

**The African Regional Human Rights System:
Comparing The African Human Rights Law System
And The European And Inter-American Human
Rights Systems Within A Normative And
Institutional Framework**

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ABSTRACT

This study is titled ‘The African regional human rights system: Comparing the African human rights law system and the European and inter-American human rights systems within a comparative and institutional framework’. It centers on a critical evaluation of the entire African, European and inter-American human rights systems, within a normative and institutional framework. The study critically reviews the vast scholarly discourses and arguments on the global issue of the regional enforcement of human rights law in Africa. Part of the study focuses on the historical antecedents of human rights on the continent and in essence, seeks explanations to the origins, scope and evolution of human rights law in Africa. This is achieved mainly by the quest to also find answers to questions such as: Was the concept of human rights recognized in Africa before the colonial era? When did Africa’s regional system emerge, and what were the factors that led to its establishment? What is the current status of international human rights law in Africa?

Thus, the study provides better understanding to the philosophical and historical origins of Africa’s regional human rights system. The study then proceeds to launch a comparative analysis of the three systems being discussed in the study, highlighting the normative and institutional similarities and differences between the systems. This is done in order to facilitate a better understanding of the operationalization process of the African system in general and also to enable the writer make credible suggestions for future reforms in the system. The study concludes with recommendations and suggestions on the possible ways to reform or restructure the African human rights system. One of the major findings of the study is that, the

African regional human rights system could be more effective with the appropriate reforms in the necessary areas.

Keywords: Human rights; enforcement, African human rights system; African charter; European human rights system

ÖZ

'Afrika bölgesel insan hakları sistemi: Afrika, Avrupa ve Amerika İnsan Hakları Sistemlerine Hukuksal ve Kurumsal Karşılaştırmalı Bakış' isimli bu çalışma üç farklı insan hakları sistemini eleştirel bir bakış açısıyla, kurumsal,ve normatif açılardan karşılaştırmayı amaçlamaktadır. Çalışma Afrika insan hakları sisteminin yaptırım gücünü akademik söylemler ve küresel argümanlar çerçevesinde değerlendirmektedir. Bunu yaparken çalışma öncelikle Afrika kökenli insan hakları değerlerinin kaynağını, kapsamını ve nasıl evrildiğini ortaya koymaktadır. Bu kapsamda temel iki araştırma sorusu cevaplanmıştır. Bunlardan ilki 'Koloni dönemin den önce Afrika'da insan hakları olgusu tanınıyor muydu?' ve ikincisi de 'Afrika bölgesel insan hakları sistemi ne zaman ortaya çıkmıştır ve bu sistemin oluşmasında ne gibi etkenler rol almıştır?' şeklinde olmuştur. Çalışma bu soruları cevaplayarak Afrika Bölgesel İnsan Hakları sisteminin felsefi ve tarihsel kökenlerini daha iyi anlaşılmasını sağlamaktadır.

Çalışma ardından normatif ve kurumsal benzerlikleri açısından bahsi geçen üç insan hakları sistemini karşılaştırmalı şekilde incelemiştir. Burada amaç, genel olarak Afrika sisteminin daha iyi anlaşılmasına yardımcı olmak ve işletilmesine engel olan engelleri ortaya çıkarmaktır. Böylece bu çalışma ile sistemde yapılacak reformlar konusunda öneride bulunmak mümkün kılınmıştır. Çalışma sonuç bölümünde Afrika insan hakları sistemi için reform ve yeniden yapılandırma konularının da tavsiyeler ve önerilerde bulunur.

AnahtarKelimeler: İnsan Hakları; Afrika insan hakları sistemi; Afrika Şartı,Avrupa
İnsan Hakları Sistemi

To my mother, Mrs. Chika Jane Obi, whose blood, sweat, tears and prayers culminated in making me a success and will forever be engraved in my heart.

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LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACJ	African Court of Justice
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AHSG	Assembly of Head of States and Government
AIDS	Acquired Immune Deficiency Syndrome
AJIL	African Journal of International Law
AM. J	American Journal
APRM	African Peer Review Mechanism
ART	Article
AU	African Union
CAT	Convention against Torture
CAAU	Constitutive Act of the African Union
CE	Council of Europe
CEDAW	Convention on the Elimination of All Forms of Discrimination against women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CILSA	Comparative and International Law Journal of Southern Africa
CODESTRIA	Council for the Development of Economic and Social Research in Africa
COMPL	Comparative Law
DRC	Democratic Republic of Congo

EC	Executive Council (of the African Union)
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ED(S)	Editor(s)
ESC	European Social Charter
EU	European Union
FGM	Female Genital Mutilation
GA	General Assembly
GA. Res.	General Assembly Resolution
HUM.RTS	Human Rights
IACHR	Inter-American Convention on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Covenant on the Elimination of all forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHRR	International Human Rights Report
ILM	International Legal Material
ILO	International Labour Organisation
IMF	International Monetary Foundation

INTL	International
INTL	International Law
LJ	Law Journal
LLB	Bachelor of Laws
LLD	Doctor of Laws
LLM	Master of Laws
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organization
OAS	Organization of American States
OSCE	Organization for Security & Co-operation in Europe
OAU	Organization of African Unity
P.	Page
PARA	Paragraph
PCIJ	Permanent Court of International Justice
P	Pages
RSA	Republic of South Africa
SA	South Africa
SADC	Southern African Development Community
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAP	Structural Adjustment Programme
SAPL	South African Public Law
SAYIL	South African Year Book of International Law
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration on Human Rights

UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Education, Science, and Cultural Organization
UNGA	United Nations General Assembly
UNHCR	United Nations High Commission for Refugees
UNICEF	United Nations Children's Fund
UNISA	University of South Africa
UNISWA	University of Swaziland
UNP.	Unpublished
UNTS	United Nations Treaty Series
US/USA	United States/ United States of America
USSR	Union of Soviet Socialist Republic
V.	Versus
VOL	Volume

Chapter 1

GENERAL INTRODUCTION

1.1 Background

International human rights law is a widely accepted branch of international law that functions according to its own rules, norms, and institutions, and even though closely related to international humanitarian law in certain aspects, should not be used interchangeably, as the former is a distinct fragment of general international law¹. The development of international human rights law over centuries has brought about positive changes in the legal systems of states and institutions throughout the world²- albeit the case was much different years ago. There is a somewhat general agreement to the fact that human rights in Africa is a relatively new concept as the promotion of the concept gained momentum with the; transformation of the Organization for African Unity (OAU) to the African Union (AU)- the latter having a wider and more active mandate for the promotion and protection of human rights in Africa in terms of norms, rules and enforcement mechanisms, and the wave of independence that took over the continent in the 1960's, which prompted many African states to begin

¹ See EZE O, *Human rights in Africa: some selected problems* (1984), p.1. According to his observation, Eze noted that after the Helsinki accord of 1975 on European security, human rights issues became an indivisible part of international relations.

² See generally the arguments presented by Titus D, *The applicability of the international human rights norms to the South African legal system* (1993), pp. 2-3. Based on his arguments, Titus argues that international human rights law only recently began to be felt, especially in Africa.

to seek their freedom from colonial masters after a long period of colonialization. One scholar who emphasizes the role or lack thereof played by the OAU in promoting and protecting human rights in Africa is Umozurike. He observed that the organization had a lot to do with the low standards of human rights that were held in the continent at the time, accusing the OAU of playing a passive role in protecting human rights or making it a priority in the region, and the non-interference principle of the OAU in the internal affairs of its member states was one of Umozurike's greater condemnations of the inability of the OAU to further the human rights agenda in Africa³. He goes on to provide examples of cases of human rights violations in some African states that correspond with his accusations of the inefficiency of the OAU to protect human rights. The imperious regimes of dictators like Idi Amin of Uganda, Jean-Bedal Bokassa of the central African republic and Macias Nguema of Equatorial Guinea, as well as the brutal killing of thousands of Hutus in Burundi, were simply a tiny speck on the radar of human rights violations that were taking place in Africa at the time, which the OAU seemed to conveniently turn a blind eye to⁴.

When the scope of investigation transcends beyond the African continent, with the international events that were transpiring simultaneously, the OAU cannot be completely held responsible for the principles they chose to protect. At this time, international events occurring were orbiting around the international law emphasis on the doctrine of state sovereignty which in essence gave impetus to the concentration of political power and protection of states from external constraints,

³ Umozurike U, 'The African charter on human and peoples' rights', (1983) 77 *American journal of international law*, p. 902

⁴ *ibid*

rather than make the protection and promotion of human rights a priority. Indeed, the case was not peculiar to the African continent.

In an attempt to preserve their sovereignty, there was constant conflict among the states that had already gained their independence as they fought hard to maintain this new found status, while those that were yet to gain their independence struggled to achieve this purpose⁵. In essence, there was a general increase of conflicts in the region which undoubtedly lent itself to the systematic violation of human rights in Africa. Following the numerous uprisings and chaos, there was therefore need to provide institutions, rules, and instruments that would halt the aggressive human rights violations that were taking place, and thus several treaty agreements were made both regionally and globally to ensure that the impunity was stopped.

The need for an effective regional human rights system was brought on by the fact that the wide geographical jurisdiction of the Universal system represented by the UN, which indeed plays an important role in enforcing international human rights law universally especially after World War II, caused the institution to lack adequate efficiency and even resources to accommodate the proliferation of cases of human rights abuses. This was also not helped by the adverse affect of the cold war which caused some of the most of the advanced states to be pitted against one another, making the veto power held by some of the most influential states in the international

⁵ See Mbondeny M and Sifuna N, 'A review of pre procedural and jurisdictional challenges in enforcing international human rights law under the African charter regime', (2006) *Berkeley Legal Press, Working paper No. 186g* at <http://law.bepress.com/cgi/viewcontent.cgi?article=8910&context=expresso> last accessed on 13 July 2012

community (U.S, China, Russia, Germany and Britain) to become instruments of power play which prevents the efficient enforcement of human rights at the global level⁶.

Moreover, for most African states, accepting the standards of human rights as established by the UN was not an option for them as they were largely unrepresented in the drafting and adoption of the universal declaration of human rights in 1948 which still stands as one of the most credible instruments of international human rights law. Many of these African states at this time were still being colonized by western states and thus were not represented by their chosen leaders, but instead by their colonial masters, which they argue falls short of a proper representation of their interests at the global level. Therefore, in an effort to work towards realizing the principles of international human rights law universally and more effectively, regional human rights systems had to be erected in different regions of the world in order to overcome the weaknesses of the global system. Consequently this brought about the emergence of the European, Inter-American and African systems and their respective mechanisms and instruments, which is discussed elsewhere in this study.

In Africa, there were several events and reasons surrounding the conviction of the OAU- currently African Union- to establish a regional human rights system, and to strengthen the already existing institution and incorporate a more active human rights protective mandate. Among these reasons was; the support and encouragement given by the UN for the establishment of an effective regional human rights mechanism,

⁶ Mugwanya G, *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003), pp. 24-29

the involvement of several NGO's in issues of human rights protection and their lobbying for this cause, and finally- and maybe the most significant reason- was the fact that some leaders of African states abandoned their belief in the non-interference principle of the OAU and recognized that cases of human rights violations in other African states was indeed a concern to all African states⁷. These reasons rose to a crescendo in the adoption of the African charter on human and peoples' rights (ACHPR) by the OAU assembly of heads of states and governments (AHSG)⁸.

