are still human rights; the effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights.*

The drafters of the 1966 international human Rights covenants adopted a similar position. That was why they included the collective right to self-determination in the covenants and gave it

pride of place. This strong endorsement, however, did not convince detractors of collective rights. Therefore, I suggest that collective rights be regarded as sui generis. They are not individual, but collective; they belong to groups, communities or peoples. When the group secures the rights in question, then the benefits redound to its individual constituents and are distributed as individual human rights. This concept can be illustrated by taking professor Sohn's example of the club further: in an interclub tennis tournament, only clubs have the right to participate even though individuals actually play the game. Members as skilled as Navratilova or Lendl would not have an automatic right to play in tournaments. Contestants are entered by their clubs in accordance with the internal arrangements of those clubs. The individual's right to play can only be expressed in and through the club. This right is actualized, first, by protecting the club's rights in the wider setting; and then by the individual rights in the club. International and individual rights are no different.

Consequently, the Banjul Charter, by separating peoples' from human rights, does not obfuscate but progressively develops international human rights Law. It shows, in clear terms, that there is a conceptual difference between collective (peoples') rights and individual (human) rights.

Furthermore, the Charter approaches the two categories in a balanced manner; it does not give the impression of favoring one category over the other. The fact that individual rights are not as well secured as one would have wished, is due not to a preference for collective rights but to the political realities of the continents and the OAU. Governments were not yet ready in 1981 to have their affairs completely opened to international scrutiny. Moreover, a close examination of the Charter reveals that, in most of the cases, peoples' rights (as opposed to state rights) do not fare much better than individual rights. However, in its own way, the Banjul character at least theoretically recognizes that all classes of rights (political, economic, individual and collective) are equal and synergetic.

…

The meaning of 'people'

The definition of 'peoples' has primarily been approached in the context of the right to self-determination, where it has been used to indicate an ethnic community or a community that

identifies itself as such because of common interests. Yoram Dinstein, writing with Middle Easter problems in mind, identified subjective and objective quantities of term:

> *The objective element is that there has to exist an ethnic group linked by common history …*
>
> *… It is not enough to have an ethnic link in the sense of past genealogy and history. It is essential to have a present ethos or state of mind. A people is both entitled and required to identify it self as such.*

Ian Brownlie expanded on that definition but laid more emphasis on identity:

> *No doubt there has been continuing doubt over the definition of what is a 'people' for the purpose of applying the principle of self-determination. Nonetheless, the principle appears to have a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives. The concept of distinct character depends on a number of criteria which it lives. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, Language, religious and group Psychology predominate.*

…

In a report written for the United Nations, Aureliu Cristescu offered a limited definition of the term 'people' for the purposes of the right to self-determination. He preceded it by explaining that the United Nations had proceeded cautiously, albeit firmly, in the struggle against colonialism and it would not be possible to produce a definition covering all possible situations. From the specific situations already witnessed, he believed the following elements had emerged:

a) *The term 'people' denotes a social entity possessing a clear identity and its own characteristics;*
b) *It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;*

c) *A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights.*

Among these three writers, the main attributes of peoplehood are presented, namely commonality of interests, group identity, distinctiveness and a territorial link. It is clear, there fore, that 'people' could refer to a group of persons within a specific geographical entity.

…

Both these references are common, but that does not make their use unambiguous. Christescu's exclusion of minorities depended on certain assumptions that, as we shall soon see, are no longer tenable.

'people' as possessors of the right to political self-determination

Under article 20 of the Banjul Charter, the right to self-determination is guaranteed to all peoples. However, paragraph 2 of article 20 singles out colonized and oppressed peoples as the possessors of that right. This is the least problematic of the uses of 'people'. Under current international Law, as evidenced, for example, by the practice of the United Nations, the Organization of African Unity and individual states, political self-determination is generally equated with freedom from colonial-type rule. It does not extend to insistence by one sector of the population of an independent (or majority – ruled) state on its own form of self-determination, culminating, perhaps, in secession.

Following this line of reasoning, Eisuke Suzuki suggested that, in reality, there are only three remaining opportunities for the exercise of this right in Africa: The dismantling of minority rule in South Africa, the achievement of independence for Namibia and the resolution of the problem of the Western Sahara. International Law has chosen to deny such groups as the Eritreans the right (privilege?) of designating their struggle as one for the attainment of the right to self-determination.

…

International Law already treats the right to self –determination as tied to a specific geographically defined territory. Further subdivision would not be consistent with that position.

Moreover, a people wishing to go its separate way would have to renounce the authority of the liberation movement representing it.

…

From the foregoing, we can conclude that the first meaning of 'people' is all the different communities (peoples), in fact, all persons within the boundaries of a country or geographical entity that has yet to achieve independence or majority rule. Once independence (or majority rule) is achieved, no further independence is permissible. The rights of the different peoples would thereafter be protected as minority rights.

Before leaving this point, I should observe that the rule against secession as an exercise of the right to self-determination is only a general one. Although it is backed by a solid body of UN, AU and state practice, it can still admit a few exceptions. The independence of Bangladesh was one. Ved Nanda, in a definitive article on the subject, demonstrated the existence of a set of circumstances that combined to lend a clock of legitimacy to what would otherwise have been impermissible in international Law. These were the physical separation of East from West Pakistan and the total domination of the former by the latter; the nature of their ethnic and cultural differences; the disparity in their economic *growth to the disadvantage of East Pakistan; the electoral mandate to secede; the brutal suppression of dissent in East Pakistan and the viability of both regions as separate entities. The fact that the United Nations was presented with a fait accompli was also significant.*

Although many of the secession claims in various parts of Africa have been characterized some of the elements of the Bengali struggle, few have come close to matching it. For example: The secessionist activities in Katanga and Biafra were roundly condemned by the United Nations and the OAU as threats to sovereignty and territorial integrity. The conflict in Eritrea has practically been shoved into a closet despite Eritrea's illegal absorption into the Ethiopia Empire in 1962. Finally, the unilateral declaration of independence by the Saharan Arab Democratic Republic (SADR), as well as its subsequent admission into the OAU in 1982, was not an exercise in secession. Moroccan and Mauritanian claims to the territory of Western Sahara had been rejected by the International Court of Justice.

…

Peoples as the different minorities

One of these problems was to work out an acceptable definition of who constituted a minority. Several definitions were essayed with varying degrees of success. The most satisfactory and acceptable was the one proffered by Francesco Capotorti in a report commissioned by the UN Sub-Commission on prevention of discrimination and protection of Minorities. He suggested that:

> *A minority is a group numerically inferior to the reset of the population of a state, in a non-dominant position whose members – being nationals of the state-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or Language.*

The pertinent question, for present purpose, is whether or not a minority, thus defined, can be referred to as a 'people' entitled to enjoy the peoples rights contained in the Banjul Charter. If we do not confine ourselves within the straitjacket of assuming that peoplehood and the right to self-determination automatically lead to independent statehood, it is not difficult to appreciate that, indeed, a minority can fulfill all the requirements of a 'peoples'. As Felix Ermacora correctly argued:

> *Unless the United Nations has not developed clear-cut ideas about the holder of the right to self-determination my opinion is that minorities also can be considered as people. They must live also in a territory or they must have been living in a territory which is now occupied; they must have cultural or religious characteristics; they must be politically organized that so that they can be represented; and they must be capable of an economic independence. It does not depend on governments as to how they are describing an entity as a people; it depends on objective and subjective criteria of a group. It depends also on the self-consciousness of identify. I think therefore, that national and racial, perhaps also religious, minorities could be considered peoples in the sense of an autonomous concept of the United Nations instruments. For them self-determination is inalienable.*

It must be emphasized that total independence is not the exclusive form in which the right to self-determination is realizable. What is important is that the right of the group and its members receive recognition and protection.

Since secession is generally impermissible in current international law, all references to political self-determination, in relation to independent states, should mean respect for minority rights. By the injunction of article 19 that '[n]othing shall justify the domination of a people by another', the Banjul Charter proscribes external and internal forms of colonialism. Minorities are entitled not to lose their identity and interests in the aggression-of the whole

The right to existence in Article 20 addresses the problem of genocide perhaps the single worst threat to minorities. In other cases involving self-determination, a people within a state should be sufficiently protected by respect for both its minority rights (for example language, culture, religion) and the human rights of its members. That this protection may break down and that minorities everywhere, especially in the Third World, are constantly in fear of repression are actualities that cannot be assured an unequivocal collective solution by international Law. Such violations are regarded as violations of individual and minority rights and treated accordingly. The International Covenant on Civil and Political Rights of 1966 adopted a similar approach. In addition to individual rights and liberties, it made room for the protection of minority rights in article 27.

Where minority and individual rights arte respected, there will not be many motives for secession. The concept of 'people', in this sense, is designed to achieve that objective.

…

In sum, the apparently progressive introduction of the concept of 'peoples' into the Benjul Charter could actually turn out to be counterproductive in some respects, that is, where the rights and interests of the people are not respected by the state. In such situations, peoples' rights might initially be treated as state rights and then degenerate into sectarian, class, government, regime and clique rights. In the extreme, they could become certain individuals' rights. This ultimate perversion has already come to pass in many Africa countries, such as Zaire, where the incumbents have unfettered control over the disposal of natural resources and

state wealth. In situations of despotic misrule, one of the first casualties is usually the economy, as the governors embark on orgies of personal enrichment. The outrageous exploits of such dictators as Amin, Bokassa and Nguema are Legendary. Indeed, politics in Africa and the developing world generally, sometimes seems like a business venture.

…

There is no necessary contradiction between the third meanings noted above, which equates 'people' with the state, as long as the state acts for the benefit of all the people, and professor Cassese's view, which underlines the need for democracy in the economic realm. This third meaning refers to the external application of the right to economic self-determination. The state would control the commanding heights of the economy so as to minimize leakage and benefit the people, that is, all the peoples. Under present circumstances, however, to achieve this goal, it is imperative that the state sall be controlled by the people in the democratic sense. This is the message of the Algiers Declaration. It deals seriously with the relationship between peoples and their state in a way the Banjul Charter does not. This omission needs urgent correction otherwise the whole basis of peoples' rights in the economic sense will hang in doubt.

…

The Banjul Charter provides for a set of individual rights and liberties, which should complement and reinforce the right of peoples. However, the timorous approach to the protection of individual rights (or, indeed, any rights claimable against a state party) does not offer much hope for this meaning of peoples to be significantly asserted.

Provide the Commission is allowed to function effectively; it could redeem some of the grounds apparently conceded to states and governments. It will be in the interest of all African countries and their peoples for popular democracy to be given a chance. The lofty ideals of the peopls' rights in the Banjul Charter-such as peace and development depend, in a large measure, on respect for individual. Peoples' rights can not be a substitute for individual human rights.

2.2.4. The Concept of Duty under the African Charter

The African Charter broke new grounds by enacting duties in a more elaborated and meaningful fashion than any other binding human rights instrument. The duty provisions of the African Charter aimed at the individual are found in articles 27 to 29. According to Article 27:

1. *Every individual shall have towards his family and society, the state and other legally recognized communities and the international community.*
2. *The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.*

Article 28 states that: "every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."

Article 29 provides that the individual shall have the duty:

1. *to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;*
2. *To serve his national community by placing his physical and intellectual abilities at its service;*
3. *Not to compromise the security of the state whose national or resident he is;*
4. *To preserve and strengthen social and national solidarity, particularly when the latter is threatened;*
5. *To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;*
6. *To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;*
7. *To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-beings of society;*
8. *To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.*

The duty posture of the African Charter as enumerated above has been subjected to criticism. The critics are concerned with that it would be a basis for state parties to the African Charter to perpetrate human rights violations. This view is driven by the gross and persistent violations of human rights in post-colonial African states and the fear that vesting states with more power can only result in more abuses. To dismiss these criticisms in the face of present day African realities would not be proper. It will only amount to a denial of a potently genuine fear. On the other hand, however, the inclusion of duties in the Charter will not per se be an automatic avenue for states to engage indiscriminate human rights violation. The duties in the Charter, which the individual is charged to observe are not of the nature that could be tied to a particular right, which a state would in turn use as a retaliatory tool. The notion of duties in the Charter is rather another unique dimension of the African Charter in entrenching positive African cultural and traditional values which existed in pre-colonial Africa, and which complement the notion of rights. If viewed from this angle, critics of the language of duties in the Charter may be persuaded to do a deeper study of the implications of the duties.

The duty-rights conception of the African Charter could provide a new basis for individual identification with compatriots, the community, and the state. It could forge and instill a national consciousness and acts as a glue to reunite individuals and different nations within the modern state, and at the same time set the proper limits of conduct by state officials. The duties enshrined in the Charter could be read as intended to recreate the bonds of the pre-colonial era among individuals and between individuals and states.

Looking at the Charter provisions on duties, one would see that they are meaningful for the smooth working of society. Article 27(1) merely restates the fact that the individual owes a duty to his family, the state, other legally recognized communities and the international community. Article 27 (2) places a limitation on the exercise of rights by an individual for the protection of the rights of others, and in the interest of collective security, morality and the interest of others. This is a normal fact of life, which reflects the practical reality that no right is absolute. Individuals are asked to reflect on how the exercise of their rights in certain circumstances might adversely affect the rights of other individuals or the community at large. The duty is based on the presumption that the full development of individual rights is only possible where individuals

care about how their actions would impact others. Article 27(2) thus raises the level of care owed to neighbors and the community. The same philosophy is embedded in Article 28. The duty of every person to respect and consider his or her fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance, is noting but a lubricant that oils the wheel of social interaction.

The duties set out in Article 29 stress responsibilities to the family, community and the state. There is nothing wrong for an individual to be reminded that he or she ought to respect his or her parents and to provide them with necessary care and maintenance. This is positive African cultural value, which has been codified for posterity. It is the joy of the African parent to toil and train his or her child, with a great expectation that when that child becomes "somebody" that child would take care of him or her. In the same vein, a person ought to serve his or her community with his or her intellectual and physical capabilities. That is the essence of community service, and it has been a long standing practice in the African past.

The same thing could be said of the duties not to compromise the security of the state, to strengthen social and national solidarity, especially when national solidarity is threatened, and the duty to preserve, strengthen and defend the national independence and territorial integrity of a person's country. This group of duties reminds Africans of the need to preserve their hard-won independence. The duties represent an extension of the principle of self-determination in the external sense, as a shield against foreign domination. The maintenance of social and national solidarity for example, is of utmost importance in present day Africa where many modern states have collapsed or failed. The duty to pay tax is the civic responsibility of every citizen of any country, where the principle of taxation is recognized. The duties to promote positive African culture and African unity are emphases of societal cohesion.

We must also observe that the notation of duty is not just one that is directed against the individual. The Charter prescribes duties to states in addition to the general obligations that apply to them. The state is under a duty to assist the family (Article 18 (2). Article 25 imposes a duty on states to promote and ensure through teaching, education, publication, the respect of the rights and freedoms contained in the Charter and to see that these freedoms and rights as well as

corresponding obligation and duties are understood. Similarly, Article 26 creates a duty for states to guarantee the independence of the courts. The difference between the duties of individuals under the Charter and those of states is that, while those of the individuals cannot ordinarily be used to proceed against them under the regional mechanism, those of states amount also to obligation within the charter, over which they can be challenged.

The notion of duties under the African Charter, while not totally without concern as to possible misuse by the political class, whether in military uniform or civilian garb, needs to be evaluated in a different light. It is noting but an embodiment of the positive dimension of African cultural philosophy, which the Charter tries to codify for the benefit of posterity. Any thinking to the contrary by the ruling class must be resisted.

2.2.5. Claw-Back Clauses under the African Charter

The phrase "claw-back clauses" has been used to generally refer to those provisions of the African Charter that tend to limit some of the rights guaranteed under the Charter. They do not qualify as outright derogation clauses that are found in other international human rights instruments. They rather qualify the enjoyment of the right as contingent upon other notions of state prescription. For example, Article 8 grants the freedom of conscience, profession and free practice of religion, "subject to law and order". Under Article 10, an individual has the right to free association "provided that he abides by the law". Similarly freedom of movement of an individual is guaranteed by Article 12 "provided he abides by the law". Citizens have the right to participate freely in their governments "in accordance with the provision of the law." Article 14 provides for the right to property, but that property may be encroached upon "in accordance with the provision of appropriate law".

These clauses have been criticized, based on the fact that states are traditionally the most frequent violators of human rights. They also have the power to create and change laws. By inserting clauses that permit rights to be limited by the law, the Charter makes human rights especially vulnerable to the very institution which attacks them most often. The criticism goes further to assert that claw-back clauses in the Charter go further than derogation clauses in that

they permit a state, in its almost unbounded discretion, to restrict its treaty obligation or the rights guaranteed by the Charter. Though derogation clauses, on the other hand, permit suspension of treaty obligations, such suspension is temporary, while that based on claw-back clauses may be permanent. In the same vein, derogations can only be invoked in cases of emergency, unlike claw-back clauses which may be applied in normal circumstances, so long as a national law is passed to that effect. Gittleman opines that while derogation clauses warrant the suspension of only certain obligation and rights, rather than all rights, claw-back clauses have no limit.

One will agree with the observation that the effect of claw-back clauses as expressed in the African Charter is that it seriously emasculates the effectiveness of the Charter as well as its uniform application by Member States. This is because instead of the Charter having primacy, the various national laws of Member States actually assume a primary place. The effectiveness of the Charter will thus be reduced, since it would appear to be subject to national standards as laid down by domestic law. Such domestic laws could be laws that are made to validate acts of violation deliberately embarked upon by Member States. Various Africa governments are known for the use of retroactive legislation to achieve their dictatorial tendencies, and will thus find the claw-back clauses a veritable source of inspiration. One must agree that claw-back clauses in the Charter, if not properly construed, will frustrate the enjoyment of some of the rights guaranteed in the Charter. This is because, permitting national law to limit, with a superseding effect, provision of the Charter, means that the Charter itself permits the perpetration of violations of rights enshrined in it. In other words, the Charter gives rights, but permits them to be taken away, thus not protecting the individuals it is meant to protect.

The Commission needs to make a categorical statement, either by way of a resolution or a finding in the course of its adjudicatory function, on the purport of the claw-back clauses scattered all over various articles of the Charter. The common phrases “subject to law”, “in accordance with the law”, etc used in claw-back clauses, need interpretation.

Review Questions

1. What are the significant and genuine reasons which motivated the OAU action in the field of human rights in the 1970s and 1980s which culminate in the adoption of ACHPR? Is that because of external pressures or internal commitment towards human rights?
2. Does the AU framework on human rights bring any significant normative and institutional improvement in the human rights promotion and protection in Africa? Discuss by giving concrete examples.
3. How the non-governmental organizations can contribute in the promotion and protection of human rights in Africa esp. in relation to the adoption of ACHPR?
4. What added value do you notice by government delegates in the drafting process of ACHPR by the legal experts?
5. Human rights concepts are now nearly becoming universal in the area of fundamental rights and freedoms. Taking this as a spring board, justify why the ACHPR deviates from other pre-established human rights norms and principles.
6. The opening address of President Sengor to the meeting of African legal experts was so impressive. Assess as to how far this statement has influenced the substantive content of ACHPR by citing concrete examples.
7. Discuss the autonomous and non-autonomous application of the principles of non-discrimination and equality under the ACHPR.
8. There are criticisms towards the manner of drafting and contents of ACHPR provisions as too vague, general and lacking specificity. Thus you are invited to locate the major areas of deficiencies of ACHPR provisions and suggest any mechanism to remedy it.
9. Discuss whether any unique approach is taken in the selection of drafting and inclusion of those substantive rights guaranteed in the ACHPR vis-à-vis other international and regional systems.
10. Discuss the notion of collective/group rights as they exist under ACHPR and other international human rights system.
11. There are contentions that the recognition of group rights will undermine the enjoyment of individual rights. This is because there is high potential of conflict between these rights in

the process of enjoyment of each and the trend is towards giving priority to the collective aspect. Therefore, evaluate the possible tension between collective and individual rights and how such conflicts can b resolved.

12. Discuss the limits of holders and beneficiaries of peopls' rights under the ACHPR. Also highlight what obligations are assumed by state parties the Charter.
13. What point is made by African Charter by way of including the concept of individual duties in such elaborate manner? Also address the danger of having such extensive duty-provisions in the human rights instruments like ACHPR. Support your justifications with the ruling of African Commission, if any.
14. What universal limits can be imposed on the claw-back clauses of African Charter? Demarcate the difference between claw-back clauses and suspension/derogation clauses vis-à-vis other global and regional human rights instruments.

Chapter III

Special Protection to Vulnerable Groups under the African Human Rights System

Introduction

It is well known that formal standard setting of human rights at the UN level started with the adoption of, firstly, general principles and norms of common standard and secondly focused on making of binding legal instruments designed to be applicable to the entire rights and freedoms of human being irrespective of sex, age, language and so on. UN Charter, UDHR and other general resolutions of UN, OAU/AU and other intergovernmental organizations fall under the first category, while binding legal instruments such as ICCPR, ICESCR, CERD etc fall under the second list.

However, the modern human rights standard setting pertaining to the special categories of human persons has come relatively late. An exceptions to this may be the 1951 UN and the 1969 OAU Refugee Conventions, both of which preceding the main general human rights conventions in their respective systems.

Those specially vulnerable groups of human persons who become the subject matter of specific human rights instruments are mainly: Women, children, refugees, minorities, indigenous peoples. Therefore, the purpose of this unit is to bring into your attention those currently operating OAU/AU human rights instruments specifically dealing with some vulnerable or disadvantaged groups of persons. African children, women and refugees are protected under special and separate instruments. While the others such as minorities, indigenous peoples, peoples with disabilities, aged/elderly, do not have separate instruments, but addressed under the general or other special human rights instruments. Among these, minority and indigenous peoples rights and protection regimes will be briefly discussed owing to the special nature and the realities in Africa.

Other especially vulnerable groups in the African reality i.e. internally displaced persons (IDPs) are becoming an important target groups to the OAU/AU. Thus, recent efforts of AU to adopt the first ever seen convention on IDPs in Africa will be touched upon under refugee subsection. Finally, students are advised to read more on the protection regimes of disabled, aged/elderly peoples and the youth under African context.

3.1. Protection of Children and Youth

With some 44 percent of its population under the age of 15, the adage that 'children are the future' rings more true in Africa than any where else. The protection of children's rights is not only an investment in the future, but also an imperative of the present, which is characterized by children's exploitation as solder's, laborers, and sex-workers, and in human trafficking; the neglect of orphans, especially due to AIDS deaths; the prevalence of street children; early marriages and other harmful cultural practices; and the disproportionate impact of conflict on children (UNICEF, 'State of the world's Children 2006: Excluded and Invisible') what these challenges show us- the level of vulnerability and special difficulties facing children. To fight these, the UN has adopted various resolutions (the 1959 Declaration on the Rights of the Child) and an important binding instrument-Convention on the Rights of the Child of 1989. These are the instruments globally addressing the rights of Children. So what is the need of having regional (OAU/AU) child rights instruments?

3.1.1. The OAU/AU Child Rights Protection System

Children's rights first featured on the OAU's agenda in 1979, the UN-declared International Year of the Child, when the Assembly adopted the Declaration on the Rights and Welfare of the African Child. Although not legally binding, this Declaration provided a moral compass for later legal reforms. Among other measures, the Declaration urged states to adopt, 'legal and educational measures' to abolish cultural practices that are harmful to children, such as early marriage and female circumcision. In 1987 nearly a decade after the adoption of the Declaration, the works and initiatives for creating binding child rights instruments in the African context were

began. Conferences involving African NGOs, UNICEF and African lawyers were conducted in 1988.

A working group of African experts set up by OAU, prepared a draft Charter which formed the basis of eventual African Children's Charter. This was ultimately adopted as African Charter on the Rights and welfare of Children on 11 July 1990 and entered into force on 29 November 1999, almost a decade later. F. Viljoen identifies two reasons for the adoption of this document: Political and legal reasons. On a political level, the OAU reacted against a perception of exclusion or marginalization of African States in the drafting process of the CRC. Their involvement was initially limited. From political point of view, there was a need to adopt a regional human rights instrument dealing with the issue of particular interest and importance to children in Africa. It was contended that in the CRC as a global instrument and the product of numerous compromises, regional specificities were victimized in the process of universal consensus-seeking.

Thus, some of the omissions' from the CRC and those not sufficiently addressed, identified by those involved in the drafting process of ACRWC, are the following: the situation of children living under apartheid, factors disadvantaging the female child, practices prevalent in African society such as FGM and circumcision, socio-economic conditions such as illiteracy and low level of sanitary conditions, the African conception of the Community's responsibilities and duties, child soldiers and minimum age for military services, and the role of family in the upbringing of the child and in matters of adoption and fostering.

All these concerns were at least partly addressed by the ACRWC. Compared to the CRC, the African Children's Charter (ACC) raises the level of children's protections in three important respects. First, while the CRC allows child soldiers to be recruited and to be used in direct hostilities (CRC- Art. 38(2) (3)), the ACC completely outlaws the use of child solders (Art. 22(2)). Secondly, in terms of CRC, child marriage is allowed, because Article 1 stipulates that child means every human being below the age of 18 years unless majority is acquired at an earlier age. The ACC is explicit in its prohibition of child marriages (Art. 21(2)); in fact, it adds that the legislation must be adopted to specify the age of marriage to be 18 years. Thirdly, in its

protection of child refugees, the ACC extends its ambit to internally displace children (IDC) (Art. 23(4)), something CRC does not do (Art. 22). The causes for internal displacement are also all-inclusive.

Therefore, it can be concluded that the ACC has fulfilled the objective of supplementing the CRC with regional specificities.