Despite its wide ratification by all the former OAU and recent AU members, human rights issues continue to proliferate in the continent⁹. Many factors have instigated human rights violations in Africa including but not limited to; civil disputes/ conflicts, religious conflicts, genocide, refugees and displaced persons, breakdown of states and rise of dictatorial regimes. Another scholar Baimu rightly notes that "the fact that conflicts, and the associated massive human rights violations, have continued to engulf the continent when most of the African states are bound by the provisions of the charter indicates that the African charter is still not taken seriously by many African states"¹⁰. However, to the credit of the African commission, recognizing some of its weaknesses and limitations has led to the establishment of the African court on human and peoples' rights (hereinafter the court). Whether or not the court has the ability or the potential to tackle the human rights issues in the region and therefore reiterate the African systems efficiency and commitment to international human rights law principles, is discussed further on in this study. It is

⁷ Murray R, *Human rights in Africa: from OAU to the AU* (2004), p. 22

⁸ Adopted 27 June 1981, 21 ILM (1982), p. 58

⁹ Hopkins K, 'A new human rights era dawns on Africa?' (2003) 18 SAPR/PL, p. 360

¹⁰ Baimu E, 'Commission and the Court', *Conflict Trends* No 3/2001. P. 19

imperative however, to mention that the year and half it took Burkina-Faso and Senegal to ratify the protocol on the establishment of the court was an indicative display that most African states were unwilling or unable to uphold the commitment to human rights protection and promotion which is clearly outlined in the charter¹¹. Scholars like Murray, Harrington, and O'shea, have high hopes that the establishment of the court will bring about a certain degree of consciousness by African leaders in terms of their human rights obligations¹², while others like Bekker and Dieng disagree to this effect, arguing that the court may not possess the potential to change the continuously deteriorating human rights situation in the continent, especially since economic, political and demographic factors are at the top of the list of causes of human rights violations in Africa¹³.

As a means of promoting human rights in the continent and reducing the rate of ignorance on the issue by African leaders and people, several workshops and conferences were held to ensure proper incorporation of human rights principles in the agenda of African states. Of these conferences, the most significant one was the

¹¹ Magnarella J, 'Achieving human rights in Africa', 4(2) at <http://web.africa.ufl.edu/asq/v4/v4i2a2.htm> last accessed on 15 July 2012

¹² See arguments presented by Harrington J, 'The African Court on human and peoples' rights', Evans M and Murray R, *The African charter on human & peoples' rights: The system in practice, 1986-2000*, (2002), p. 305; O'Shea A, 'A critical reflection on the proposed African Court on human and peoples' rights', (2001) 1 *African Human Rights Law Journal*, p. 285; Naldi G and Magliveras K, 'Reinforcing the African system of human rights: The protocol on the establishment of a regional court of human and peoples' rights', (1998) 16 *Netherlands Quarterly of Human Rights* p. 431

¹³ See generally, Dieng A, 'Introduction to the African Court on human and peoples' rights', (2005) 15 *INTERIGHTS Bulletin*, p. 3; Bekker G, 'The African Court on human and peoples' rights: Safeguarding the interests of African states', (2007) 51/1 *Journal of African Law*, p. 153

Grand Bay conference which was held in Mauritius in 1999, and which marked the very first ministerial conference on human rights in Africa. The conference was concluded with a plan of action and a declaration to reaffirm commitments to democracy, rule of law and human rights protection in the region¹⁴. The declaration urged African states to protect and promote several kinds of human rights including the protection of women and children's rights, an abolishment of any kind of discrimination against this category of individuals, and also encouraged the creation of national human rights institutions.

Notwithstanding previous or existing efforts by states, individuals, NGO's and other groups, the enforcement of human rights by the African regional system is still faced with a great deal of challenges. This study therefore examines the scope and nature of these challenges among other things, and puts forth some recommendations and suggestions on how they may be addressed to achieve the effective protection and promotion of human rights in Africa. This study is not a conclusion in itself, but is simply an added perspective, a fresh point of view and presentation of arguments to support persistent outcry for a more effective regional human rights system in Africa.

1.2 Subject Matter of the Study and Research Questions

The subject matter of this study is the 'The African regional human rights system: comparing the African human rights law system and the European and inter-American human rights systems within a normative and institutional framework'. Although this comparison takes place within the context of comparing in general the three existing human rights systems, the subject matter centers on a critical research problem which is the identification of the challenges that beset the regional

¹⁴ CONF/HRA/DECL (1), 16 April 1999

enforcement of human rights in Africa as compared to the other regional human rights systems, and how these challenges can be addressed to ensure that human rights are fully protected in the continent.

Also considered is that after investigation of the European, inter- American and even global systems of human rights and the mechanisms for their enforcement, certain shortcomings become noticeable in the sense that the African system is seen to be lacking in some aspects in comparison to the other systems, and therefore the ways that the system can be reformed and adapted to achieve a more developed system in Africa is also analyzed and discussed in this study. The relevance of the research problem and its implications to the millions of African people -whose daily lives are made up of grass roots human rights struggle, makes this study not only fascinating, but also a necessary and challenging intellectual project.

As noted before, human rights abuses have continued to increase in Africa despite the very high percentage of ratification of the African charter by OAU/AU member states¹⁵. This is hardly surprising considering the fact that since many African states gained their independence, the governments of these states have resorted to using violence as an instrument of governance to control and manipulate their citizens, especially those who seek to topple the regimes by means of peaceful demonstrations. Some of these governments have ventured beyond simple violent tactics to govern their states, but have also employed otherwise extreme tactics like torture, extra judicial killings or false imprisonment of civilians to achieve their aims.

¹⁵ Alemika E, 'Protection and realization of human rights in Africa', in Kalu A & Osibanjo Y, *Perspectives on human rights* (1992), p. 159

The wave of human rights violations were noticeably higher in the nineteenth and early twentieth century, when most of the African states were still struggling to lose the shackles of colonialism and others were experiencing conflicts over the equal distribution of power among their domestic ethnic communities. African states like Nigeria, Ethiopia, Liberia, Kenya, Sierra Leone, Togo, Ghana, Sudan, Guinea, Somalia, Cameroon, and Malawi amongst others were experiencing the repression of opposition groups, and such actions brought about grave violations of human rights¹⁶. As a result of military interventions and killing of coup plotters, many of the above mentioned states have continued to be politically, religiously and culturally unstable. One is inclined to agree with the observation made by Alemika that;

The chronic and worsening conditions of human rights in Africa have produced serious political, social and economic consequences...the violations of political and civil rights by rulers often either include or result in the denial of the citizens of full participation in the formulation and implementation of vital policies affecting them and their society. Human rights violations, therefore, produce a vicious circle of repression, economic stagnation, and regression and political instability. The challenge therefore is how to break the vicious chain, set in motion and enliven the forces liberation, social democracy, economic...advancement, and the enjoyment of human rights by everyone in the African nation.¹⁷

The democratic surge that seemed to be taking over the continent in the mid 1990's was simply a means to topple dictatorial regimes and it incidentally minimized human rights violations though it did not stop it completely or ensure a long term

¹⁶ Human Rights Watch, *World reports on human rights (2009)*; Human Rights Watch, *The scars of death: Children abducted by the Lord's resistance army in Uganda*, Report of September 1997, available at <http://.hrw.org/hrw/reports97/uganda/index.html> last accessed on 18 July 2012; see also Kwakwa E, 'Internal conflicts in Africa: Is there a right to humanitarian action?', (1994) 2 *African Journal of International Law*, p. 9

¹⁷ Alemika E, 'Protection and realization of human rights in Africa', note 22 above, p. 160

remedy to the problems. Reports are still received about several cases of human rights violations in Africa such as the detainment of journalists for exposing corruption, the stigmatization of a scholar for questioning the government and its motives in employing violence or other related tactics as tools for governance, political activists being detained without trial or worse still exiled for their stand against incumbent authoritarian regimes¹⁸.

The political instabilities caused by human rights violations in Africa were large determinants of the armed conflicts and war related deaths that occurred between 1970 and 1998 in the region. During this period, genocides were committed in the Great Lakes region of Africa, one of which was the infamous Rwandan genocide of 1994¹⁹. Many African states ignored the valuable lessons to be learnt from such crisis and the role played by human rights violations in aiding these disasters, and this has continued to see the number of human rights crisis in the continent increase steadily. Sierra Leone experienced a civil war that resulted in the death of thousands of people and many more injured or displaced. In Northern Uganda, human rights violations has lent itself to the crisis, culminating in the kidnap of children and forcing them to work as soldiers, handling automatic weapons and made to commit all kinds of atrocities to their friends and family members²⁰. There are several other instances where human rights violations have led to crisis, which leads to further violations of

¹⁸ Akokpari J, 'Policing and preventing human rights abuses in Africa: The OAU, the AU & the NEPAD peer review', (2004) 32/2 *International Journal of Information*, p. 461

¹⁹ The ICTR was established by the UN general Assembly resolution 955 of 1994, to prosecute the perpetrators of the genocide which saw the loss of about 800,000 lives.

²⁰ See 'conflicts in Africa', available at <http://www.globalissues.org/Geopolitics/Africa.asp>, last accessed on 28 June 2012

human rights; for example, the crisis in Sudan as a result of the war in Darfur region, and Somalia where the conflict has ended but political instability still plagues the country both serve to prove that Alemika's theory of a vicious circle could not be more correct. This section will not be complete if one forgets to mention the countries to the south of the continent that have also experienced their own fair share of human rights incidents, example South Africa whose apartheid regime-though ended, still plagues the political, cultural and social aspects of the lives of the population. Even though the government in the country is a democratic one, it still struggles to stay above racial discrimination and xenophobia. Other countries in the south of the continent still face such difficulties and other forms of human rights issues like Zimbabwe which is still under an autocratic rule with President Robert Mugabe who was the founding father of the state and is considered one of the worst dictators in the world, regardless of his façade of free elections in principle which are neither free nor fair in reality²¹. The country's human rights record is not just embarrassing to the AU, but also to other African states who aspire to uphold the principles of international human rights law. Moreover, Angola, Mozambique, Swaziland, and Namibia amongst others, are the other countries in the southern region of Africa that are experiencing all forms of human rights violations.

²¹Wallechinsky D, 'The world's ten worst dictators', available at http://archive.parade.com/2005/0213/0213_dictator.html, last accessed on 29 June 2012. Listed alongside Mugabe are dictators like King Adullah of Saudi Arabia, Omar Al-Bashir of Sudan and Kim Jong-il of North Korea among others

1.3 Importance and Aim of the Study

1.3.1 Importance of the Study

The major incentive for this research is to make a contribution towards understanding the problems and challenges that the African regional human rights system is facing in ensuring the effective protection and promotion of human rights in the region, as well as comparing the mechanisms for enforcement in this system with the other existing regional human rights systems. Thus this research is important to the extent that it will help in securing the future of international human rights law in Africa by providing recommendations and suggestions that will aid in the reform of the system, which will in turn help to overcome the challenges the system currently faces. The study is also important because it could provide a certain degree of legal certainty, and could assist the leaders of African states in bringing their human rights practices in line with international standards.