Another feature of ACC is that it deviates from CRC by placing duties or responsibilities on children (Article 31). This aspect may be identified as one of the African feature of ACC like that of the main Charter (ACHPR). This approach was taken by some as giving legal effect to the subordinate role of children within the strict age-based hierarchy of traditional African societies. However, it is expected that these duties will be interpreted in light of the whole charter's provisions and that of international human rights laws (Art 46). Such other counterbalancing provisions of the ACC are the right to free expression and protection of privacy as well as parental duty to ensure the best interest of the child. Moreover, the inclusion of duties into ACRWC also emphasizes the relational character of children's rights which is, to some extent, enjoyed in reliance on adult support and guidance. Thus, it remains for the monitoring Committee to clarity further the scope of the children's duty-provision.

One of the prominent features of the main African Charter, peoples rights such as self-determination (Art. 20), is not reflected in the ACRWC. This could be possible because it is not appropriate to specifically entitle children to most collective rights or if the need arises children can invoke/claim rights under the main Charter as part of the phrase 'every individual' & 'Peoples' (whatever its meaning).

The ACRW enumerates a number of civil, political, economic, social and cultural rights in a holistic way. While most rights are recognized and guaranteed as in the general human rights instruments and that of CRC, there are some provisions uniquely designed to African reality. These include provisions on enjoyment of parental care and protection (Art. 19), protection against harmful social and cultural practices (Art. 21), rights during times of armed conflict which provide greater protection than the UNCRC (Art. 22); and rights of refugees (Art. 23).

There are specific provisions in the Charter for 'handicapped children' (Art. 13) and those of imprisoned mothers (Art. 30).

Recently on 2 July, 2006, African Union has adopted another instrument partly dealing with children. This is known as African Youth Charter (AYC). With 15 minimum requirements, but so far with 11 ratifications, AYC has not yet entered into force. The content of the Charter addresses many matters of African youth in the political, economic, social and cultural scenarios. Do you think having such separate human rights instruments is necessary? Read the detail provisions of AYC and identify its salient features vis-à-vis other instruments in Africa.

3.2. Protection for Women under African Human Rights System

Sexual (gender) inequality is a global reality. Women as part of human being are entitled to benefits and protections under the general human rights instruments (both UN and regional) such as the equality and non-discrimination clauses, and other fundamental guarantees. However, the reality has been otherwise. Women have been subjected for long time to discrimination, denial of access to basic rights (education, health, property, employment etc), and victim of a wide range of discriminatory and harmful practices (domestic violence, early marriage, FGM, etc).

Women in the African context are even more exposed to differential treatment and a lot of disadvantages. It is stated that African public and private life have been and are dominated by men. Women's participation in most walks of life has been undermined.

These are among the limited reasons which lead to the separated treatment of women's rights and eventual adoption of separate documents. The two basic documents of paramount importance to women's rights are the UN Convention on the Elimination of All forms of Discrimination against women (CEDAW) and the recently adopted African Protocol to the African Charter on Human and Peoples Rights on the Rights on the Rights of women in Africa (APRW). Thus, the purpose of this subsection is to highlight the importance and innovations of APRW in light of the global and preexisting African instruments (CEDAW).

3.2.1. Women's Right under the OAU/AU Framework

There has been a repeated criticism that the OAU Charter and the ACHPR gave inadequate attention to women in Africa. The first does not contain any mention of gender, while the later raised women's rights specifically under a single provision (Article 18). However, OAU Charter's silence was later remedied by a series of resolutions and decisions addressing the promotion and protection of women's rights in Africa. The most underlying factors behind such initiatives were said to be: the participation of the OAU in international conferences, the role and contribution of women in the African liberation struggle and to react to conflicts and economic development of the continent.

The central them of the decisions and resolutions of OAU on women's matters throughout 1990s were on promotion, enhancement and empowerment of women's participation at all levels of decision-making (international, regional, national and local). It was believed that it is only through the participation of women in every aspect of national and international affairs (Political, economic, social, etc) that a meaningful change can be brought. Of course, this position of the OAU was reflected in the recently adopted women's Protocol. Moreover, the OAU Charter's omission has been now remedied under the AU Constitutive Act by providing 'promotion of gender equality' as one of its guiding principles (CA, Art. 4(1)). In addition to this, the AU has adopted a 'Solemn Declaration on Gender Equality in Africa' on July 2004 which calls for the expansion of the gender parity principle to all AU organs, NEPAD, the RECs, and national parliaments.

3.2.2. African Protocol on the Rights of Women

The need to adopt women's treaty law was called upon by NGOs working on women's right which was based on concern about the pervasive abuse of women's rights. The work was begun by appointing commissioners to coordinate and prepare women's protocol. The role of African Commission on Human and Peoples Rights and the Gender Unit within the OAU was significant. The later prepared a draft OAU Convention on Harmful Traditional Practices (HTPs). However, the African Commission's draft protocol and the HTPs draft conventions were

later merged and adopted as the Draft Protocol to the African Charter on the Rights of Women in Africa (the Addis Ababa draft).

On "July" 2003, the AU Assembly adopted the protocol to the African Charter on the Rights of women in Africa which entered into force on 25 November 2005.

Women's protocol, like that of African Children's Charter, has introduced innovative norms and addressed the realities and problems of African women. Of course, it has also similarity with that of CEDAW provisions.

To assess the normative expansion brought about by the protocol, the pre-existing normative framework ('the existing law') has to be reviewed and contrasted with the protocol.

Though Article 18 of the ACHPR characterizes women as one of the groups deserving of protection, the special measures to be directed in protecting women and ensuring the elimination of discrimination against them are not delineated. Even if CEDAW was passed two years prior to the adoption of the African Charter, the fact is that the later was only minimally influenced by CEDAW's provisions by incorporating only a single provision dealing with women's rights.

Dear students, read article 18(3) of African Charter. Does it imply that all state parties to the African Charter have become bound to implement all the provisions of CEDAW?

The African Children's Charter has also some link to women's protocol as it provides for important rights of girl child, in particular the prohibition in children marrying under the age of 18.

Given the scope of protection under the above treaties, what then is the 'added normative value' of the protocol? Compared to CEDAW, the protocol speaks in a clear voice about issues of particular to African women and locates CEDAW in African reality.

The women's protocol is the first treaty to place domestic violence, polygamy, HIV/AIDS, and medical abortion, in a binding human rights framework (Articles 4(2), 6(c), 14(1) (e), 14(2) k) respectively). It also provides in detail for the protection of women in armed conflict (Art. 11), and reiterates the need to accord women refugees protection under international law (Art. 4(2) (k)). The women's protocol incorporates clear and expansive definitions of 'discrimination against women' (Art. 1(j), e.g. it includes economic harm), 'harmful practices' and 'violence against women'. 'Harmful practices' such as female genital mutilation are specifically prohibited (Art.5).

The protocol provides specificity where vagueness prevailed, for example when it clarifies that 'Positive African Values' are those based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy (preamble). It also spells out the scope of socio-economic rights in greater detail than CEDAW, which limited some socio-economic rights to rural women (EDDAW, Art. 14), and goes beyond the scope of the rights provided for under the African Charter by spelling out the content of rights and by including the right to food security and adequate housing (Arts. 12,13,14,15 & 16).

A necessary implication of targeting violence against women and 'unwanted or forced sex' in the private sphere is that the protocol requires domestic violence legislation and the criminalization of 'rape in marriage'. The precarious position of groups of women that have been rendered particularly vulnerable due to loss of a spouse, overlap with old age, disability, and poverty which also receive the protocol's attention. (Arts. 20-24). The protocol once again reiterates the general stipulation of 18 years as the minimum age of marriage (Art. 6(b)).

Adopting a distinctly transformative stance, the protocol emphasizes 'corrective' and 'specific positive' (or 'affirmative') action. While CEDAW contains a generic provision allowing for 'temporary special measures aimed at accelerating de facto equality between men and women' (CEDAW, Art. 4(1)), the protocol reiterates the need for 'positive' measures by locating them in different contexts.

The protocol requires states to adopt measures that may favor women above men 'such as electoral quotas for women in order to ensure substantive' ('in fact') equality (Art. 9(11)). Positive action is also specifically required with regard to 'discrimination in low' (Art. 2(1) (d)), illiteracy, and education (Art. 12(2)).

Although the women's protocol significantly advances standard-setting, it suffers from inelegant and unfortunate drafting deficiencies. The disproportionate effect of HIV and AIDS on women in Africa is not adequately reflected in the text. In any event, the right to be informed of one's own and one's partner's HIV status is ambiguous and should not form the basis for the erosion of rights. The feminization of poverty, especially in rural Africa, is also not adequately reflected. As for its drafting, there is some inconsistency in the 'rights-bearers' in the protocol, with men sometimes specifically included in the scope of rights, and sometimes not. Similar to the instrument that it supplements, the African Charter, the women's protocol does not have a provision on reservations. At the beginning of 2007, three states (Namibia, South Africa, and the Gambia) entered reservations upon ratification of the protocol. Thus, the benefits of these treaty provisions may be lost if reservations exclude the application of some of its important provisions. However, there are some hopes that even countries that entered reservations to CEDAW (e.g. Libya and Lesotho) did not enter similar reservations when ratifying the protocol. For lack of clarity, this area is expected to be elaborated by the enforcing organs on the basis of Vienna Convention on the Law of Treaties (1969).

3.3. Protection of Refugees and Internally Displaced Persons(IDPs)

Refugees and internally displaced persons (IDPs) are other vulnerable groups deserving some protective regimes. This is because in the first case being outside the territory of their country, they are unable or unwilling to receive the protection from their national states, while in the second, even if within territorial limit of their states, they are placed in specially difficult situation due to dislocation from their normal or habitual residences.

Africa is the first continent which established regional arrangement for the protection of refugees. The international community had managed to have Refugee Convention in 1951 and its

additional Protocol in 1967. However, backgrounds and scope of protection of these UN instruments were not found to be appropriate to refugee problems out of Europe.

Some of the consequences of the solidification of African Colonial borders in line with the principle of uti possidetis were internal strife, large scale dislocation, and the movement of people across these borders. Although the national war of liberation accounted for a substantial number of refugees in the 1960s, many more fled 'explosive internal, social and political situations' which predated independence. By 1964, the influx of refugees from Rwanda into Burundi, the DRC, and Uganda had spurred the OAU into action, first to the establishment of a ten member Refugee Commission to investigate the refugee 'problem' in Africa, and later setting in motion the drafting of a regional treaty. The reasons for having such regional regime was justified on the ground that the 1951 UN Convention on Refugees was European in focus and not suitable for the African situation, particularly as many refugees were seen at that stage as being the result of the fight for independence. A regional High Commissioner for Refugees was also contemplated although it was resisted by the UNHCR and abandoned later on.

This process culminated in the adoption by the OAU Assembly on 10 September 1969 of the OAU Convention Governing the Specific Aspects of Refugees in Africa (OAU Refugee Convention). It was entered into force on 20 July 1974.

- **Definition of Refugee in the OAU Convention and Major Departures**

It has been argued that the concept of refugee as defined in the statute of the UNHCR and UN Convention of 1951 is not universal and creates problems when it comes to its application to new refugees from new areas and notably in the Third World. The following are refugee definitions as provided under the UNHCR statute, UN Convention of 1951 and the 1969 OAU Refugee Convention respectively.

Statute of UNHCR, Article 6, Para, B,: the UNHCR can deal with any:

> *Person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of his nationality, or if he has no nationality to return to the country of his former habitual residence.*

UN Convention of 1951 (which entered into force in 1954) Article 1(a):

> *As a result of events occurring before 1st January 1951 and owing to well-found fear of being persecuted for reasons of race, religion nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.*

Article 1 the OAU Convention provides that:

> The term 'refugee' shall mean every person who, owing to will-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and… (except the beginning clause, all are similar to UN Refugee definition….).
>
> The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave place outside his country of origin and nationality.

Dear students, can you identify the major point of departure between the definition of refugees under the UN Convention/UNHCR Statute and that of OAU Convention, particularly second paragraph?

Three of the most important limitations of the UN Refugee Convention may be traced to the Socio-political context of its adoption, which was dominated by the effects of the aftermath of WWII and the beginning of cold war. First, the basis of qualification for refugees was limited to a 'well-founded fear of being persecuted for reasons of ….' 'Fear' is a subjective requirement, which needs to be assessed individually for its 'well-foundness'. Apart from the individualistic focus, the list of grounds on which one could earn the status of a 'refugee' is very restrictive and also does not take into account other factors (such as natural disasters or internal wars).

Secondly, a time-limit was included in the UN Refugee Convention. The 'fear' had to be 'as a result of events occurring before 1 January 1951', underling the close link between the Convention and the war that preceded it. A third limitation, geographical in nature, was included as an option to be adopted at ratification (or accession).

In light of the above, it is not surprising that African states saw the convention as a 'European instrument' The perception of exclusion was exacerbated in the 1960s, when it became clear that, in Africa, refugee problems continued and, most often started well after 1951. Due in the main to Africa's criticism and its efforts to adopt a separate convention, the UN in 1966 adopted a brief protocol to the 1951 Convention which entered into force in 1967. The protocol dispensed with the temporal and geographical limitations of the 1951 Convention. From 1967 on, then, the Convention applied equally to all who qualified for refugee status. However, the restrictive definition of 'refugee' was left in tact.

Therefore, after the adoption of the 1967 protocol, African efforts to elaborate a separate UN instrument dealing with refugees were channeled into the adoption of a complementary regional instrument (OAU Refugee Convention recognizes the two UN instruments in its preamble). Thus, to understand the added value of OAU Convention, one should differentiate between the global and regional systems of refugee protection.

The OAU Refugee Convention mirrors exactly the wording of the UN Convention, but expands the definition of the term 'refugee'. The global instrument requires a 'well-founded fear of being

persecuted' as a fundamental precondition for refugee status. In contrast, the OAU Refugee Convention extends the term to include anyone who is compelled to flee a country of residence 'owing' to external aggression, occupation, foreign domination or events seriously disturbing public order….. It is no longer the subjective fear of the individual alone, but also objectively ascertainable circumstantial compulsion that may give rise to 'refugee' status. 'Fear of persecution' places the emphasis on person's beliefs, and not on the socio-political context.

The UN Refugee Convention's definition presupposes that refugees will be screened individually in order to establish whether they have a 'well-founded fear of persecution'. Such a system is obviously only manageable when persons flee on their own or in small groups. However, in the case of mass migrations, the application of such an individualized test becomes impossible. Mass migrations necessitate an approach which uses cumulative and objective factors to determine refugee status. Such factors are events 'seriously disrupting' public order and 'foreign domination' (Art. 1(2)) of OAU Refugee Convention).

The grounds in the OAU Convention on which refugees lose their status ('cessation of status') or on which they are barred from qualifying as refugees ('exclusion from status') are once more derived from the UN document. What are the three additional categories of exclusion or cessation under the OAU Refugee Convention.(See OAU Refugee Convention Arts. I (4) & I (5)).

The OAU Refugee convention is explicit about the obligation of states to grant asylum (Art. II (2)), in contrast to the UN Convention which is silent on the issue. However, the way this right is framed and the requirement of compliance with internal laws renders asylum provision more of recommendatory to states. Further, the non-refoulement principle (the right not be sent back or expelled) appears to be absolute (Art. II (2)). The OAU Refugee Convention also expressly includes reference to voluntary repatriation in Article 5.

Its adoption being resulted from the inter-state ramifications of refugee moments than from a concern for the 'rights' of refugees, the OAU Convention reinforces notions of state security and sovereignty. It determines that a refugee has to conform to the law in the state of refugee, and

that he/she has a duty to 'abstain from any subversive activities against any member state of the OAU (Art. III (1)).

Another innovation is the duty placed by the OAU Refugee Convention on the country of origin in relation to returning refugees: state must grant full rights and privileges to returning nationals, and must refrain from any sanctions or punishment against them (Art. III (3) & III (4)).

Though the OAU Refugee Convention has addressed regional specificities and nature of refugee problems in Africa, it is said to be not adequate document. It is argued that it is 'entirely silent' on issues of mass influx and the procedure for determining who is a refugee is largely left to states discretion. In addition there is a suggestion that the principle of non-refoulement can be limited if the individual acts contrary to the principles of the convention.

It is also said that the Convention does not take a strong human rights approach. There is no real mention of rights of refugee beyond those discussed above (asylum and non-refoulment), it does not deal with women and restricts freedom of movement and rights of expression and association. It does not have provisions relating to the quality of life of refugees (food, health, housing, etc). It does not have its own enforcement mechanism and depends on external organs (UNHCR). Therefore, with a view to filling some of the gaps in the convention it is suggested that the convention should be considered together with the guarantees under ACHPR, ACRWC and APRW.

- **Position of Internally Displaced Persons (IDPs)**

Internally displaced persons (IDPs) are distinguished from refugees and have a challenge of their own, even more than the former. According to the 1998 UN Guiding Principles on Internal Displacement, IDPs are defined as:

> *'Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effect of armed conflict, situations of*

> *generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized state border'.*

Dear students do you see any essence of the above definition of IDPs as compared to refugee definition?

IDPs are persons who are forced or compelled to leave their homes or normal residence as a result of one or more of the causes listed above. They are people within the territorial limit of their national state (no border crossed).

The number of IDPs has been increasing tremendously in Africa compared to refugees. However, there is no any international or regional instrument addressing the special situation of IDPs though they are facing no less difficulty (even more) than refugees in their home countries. In this regard, human rights law is particularly important but also suffers often from limitations where states can derogate from certain rights during times of war or other public emergency situations. Yet the responsibility for their protection lies with home state /national government as they are people within the territorial limits of concerned state.

The 1998 UN Guiding Principle on Internal Displacement is the collection and restatement of principles embodied in human rights law, humanitarian law and refugee law. It recommended the prevention of internal displacement, and the protection of those who found themselves internally displaced, noting that states bear the primary responsibility in both regards.

Thus, IDPs are persons in difficult situation due to dislocation from their homes or habitual residence as a result of one or more natural or man-caused factors but within the territory of their country. However, internationally, no legal (binding) instrument and institution/ organ exist to address their needs, except any existing machineries under the national system. In some counties such as Burma they are denied access to international humanitarian relief. So sovereignty of states will continue to pose more sufferings to IDPs.

African Union has been in the process of drafting a regional IDP convention taking the gravity of the problem in the continent. If successfully adopted, it will be the first ever seen document and is hoped to address and minimize the protracted sufferings of Africans displaced from their homes due to natural disasters or other man-made causes principally internal conflict, generalized violence, violations of human rights or developmental activities.

3.4. Protection for Minorities and Indigenous Peoples

The concepts of minorities and indigenous peoples are controversial under international law and politics. The very difficulty arises from identifying with precision those people falling under the two categories and the extent of the rights and level of protection to be claimed. Owing to the difficulties surrounding the two notions, the purpose of this section will be limited to elaborating any existing legal norms relating to the two groups.

3.4.1. Protection of Minorities

There is no legally binding and accepted definition of minority. Even there are conflicting positions regarding the very need of definition. However, for the purpose of this text, the following are provided from the UN minority framework. Francesco Capotorti, the UN Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, defines minority as:

> *"A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members-being nationals of the state-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*

Another Special Rapporteur of the UN, Jules Deschenes, has defined the concept in more or less similar manner. But what are the basic elements behind the above definition and what problems do you observe?

Certain relevant defining characteristics can be identified from the above definition: objective and subjective criteria.

Those elements which can be categorized under objective criteria are the requirements of: - distinct groups, the numerical factor, non-dominance, nationality of the state and existence in the state. Factors falling under the subjective criteria are the sense of community, goal and self-identification. Do you see any problem with one or more of the above elements?

As to the protective regimes of minorities, there are little and unsatisfactory regimes despite the long period movement (at least formally and vigorously starting from IWW). The two possible reasons behind repeated reluctance for the recognition of minority rights by the international community were: ideological and the implication of its recognition. In the first case, the individualistic notion of human rights development has not been willing to accept certain groups as holder of rights. The second arises from the ambivalence of the international community that abuse of powers and violation of state sovereignty had occurred in the name and under the guise of minority rights.

This has minimized the scope of protection of minority rights during the extensive standard setting as envisaged by the inclusion of a single individualist version under the ICCPR. Article 27 of ICCPR, though it contains some rights of group/collective dimension, is more of individualist as it begins by 'persons belonging to…' the UN Declaration on Minorities has also primarily taken the individualist approach of minority protection.

In the African Context, unlike ICCPR, there is no single provision in the ACHPR or other separate instruments dealing with the protection of minority groups. This was too unfortunate as African states had inherited colonial boundaries under the uti posidetis principle which fragmented a single ethnic group. The ever-increasing conflicts among the diverse ethnic groups and interventions from neighboring states or peoples are creating a devastating effect on the peace, stability and development of the continent. Thus, it is contended that real minority protection regimes can only be emerged from national constitutions by citing the Ethiopian and South African constitutions.

However, it is still possible to argue for the existence of minority rights protection regimes under the ACHPR. In the first place, members of minority groups can invoke the safeguards of equality and non-discrimination. If there is any differential treatment on the basis of their membership in a certain minority group (ethnic, linguistic, religious, etc) which prejudices their rights, it is possible to challenge. Freedom of religion, rights of participation in the government of ones state (political participation), freedom of association, assembly and expression can also essentially serve the rights of minorities.

The more pertinent grounds of minority protection in the ACHPR can be the principle of equality of peoples, the rights of people to existence, the self-determination, and the right to development (Arts.19-22 of ACHPR). The notion of 'peoples', though usually taken from colonial aspect or oppression by external(alien) power, there has been a strong argument to apply it within the set up of sovereign state and its peoples. Thus, Article 19 of the ACPPR on the equality of peoples would be a condemnation of all hegemony-de jure or de facto-exercised by one or more ethnic group over one or more others. Similar approach was taken by the African Commission when it stated that the right of equality peoples to equality had not been violated by the Government of Mauritania. It has been contended that Article 19 of the Charter would thus serve to prevent all discrimination against any particular ethnic group, in other words, all discriminatory practices aimed at its members solely on the basis of their membership of that group.

The rights to existence and self-determination are other closely related rights of paramount importance to certain minority groups. The right to existence relates to the right of certain groups of people (as minority) to physical existence. Thus, like the Genocide Convention, it prohibits the acts directed towards extermination of certain groups of peoples including minorities.

The last to come in this relation is the right of peoples to self-determination. Even if the holders of this broad right have been still debatable, it is possible and legitimate for certain minority groups to claim the right to self-determination.

It is more plausible to invoke the internal dimension of the political, economical, social and cultural self-determination of certain group of peoples whatever meaning is given to the later term. Of course, the practice of African Commission, as revealed in the Katangese secession case, confirms the same position.

Therefore, minority groups can (through the instrumentality of these rights) ensure their right to separate identity. Ensuring ones separate and distinct identity in turn requires an exercise of a series of other rights such as linguistic rights, cultural rights, participatory rights and even including the right to equality. Owing to their numerical inferiority and non-dominant position, minorities should be positively assisted in keeping their distinct identity though this does not prevent any voluntary assimilation.

3.4.2. Indigenous Peoples

The term 'indigenous' in 'indigenous peoples' rights is a result of significant population movements spearheaded by colonial conquest, mass murder, dispossession, and displacement, particularly in the Americas and Australia. 'Indigenous' came to be defined in opposition to those who came later ('second peoples'), who dislocated 'first peoples' through conquest and colonialism. The 'primitive' cultural distinctiveness of a particular group also emerged as a further defining feature denoting indignity.

In the international arena, it is the ILO which for the first time adopted a separate Convention in 1957 and lager in 1989 concerning Indigenous and Tribal Peoples in Independent countries. Echoing the 'first peoples' and 'primitiveness' elements, the later convention applies to people who descended from populations 'which inhabited the country…at the time of conquest or colonization', and whose 'status is regulated… by their own customs or traditions'. The basic obligation of state parties is to guarantee these groups 'the full measure of human rights and fundamental freedoms'. Since few states ratified this convention (esp African states are reluctant), the UN developed other institutional mechanisms-a Working Group on Indigenous populations and a Special Rapporteur for Indigenous Peoples.

According to such initiatives, the UN came up with the working definition of indigenous populations as follows:

> *Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.*

The indispensable element of the definition of indigenous peoples seems to be the desire or interest in the preservation of certain historical and traditional characteristics of the group. These include a groups desire for maintain the continuity of its distinctive characteristics, preserve its ethnic identity, maintain occupation of its ancestral lands, keep its religious beliefs and use of its language.

Thus, can you at this point distinguish between minority and indigenous peoples?

After a long process within the UN, the Human Rights Council in June 2006 approved the UN Declaration on the Rights of Indigenous peoples and this was adopted by the GA on Sept. 13, 2007. This declaration discards the notion of 'tribalism' and introduces the right to self-determination of indigenous peoples (Arts 3&4). This includes the right to autonomy in their internal and local affairs.

The involvement of African states in the UN initiatives has been very limited: no African state has ratified the ILO Convention 169 and of the 13 African members of the Human Rights Council, only four of voted in favour of the UN Declaration. The resistance to accepting the rights of 'indigenous peoples' is due in to the association of the term with colonialism, informing uneasiness about the determination of who 'first peoples' are, and fear the recognition of the right to self-determination. Even in January 2007, the AU assembly expressed its concern

on the destabilizing effect of the UN Declaration invoking its blind acceptance of the principle 'uti posidetis'.

It is said that in Africa, most nationals are in varying degrees 'indigenous' in the original sense of the term. Attaching the term to only one particular group would, therefore, be an unacceptable privilege of a part of the nation and would undermine nation-building. Therefore, the need to focus the term indigenous to refer to 'marginality', and 'self-identification' rather than priority of time' developed in Africa.