The situation warrants a detailed analysis and study of the African system of human rights and the challenges it faces in order to properly grasp the concept of human rights in Africa. Furthermore, the steps that have been taken, the prospects and opportunities for an effective regional human rights protective mechanism, and the problems encountered in the process of these endeavors will be discussed and analyzed throughout the course of this study. The historical dimension of human rights law in Africa and the institutions created for its enforcement will be an essential part of this study because as Umozurike argues “an appreciation of the development of human rights in different societies calls for the study of

history...”²². The study therefore entails a certain degree of traverse through historical timelines to explain the origins, scope, evolution and changes that have occurred in the course of the development of human rights law in Africa and ergo, the African regional human rights system which promotes and protects its principles. The study will not only outline the challenges for the African human rights system, but will also uncover prospects for the future of human rights enforcement in the region. A good number of work and study have been conducted to this respect, but the main focus has been the universal, inter-American and European systems. The European and inter-American systems will be partly incorporated in this study but within a limited scope of comparative analysis between them and the African system in order to further clarify areas and prospects for the reform of the African regional human rights system.

The impact of human rights on democratization and development in Africa are undeniable as human rights violations leads to crisis in government and impedes development. In fact, these three concepts are *sine qua non* of each other, and this study will lead to a better understanding of this aspect as well which reinforces the importance of the work. Furthermore, the study will provide an added appreciation for the fact that without effective regional enforcement of international human rights law in Africa, peace, development, and sustainable democracy in the region will be abated.

²² Umozurike U, *The African charter on human and peoples' rights* (1997), p. 1

1.3.2 Aims of the Study

The aim of the study is to investigate the African regional human rights system and the degree of development it has achieved, which will be assessed through an analysis of the challenges the system faces and how it has or seeks to overcome them, as well as an analysis of the comparative differences and similarities between the institutional and normative instruments of the African system and the European and inter-American systems. Specifically, the aim of this study is to emphasize a number of concerns that come within the scope of the subject matter. Firstly, a brief analysis of the philosophical foundations of human rights in Africa will be discussed, which is essential to contest the notion that human rights are irrelevant in Africa and for Africans as held by some scholars, a subject that will be discussed further on in the study. Identifying that this notion is incorrect and that human rights are relevant in Africa will help underscore the need to empower its enforcement in the region.

Another aim of the study is to present a theoretical and historical origins and evolution of the African human rights system. As will be discussed elsewhere in the study, the system is a result of negotiations and contributions that took place over a long period of time, and it is therefore necessary to analyze this process in order to gain proper insight and perspective on whether the system is indeed progressing or regressing.

1.4 Justification for the Study

The study is made up of different components which when combined, provides an intriguing justification for this scholarly research.

1.4.1 Justification for Studying the Enforcement of International Human Rights Law in Africa.

Generally, the enforcement of human rights takes place on two levels- the international and regional levels. Based on organization alone, it has been argued and also stated previously that the regional level of human rights protection has proven to be more efficient and expedient than the international level, however, the institutions and laws on both levels exist because of the inability of states to ensure that human rights are protected within their respective territories. For example, it was the failure of African states to respect and protect human rights in their national jurisdictions that brought about the need for international human rights mechanisms in the region²³. Following the wave of independence that was sweeping the continent especially the sub-Saharan regions of Africa from mid-20th century, there was hope that the protection of human rights in the region will be secured. Unfortunately, these hopes were never fully manifested and this was what led to the series of negotiations to create a regional enforcement system in Africa²⁴.

Studying the enforcement of human rights law in Africa is therefore justified by the fact that since most African states ignored or neglected their obligations and responsibilities to their people, the regional system needs to be strengthened to tackle the crisis brought on by such negligence on the part of African leaders which has instigated region-wide crisis that has continued to affect the African people. Mugwanya correctly identifies that:

²³ Sall E & Wohlgenuth L (eds), *Human rights, regionalism and the dilemmas of democracy in Africa*, (2006), p. 4

²⁴ *ibid*

States have the obligation of giving effect to human rights but inter-governmental instruments, institutions, mechanisms, structures and procedures at the global and regional levels are indispensable as a last resort of safety net for individuals when governments fail to respect international human rights norms²⁵.

Thus the need for an efficient regional enforcement of human rights in Africa transcends beyond creating more expedient and easy ways to tackle human rights problems, but also to ensure that states uphold their responsibilities as guardians of their citizens' rights.

1.4.2 Justification for Comparing the African System of Human Rights with the European and Inter-American Systems

The African human rights system has been on the path of continuous evolution and adaptation to higher standards of international human rights rules and norms since its inception. This evolution has taken its cue from the more developed standards of human rights enforcement carried out in the universal system as well as in the other regional human rights systems. For the sake of international peace and stability, these above mentioned systems provide guidance and support to the African system to ensure that human rights protection in the continent spills over to affect positively; sustainable peace and democracy, stability and development in the region. For example, the European Union (EU) has taken the AU as an important international partner that plays a strategic role in managing crisis and promoting peace²⁶. As a result of this, the EU has gone on to help the AU coordinate their efforts and policies to ensure an effective system of human rights protection in Africa.

The study of the comparison between these systems is justified by the fact that the African system mostly tries to adapt and incorporate successful rules of procedure

²⁵ Mugwanya G, *Human rights in Africa*, note 8 above, p. xvi

²⁶ <http://www.africa-eu-partnership.org/fr/node/382> last accessed 3 August 2012

and norms from these other systems, and try to imitate them institutionally, normatively and theoretically, thus, it is important to this study to highlight possible areas in the other systems where the African system can stand to change or initiate reforms. This will not only give a clearer understanding of the systems and how they function, but will also be invaluable to this study in terms of the recommendations and suggestions it aims to outline for the improvement and efficiency of the African human rights system²⁷.

Based on the objectives of this study, several research questions have been outlined and identified to help further the conclusions of the study and these are;

What is original in the African charter on human and peoples' rights?

Does the element of originality in the African charter make it a more or less effective normative instrument for the protection of human rights in Africa?

What are the normative and institutional similarities and differences between the African regional human rights system and the European and inter-American systems?

This study will focus on these essential questions and attempt as much as possible to provide adequate answers to them for a better understanding of this work and other scholarly works and study on the African human rights system, and human rights in Africa in general.

1.5 Methodology

²⁷ Kidanemariam, Fekadeselassie F., "Enforcement of Human Rights under Regional Mechanisms: a Comparative Analysis" (2006), *LLM Theses and Essays*. Paper 80

In consideration of the subject matter of this research, a number of approaches have been considered appropriate in enabling the researcher draw precise and proper conclusions.

1.5.1 Comparative Approach

In using this approach, what is considered are units of analysis which include organizations, countries, societies, institutions, human rights instruments and individuals²⁸. One cannot study the African human rights system in isolation from the other existing regional human rights systems. As the thesis topic suggests, this study will apply a good degree of the comparative approach when analyzing the disparities and similarities between these systems, and thereby enable the researcher to portray a more accurate image of the African system and to what extent it has adapted its norms and rules of procedure from the other systems. Because this approach is primarily based on comparison, it has its own unique set of limitations. In the case of human rights law and its development, it is evident that in the systems to be investigated in this study, there is a significant gap in the historical, cultural, social and political aspects of human rights development in the different regions as compared to that of Africa. This was acknowledged in the Cairo seminar of 1969 where states of the same or similar heritage were advised to work together in solving the problems that they have in common as a result of this common heritage²⁹.

1.5.2 The historical Approach

There is a need in this study for a historical reconstruction of past events to clarify the issues that relate with the conception of international human rights law in Africa,

²⁸ Mouton J, *How to succeed in your Master's and Doctoral studies*, (2005), p. 154

²⁹ See *Seminar on the establishment of Regional Commissions on human rights with special reference to Africa*, Cairo, 2-15 September 1969, para. 20, cited in Eze O, *Human rights in Africa: Some selected problems*, note 1 above, p. 223

and how it has evolved over time. This reconstruction will be based on the chronology of events between the pre-colonial, the colonial and the post-colonial eras. The main reason why the study seeks to go back as far back as the pre-colonial period is to show that despite what some scholars may argue, that human rights existed in the continent during this period and therefore that the concept is not foreign to the states and peoples' of the region. Unless this point is driven home, there will be little or no appreciation for the African human rights system and the efforts it has made and continues to make in ensuring the protection of human rights in the region. Again it must be emphasized that the historical presentation will be in a limited capacity, specifically fitted to suit the scope of the study as this is not a historical research.

This method will operate on the basis of identifying when human rights originated in Africa and how the system was created and has evolved over time. Needless to say, the historical approach will provide the basis for further analysis in the study, because as noted by Miles and Huberman "with qualitative data one can preserve chronological flow, see precisely which events led to which consequences, and drive fruitful explanations"³⁰.

1.5.3 Secondary Data Analysis Approach

The main aim of this approach is to re-analyze and re-evaluate existing data and information or to validate existing models³¹. Simply put this approach hinges on

³⁰ Miles M, & Huberman A. M, 'An expanded sourcebook: Qualitative data analysis', (eds), (1994), pg. 1

³¹ Mouton J, 'How to succeed in your master's and doctoral studies: a south African guide and resource book', (2001), pg. 164

literature review which seeks to combine the theory and practice that this study entails. This therefore makes the unit of analysis for this approach to include, books, journals, articles, information from the internet, newspapers and reports from both local and international news sources.

Chapter 2

LITERATURE REVIEW

2.1 Introduction

Attempting to review the existing literature on the African regional human rights system is a tremendous task due to the vastness of the materials available. Needless to say, this subject has attracted many scholarly contributions by writers from different fields of study including general international law, political science, international relations and even sociology. Thus this chapter will review some of these works on the subject matter; primarily focusing on books and articles as far as is practically possible in order to highlight the major features they contain. In the latter part of the chapter, there will be a discussion on the questions regarding the subject that the reviewed literature fails to address properly, and questions that are omitted completely, which are relevant to the subject matter of the present study.

Drawing from the debates on the subject matter, it is notable that many scholars agree that the ineffectiveness of the African human rights system is as a result of inadequate normative and institutional instruments to ensure the protection of human rights in the region³² and therefore these will be analyzed as well.

³² See the arguments of Murray R, 'The African charter on human and peoples' rights 1987-2000: An overview of its progress and problems', (2001) 1 *African Human Rights Law Journal*, p. 1; Heyns C,

2.2 Major Features in Reviewed Literature

The first major feature identified as one that would be a useful basis for conducting this research is related to the discord among scholars on the definition and scope of human rights in the African system of human rights. In the general study of human rights law in Africa and the study of the regional human rights mechanisms, the discourse is torn between the African charter-which is narrower in scope, and the African human rights system in general which is undoubtedly broader in scope. Scholars like Gutto argue that this distinction should be made because “there are a number of African regional human and peoples’ rights instruments or generalized instruments that incorporate important rights issues but which do not fall directly within the protection and promotion mandate of the commission”³³. Thus the African human rights system goes beyond the commission and the court created based on the provisions for enforcement mechanisms in the Banjul charter, and includes political institutions and other enforcement mechanisms which were created under the AU and not specifically provided for in the charter or even its protocols.

After a comprehensive examination of the courts framework- both institutional and normative, other scholars have given rise to the argument that the OAU/AU members have purposely created such a lax regional human rights mechanism in order to avoid being held responsible for human rights violations occurring in territories within their

‘The African regional human rights system: in need of reform?’, (2001) 2 *African Human Rights Law Journal*, pp. 157-158

³³ Gutto S, ‘The reform and renewal of the African regional human rights system’, (2001) 2 *African Human Rights Law Journal*, p. 176

jurisdiction³⁴. These arguments will be further expanded and analyzed systematically in the course of this study. In spite of arguments in favor of or against the efficiency of the court, it is necessary to note that its establishment should not be undervalued.