However, it is asserted that indigenous group may still be identified, mainly on the basis of their life style and the ethnical imperative of their marginality and vulnerability. It is the confluence of a historical dependence for survival on the land, exemplified, in Africa, by a life of hunter-gatherer and pastoralists, and a present day neglect and exploitation that constitute an 'indigenous' group. It is precisely their traditional lifestyles that left indigenous groups unprepared for life in a modernizing state, eroding the basis of their survival, increasing their vulnerability and exposing them to the real risk of extinction.

Like the minority cases, the African Charter does not expressly include indigenous peoples within its ambit. However, it is still possible to argue that indigenous peoples can be beneficiaries of the charter-guarantees both as an individual and collectivity (from peoples rights). Among these, one could be the right to autonomy as clarified in the Katangese secession case. It is also interesting to note that the African Commission has provided an institutional foothold for the concerns of indigenous peoples in 2002 when it established the Working Group on Indigenous Populations or Communities in Africa. The Working Group prepared a report which was adopted by the Commission in 2003. In this very significant report, the Commission takes the view that indigenous peoples are present in many African countries[1], that the African charter guarantees their rights as individuals and 'peoples', and that state parties to the charter routinely violate these rights.

[1] . The Working Group Report includes reference to the Batwa/Pygmy(Central Africa), Hadzabe(Tanzania), Ogiel(Kenya), San(South Africa), Masaai(East Africa), Himba(Namibia), Tuareg(West and North Africa), Ogoni(Nigeria), and the Berbers(North Africa), based on self-identification and traditional lifestyle(categorizing the groups above into 'hunter-gatherers' and 'pastoralists') as primary indicia.

Dear students, is there any notion of indigenous peoples in Ethiopia, be it under FDRE or Regional /State Constitutions? Discuss.

Review Questions

1. What are the salient features of ACRWC as distinguished from the UN CRC?
2. Do you think that ACRWC has sufficiently addressed the problems of African children?
3. Give your comment on the necessity of having African Youth Charter, esp. when the groups within its ambit are already covered under pre-existing instruments (ACHPR, ACRWC, APRW, etc). Is that not unnecessary duplication?
4. Do you think that the new African Protocol on the Rights of Women is capable of resolving the problems of African women?
5. What major changes are introduced by the Women's Protocol vis-à-vis pre-existing instruments on the same subject?
6. Can parties to the APRW be bound by the provisions of CEDAW via the mandatory reference under article 18(3) of ACHPR?
7. What are the reasons behind for early adoption of OAU Refugee Convention? Can that intention adequately accommodate the later or current refuge problems in Africa? Thus, what are the major draw backs of this convention?
8. What are the protective regimes of IDPs? To what extent are the international community bound to protect these groups?
9. What criteria can you to distinguish between minorities and indigenous peoples? How far the African human rights system addressed the rights of these groups, if any?
10. Discuss the role of domestic constitutions in the protection of the rights of minorities and indigenous peoples by taking the position FDRE constitution.

Chapter IV

The African Human Rights Enforcement Mechanisms

4.1. Introduction

Dear students, in the Second and Third Chapters, we have seen the substantive rights as enshrined in the African Charter on Human and Peoples Rights and the special protection to vulnerable groups under different human rights instruments in Africa. Any law, national or international, is useful to the community only if it can be enforced. It does not serve any good purpose to have a beautifully constructed and phrased legal instrument (including human rights instruments) which can not be put in to action. In this Chapter we are going to examine the enforcement mechanism for the rights and freedoms and obligations provided for in the African Charter and different human rights instruments in African. We are going to also see the role of regional initiatives like NEPAD, NGOS and civic organizations in enforcing human rights in Africa.

4.2 The African Commission on Human and Peoples' Rights

The African Commission is the only organ specially created in 1981 for the purpose of verifying the implementation of the African Charter. Article 30 of the African Charter established the African Commission as an organ of the Organization of African Unity (OAU). Although very much geared to promoting human and peoples' rights, the Commission's activities also entail protection; however, in this area, its role is in theory offset by the role played by the supreme body of the OAU, the Assembly of Heads of State and Government, now the Assembly of the Union. Dear students, in this section we will examine the organization, operation and function of the Commission as well as the procedural aspects relating to its activity for the protection of human and peoples' rights.

4.2.1. Composition

The African Commission consists of eleven independent experts. Members serve in their personal capacity and should be known for their high reputation, morality, integrity, impartiality, and competence in relevant matters (Art.31). In contrast to previous compositions, members of the Commission today satisfy most of the criteria as well as representing a broad geographical balance.

Members of the Commission are elected by secret ballot by the Assembly of Heads of State and Government after nomination by the state parties to the African Charter (Art.33). States must nominate candidates four months before the election.

Members of the Commission are elected for a six year period and are eligible for re-election. To ensure that the Commission is gradually renewed, the term of office of four of the members elected in the first election ends after two years and the term of office of three others after four years; immediately after the first election, the chairman of the Assembly of Heads of State draws lots to decide the names of the members concerned (Art.37).

When they have been elected and before taking up office, members of the commission must, at a public sitting, make a solemn declaration to discharge thief duties impartially and faith fully.

Members of the Commission serve in a personal capacity (Art.31 (2), Rule 12(2)). It might have been feared that, as laid down by Article XXI of the OAU Constituent Charter in relation to the Specialized Committees, the Commission would be composed of ministers or plenipotentiaries of Member States; although created "with in the Organization of African Unity" (Art 30), the Commission does not therefore constitute one of these "Specialized Committees." whose status is regulated by Articles 20 to 22 of the OAU Charter.

4.2.2. Function of the Commission

Apart from the duties which may be assigned to the Commission by the Assembly of Heads of State, Articles 30 and 45 of the African Charter assign three main duties to the Commission: promoting human and peoples' rights in Africa, protecting those rights and interpreting any of the provisions of the African Charter. At no points does the African Charter define what it understands by "promotion" and "protection" of human and peoples' rights; it merely gives examples of promotional activities. The Rules of Procedure are equally discreet on how these two concepts should be understood. According to the rules, promotional activities are essentially those laid down in Article (1) of the African Charter and also include consideration of the periodical report of state parties; however, the Rules confine protection activities to consideration of communication from states parties to others.

As envisaged by the African Charter, the activities to promote human rights aim to publicize human rights and develop and encourage respect for them. So, these can be a whole range of activities, all of which help to raise the awareness of the main parties concerned - those who govern as well as those who are governed - to the human rights issue.

As for the activities of protection, their content is more clearly circumscribed since, under the terms of the Charter and the rules of procedure, they consist solely of the consideration of communications pleading to alleged human rights violation. However, the communication's protection activities are not in fact confined solely to the consideration of communications.

I. The Promotion of Human and People's Rights

Dear students, Article 45(1) of the African Charter envisages three main functions: information and research, consultation and cooperation with similar institutions; Article 62 suggests a fourth relatively important function; consideration of the periodical reports from states.

Information and research is the Commission's promotional activity, *par excellence*, its purpose being to raise public awareness of the human rights issue in African public opinion. Among other

things, the Commission's task will be to "collect documents, undertake studies and research on African problems in the field of human and peoples rights", to organize seminars, symposia and conferences, to disseminate information and to encourage national and local bodies concerned with human and peoples' rights.

The Commission has also a consultative role with African countries, one of its tasks here being to give its views or make recommendations to governments and to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation. In other words, it has a genuine role in providing expert opinion provisions of the African Charter, this role is of particular importance as it concerns are of the essential aspects of the implementation of the Charter.

Dear students, another task of the Commission is to co-operate with the other African or international institutions interested in the promotion and protection of human and people's rights, This is an aspect of the promotional activity which it should not neglect.

Since its creation, the Commission has actually paid particular attention to this type of activities. In this way, it has established contacts with, for example, the United Nations Human Rights Centre, the United Nations High Commissioner for Human Rights, the European Commission and Court of Human Rights, the Inter- American Commission and Court of Human Rights, UNESCO, the United Nations Economic Commission for Africa, the European Community or the European Union.

The other important task of the Commission is the consideration of the periodical reports of states parties. This task is not, strictly speaking, entrusted to the Commission by the African Charter, for Article 62 merely lays down that, every two years, states parties should submit a report on the legislative or other measures taken to give effects to the rights and freedoms which are the objects of their undertaking; it does not state for whom the report is intended or what action will be taken upon it. However, at its 24th ordinary session, the Assembly of Heads of State and Government expressly decided to entrust consideration of the periodical reports to the

Commission and to authorize it to draw up general guidelines for states parties on the form and content of these reports. It is therefore to Chapter XV of the Rules, which is entirely devoted to the Commission's promotional function functions.

According to rule 81 of the Rules of Procedure, these reports should indicate, where possible, the factors and difficulties impeding the implementation of the provisions of the Charter.

Under Rule 83, the report is then considered by the Commission at a session whose venue opening date and duration have been communicating before hand to the state concerned, which may send a representative. The periodical report is examined at a public meting of the Commission, which may therefore also be attended by all NGOs with observer status with the Commission. The Commission generally appoints one of its members as reporter and, after the presentation of the report by the representative of the state concerted. At the end of the meeting to consider the report the Chairman of the Commission informs the representative of the state concerned that a report on the deliberations will subsequently sent to his government; this report generally contains the Commission's observations and any requests for clarification of point which remained at the meeting to consider the report. The state concerned may thus be given a date by which this additional information should be submitted.

Dear students, in general, the exercise by the Commission of this important aspect of its function to promote human and peoples' rights has not actually been a great success to date, essentially because the state parties have seldom demonstrated the requisite diligence and rigour. The second serous problem affecting the Commission's task of considering the periodical reports is that, even though certain states parties do apparently decide to submit their reports to the Commission, they fail to send a representative to the Commission's session, even though duly informed that their report will be discussed there.

Under its Rules of Procedure, the only "section" available to the Commission when performing its function of considering the periodical reports, is its power to refer the matter to the supreme organ of the African Union and to the states parties. Under Rule 86, the Commission is transmit to all the states parties its "general observations made following the consideration of the reports

and the information submitted by the states concerned; these observations, together with the reports, may also be transmitted by the Commission to the Assembly of Heads of State and Government.

II. The Protection of Human and Peoples' Rights

Dear students, the protection of human and peoples rights is also the Commission's task to "ensure the protection of human and peoples' rights under the conditions laid down by the African Charter" (Art. 45(2)). Accordingly, its powers may be assessed on the basis of the nature of the human and peoples' rights violated, the date and place of their violation and the status of their subjects, active as well as passive.

Material jurisdiction or jurisdiction *ration material*

The Commission is entrusted with the task of ensuring the protection of human and peoples' rights "under the conditions laid down" by the African Charter, the Commission's task to ensure compliance with will be the duty of the state to implement the rights, freedoms and duties set forth in the African Charter to which the two specific duties placed on the state by Articles 25 and 26 will naturally need to be added. In its activity of protection, the Commission should therefore not deal with the individual's failure to comply with his duties but only with the violations of the human and peoples' rights as set for by the African Charter.

Dear students, it should be emphasized that the African Charter makes no distinction as between individual rights and collective rights on the one hand, and civil and political rights and economic, social and cultural rights, on the other; the inescapable conclusion is there fore that it is the Commission's task to deal with the failure of a state to respect any right falling with in any of the above-mentioned categories.

Territorial jurisdiction or jurisdiction *ratione loci*

Neither the African Charter nor the Rules of Procedure of the Commission deals with this matter satisfactorily. The first Article of the Charter lays down in very general terms that:

> "The member states of the {African Union} parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this charter and shall undertake to adopt legislative or other matures to give effect to them."

and its Article 30 lays down in equally terms that an African Commission shall be established to "promote human and replies rights and ensure their protection in Africa." Yet it is implicit that the Commission may deal with violations of human and peoples' rights in the territory of any state party to the African Charter.

Nor does the relative lack of precision of the African Charter in this respect precede the Commission from also being able to deal with a violation of human right to which can be imputed to a state party, even that violation took place outside the territory under the jurisdiction of that state.

Temporal jurisdiction or jurisdiction *ratione temporis*

Dear students, on this point, the texts are silent; yet in accordance with the well established principle in international law that treaties are not retroactive, only violations of human or peoples' rights subsistent to the entry in to force of the African Charter with respect to the state concerned should be brought before the Commission, in other words three months after the date of the deposit by this state of its instrument of ratification or adherence (Art.65). The Commission thus declared a communication alleging human rights violations by an African state not yet party to the African Charter inadmissible.

The African Commission had occasion to deal with a case in which it recognized its jurisdiction to consider acts which had taken place before the entry in to force of the African Charter with respect to a state, yet continuing to produce its effects after the entry in to force. In the case concerning *John K.Modise V.Botswana,* the Commission after noting that Botswana had ratified the African Charter on 17 July 1986, held indeed that:

> "Although some of the events described in the communication took place before ratifition, their effects continue to the present day. The current circumstances of the complaint is a result of a present policy decision taken by the Botswana government against him"

Personal jurisdiction or jurisdiction ratione personam

1. Jurisdiction *ratione personae* with respect to the Applicant

A matter may be referred to the Commission by any state party to the African Charter (Arts.47 and 49) whether the individual or people which is the victim of the alleged violation is or is not legally attached to it.