The second conception is that there should be a much broader definition of the African human rights system since it not only incorporates the regional system, but also the supra-national and pan-continental systems and mechanisms. Scholars like Odinkalu subscribe to this particular conception as he argues that the broader definition is necessary to encompass also the domestic legal systems in Africa³⁵. There is however a certain weakness to this broader definition of the African system as it cannot enforce supra-national or domestic laws, but the reverse is the case for domestic and supra-national systems.

The second major feature identified in the discourse of the African regional human right system is that there is a general tendency for afro-pessimism, depicting Africa as a backward region where the human rights status is despondent. Conversely, there is also a general tendency to view the African system as a periphery in relation or comparison with the western models of human rights systems. This sort of euro-centrism has caused the study of the African system to be based not on the dynamics of the region, but based on its conformity with western standards of international

³⁴ See Nmehielle O, 'Towards an African court of human rights: Structuring and the court', (2000) 6/1 *Annual Survey of international and comparative Law*, pp. 96-109; Loyds A & Murray R, 'Institutions with responsibility for human rights protection under the African Union', (2004) 48/2 *Journal of African Law*, pp. 165-186

³⁵ Odinkalu C, 'The role of case and complaint procedures in the reform of African regional human rights system', (2001) 2 *African Human Rights Law Journal*, p. 227

human rights law³⁶. The literature on this feature is based on identifying whether or not there was a human rights trend in Africa or if there was no pre-existing tradition of human rights in the region. What is noteworthy is that many of the literature that date back to the 1960's and 1980's are burdened with this kind of argument, which caused friction between some African scholars and their western counterparts, while the more current writings have noticeably moved away from this controversial pattern and present their arguments more tastefully than previous works. However, while this pattern may have been broken in many ways, there are still scholars who share this sentiment and others who chose to adopt a rather pro-African opinion on the matter, arguing that there has always existed a tradition of human rights in Africa including during the pre-colonial times, and thus that the concept of human rights is not peculiar in the region³⁷. Writers like Eze have as much as uncovered that even in the pre-colonial African societies, there existed not only an effective legal system at

³⁶ Mangu A, 'The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo' (2002), *LLD Thesis University of South Africa*, p. 36

³⁷ For a detailed discussion on this debate see generally arguments featured in; Mangu A, 'The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo' (2002), *LLD Thesis University of South Africa*, p. 235-257; Appiagyei-Atua K, 'A rights-centered critique of African philosophy in the context of development', (2005) 5 *African Human Rights Law Journal*, pp. 335-357; Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique', (1992) *Journal of Human Rights Law and Practice*, pp. 22-38; Wiredu K, 'Democracy and consensus in African traditional politics: A plea for a non-party polity', in Eze O, *Postcolonial African philosophy: A critical reader* (1997), p. 303, Hountondji P, 'The master's voice: The problem of human rights in Africa', in Ricoeur P (ed), *philosophical foundations of human rights* (1986), p. 319; El-Obaid A & Appiagyei-Atua K, 'Human rights in Africa: A new perspective of linking the past to the present', (1996) 41 *McGill Law Journal*, pp. 829-836

the time, but also provisions for human rights protection³⁸. This sort of discovery has led to the criticism of the western scholars who have failed to identify sources or roots of human rights practices in African cultures, thereby proving that human rights are not foreign to Africans. Other scholars who also subscribe to this nature and origin of human rights in Africa include but are not limited to Shivji, Wiredu, Quasigah, Cobbah, and Hountondji among others. Shivji's contribution rests on the philosophical foundations of human rights in Africa, arguing that it differs from that of the western regions³⁹. His explanation is that the contrast can be found in the African way of thinking where the individual rights of people are not as emphasized as the collective interest of the community⁴⁰.

Nyerere and Wai's argument was similar to Shivji's when they presented that in pre-colonial African societies, the emphasis was not on the individual, but on his dignity and inequalities between members of the society were not tolerated⁴¹. A number of other scholars have conducted studies that conform to this view including Busia and Rattray but especially Cobbah who concluded that:

Africans do not espouse a philosophy of human dignity that is derived from natural rights and individualistic framework. African societies function within communal structures whereby a person's dignity and honor flow from his or her transcendental role as a cultural being...we should pose the problem in

³⁸ Eze O, *Human rights in Africa: Some selected problems* (1984), p. 9

³⁹ Shivji I, *The concept of human rights in Africa II* (1989), p. 24-30

⁴⁰ *ibid*

⁴¹ See generally Nyerere J, *Essays on socialism* (1968), p. 33; Wai D, 'Human rights in Sub-Saharan Africa', in *Human rights perspective*, p. 115-144

this light, rather than assuming an inevitable progression on non-westerners towards western lifestyle⁴².

Quashigah in his analysis focuses on the genesis of the concept of human rights in the western world through the application of the methodologies of philosophical materialism and idealism⁴³. He recognizes that African and western traditions share a certain similarity because of the innate contradiction on both the respect for and the violation of human rights.

The euro-centric attitude of some scholars who view African societies as being unable to form decisive opinions on issues affecting them, and having no history of human rights practices or even democracy, was further criticized by Nzongola-Ntalaja who held that:

Such an approach not only glosses over the impact of the Atlantic slave trade on political institutions and practices in west and central Africa, but also minimizes the role of colonial despotism as a school of post-colonial rules⁴⁴.

One non-African writer whose work has served as reinforcement to the arguments provided by Shivji and others is Fernyhough, who argues that human rights existed in pre-colonial Africa and that such events like the American or French revolutions might not have occurred in Africa and thereby did not aid the development of human rights in the region as it did in the American and European continents, but that there

⁴² Cobbah J, 'African values and the human rights debate: An African perspective', (1987) 9 *Human Rights Quarterly*, pp. 331

⁴³ Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique', note 4 above, p. 30

⁴⁴ Nzongola-Ntalaja G & Lee M (eds), *The state of democracy in Africa* (1997), p. 11-12

were distinctive African cultural milieus that facilitated the evolution of human rights in the continent⁴⁵.

Following the above presentation of arguments by these different scholars, it is imperative to note that the respect for human rights or its abuse are not monopolistic concepts held by one country or even a region. Since democracy and the respect for human rights seem to be mutually exclusive concepts, it is also important to note that Greece which is considered the birthplace of modern democracy was under an autocratic regime until 1974, and the United States, which is considered to be an exemplary democracy is currently known to have bad instances of human rights violations⁴⁶ even though they rely on tactics like extraordinary rendition to cover up such violations. The bottom line of this point is that no country can lay claim to being an exception to violating human rights within or even outside its territory, or can claim to be a paradise where human rights are fully protected.

Those western scholars who insist that human rights were non-existent in pre-colonial Africa -and therefore is a foreign concept in the region, do more than advance imperialistic views that bring back the memories of the horrors of colonialism. This is because the argument is that human rights is the result of natural human existence therefore, how these scholars can deny that it existed in Africa which is a region that was inhabited by millions of people, is almost beyond

⁴⁵ Fernyhough T, 'Human rights and pre-colonial Africa', in Cohen R, et al (eds), *Human rights and governance in Africa* (1993), p. 40-41

⁴⁶ Available at http://www.chinadaily.com.cn/cndy/2012-05/26/content_15392452.htm last accessed on 13 August 2012

reasoning⁴⁷. The reality is that just like An-Na'im and Deng argued, the failure of the western scholars to grasp the concept of human rights in Africa could be as a result of the different ways in which the concept is observed and incorporated into the lives of people in different societies⁴⁸.

The conviction of Deng and other scholars who argue that human rights existed in pre-colonial Africa is lost on some western scholars who argue that the ways of traditional African societies does not recognize human rights⁴⁹. Those like Howard extend this argument further by suggesting that the concept of human rights in Africa is being confused with the idea of human dignity, and he posits that:

The African concept of human rights is actually a concept of human dignity, or what defines the inner (moral) nature and worth of a human person and his or her proper (political) relation with the society. Despite the twining of human rights and human dignity in the preamble of the universal declaration of human rights and elsewhere, dignity can be protected in a society not based on rights. The notion of African communalism, which stress the dignity of membership in, and fulfillment of one's prescribed social role in a group (family, kinship group, tribe), still represent how accurately how many Africans appear to view their personal relationship to society⁵⁰.

It should be recalled that human rights as a concept is dynamic and adapts over time and condition. What is considered human rights today may at one point in time not have been considered or recognized as such. If this is the case, does Howard's argument not need amendment since what he considers to be human dignity is protected as human rights in many systems today, and does the concept of human

⁴⁷ Nmehielle O, *The African human rights system* (2001), p. 15

⁴⁸ An-na 'im A & Deng F, (eds), *Human rights in Africa: Cross cultural perspectives* (1990), p. 159

⁴⁹ Donnelly J, *Universal human rights in theory and practice* (1989)

⁵⁰ Howard R, 'Group versus individual identity in the African debate on human rights', in An-na 'im A & Deng F, (eds), *Human rights in Africa: Cross- cultural perspectives*, note 56 above, p. 165- 166

right in itself not portray the intent to preserve the human worth in itself? Due to the ever evolving nature of the concept, the preservation of what is known to be human rights today and what Howard contends was human dignity previously could have transformed what used to be the political relations of people with the society they belong to, to include economic, social and even psychological relations with the society. Hence, this would mean that what may have been considered human dignity before has now evolved to attain the status of human rights, which means that the two concepts in a way are mutually exclusive as well and cannot be divorced from each other. This means that in many ways, Africans had it right all along.

In spite of such arguments like those presented by Howard and Donnelly, there still exists proof to validate the claim that human rights did in fact exist in the traditions of pre-colonial African societies.

If the argument that European liberalism brought about the concept of human rights in Africa, then that will certainly undermine the disposition that many scholars hold that the concept is a universal one, and is not driven from the colonial imposition of the concept in Africa⁵¹.

⁵¹ Mutua M, 'The Banjul charter and the African cultural fingerprint: An evaluation of the language of duties', (1995) 35 *Virginia Journal of International Law*, p. 339, Burgenthal T (ed.), *International human rights in a nutshell*, Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique', Panikkar R, 'Is the notion of human rights a Western concept?' in Alston P (ed.), *Human Rights Law*, Shestack J, 'The philosophic foundations of human rights', in McCorquodale R, *Human rights*, Wai D, 'Human rights in Sub-Saharan Africa', in Pollis A & Schwab P (eds.), *Human rights: Cultural and ideological perspectives*

Aside from the major features identified and discussed above, there are also some minor trends that have been raised in some of the literature that have been reviewed, and are arguments that relate with the subject matter of the current study. One of these is the definition of the concept of human rights itself. Viljoen not only recognizes that human rights did exist in pre-colonial African societies-so long as it is understood from the position of the social roles of individuals, but he also concedes that there is a confusion inherent in the definitions of the concepts of human rights and international human rights law⁵². This position will be discussed in detail in the following chapter.

There have been several attempts by scholars to find a distinct definition for the concept of human rights, but this task seems to be a fleeting one as a result of the evolving nature of human rights, which had led Laski to pronounce that it should be accepted that the concept cannot be easily determined⁵³. In other ways, Viljoen's description of human rights contrasts with Howard's suggestion that human dignity and human rights are inter-twined in African societies. In his own work, Viljoen identified that the twining is more or less between human rights and human rights law, and not on the concepts of human rights and human dignity. While Howard defined human dignity as part of the moral nature of people, Viljoen incorporates morality into his own definition of the concept of human rights as "denoting a special kind of moral claim that all humans may invoke"⁵⁴.

⁵² Viljoen F, (ed), 'International Human Rights Law in Africa', (2007), p. 4-5

⁵³ Laski H, *A grammar of politics* (1967), p. 91-92

⁵⁴ Viljoen F, (ed), 'International human rights law in Africa', note 60 above, p. 4

Moreover, also identified as a minor trend in the literature reviewed is the comparison between the African human rights system, its normative and institutional provisions, and the European and inter-American regional human rights systems. Upon investigation, it was discovered that most scholars tend to evaluate the efficiency of the African system based on the efficiency and achievements of the other systems. There is a large volume of literature that proves that the long experience of the European and inter-American systems have contributed to their success in the regional protection of human rights, but most of them fail to point out the effect of centuries of political development on the efficiency of these systems, and how the lack of such experiences in Africa has negatively affected the ability of the system to effectively enforce human rights in the region⁵⁵. Because the level of individual and group rights recognized in the western democracies are higher than those in many African states, evaluating the human rights standards will simply emphasize the African systems shortcomings, and not commend the commitment that has been shown by African states, individuals and other groups to the value of human rights in the continent⁵⁶.

Considerable attention was also paid to the African human rights system itself in many of the literature reviewed. Some of the scholars identified issues relating to the enforcement mechanisms, the system generally and how it was initiated and has evolved over time. Other scholars have talked about the strengths of the system, its weaknesses, and ways to reform it and areas where they are vulnerable to criticism. Murray for instance identifies that the African regional system has attracted many

⁵⁵ Jacobs F, *The European convention on human rights* (1975), p. v

⁵⁶ Howard R, 'Evaluating human rights in Africa: Some problems of implicit comparisons', (1984) 6 *Human Rights Quarterly*, p. 166

criticisms and disdain from many writers, especially when compared with the other systems in the world⁵⁷. In another work, Murray discusses the normative enforcement mechanisms of the African system, and its transformation from the OAU to AU, giving a detailed description of conventional conceptions of the system⁵⁸. Other scholars focused on scrutinizing the commission and do not hold back their overwhelming lack of faith and trust in the ability of the commission to carry out its promotional and protective mandate. The capacity of the commission to consider petitions regarding alleged human rights violations⁵⁹ has also been discussed, as well as its lack of investigative powers⁶⁰, and its lack of willingness or resources to carry out its functions⁶¹.

Suffice it to say at this point that the general portrayal of the African human rights system and the conviction of many Africans and non-Africans alike on the origins and development of human rights in the continent do not provide much optimism for the future of human rights in Africa.

⁵⁷ Murray R, 'The African charter on human and peoples' rights 1987-2000: An overview of its progress and problems', (2001) 1 *African Human Rights Law Journal*, p. 1

⁵⁸ Murray R, 'Human rights in Africa: From the OAU to the African Union', (2004), p. 49

⁵⁹ Murray R, 'Decisions by the African commission on human and peoples' rights on individual communications under the African charter on human and peoples' rights', (1997) 46 *International and comparative Law Quarterly*, p. 413

⁶⁰ Naldi G & Magliveras K, 'Reinforcing the African system of human rights: The protocol on the establishment of a regional court on human and peoples' rights, (1998) 16 *Netherlands Quarterly of Human Rights*, p. 432

⁶¹ Welch C, 'The African charter and freedom of expression in Africa', (1998) 4 *Buffalo Human Rights Law Review*, p. 114

2.3 Questions Insufficiently Addressed in the Reviewed Literature and Neglected Questions

In the literature that has been reviewed for this study, there are issues that were failed to be identified, or were identified but not properly addressed, and one of such issues relates to the question of the contribution that has been made by Africa in the field of international human rights law. This question was completely ignored in many of the literature and not just the ones that have been reviewed, but also others that deal almost exclusively on the issues of human rights in Africa. The region is majorly associated with the negative aspects of human rights protection, and the weaknesses are romanticized to the extent that it diminishes the positive achievements of the African regional human rights system, as well as states, individuals and other groups. For instance, the criticism of the commission, the court, and the African charter have all served the purpose of highlighting the poor human rights records and inefficiency of the African system in enforcing human rights in the continent. Viljoen rightly declares that:

Africa is associated more with human rights problems and humanitarian crisis than with their solutions, and...if Pliny had the opportunity of writing today, he would probably have coined the phrase; 'out of Africa, always something terrible'⁶².

Admittedly, one cannot deny or ignore the fact that the African system is in dire need of efforts to facilitate efficiency in several aspects, however like Acheampong rightly states, the efforts that have been made so far by states and individuals in Africa should certainly be appreciated and the effects are not to be under-estimated.

⁶² Viljoen F, 'Africa's contribution to the development of international human rights and humanitarian law', (2001) 1 *African Human Rights Law Journal*, p. 18

There is a need for more constructive and positive criticism of the African system rather than the cynical resolve that many scholars and leaders-especially the westerners- have adopted in their view of the African system of human rights⁶³.

Another issue that was introduced but not properly addressed in the literature relates to the question of whether in discussing the African human rights system, if the concept of human rights should be dealt with from a universal aspect, ignoring the ideological and philosophical contradictions posed by the African case. It has in fact been identified by some writers that human rights is a universal principle, but the question of applying human rights law differently in Africa due to the historical, philosophical and ideological differences with other regions was not addressed properly in the literature reviewed. The former secretary general of the UN Kofi Anan criticized this relativist notion of human rights in any region or state, identifying human rights as “fundamental to human kind itself that belongs to no

⁶³ Acheampong K, ‘Reforming the substance of the African charter on human and peoples’ rights: Civil and political rights and socio-economic rights’, (2001) 2 *African Human Rights Law Journal*, pp. 185, ⁶³ Mutua M, ‘The Banjul charter and the African cultural fingerprint: An evaluation of the language of duties’, (1995) 35 *Virginia Journal of International Law*, Alemika E, ‘Protection and realization of human rights in Africa’, in Kalu A & Osibanjo Y, *Perspectives on human rights*, Busia K, ‘The status of human rights in pre-colonial Africa: Implications for contemporary practices’, in McCarthy-Arnolds E, et al, *Africa, human rights, and the global system: The political economy of human rights in a changing world*, Donnelly J, *Universal human rights in theory and practice*, Fernyhough T, ‘Human rights and pre-colonial Africa’, in Cohen R, et al (eds), *Human rights and governance in Africa*, Onguergouz F, *The African charter on human and peoples’ rights: A comprehensive agenda for human dignity and sustainable development in Africa*

government and are limited to no continent”⁶⁴, a view that was also favorably held by his predecessor Boutros-Ghali⁶⁵.

Also neglected was the question of the role of democracy in the African regional human rights system, a concept which has been identified to the extent of its existence in respective African states but not the African system. As stated previously, democracy and human rights are both mutually exclusive terms and thus any discussion on areas for the reform of the African system should include that of the rule of law and democracy in the system. Boutros-Ghali recognized the relationship between the two concepts and went on to state that:

The process of democratization cannot be separated, in my view, from the protection of human rights...democracy is the political framework in which human rights can be safeguarded...it is not possible to separate the...promotion of human rights from the establishment of democratic systems with the international community⁶⁶.

Even though this study does not include in detail this form of discussion or argument, it is essential to mention that if the African human rights system is to be successful and efficient, the states respectively have to uphold higher levels of democratic practices which favor the protection of human rights and better human rights values and principles in general.

⁶⁴ Gaer F, ‘Human rights: What role in U.S foreign policy?’, *Great decisions, special issue*, (1998), p. 33

⁶⁵ See Ghali’s sentiments quoted in Acheampong K, ‘Reforming the substance of the African charter on human and peoples’ rights: Civil and political rights and socio-economic rights’, (2001) 2 *African Human Rights Law Journal*, p. 188

⁶⁶ *ibid*

Other questions that were neglected in the literature include; the role of women in the African regional human rights system, the impact of western countries on the efficiency of the African system, and the role of respective African states in attempting to ensure the efficiency of the system. Due to these questions that were overlooked, this study will attempt to address some of these issues as they relate to the scope and subject matter of the study in order to try to make up for the inadequacy of the reviewed literature. Although not all the questions can be addressed as a result of space and time constraints, as well as contrasts to the subject matter and aims of the study, some of the questions that will be addressed are seen in the following section.

2.4 Research Questions

What is original in the African charter on human and peoples' rights?

Does the element of originality in the African charter make it a more or less effective normative instrument for the protection of human rights in Africa?

What are the normative and institutional similarities and differences between the African regional human rights system and the European and inter-American systems?

This study will focus on these essential questions and attempt as much as possible to provide adequate answers to them for a better understanding of this work and other scholarly works and study on the African human rights system, and human rights in Africa in general.

Chapter 3

HUMAN RIGHTS IN AFRICA

3.1 Introduction

As already stated elsewhere in this study, international human rights law is a distinct branch of public international law which is often used-albeit incorrectly-interchangeably with international humanitarian law. Viljoen and Alston comprehend that the development of international human rights law has its roots in the global system of human rights and that even though there is a certain degree of human rights law in the domestic legal, political, and social systems of states, the development of international human rights law has been more of a top-down rather than a bottom-up occurrence. The status of international human rights law was authenticated with the adoption of the UN charter, which reaffirmed the commitment of many states to the protection of human rights throughout the globe, and which helped to transform the status of human rights to the universal one it currently possesses. International human rights law has a defined personality, although it is expected that this branch of international law is dynamic and subject to constant evolution. This law faces a philosophical challenge in Africa where the debate over cultural relativism and the universal status of human rights, have been ongoing for many decades. Due to this controversy, this chapter examines the philosophical and historical background of human rights law in Africa, the main objective being to trace back- in a limited capacity- the origins of the law in the region, and how it has developed to experience the emergence of the African regional human rights system

which is responsible for enforcing the law in the region. The basis of this is that in order to understand the development of the African system, an examination of the history of human rights in the region is vital⁶⁷. An objective of this study is to examine the African human rights system, and compare it to the other existing regional systems in relation to the enforcement of international human rights laws at the regional level. Therefore the examination of the history of human rights in the region should not be conceived as a deviation from the scope of the study, but as a means of trying to understand the origins and basis of human rights in the region, and thus if the African system is functioning accordingly or if there is need for reforms. This is necessary because it will show that Africans grasped the concept of human rights even before colonialization and therefore dispute the argument that human rights was introduced to the region by western colonial powers. Before Africa came to be known as a 'region', many communities existed there and they had their own perceptions on issues concerning human rights and the issues of life and death, to ignore this in a study of this magnitude would betray the fact that ultimately, these perceptions of human rights have continued to evolve and influence the development of states in the region as well as the regional human rights system. Some of the research questions outlined previously will be addressed in this chapter including; the definition of human rights, its origins in Africa, and how it has evolved over time to achieve its current status among others.

⁶⁷ Umozurike O, *The African charter on human and peoples' rights (1997)*, p. 1

3.2 Definition and Scope of Human Rights

3.2.1 Definition of Human Rights

In a study of this nature, one of the first issues to address is the definition of the key concept being discussed which in this case is human rights. This is because the entire study rests upon the proper understanding of the concept in order to understand its enforcement in the different regions of the world. Because the definition of the concept has become the subject of great debates among scholars due to the difficulty in identifying human rights, the definitions presented here shall be more or less as it pertains to the current study.