A communication may also be considered by the Commission at the request of a simple majority of its members (Art.55 (2)) under an original procedure in which the individual is closely involved. Although not formally designated as such by the African Charter (Arts-55 et set) the individual is in fact the potential author of the "other communication" it provides for; the Commission's Rules of Procedure leave one in no doubt about this. Rule 104(10 ("Request for Clarification") lays down, for example, that the Commission may request the author of a communication to specify his name, address, age and profession.

The revised version of Rule 114 (current Rule 116 ("Admissibility of the Communication") contains far fewer details on this point, merely stating as it does that "(t)he Commission shall determine questions of admissibility pursuant to Article 56 of the Charter". However, this is not important because, as under the former Rules of Procedure, the Commission continues to

consider communications addressed to it by non governmental organizations based in the African continent or outside it (Amnesty International, Interights, International Commission of Jurists, International PEN, Lawyers' Committee for Human Rights, etc), or by individuals; in this connection, it should be noted that the commission did not hesitate to deal with communications lodged by an individual on behalf of another individual even though the author of one of these communications was not resident in the territory of a state party to the African Charter.

2. Jurisdiction ratione personae with respect to the Respondent

The Commission may only deal with violations of human and peoples' rights by a state, yet this State must also be a party to the African Charter (Arts.47 and 49); Rule 102 (2) of the Rules of Procedure of the Commission provides that "No communications concerning a state which is not party to the Charter shall be received by the Commission or placed in a list under Rule 103 of the present Rules." The Commission thus declared "inadmissible" a number of communications lodged against African States not then parties to the African Charter, such as Angola, Burundi, Cameroon, Ethiopia, Kenya, Lesotho, Malawi, Morocco, or non African States such as Bahrain, Haiti, Indonesia, the United States, or Yugoslavia. These communications were declared "inadmissible" pursuant to the abovementioned Rule 102 ("seizing of the Commission") which was then Rule 101.

Like the European Convention on Human Rights (Art.24) before the control machinery established by the European Convention was restructured, but unlike the American Convention on Human Rights (Art. 45), the African Charter does not make the seizing of the Commission by a State subject to a prior declaration of acceptance of the jurisdiction of this body by the state challenged. Lastly, it is self-evident that a non-State entity - be it an individual or an organization - can in no circumstances be brought before the Commission: this is shown both by the relevant texts and by the very object and purpose of the African Carter. In this connection, it should be noted that the Commission has received a communication alleging a violation of the African Charter by the Organization of African Unity and which the Commission declared "inadmissible".

Procedure before the Commission

The Commission's activity for the protection of human and peoples' rights chiefly consists in considering violations of any right or freedom guaranteed by the African Charter brought to its attention by "communication" which, as we have seen, may be of State as well as private origin. The procedural aspects surrounding this activity are regulated by Chapter III of part II of the African Charter (Arts.46 to 59) and Chapters XVI and XVII of the Commission's Rules of Procedure (Rules 88 to 120). However, it will be noted that although, regardless of the nature of the communication, the outcome of the procedure before the Commission is identical, namely, the preparation of a report, this is not so as regards how that procedure is set in motion and develops: the conditions governing the admissibility and consideration of communication vary indeed according to the nature of their author. The difference is patent where the admissibility of communications is concerned. And also as regards their consideration; for example, the text of the African Charter makes consideration of the "other communication" subject to a veritable procedural shuttle between the Commission and the Assembly of Heads of State. Yet we will see that, in practice, the procedure followed by the Commission is not always faithful to that laid down by the letter of the African Charter, as the Commission has assumed certain powers that it does not formally posses, regardless of he differences between the procedures for "communication from states parties" and that for "other communications", it is nevertheless clearly geared to the same objective, namely, conciliation.

I. Procedure for'' Communications from states Parties''

It is in relation to this procedure that the desire for conciliation is most clearly apparent. Indeed, Articles 47 to 49 of the African Charter provide an alternative to any State party having found that the provisions of the Charter have been violated by another state party. They offer the requesting State a choice between two procedures which the Commission's Rules of Procedure designate in a highly revealing manner as "procedure for communications-negotiations" and "procedure for communications complaints", the former possibly leading to the latter, which alone of the two truly sets in motion the procedure before the Commission. As indicated above, it

is only recently that the Commission was seized for the first time with an inter-state communication worthy of the name, in other words from a State party to the African Charter and lodged against another State party; the Commission therefore has no true practice in this respect, and we will consequently limit our examination solely to the text of the African Charter.

II. Procedure relating to "communications-complaints"

Under Article 49, it may also be initiated by a state outside any conciliation attempt. This alternative, which did not exist in the draft African Charter, seems a priori to conflict with the intended aim, which I conciliation. In fact, conciliation is always possible at all stages of the procedure before the Commission; indeed, the seizing of the Commission, without prior conciliation, thus enables a requesting state to avoid entering into direct contact with the addressee state in cases where such contact is not desired for diplomatic reasons. However, it should be noted in this connection that there is a certain contradiction between the texts of the African Charter and that of the commission's rules of procedure (both in its original version and in the version as amended in 1995). Indeed, as currently worded (see rule 93 (2) and Rule 97), the rules take no account whatever of the alternative proposed to the requesting state by Article 49 o the African Charter, the essential consequence of this is to prevent any communication from being submitted on the basis of article 49. 1998 The authors of the Rules therefore need to clarify this; meanwhile, we will adhere to the text of the African Charter which, as it is a treaty, remains the only reference instrument in this matter.

1. Seizing of the Commission

Whether it is the continuation of a fruitless negotiation procedure or without such a first step by the requesting sate, the procedure relating to "communications-complaints" will start with notification of the chairman of the Commission. Among other things, this notification must mention:

a) Measures taken to try to resolve the issue pursuant to Article 47 of Charter including the text of the text of the initial communications and any future written explanation from the interested States parties to the charter relating to the issue;

b) Measures taken to exhaust local procedure for appeal;

c) Any other procedure for the international investigation or international settlement to which the interested States parties have resorted".

Although not apparent from the wording of this provision, it is clear that the requirement of its sub-paragraph (a) will not apply in the event of a communication submitted pursuant to Article 49.

Duly informed by its Secretary that it has been seized of a communication, the Commission considers the communications received in closed session. After consulting the States parties concerned, it may issue, through the Secretary, press release on its closed sessions for the attention of the public (Rule 96).

2. Consideration of the Admissibility of the Communication

The conditions for the admissibility of the communication are laid down by Article 50 of the African Charter and rule 97 and are three in number. The exhaustion of all available local remedies is laid down by article 50 of the African Charter and rule 97 (c) , while the other two conditions, the exhaustion of the conciliation procedure and the expiry of the time-limit of three months set by Article 48 of the African Charter, are laid down only by rules (rule 97 (a&b)).

i. Exhaustion of local remedies

According to article 50 of the African Charter, the Commission can only deal with a matter which is submitted to it "after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged".

This is a cardinal principle of international law relating to diplomatic protection and dear to all international systems for the protection of human rights. This rule essentially seeks to protect state sovereignty; it is founded on the principle that the State challenged must first be given an

opportunity to rectify the litigious situation within the framework of its own internal legal system. Moreover, the Commission has had occasion to comment many times on this principle in the following terms:

> ‘’The requirement of exhaustion of local remedies is founded on the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before and international body".

Again according to the Commission,

> "requiring the exhaustion of local remedies also ensures that the Arian commission does not become a tribunal of first instance, a function that is not in its mandate and which it clearly does not have the resources to fulfill."

Under the terms of Article 56 (5) of the African Charter, the exhaustion of local remedies is also a condition of the admissibility of the "other communications" and since the Commission has so far only considered this conditions in the context of these "other communications". Methodologically speaking, it seems more logical not to pursue our examination of this condition at this point and to refer the reader to our analysis of this question in the section devoted to this second type of communications. The examination of the condition laid down by Article 56 (5) of the Charter can therefore be transposed mutatis mutandis on to the condition laid down by Article 50 of the same instrument.

Finally, it should be underlined that it is doubtful how appropriate the rule of the exhaustion of local remedies is in a case entailing the violation of the African Charter apart from any consummate violation of the rights of an individual, such as, for instance, the failure to respect the obligations lid down in Articles 1, 25 or 26 of the African Charter; in that case, indeed, as it is a matter of the infringement of a right of the State and not of the individual, the rule should not normally be applied in such circumstances.

ii. Failure of the conciliation procedure

This condition confirms the preference displayed by the African Charter for negotiated solutions. However, as indicated above, this condition laid down by Rule 97 betrays the letter of the African Charter as it does not take account of the option offered to States by its Article 47 and 48, which assign and important role to conciliation, this condition is not justified in the context of the extraordinary procedure of Article 49, which permits direct seizing of the commission without any prior conciliation. This condition should therefore only be required in the former situation; this is the only way of maintaining the whole integrity of the text of the African Charter.

iii. Expiry of the three-month time -limit laid down in Article 48

The expiry of the three-month time -limit from the date the original communication is received by the addressee state (rule 91 (1)) is also one of the conditions for referring the matter to the Commission in the context of the procedure relating to the "communication-negotiation". It is only meaningful in the context of this procedure alone and, like the previous condition, should not be a condition of the referral of the matter to the Commission on the basis of Article 49.

Ultimately, the exhaustion of local remedies appears to be the only inescapable condition of admissibility, the other two conditions being required only in the contest of admissibility, the other two conditions being required only in the context of the procedure laid down by Articles 47 and 48. This relative flexibility of the African Charter and the rules of procedure as regards the conditions for the admissibility of communications from sates is otherwise only found in the International Covenant on Civil and political Rights.

3. Consideration of the admissible communication

Prominently placed at the beginning of Chapter III on the procedure of the Commission, Article 46 of the Charter authorize the commission to resort to any appropriate method of investigation and, in particle, to hear any person capable of enlightening it. This provision, therefore,

authorizes the Commission to hear witnesses such as and why not after all, national liberation movement or a non-governmental organization. Neither the African Charter nor the Rules of procedure envisages the possibility for the Commission to carry out on-the-spot investigations.

The Commission may also ask the States concerned to provide it with any information it may judge necessary or to inform it, orally or in writing, of any observations they may gave (Article 51 (1); Rule 99). In that case, it fixes a time limit for the submission of such information or observations.

The States parties to the dispute have the right to be represented when the case is considered by the Commission and by making oral or written observations (At. 51 (2); rule 100). This, it should be noted, is right of the States parties, not a duty. The Commission could nevertheless oblige the parties concerned to appear by an extensive interpretation of the power it is granted by Article 51 (1) of the African Charter and Rule 99 of the rules of procedure.

Although this in one way prejudges its decision on the merits, the Commission, it would seem, also has the power to inform the state party concerned of "its view on the appropriateness of taking provisions of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation". This power is laid down by Rule 111 ('Provisional Measures") and although this provision is found in the chapter on procedure in connection with "other communications", it may, in our view, also apply in the context of the procedure considered her, however, the convoluted wording of rule 111 merely lays down the possibility for the Commission to recommend measures of protection: it does not clearly give the Commission the power to request a State party to respect them.

A further point is that, throughout this stage of the consideration of the communication by the Commission, this body remains at the disposal of the parties for an amicable settlement of the case (Art. 52; Rule 98). Only when in possession of all the essential information relating to the case under consideration and after seeking an amicable settlement of it, does the commission prepare a report.

1. Procedure Relating to ''Other communications"

This procedure is regulated by articles 55 to 58 of the African Charter and Articles 102 to 120 of the rules. In many respects similar to the procedure relating to inter-State communications, it is nevertheless appreciably more complex and is governed by much stricter rules. Ultimately, everything in this procedure indicates a desire to control and channel as strictly as possible the flow of these communications which, since they may come from either individuals or organizations, have every chance of exceeding in number those from the states parties to the African Charter.

i. Seizing of the Commission

The rules of procedure-like the African Charter- do not specify what form these "other communications" should take. However, Rule 104, entitled "Request for clarifications", states that the Commission may request the author of a communication to furnish clarifications on the applicability of the African Charter to his /her communication, and to specify, in particular, 1) his name, address, age and profession, providing proof of his/her identity even if requesting anonymity of the Commission, 2) the name of the State party referred to the communication, 3) the purpose of the communication, 4) provision (5) of the Charter allegedly violated, 6) the facts of the claim, 7) the measures taken by the author to exhaust local remedies, or explanation why local remedies will be futile and 8) the extent to which the same issue has been settled by another international investigation or settlement body.

ii. Consideration of the admissibility of the communication

To be admissible, communication must meet certain conditions which, according to Article 56 of the African Charter, are seven in number; namely, they must indicate the identity of their authors, must be compatible with the charter of the Organization of African unity, ust be submitted after the exhaustion of local remedies, must be submitted within a reasonable period and must respect the *non bis in idem* principle. The current Rules of Procedure do not add any further condition, as was the case before their amendment in 1995. Indeed; Rule 116 merely

indicates that "the Commission shall determine questions of admissibility pursuant to Article 56 of the Charter". The conditions of admissibility laid down by Article 56 to the African Charter are more or less the same as those laid down by our other three reference instruments.

iii. Consideration of an admissible communication

It should first be pointed out that, even during this phase, the Commission can reconsider decision of inadmissibility if it is seized of an application to this effect and that the author of a communication can always withdraw it, thus putting an end to the proceedings before the Commission.