Cassese defines human rights as those that are generally “based on an expansive desire to unify the world by drawing up a list of guidelines for all governments...an attempt by the contemporary world to introduce a measure of reason into its history”⁶⁸. According to his observation, human rights can consequently not be claimed to be inherent in all human beings, but are conferred on the leaders through the ‘list of guidelines’. This thus means that it is the responsibility of the world leaders to evaluate whether or not these rights are relevant to their people. This observation is at best myopic, and at worst undermines the general understanding that human rights are inherent entitlements of all human beings which cannot be denied or granted, without grave injustice being suffered by people⁶⁹. Cassese’s argument and others towing this line meet with great criticism from other scholars who believe that the promotion and protection of human rights goes beyond the mere

⁶⁸ Cassese A, *Human rights in a changing world* (1990), p. 3

⁶⁹ Cranston M, ‘Human rights: Real or supposed’, in Raphael D (ed), *Political and the rights of man*, (1967), p. 52

need to unify the world, but can be viewed from many perspectives including that of upholding justice for all people as well as the principles of democracy and the rule of law to a lesser degree.

Brendalyn also presents a definition of human rights that is completely on the opposite end of the spectrum from Cassese's definition. She suggests that human rights are those individual entitlements that every human being possesses by virtue of being human⁷⁰. This definition has an undeniable implication which suggests that all people are equal, and that their rights are equal as well irrespective of sex, age, social class, race, culture or religion⁷¹. Henkin presents a similar definition suggesting that human rights cannot be forfeited, waived or transferred, but are universal rights that all human being have which are fundamental to the existence of humankind⁷².

Eze provides another definition of human rights stating that they are those "demands or claims which individuals or groups make on society, some of which become part of *ex lata* while others remain aspirations to be attained in the future"⁷³. This definition is limited in scope in the sense that Eze's perception is that human rights are those that are recognized and protected by a legal system, whereas some rights are not yet recognized by law, but are important as well as inherent in all persons. Therefore if one is to emphasize the legal system and the recognition of rights, it should be envisaged as a 'protector' and not a 'guarantor' of rights, and should protect all those rights inherent in all persons whether recognized by law or otherwise. In defining human rights, it has been noted that it is a fleeting task due to

⁷⁰ Brendalyn A, *Democratization and the protection of human rights in Africa* (1995), p. 29

⁷¹ *ibid*

⁷² Henkin L, *The age of rights* (1990), p. 2

⁷³ Eze O, *Human rights in Africa: Some selected problems* (1984), p. 5

the constant evolution of the concept but whatever the case, it cannot be denied that they are inherent in every human being and belong to every society in spite of geographical location, religion, ideology, culture and political system. Having made this observation, it is clear that the definition of human rights that best fits this study is that which is given by Laski which explains that human rights are those claims that individuals or groups make that are necessary for their well being, fulfillment and dignity⁷⁴. The famous philosopher Immanuel Kant observed that human beings have values that differentiate them from inanimate objects or animals and therefore a denial or violation of their inherent rights would be failing to recognize their value and the worth of their lives⁷⁵. In the spirit of recognizing that human rights are inherent and are equal to all people, Humana provided a definition of human rights which reinforces the subject of the concept for certain categories of persons that may be vulnerable in the society including; the old, the disabled, women, and children. Humana's definition construes that human rights are those laws and practices that protect the ordinary people, groups, races and minorities from oppressive governments⁷⁶. The protection of human rights has come to be considered as the authentication mark of a civilized society, and the term 'human rights' has replaced ones like the 'rights of man' and 'natural rights' in the twentieth century. The standard and scope of human rights has also evolved over time and rights that were formerly unrecognized by law are continuously being included to the list of those rights that are protected in all legal systems.

⁷⁴ Laski H, *A grammar in politics* (1967), pp. 91-92

⁷⁵ Melden A. I, *Rights and Persons* (1977), p. 189

⁷⁶ Humana C, *World human rights guide* (1983), p. 7

3.2.2 Scope of Human Rights

Human rights can be applied broadly in the sense that it can be done nationally, regionally, or internationally. After the Second World War when the UN charter was adopted, human rights were transformed from issues of mainly national concern, to the more universal scope it currently has. Even after it is stated in the preamble of the UN charter that all states party to this instrument shall reaffirm their faith in fundamental human rights and the dignity and worth of the human person, article 1(3) goes on to reiterate their commitment to the promotion and protection of human rights and fundamental freedoms. With this, the UN ensured that the promotion and protection of human rights becomes the responsibility of all states in the international community.

There have also been numerous efforts at the regional level to ensure that human rights are protected in the different regions of the world. Instruments such as the African charter on human and peoples' rights, the American convention on human rights, and the European convention on human rights and fundamental freedoms among others, ensure that the violations of human rights in these regions are prohibited and those who are responsible for such violations are brought to justice irrespective of political, social, or economic considerations or power equations. A credible human rights system is yet to be established in Asia or Middle East although great success and achievements are being made by the association of south-east Asian nations (ASEAN), a group of ten states working together to establish a human rights system for south-east Asia. As of 2007, a charter has been signed by all ten members of ASEAN and they continue to work towards establishing comprehensible

institutional frameworks and rules of procedure under which such a system will function⁷⁷.

The respect for human rights has continued to affect the international relations among states, and has come to have a great bearing on the nature of the relationship that states cultivate with each other in the international community. Umozurike rightly noted that human rights have become “a potent instrument of diplomacy to which has been added democracy”⁷⁸. For instance, states recoil from engaging in diplomatic relations with other states that have low standards of human rights protection, and as a consequence the nature and definition of the relationship among states is largely determined by the level of human rights protection. See for instance the case of Libya and the international community when many states imposed sanctions of the Libyan government and others withdrew their diplomats and closed their embassies in the country because the regime was violating the rights of the nationals. This is also the case between the international community and several other states including but not limited to; Somalia, Darfur, Iran, Iraq, and Afghanistan. Something that is intriguing in the case of human rights is the irony of it all. The governments, who are responsible for protecting human rights or are expected to be the main protectors of these rights, are also sometimes some of its worst violators⁷⁹. Often times the responsibility of the states to protect human rights are not fully applied, and therefore, regional systems of human rights are established to ensure

⁷⁷ Available at <http://www.bankok.ohchr.org/programme/asean> last accessed on 15 August 2012

⁷⁸ Umozurike O, *The African charter on human and peoples' rights*, note 1 above, p. 7

⁷⁹ Okongwu O, ‘The OAU charter and the principles of domestic jurisdiction in inter-African affairs’, (1973) 13 *Indiana Journal of International Law*, p. 589

that states carry out their obligations by putting into place enforcement mechanisms that will be efficient in the goal of protecting human rights all over the globe.

3.3 Classification of human rights

Human rights can be divided into several categories and these include; civil, political, social, economic and cultural rights. Under the civil and political rights category, the rights that are catalogued include; the right to liberty and security of person, right to self-determination, right to life, freedom from torture and other cruel, inhumane and degrading treatments or punishments, freedom from slavery and other forced labor, right to fair trial, right to privacy, freedom of thought, conscience and religion, freedom of opinion and expression, right to assembly, freedom of association, the right to marry and found a family, the right to participate in one's government either directly or through freely elected representatives, and the right to nationality and equality before the law among others. This category of rights are enshrined in articles 3-21 of the universal declaration of human rights, and the international covenant on civil and political rights (UDHR and ICCPR respectively), as well as in the normative instruments of the regional human rights systems.

In the economic, social and cultural rights category, the rights embodied include, *inter alia*, the right to work, the right to fair working conditions, right to fair remuneration, right to adequate standard of living, the right to organize, form and join trade unions, right to collective bargaining, right to equal pay for equal work, right to social security, right to property, right to education, right to participate in cultural life and enjoy the benefits of scientific progress. These rights are embodied in the UDHR articles 22-28, the international covenant on economic, social and

cultural rights (ICESCR) and also in the normative instruments of regional human rights system⁸⁰.

Aside from the above listed first and second generation of human rights, there is a third generation of rights-albeit an initiative that gained momentum in the twentieth century- and they include; the right to gain from the benefits from mankind's common heritage among others. Although these rights are more complex to protect due to the claims made by states about its interference with their sovereignty, some states have included mechanisms for their protection in their respective constitutional provisions, for example, Hungary, Finland, Israel and New Zealand⁸¹.

Just as human rights are not inert and are susceptible to change, so are the classifications, and although the changes may not occur as often as the recognition of rights themselves, the above classifications should in no way be considered to be inflexible as human rights are interrelated and inter-dependent⁸².

3.4 Human rights in Africa

Evidently, human rights have existed in Africa even during the pre-colonial period and to the colonial period when the structures and social forces that influenced African societies were transformed into models of social institution, which finally emerged in the post-colonial era as some of the factors that have continued to

⁸⁰ See these classifications in for example, Aka C, "Military, globalization and human rights in Africa", (2002) *New York Law School Journal of Human Rights*, p. 371

⁸¹ P. L. Mehta and S. S Jaswal, 'Human rights: concept and ideology', 30 (1&2) *Indian socio Legal Journal* (2004), p. 83-84

⁸² See art. 5 of the Vienna declaration and programme of action

influence the promotion and protection of human rights in the region⁸³. One cannot argue that the subsistence of the simple social forces in pre-colonial African societies is irrelevant to the discussion on the origins of human rights in the continent⁸⁴. In pre-colonial African societies, the communities lived under different social and political arrangements which were vastly different from the structure of other communities in other parts of the world at the time. Regardless of their socio-political arrangements however, there is evidence to prove that the protection of human rights was in the agenda of the legal systems that existed in the African communities, although it may have not taken priority over social and political issues⁸⁵. The African concept of ‘man’ during this time as observed by Okere was “...not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity”⁸⁶. Mutua accentuated this argument by adding that due to the homogeneity of pre-colonial African societies in terms of culture, language and ethnicity, they identified with each other, bringing about cohesion amongst the different communities⁸⁷. Deriving from such observations, Mbiti made an illustration of the pre-colonial African society’s concept of human rights which

⁸³ William C, *The destruction of black civilizations: Great issues of a race from 4500 B.C to 2000 A. D.*, (1987)

⁸⁴ Busia K, ‘The status of human rights in pre-colonial Africa: Implications for contemporary practices’, in McCarthy-Arnolds E, et al, *Africa, human rights, and the global system: The political economy of human rights in a changing world*, p. 226

⁸⁵ Eze O, *Human rights in Africa: Some selected problems*, note 7 above, p. 5

⁸⁶ Okere B, ‘The protection of human rights in Africa and the African charter on human and peoples’ rights: A comparative analysis with the European and American systems’, (1984)6 2 *Human rights Quarterly*, p. 141

⁸⁷ Mutua M, ‘The Banjul charter and the African cultural fingerprint: An evaluation of the language of duties’, (1995) 35 *Virginia Journal of International Law*, p. 349

basically summed up what other scholars already stated. His own summation was “I am because we are, and because we are, therefore I am”⁸⁸, giving credence to the argument that in pre-colonial African societies, the individual was considered to be part of a group, and thus protecting the rights and freedoms of the entire group was also protecting that of the individuals. Because of these communalistic perceptions, the rights of individuals were intertwined with the rights of the community and vice versa⁸⁹. Nyerere and Wai both presented similar arguments separately to prove that human rights did exist in pre-colonial Africa concluding that the individual welfare of the members of the society and their dignity were supported, and there was very low tolerance for great inequalities between members⁹⁰.

Some of the scholarly works on pre-colonial African societies deal mainly on the existence of democratic principles during this time, but incidentally by proving this case, some of the scholars inadvertently prove also that human rights existed as well. For instance, in trying to prove that individuals had the power to bring down regimes, Busia showed that human rights and individual and group freedoms existed as well⁹¹. Despite these observations, there are still many questions about the existence of human rights and democratic principles in pre-colonial African societies. This has been largely attributed to the fact that most of these African societies were

⁸⁸ Mbiti J, *The African religions and philosophy* (1970), p. 141

⁸⁹ Mutua M, ‘The Banjul charter and the African cultural fingerprint: An evaluation of the language of duties’, p. 349

⁹⁰ See Wai D, ‘Human rights in Sub-Saharan Africa’, in *Human rights perspective*, p. 115; Nyerere J, *Essays on socialism* (1968), p. 102

⁹¹ See Busia K, *Africa in search of democracy* (1967), pp. 22-26; Busia K, *The position of the chief in modern political system of Ashanti* (1951), chapter 3

governed by customs⁹² and because there were no classes in the society, there was no need for law or a state. Law or state would be important if man began exploiting each other⁹³ which fortunately was not the case in Africa at the time, and the only way to ensure that the governing customs were obeyed was through group sentiment⁹⁴. This generally resulted in difficulties in distinguishing between religious, legal or moral rules, which were all together “interwoven into the single texture of customary behavior”⁹⁵. Admittedly one cannot deny the fact that some of the most heinous crimes in Africa were committed during this period including; human sacrifices, killing of twins, and burying slave masters with their slaves, and these instances serve to buttress the western inquisition into the existence of law and human rights in pre-colonial Africa, their argument that the concept of human rights was introduced in Africa by western colonial powers, and that the concept is a western invention that is foreign to Africans. While some scholars will debate these points and argue that the human rights concept in Africa pre-dates the arrival of colonialism in the region, others like Donnelly argue that not only is the concept of human rights foreign to Africans, but also the principles of democracy and constitutionalism. In an attempt to refute this euro-centric argument, Mamdani argued that the claim of western ‘paternity’ on human rights has been falsely stated.

It is difficult to accept, even in the case of Europe, that human right was a concept created by 17th century enlightenment philosophy. True, one can quote Aristotle and his ideological justification of slavery as evidence that the

⁹² Nmehielle O, *The African human rights system* (2001), p. 7

⁹³ ‘The origin of the family private property and the state’ in Marx K & Engels L, *Selected works* (1982), pp. 461-556

⁹⁴ Nmehielle O, *The African human rights system* (2001), p. 7

⁹⁵ Lloyd D, *Introduction to jurisprudence* (1972), p. 566

idea of human rights was indeed foreign to the conscience of the ruling classes in ancient Greece...what was unique about enlightenment philosophy, and about the writings of the French and American revolutions, was not a conception of human rights, but a discussion of these in the context of a formally articulated philosophical system⁹⁶.

This observation proves what has been stated previously in this study that no single state can claim monopoly on human rights protection or its violation, and so no state can claim to be a paradise for it. Quashigah insists that human rights did exist in pre-colonial African societies but only lacked an articulated philosophical form, and that if the western scholar's arguments were valid, then any society, regardless of its level of development, should based on logic, recognize rights which can be classified as human rights⁹⁷. The implication of this analysis is that both African and western societies contradict each other as they all possess the potential for human rights abuse or protection⁹⁸.

The seemingly un-ending debate about the existence of human rights in pre-colonial Africa has effectively created a divide among scholars. While some of them consider human rights from a relativist perspective, others view consider it as a universal principle which should not be burdened by cultural overtone. The former category of

⁹⁶ Mamdani M, et al (eds.), *Social movements, social transformation and the struggle for democracy in Africa* (1988), pp. 236-237

⁹⁷ Quashigah K, 'The philosophic basis of human rights and its relations to Africa: A critique', (1992) *Journal of Human Rights Law and Practice*, pp. 30

⁹⁸ Mamdani M, et al (eds.), *Social movements, social transformation and the struggle for democracy in Africa* (1988), pp. 249

scholars subscribe to the ‘cultural relativism’ theory, while the latter category subscribes to the ‘universalism’ theory⁹⁹.

The argument by scholars in the ‘cultural relativism’ category is that there are an infinite number of cultural differences in every society, and therefore human rights should not be viewed in absolute terms¹⁰⁰. Lindholt is explaining that different societies have different comprehensions about what constitutes human rights, and more often than not, these represent the cultural idiosyncrasies of particular societies. Thus what is considered human rights violation in once society, may be considered otherwise in another society, and in some others may even be considered to be legal.

The argument from the ‘universalism’ theory suggests that human rights are no longer- since the adoption of the UDHR- issues of only national concern, but have been transformed into a universal or international one¹⁰¹. Deriving from Panikkar’s conclusions, it can therefore be argued that human rights have come to displace other

⁹⁹ See arguments in Howard R, ‘Evaluating human rights in Africa: some selected problems of implicit comparison’, (1984) 6 *Human Rights Quarterly*, p. 160-179; Howard R, ‘Group versus individual identity in the African debate on human rights’, in An-na ‘im A & Deng F, (eds), *Human rights in Africa: Cross- cultural perspectives*, p. 159-183; Lindholt L, *Questioning the universality of human rights: The African charter on human and peoples’ rights in Botswana, Malawi and Mozambique*, p. 33

¹⁰⁰ Lindholt L, *Questioning the universality of human rights: The African charter on human and peoples’ rights in Botswana, Malawi and Mozambique*, p. 33

¹⁰¹ Shestack J, ‘The philosophic foundations of human rights’, in McCorquodale R, *Human rights*, (2003), p. 228

homeomorphic equivalents and have become the center of a just social order. Thus the principle of human rights has become a universal culture¹⁰².

The universalism theory has met with great criticisms due to the lack of representation of the majority of African states and their ideologies and culture during the time the UDHR was adopted. This makes the instrument- as seen by many African states- to be dominated by western philosophies and ideologies, and hence not valid for every state or people¹⁰³. This dissatisfaction has led to an exploration for a human rights instrument that is unique to the culture, history, and religious orientation of African societies, one that will recognize that the African concept of human rights is based on the role of the individual in the community, as opposed to most of the UN human rights instruments that places emphasis on the individual directly. The concept of human rights in Africa is not validated on a constitutional basis but from fortified African beliefs, and is passed on through oral history and positive traditional practices¹⁰⁴, and on this point, most scholars agree to the foreign nature of the principle of human rights to Africans. Shivji for instance noted that the African traditional society is based on collectivity (community) rather than on the individual and therefore, the notion of individual rights is foreign to African ethno-philosophy¹⁰⁵. This communitarian ideal led African societies to believe that if

¹⁰² Panikkar R, 'Is the notion of human rights a Western concept?' in Alston P (ed.), *Human Rights Law*, (1995), p. 170

¹⁰³ Swanson J, 'The emergence of new rights in the African charter', (1991), 12 *New York Law School Journal of international and comparative law*, p. 326

¹⁰⁴ Eno W, 'The african commission on human and peoples' rights as an instrument for protection of human rights in Africa', (1998) *LLM Thesis University of South Africa*, p. 18

¹⁰⁵ *ibid*

individuals are raised to respect each other, there will be no violation of human rights, and this consequently led to the non-establishment of courts or similar mechanisms for human rights protection, as opposed to the modern concept of human rights which relies on judicial mechanisms for the enforcement of human rights law in the region¹⁰⁶. As Keba observed, “according to the African conception of law, disputes are settled not by contentious procedures, but through reconciliation...trials are always carefully avoided...”¹⁰⁷.

Following the entry into force of the Banjul charter which outlined in principle the protection of all types of human rights including; civil, political, economic, social and cultural rights, the OAU thus officially acknowledged the regional promotion and protection of the concept in Africa¹⁰⁸.

Aside from the catalogue of rights provided in the charter, there are also provisions for the establishment of enforcement mechanisms for the rights guaranteed in the form of the African commission on human and peoples’ rights (hereinafter the commission). While the charter provides the rights protected, the mechanisms to achieve this purpose, and the general shift in attitude of state leaders from non-interference to involvement in issues of human rights violations regardless of the boundaries, many scholars continue to argue that the charter is flawed in many ways

¹⁰⁶ Mutua M, ‘The Banjul charter and the African cultural fingerprint: An evaluation of the language of duties’, note 21 above, p. 342

¹⁰⁷ International Commission of Jurists, ‘A report on the proceedings of the conference’ (1961) (African conference on the rule of law, Lagos, Nigeria, Jan 3-7, 1961), p. 27

¹⁰⁸ Murray R, *Human rights in Africa*, p. 22

and that the enforcement mechanisms are less than effective¹⁰⁹. For instance, Murray correctly identifies that “resolutions adopted by the OAU organs relating to the work of the commission and in the adoption of its reports have generally...been limited to formalities”¹¹⁰. Murray incidentally is hardly the only scholar that has found the commission to be lacking in several aspects, and the African regional human rights system to be generally inefficient. As a result of its inefficiency, the commission is no longer viewed as the only enforcer of human rights in the region and this is one of the many reasons why the African human rights system is considered to be the least effective and developed system when compared to the European and the Inter-American systems. This is disappointing when one considers that of the other regional human rights instruments, the Banjul charter is the most widely ratified of them¹¹¹.

To summarize, the African concept of human rights is made up of several important elements including; putting the interests of the group before that of the individual, preference of consensus over competition, and the high level of consideration for human dignity in general¹¹². In fact, it could be beneficial to support the ongoing

¹⁰⁹See generally; Murray R, *Human rights in Africa*, pg 22, Mutua M, ‘The Banjul charter and the African cultural fingerprint: An evaluation of the language of duties’, (1995) 35 *Virginia Journal of International Law*, Viljoen F, (ed), ‘International Human Rights Law in Africa’, (2007), Shivji I, *The concept of human rights in Africa II* (1989), Mbiti J, *The African religions and philosophy* (1970), p. 141, Mutua M, ‘The Banjul charter and the African cultural fingerprint: An evaluation of the language of duties’, p. 349, Wai D, ‘Human rights in Sub-Saharan Africa’, in *Human rights perspective*

¹¹⁰ Murray R, *Human rights in Africa*, note 9 above, p. 23

¹¹¹ Mubangizi J, ‘Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains’, (2006) 6 *African Human Rights Law Journal*, p. 147

¹¹² Howard R, *Human rights in commonwealth Africa*, (1986), p. 50

debate about the concept of human rights in Africa because it will enable the further development of the African human rights system, although care should be taken when analyzing the concept of human rights in Africa so as not to portray the idea that the concept is foreign to Africans and that there is no historical antecedent to the current tradition of human rights protection in the continent.

3.5 The Emergence of the OAU and the Emergence and Evolution of Africa's Regional Human Rights System

3.5.1 The Emergence of the OAU

Around the 1950's, there was an agitation in the international community for the protection and promotion of human rights, but the status of human rights in Africa at this time was taking a slightly different turn. Most of the colonized states were seeking liberation from their colonial masters, and were struggling at the same time to familiarize themselves with the new systems that were erected by these colonial powers which were in contrast with the socio-economic and political structures that were in place and served the local populace's values and norms. With the challenges facing the newly independent states of Africa, they decided to concentrate their efforts towards completely eradicating colonialism from the continent, and to orchestrate a homegrown remedy for the human rights abuses that persisted in the region. This brought about the establishment of the Organization for African Unity (OAU). In many ways, it can therefore be said that the creation of the OAU was due to the different kinds of developments in the different regions of the continent one of which was the war in Algeria which prompted nine independent states in Africa¹¹³ to hold a conference in 1959 in Monrovia, the primary purpose of which was to provide assistance to the provisional government in Algeria, for which they held support.