When the communication has been declared admissible, it must be brought to the attention of the State concerned before it can be examined on the merits; this is a procedural requirement laid down by article 57 of the Charter and Rule 112. For reasons of convenience and perhaps also streamlining, and as it is permitted to do under Rule 114(2), on a number of occasions the Commission has grouped together communications against one State and delivered one single decision covering all the cases concerned. Communications (regardless of their origin-State or non-State) are considered by the Commission at private session, although the Commission always has the possibility of revealing all or part of the content of it discussions by publishing press releases. We will examine the general aspects of the procedure for considering admissible communications, as well as some of its particular aspects such as the use of certain methods of investigation, the possibility for the commission to indicate provisional measures or to seek amicable settlement of the case.

4.3. The Committee on the Rights of the Child

A Committee of Experts (Art. 32 of the African Charter on the Rights and Welfare of the Child 1990) monitors the Charter on the Rights and Welfare of the Child. The first meeting of the Committee was held in 2002. It has a broad mandate to promote and protect the rights and welfare of the child (Art. 42 of the African Charter on the Rights and Welfare of the Child 1990). Unlike the United Nations Committee, the Committee of Experts has competence to receive

individual complaints which are to be dealt with confidentially (Art. 44 Art. 42 of the African Charter on the Rights and Welfare of the Child 1990) though in line with the approach of the United Nations, reports of the Committee are to be widely disseminated.

4.4 The African Court of Human and Peoples' Rights

The date 25 January, 2004 is a memorable date for the Africans and all those other advocates of human rights protection all over the world. This date marked the entry into force of the Protocol which established the African Court on Human and Peoples' Rights.

Article 66 of the African Charter lays down the special protocols or agreements may, where necessary, supplement the provisions of the Charter. This Article did not remain a dead letter, as it was precisely by virtue of a Protocol that, in June 1998, the States parties to the African Charter created the African Court of Human and Peoples' Rights, a judicial body intended to reinforce the safeguards of safe mechanism instituted by the African Charter in 1981. Article 1 of the Protocol establishes the Court, emphasizing that it is established within the framework of the African Union (hereinafter AU). We will now go on to consider, in turn, the organization, operation, functions and procedures of this Court.

1. Organization of the Court

We will consider the composition of the Court, the question of its seat and the material and human resources at its disposal.

The Judges

Article 11 of the Protocol lays down that the Court shall be composed of eleven judges and that in no case may it include more than one national from the same state. To be eligible, candidates must meet certain condition and, once they are elected, the exercise of their office must comply with certain rules.

Bureau

Under the terms of Article 21 of the Protocol, the Court shall elect its President and one Vice-President for a period of two years, and both may be re-elected once; their functions shall be set out in the Rules of Procedure of the Court, and the president shall perform his functions on a full-time basis and shall reside at the at of the Court.

2. Operation of the Court

The Protocol is relatively discreet on the operation of the Court, and it will therefore be for the court to lay down the precise details of this in its Rules of Procedure. We will here consider some of the rather unusual aspects of the operation of the Court regulated by the Protocol, taking them one by one.

Rules of Procedure

Article 33 of the Protocol provides that the Court shall draw up its Rules and determine its own procedures and shall consult the Commission as appropriate. Here, it should be recalled that the Court is, in fact, designed to "complement" the African Commission (Art. 2 of the Protocol, and Para. 7 of its preamble). As the Court is essentially assigned judicial functions, consultation between these two bodies should focus on specifying the functions of the African Commission. [2401] This point is made by Article 8 (entitled" Consideration of cases"), stipulating as it does that

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

3. Functions of the Court

The Protocol lays down at the outset, in Article2, that the Court shall, bearing in mind the provisions of this Protocol, "complement the protective mandate of the African Commission", a reading of Articles 3 and 4 shows that the Court has a twofold function: contentious and advisory.

A. Contentious Functions

We will now consider the contentious function of the African Court, looking in turn at it jurisdiction, the procedure followed during the consideration of the cases brought before it and the decisions it has the power to take.

i. Jurisdiction of the Court

As the provisions of the Protocol do not clearly delimit the jurisdiction of the Court, we will endeavor to sketch in its major outlines, including it material, personal, territorial and temporal aspects.

1. Material jurisdiction or jurisdiction ratione materiae

Article 3 (1) of the Protocol provides for very broad jurisdiction, stating that:

> "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol, and any other relevant Human rights instrument ratified by the states concerned".

The formula enshrined in Article 3 of the Protocol is most original; it is broad and generous. To begin with, it makes it possible to invoke before the Court the violation of the provisions of the African Charter which, as we have seen, constitute a bold juxtaposition of individual rights and collective rights, civil and political rights and economic, social and cultural rights, as well as rights and duties. The originality of Article 3 of the Protocol resides in the fact that the Court could also consider the interpretation and application not only of the Protocol itself, which seems self-evident, [2419] although the Protocol does not recognize any human right, but also and above all it could consider any other legal human rights instrument "ratified by the States concerned"

Only two limitations are laid down by Article 3; the instrument concerned must be a convention (as suggested by the ratification requirement) and it must have been ratified by 'the States concerned". The principle of the relative effect of treaties means that the expression just referred

to must be seen as the requirement that both the Applicant State and the Respondent State must have ratified the convention concerned, in the event of a communication between States.

Theoretically, Article 3 of the Protocol thus authorizes the African Court to gear all cases or disputes concerning, for expel, the interpretation or application of the very protective provisions of the two United Nations Covenants of 1966, to which virtually all African States are parties, or those of the 1990 African Charter on the Rights and Welfare of the Child or the 1969 OAU Refugee Convention.

2. Personal jurisdiction or jurisdiction ratione personae

The question of the jurisdiction ratione personae of the African Court certainly raised a number of problems during the process of the elaboration of the Protocol. In its very first version, the protocol laid down, in Article 5, that cases could be brought before the Court by the African Commission, and by the state party against which the complaint has been lodged at the Commission, its Article 6 (entitled "Exceptional Jurisdiction") also laid down that "the Court may, on exceptional grounds, allow individuals, non-governmental organizations and groups of individuals to bring cases before the Court, without first proceeding under Article 55 of the Charter".

We will now consider the jurisdiction ratione personae of the Court as regards the Applicant and the Respondent; we will also briefly consider the possibility open toe certain States to intervene in the proceedings.

I. Jurisdiction ratione personae with respect to the Applicant

As defined by the Protocol, access to the African Court is relatively liberal when compared with the American Convention or what it was prior to 1 November 1998 in the European Convention. For under the terms of Article 5 of the Protocol, the following are entitled to submit cases to the Court:

1. the African Commission,

2. the State party which has lodged a complaint to the Commission,
3. the State party against which the complaint has been lodged at the Commission,
4. the state party whose citizen is a victim of a human rights violation, and
5. African Intergovernmental Organizations.

A case may also be brought before the Court by a non- governmental organization with observer status before the Commission, or an individual, provided the State concerned has made a declaration accepting the jurisdiction of the Court to receive such cases. The Protocol therefore lays down the compulsory jurisdiction of the African Court for all cases brought before it by the Commission, a State party or an African inter-governmental organization, and the optional jurisdiction of the Court as regards cases brought by an individual or a non-governmental organization.

As defined by the Protocol, the jurisdiction of the Court in contentious matters is not necessarily intended to be exercised in an extension of proceedings before the Commission. The travail repertoires of the protocol show that it was originally planned to include all proceedings before the Court in the immediate extension of those brought before the Commission, but that this idea way subsequently abandoned.

The abandonment of the formula initially chosen by the authors of the Protocol means that it can be concluded without hesitation that they did not intend to limit the jurisdiction of the Court solely to cases brought before the Commission, The first type of case covers those already having been the object of proceedings before the African Commission and subsequently referred to the Court by the Commission itself or by a State party which has lodged the complaint to the Commission a State party against which the complaint has been lodged at the Commission or a State party whose citizen is the victim of the human rights violation brought to the consideration of the Commission. In this first type, the question is at what stage in the proceedings before the Commission the case may be brought before the Court. In the Inter-American context, a case cannot be bought before the Court until a relatively advanced stage in the proceedings before the Commission. Since the Protocol is silent on the matter, and failing any contrary indication in the Rues of Court, as soon as a case is brought before the Commission, both the Applicant State and

the respondent State or the State whose national the victim is could bring a case before the Court, on the sole condition that they are parties to the Protocol.

The second type of cases covers those submitted directly to the Court by a state or" African intergovernmental" organization without any proceedings having been instituted before the African Commission. The drafting of Article5 (1 d) is sufficiently vague to permit a case to be brought before the court by a State whose national is the victim of the violation of aright, whether a case regarding this violation has been brought before the commission or not.

The third type of case covers those brought directly before the Court by an individual or non-governmental organization without any proceedings having been instituted before the African Commission. This is indicated by Article 5 (3) of the Protocol, which states that:

> "The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Aricle34 (6) of this Protocol".

Article 34 (6) of the Protocol lays down the procedure for the deposit of the optional declaration of acceptance of the compulsory jurisdiction of the Court. However, it is silent on whether this decoration can be made only for specific cases or for a specified period of time: for its part, the Protocol to the African Charter does not require the individual to be the victim of the alleged violation; nor does it lay down this requirement for a non-governmental organization wishing to bring a case before the Court. The court ought therefore to make a liberal interpretation of the relevant provisions of the Protocol when drafting its Rules and not require the author of an application to be the victim of the alleged violation.

Lastly, attention should be drawn to a small ambiguity in article 5 (3). What indeed, is the meaning of the expression "The Court may entitle"? This form of words would suggest that the Court's jurisdiction is not automatic and that bringing a case before it depends upon its discretionary power. Yet, the reference to Article 34 (6) confirms that the only condition on bringing a case in this way is the deposit of a declaration of acceptance of the jurisdiction of the Court by the state concerned. At this stage, the Court's only discretionary power would be to

ascertain the existence of such a declaration, as well as the observer status of the non-governmental organization concerned. Be this as it may, the Court has the "*competence de as competence*". The power to determine its own jurisdiction, as clearly shown by article 3 (2) of the Protocol; in other words, "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide". Ultimately, there was no need to stipulate that the "Court may entitle" non-governmental organizations and individuals to institute cases directly before it; such permission falls within the sole domain of States parties to the Protocol.

II. Jurisdiction ratione personae with respect to the Respondent

Every State party to the Protocol may be brought before the Court by the African Commission, a State party or by an African inter-organizational organization, without it needing to give its consent either by the prior deposit of a declaration of acceptance of the compulsory jurisdiction or the Court or in any other way; the jurisdiction of the Court is compulsory for it solely by virtue of its accession to the Protocol. In the Inter-American system, the jurisdiction of the Court is optional; this was also the case in the European system prior to the entry into force of Protocol No.11, which made this jurisdiction compulsory regardless of the status of the complaint.

However, a State party to the Protocol cannot be brought before the Court by an individual or a non-governmental organization unless it has first made the declaration laid down in Article 34 (6), by which it accepts the Court's jurisdiction to deal with such cases. [2455] The question arises whether a State may nevertheless agree to be brought before the Court by expressing its consent on a case-by-case basis, other than by the prior deposit of its declaration as laid down in Article 34 (6).

III. The opportunity to intervene for states with an interest in a case

Article 5 (2) of the Protocol states that" (w)hen a State party has an interest in a case, it may submit a request to the Court to be permitted to join". The wording of this provision is not particularly fortunate since it seems to be an amalgam of two quite different legal institutions – the joinder of cases and the intervention of a third State in a case. For a judicial body, the joinder

of cases entails the consideration of two or more interrelated cased, the initiative for such joinder lying with the judicial body concerned. The purpose of intervention is quite different. In general, when a State has an interest in a case between two other States, it may submit a request to the Court to be permitted to intervene; moreover this is the language used in the French version of this provision, and also that of Article 62 (1) of the Statute of the International Court of Justice.

3. Temporal jurisdiction or jurisdiction ratione temporis

As the Protocol provides no pointers on the question of the Court's jurisdiction *ratione temporis*, the organ should as a rule only hear cases and disputes which have arisen after the date of the entry into force of the Protocol with respect to each state party concerned; this is the solution which would be dictated by the strict application of the principle of the non-retroactivity of conventions.

However, the aim and purpose of the Protocol point towards a contrary solution. Indeed, it could be asserted that the intention of the authors of the protocol was to improve the operation of the safeguards system of the African Carter as soon as possible. It will be recalled that, in the preamble of the Protocol, the AU Member States declared themselves

> "(f)irmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights";

Article 2 of the Protocol also lays down that "the Court shall (---) complement the protective mandate of the African Commission".

4. Territorial jurisdiction or jurisdiction *ratione loci*

On this point too the protocol is silent. It may therefore be deduced that the extent o the Court's territorial jurisdiction coincides with that of the Commission. The Court could thus deal with violations of human and peoples' rights falling within the material scope of Article 3 (1) and

occurring in the territory of any State party to the Protocol. The broad wording of Article 3 does not prevent the Court from also dealing with violations which can be imputed to a State party even if they occurred outside the territory falling within
its jurisdiction.

ii. Procedure before the Court

1. Consideration of applications as regards their admissibility

The Protocol devotes only three short paragraphs to the question of the admissibility of applications and the least that can be said is that the way it deals with this important matter is not very satisfactory owing to its lack of clarity. Indeed, Article 6 entitled "Admissibility of Cases" reads as follows:

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

It is patently clear from a reading of the first paragraph of this article that it relates solely to cases brought before the Court by an "individual" or a "non-governmental organization". This provision lays down a simple option for the court, not obligation.

Notwithstanding the admissibility of a case on the basis of the strict conditions set forth in Article 6 of the Protocol and 56 of the Charter, the Court may request the opinion of the Commission before ruling on the admissibility of a complaint.

However, the Statute of the Court does not clearly indicate the procedure to be followed or the conditions under which a case begun or referred to the Commission by the Court may be subsequently referred to the Court.

2. Consideration of the application on the merits

Africa 8 of the Protocol is entitled "Consideration of cases" and states that

> "(t)he Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarily between the Commission and the Court".

Like the American and European Conventions, the Protocol thus gives few details regarding the procedure for the consideration of applications on the merits. However, it seeks to regulate certain specifies matters such as the court hearing a case, laying down the exclusion of a judge if he is a national of State party to a case submitted to the court, or the option given to the Court to make no-site visits. It also regulates other equally specific and important matters such as sources of law, hearings and representation, evidence, interim measures, amicable settlement, and findings.

3. Judgments of the Court

The judgment of the Court decided by majority would be final, and not subject to appeal. However, the Court is empowered to review its decisions in the light of new evidence, under conditions that would be set out in its Rules Of Procedure. At the same time, the Court enjoys the power to interpret its decisions.

Under the terms of article 28 of the Protocol, the Court "shall render its judgment within ninety (90) days of having completed its deliberations". The immediate question which arises here is how appropriate it is to impose on the Court a time-limit for delivering its judgments. The idea here was certainly to prevent cases from dragging on endlessly before the Court after being considered. However, it might prove difficult for the Court systematically to respect such a 90-day time-limit. Owing to the inadequacy of the human and material resources of it Registry, the Court might find itself unable to produce a judgment within the time-limit allocated.

It is interesting to note that article 29 lays down that the judgment of the Court shall be notified not only to the parties to the case, the member States of the AU and the African Commission, but also to the AU Council of Ministers, which "shall monitor its execution on behalf of the assembly" of Heads of state and Government. This is an important provision, whose purpose is to ensure that the Court's decision is made public and to guarantee it performance by the political organs of the regional organization.

B. Advisory Function

The Protocol also confers an advisory function on the African Court, like the American and European Human Rights Courts, whose powers in this respect are governed respectively by Article 64 of the American Convention and Articles 47 to 49 to the European Convention, as amended by Protocol No. 11.

Indeed, Article 4 of the Protocol entitled "Advisory Opinions" reads as follows:

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

We will consider in turn who the potential instigator of a request for an advisory opinion are, the material scope of the jurisdiction of the Court in this domain and also the action the Court can take on receipt of such a request.

i. Initiative for a request for an advisory opinion

The first point to note is that Article 4 of the Protocol is relatively liberal in this respect, since to authorize requests for advisory opinions not only by states parties to the Protocol and other

members of the organization of African Unity, but also by that organization and each of its organs, as well as by "any African Organization recognized by the AU". It will be recalled that article45 (3) of the African Charter also authorizes the African Commission to interpret any provision of the Charter "at the request of a state Party, an institution of the AU or an African Organization recognized by the AU".

The solution adopted by the Protocol differs somewhat from the one adopted by the African Charter concerning the African Commission's power of interpretation, since the Protocol does not limit access to the advisory function solely to states "parties". This solution also differs appreciably from the one adopted in the European system where only the Committee of ministers may request an advisory opinion. On the other hand, it is similar to the solution favored in the Inter-American system in that many of the Member States of the Organization of American States, and also some of its organs, may bring a case before the Court: the only major difference lies in the fact that the Protocol does not specify which these organs are.

ii. Material scope of the Court's advisory jurisdiction

The Court has relatively broad advisory jurisdiction, extending as it does to both to African Charter itself and "any relevant human rights instrument", which includes not only all regional or universal human rights treaties, the Protocol included, but also the other formally non-binding legal instruments such as the resolutions of relevant bodies (African Commission, United Nations General Assembly, etc). There are only two imitations no the jurisdiction of the court: the opinion may only concern a "legal matter" and it should not be 'related to a matter being examined by the Commission".

The purpose of the latter limitation is probably to prevent the Court, in the exercise of its advisor unction, from prejudicing the integrity of the quasi-judicial junction of the African Commission as regards the protection of human and peoples' rights, and to protect the Commission's full freedom of decision. It would, moreover, be most regrettable were the Commission and the court to give divergent interpretations of the same legal issue. In this connection, it African Commission is vested with the power to interpret any provision of the Charter outside any

consideration of a case pending before it. However, Article 4 of the Protocol did not envisage such a potential conflict between the respective powers of the Court and the Commission in this area.

iii. Action following a request for an advisory opinion

Essentially, it should be noted that the language of Article 4 (1) is permissive ("the Court may provide"); in other words, the Court's power to issue advisory opinions is purely discretionary like that of the other regional courts or the International Court of Justice. Indeed, the Court could decline to issue an opinion on grounds of judicial expediency, even if the conditions for submitting a request to it laid down by Article 4 are met. Yet, this discretionary power is not infinite, for, as the inter-American Court has stated:

> "This broad power of appreciation (of the American Court) should not be confused, however, with unfettered discretion to grant or deny a request for an advisory opinion. The Court must have compelling reasons founded in the conviction that the request exceeds the limits of its advisory jurisdiction under the Convention before it nay refrain from complying with a request for an opinion. Moreover, any decision by the Court declining to render an advisory opinion must conform to the provisions of Article 66 of the Convention, which require that reasons be given for the decision".

The African Court should not, therefore, decline to act on a request for an advisory opinion unless there are compelling reasons for doing so. Be this as it may, it must in the reasoning of its opinion explain why it has declined. Article 4 (2) of the Protocol places and obligation on the court to give reasons for its opinions and this obligation applies regardless of whatever action is actually taken.

Lastly, it should be noted that although the question of the legal force of the Court's advisory opinions was not dealt with by the Protocol, it is nevertheless clear that, as their name suggests, they are solely advisory. Yet while not binding, the advisory opinions delivered by international judicial bodies are not bereft of all legal force and generally possess great moral authority. The

same authority ought therefore also to characterize the advisory opinions of the African Court; yet that authority will largely depend on the nature of the questions they relate to and the quality of the legal reasoning which underpins them.

4.5 The Court of Justice of the African Union (ACJ)

The Constitutive Act establishing the AU, which entered into force in May 2001, features human-rights issues prominently in the preamble in contrast to the OAU Charter, "the inclusion of human rights, the objectives and guiding principles of the Act is an important step toward anchoring human rights in the AU.

This Act provides for the ACJ, with the jurisdiction of implementation and application of the Act, whose competence will obviously extend over human rights controversies as the ACJ can interpret and apply treaties and all subsidiary legal instruments adopted within the framework of the AU, which might be human rights treaties.

As per its Protocol, the ACJ has jurisdiction to resolve disputes and applications referred to it. It can interpret and apply the AU Constitutive Act, AU treaties and all subsidiary legal instruments adopted within the framework of the Union. It also has jurisdiction over any question of international law; all acts, decisions, regulations ad directives of the organs of the Union; all matters specifically provided for in any other agreements that State parties may conclude among themselves or with the Union and which confer jurisdiction of the ACJ. The latter can also rule on the existence of any fact, which, if established, would constitute a breach of an obligation owed to a state party or to the Union, and also on the nature or extent of the reparation to be made for the breach of an obligation.

Because this Court has such broad jurisdiction, it will obviously come across human rights issues. As a result, both the African Human Peoples' Rights Court and the ACJ of the AU may end up adjudicating human rights issues. At this juncture, it is important to note that the Protocol of the ACJ is still open for ratification and thus is not yet in force.

4.6 The Regional Initiatives: NEPAD and Related Initiatives

The New Partnership for Africa's Development (herein after called NEPAD) is an expression of the collective developmental vision of a new generation of African leaders. It is a reflection of the desire of African leaders to forge out a new partnership with the developed countries of the world to deal away with the malaise of underdevelopment that has still clouded the African continent after four decades of independence.

The NEPAD document was officially endorsed at the Extraordinary OAU Summit in March 2001 in Sirte, Libya which has at the same time declared the establishment of the AU to replace the OAU as has been mentioned in the previous chapter. After its official endorsement, NEPAD was adopted in July 2002 as 'Africa's Development Strategy' by the OAU summit that met in Durban, South African to give birth to the AU and replace the OAU.

One of the ways in which NEPAD seeks to address Africa's underdevelopment is through promoting and protecting human rights in African countries and sub-regions thus undertaking a human rights-based approach to development. Four broad areas are covered under the initiatives that are built into the NEPAD and defined as prerequisites for the success of the programme. These are the peace and Security Initiative; the Democracy and Political Governance Initiative; the Economic Governance Initiative and the Sub- Regional and Regional Approaches to Development.

Close scrutiny of NEPAD, especially the part dealing with Peace, Security, Democracy and Political Governance Initiatives Reveals NEPAD aims to go about achieving development through human rights based approach.

Also, as issues of governance are the central concern of NEPAD, the programme acknowledges that African leaders will take joint responsibility for 'promoting and protection democracy and human rights' and 'promoting the role of women.'

The proposal goes on to commit NEPAD to engage in capacity building initiatives to help meet these goals by focusing on administrative and civil services, strengthening parliamentary oversight, promoting participatory decision – making, implementing effective measures to fight for corruption and undertaking judicial reform.

In addition to the above, Africa's political leaders also propose a heads of State Forum which will serve as a mechanism through which the leadership of NEPAD will periodically monitor and assess the progress made by African countries in meeting their commitment towards achieving good governance and social reforms. They add that the forum (which is to be referred to as the African Peer Review Mechanism after the July 2002 Durban Summit) will also provide a platform for countries to share experience with a view to fostering good governance and democratic practices.' Generally, looking at the above points addressed in NEPAD, we can conclude that while human rights are referred to as core values that have been accepted as essential to good governance and sustainable development, the document in its current form, focuses on the promotion of good governance including transparency, accountability implying that human rights issues will be addressed as a matter of course.

4.7 The Role of Non-governmental Organizations (NGOs) and Civic Organizations

Although not a legal part of the institutional framework established by the African Charter, of even the AU, NGOs play a prominent role in enforcing human rights. Their inclusion is thus justified; the involvement of NGOs in the African system is quite unprecedented in international human rights. The African Commission has forged close relations with a number of NGOs, granting Observer Status to many. The Commission has even formalized the criteria NGOs must meet to be granted or to maintain, observer status. The recognized NGOs may be transnational or national, 'on the ground' and, unlike elsewhere, NGOs may, and frequently do, bring cases before the Commission.

As the 1993 World Conference on Human Rights marked the watershed of NGO involvement in international human rights, the African system appears once more to be more forward thinking than its sibling systems (it is acknowledged that many of the preexisting United Nations'

instruments had some NGO involvement at the drafting stage). There are many practical reasons for encouraging NGO involvement in the African system, not least the fact that NGOs may have the resources and dedication to bring cases forward. The individual may not be in such a fortunate position (though, as noted, individuals can be called to testify). As Rachel Murray acknowledges, 'it could be argued that the need for NGOs in the African system is largely due to the weaknesses and ineffectiveness of the African Commission'. She concludes that NGO involvement is a necessary and integral part of the 'holistic and community responsibility' advocated by the Commission.

The participation of NGOs in the African system is a two-way process: whilst they enjoy access to the Commission and even some rights of participation in public meetings, NGOs also have responsibilities to promote human rights. They discharge these responsibilities through national training programmes, dissemination of materials, raising of the profile of the Charter at the national level, especially in rural districts, and promoting and facilitating Commission visits to states. On occasions, the Commission will explicitly utilize NGO information when the information cannot be obtained directly from the State.

Review Questions

1. Discuss the powers and functions of the African Commissions vis-à-vis the African Court of Human Rights.
2. What is the role of the African Court of Human Rights in protecting and promoting human rights?
3. ''One of the ways in which NEPAD seeks to address Africa's underdevelopment is through promoting and protecting human rights in African countries and sub-regions thus undertaking a human rights-based approach to development.'' Discuss!

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