¹¹³ Ethiopia, Ghana, Guinea, Liberia, Morocco, Libya, Sudan, Tunisia, and the United Arab Republic

Following the success of this conference, other conferences were held by African states with the aim of organizing a peaceful revolution in the continent, and to encourage those states that were still being colonized to break free and liberate themselves¹¹⁴.

Recognizing the need for a regional organization of African states, some independent states held another conference in Monrovia in 1961 calling for the adoption of a charter for the Organization of African and Malagasy states¹¹⁵. However, this conference was attended by twenty-two of the twenty-seven already independent states in Africa because of their inability to reach a consensus on the nature of the organization. Thus the twenty-two states that attended the conference went ahead to hold another one in 1962 in Lagos, Nigeria, to discuss the drafting of the charter¹¹⁶. The newly formed heads of states and government proposed, among other things, the creation of a council of ministers for the organization. In December of 1962 in another conference, the charter was signed by seventeen African states. Kannyo recognized that the ideals that gave the creation of OAU its momentum was the dire need to end colonialism in Africa, and also to bring down the regime of apartheid in South Africa¹¹⁷. The primary objective of the organization was therefore not the protection or promotion of human rights in the region, although the preamble of the charter expressed the desire of the African states to promote human rights protection in the continent. The preamble of the charter glossed over this point in the following sentences;

¹¹⁴ Murray R, 'Human rights in Africa: From the OAU to the African Union', (2004), p. 2

¹¹⁵ Elias T, 'The charter of the Organization of African Unity', *AJIL* (1965) 59, pp. 243-244

¹¹⁶ *ibid*

¹¹⁷ Kannyo E, *Human rights in Africa: Problems and prospects* (1980), p. 15

Conscious of our responsibility to harness the natural and human resources of our continent...persuaded that the charter of the United Nations and the universal declaration of human rights, to the principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among states...¹¹⁸.

Scholars like Kannyo go on to argue that perhaps the failure of the OAU was the purpose for which it was created. The failure of the OAU to specifically emphasize its commitment to the protection of human rights in the continent may have contributed to the reason why some of its members lacked extensive bill of rights in their respective constitutions. The OAU's ultimate concern was to end all forms of foreign domination and on the issues of human rights, expected that its members should ascribe to the principles enshrined in the universal declaration of human rights and the UN charter¹¹⁹.

In spite of the OAU's failure to re-emphasize its commitment to the principles of human rights and its protection, it served some purpose and achieved some success in ensuring certain standards of human rights and fundamental freedoms in the continent. Through the provisions in the organization's charter, the right of self-determination was strengthened, and the OAU also played a significant role alongside the UN in ending colonialism in Africa, and dismantling the apartheid regime in South Africa. Also significant was the role played by the OAU in the adoption of the Lusaka manifesto in 1969 by the UN general assembly and the heads of state of East and Central Africa. The manifesto was notable because it condemned the apartheid regime in South Africa and reiterated the commitment to equality of all peoples' rights to "human dignity and respect regardless of color, religion or sex. We

¹¹⁸ See the preamble of the OAU charter

¹¹⁹ Othman H, 'Africa and the protection of rights', (1995) 6/1 *African Law Review*, pp. 51-55

believe that all men have the right and duty to participate as equal members of the society, in their government”¹²⁰. Other important roles played by the OAU in the aspect of human rights protection in Africa include; the summits held to discuss issues of human rights which facilitated the adoption of several declarations, protocols and treaties. There was also the effort by the OAU to help resolve the issue of refugee emigration caused by liberation wars and colonial oppression¹²¹. To this respect, the OAU together with other international organizations and agencies, and assisted host countries of those refugees financially.

Regardless of the above mentioned efforts by the OAU to exert itself to human rights issues in the continent, the organization faced a legitimacy crisis as many of its members failed to protect the human rights of their citizens, and the OAU seemingly turned a blind eye to these substantial human rights violations, remaining steadfast to their principle of non-interference in the internal affairs of their members. Included also to the list of OAU’s failures were their inability to end the conflict in the democratic Republic of Congo, its failure to stop the Rwandan genocide, its inability to stop the civil war in Liberia, and its failure to end the crisis in Burundi or find a lasting remedy to these problems.

As the millennium drew to a close, there was an opportunity to reposition the OAU from its endeavors to end colonialism- which had basically come to an end on the continent, to a path that was more accommodating to the principles of human rights

¹²⁰ Hamalengwa, Flinterman & Dankwa (eds.), *The international law of human rights in Africa* (1988), pp. 104-110

¹²¹ Murray R & Lloyd A, ‘Institutions with responsibility for human rights protection under the African Union’ (2004) 48/2 *Journal of African Law*, p. 167

and its protection, and in general, peace, stability, development and sustainable democracy in the continent. The opportunity was seized and thus led to the transformation of the OAU to the African Union (AU) whose principles of human rights are reinforced in its charter as opposed to its predecessor. It is however imperative to mention that the emergence of the African regional human rights system happened during the existence of the OAU and is thereby not an AU initiative.

The emergence of the African human rights system was initially resisted by the OAU leaders because it meant the creation of a system that required capping the human rights violations these leaders themselves were involved in. Nevertheless, the increasing levels of such violations surmounted the resistance to the establishment of a regional human rights system that would define specifically the benchmark for compliance to human rights norms¹²². Moreover, the focus of the international community was drawn to human rights issues globally and therefore, the stage was set both internally and externally for a more pro-active response to the issues of human rights violations in the continent. Umozurike notes accordingly that:

...The emphasis that President Carter placed on human rights in the international relations of the United States, the Helsinki act of 1975, signed by the United States, Canada and 33 European countries, emphasized respect for human rights...an attempt was made to include human rights in the renewed EEC-ACP pact, the Lome II convention. The stage was thus set...for the debut of the African charter on human and peoples' rights¹²³.

¹²² Reisman W, 'Through or despite governments: Differentiated responsibilities in human rights programs', (1987) 72 *Iowa Law Review*, p. 392

¹²³ Umozurike U, 'The African charter on human and peoples' rights', (1983) 77 *American Journal of International Law*, p. 904

The issues of human rights were so effectively embedded in international politics that President Carter sanctioned an embargo on Uganda due to President Idi Amin's violation of the rights of his people¹²⁴. The behavior of Idi Amin and other dictators like him in Africa who had no regard for the principles of human rights, brought shame to some of the African leaders who held in high esteem, the principles of democracy, rule of law, human rights and fundamental freedoms. Such leaders like President Leopold Senghor of Senegal and others that shared similar sentiments as he-the betrayal of African dignity in the eyes of other states in the world, set out to establish a regional human rights system that would be responsible for dealing with such issues¹²⁵.

It is crucial to note that this search began in 1961 with the meeting of African Jurists in Lagos, Nigeria, where the 'Law of Lagos' was proclaimed, which outlined among other things, "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"¹²⁶. The process of creating a legal framework for the protection of human rights in Africa began in

¹²⁴ Ojo O & Sesay A, 'The OAU and human rights: Prospects for the 1980's and beyond', (1986) 1/9 *Human Rights Quarterly*, p. 92

¹²⁵ Umozurike O, *The African charter on human and peoples' rights (1997)*, p. 12

¹²⁶ Quoted in Lindholt L, *Questioning the universality of human rights: The African charter on human and peoples' rights in Botswana, Malawi and Mozambique*, p. 73

Lagos, and intensified through a series of seminars and conferences¹²⁷. In 1969, after a UN seminar in Cairo, Egypt, nineteen African states asked that the UN secretary general recommend to the OAU leaders, *inter alia*, set up a regional commission in Africa which will be fully supported by all African states¹²⁸. The Cairo seminar prompted other seminars and conferences in various parts of Africa and the main objective was to establish the commission or another kind of mechanism for the protection of human rights in the region¹²⁹. In 1978, there was a meeting of African Bar association in Sierra Leone where the fundamental natures of individual rights in Africa were reaffirmed. Also at this time, the UN human rights commission sought the help of the UN general assembly in establishing institutions in Africa that would enable the proper enforcement of the principles of international human rights law in the region¹³⁰. As a result of pressures emanating from the international community, some African leaders and some pro-active non-state actors, the OAU gave in and put in motion the process of creating the commission on human rights at a conference

¹²⁷ See Onguergouz F, *The African charter on human and peoples' rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003), p. 20; Nmehielle O, *The African human rights system*, (2001), p. 70

¹²⁸ Umozurike U, 'The African charter on human and peoples' rights', note 53 above, p. 904

¹²⁹ Seminar on the Realization of Economic and Social Rights with particular reference to the Developing countries' Lusaka, Zambia 23 June- 4 July 1970; Conference of African jurists on (the) African legal process and the individual' Addis Ababa, Ethiopia 19-23 April 1971; Seminar on the study of New ways and Means for Promoting Human Rights with special Attention to the problems and Needs of Africa, Dar-es-salaam, Tanzania 23 October- 5 November 1973

¹³⁰ Naldi G, *The Organization of African Unity* (1989), p. 110

held in Monrovia in July 1979¹³¹. The first meeting of experts in Dakar in 1979 brought about the process of drafting a charter and an eventual production of a draft charter. The expert group found out that the OAU secretariat had prepared a draft as well that was adapted from the American and European conventions on human rights¹³², which was rejected by this group that had a fresh draft produced.

Though unsuccessful, the council of ministers of the OAU met twice in Banjul, Gambia for the adoption of the charter, and the failure to do so was attributed to the lack of consensus and the general lack of trust among the states¹³³. Fortunately, these difficulties were surpassed in January of 1981, when the preliminary draft of the charter was finally adopted by the council of ministers of the OAU. The assembly of heads and states and government (AHSG) adopted the charter in its session later which was held in Nairobi, Kenya¹³⁴. This charter eventually came into force in 1986 and has been ratified by all independent states in Africa including the three suspended members of the AU; Guinea Bissau, Madagascar and Mali, and except only Morocco which left the OAU in 1984. Considering that it took eleven years for the UN covenant to be ratified and come into force, the African charter on human and peoples' rights stands out proudly in light of the economic, social and political

¹³¹ The conference was preceded by a symposium that was organized by the OAU secretariat in Monrovia, Liberia, from 12-16 February 1979 which was to discuss the theme, 'What kind of Africa by the year 2000?'. The conference attracted experts from various fields

¹³² Bello E, 'Human rights, African development', *Encyclopedia of public international law*, (1985), p. 30

¹³³ Lindholt L, *Questioning the universality of human rights: The African charter on human and peoples' rights in Botswana, Malawi and Mozambique*, p. 80

¹³⁴ This session was held on 26 of June 1981

circumstances surrounding its inception¹³⁵. The adoption of the Banjul charter turned out to be the precursor to the establishment of the African commission on human and peoples' rights in 1987, and the charter though criticized as 'faulty', represents the commitment of African states to improving the standards of human rights in the continent and support for the protection of human rights and freedoms as emphasized in the UDHR¹³⁶.

Despite having successfully established a regional human rights system in Africa, there was an almost immediate demand for its reform which was brought on by the lack of effective enforcement mechanisms. Admittedly, the commission has a promotional mandate, but it does not possess protective powers that will enable it ensure that the levels of human rights violations on the continent are reduced significantly. There was therefore a need to create other enforcement mechanisms that would provide supplementary support to the commission in carrying out its mandate, hence the creation of the regional human rights court. Consequently, what follows is an analysis of the evolution of the African human rights system from its former status under the OAU and the early years of the AU, to its current status under the AU and the African court- which is to incorporate the African court on human and peoples' rights pursuant to the merger protocol adopted in 2008. As of the beginning of 2011, only three of the fifteen state signatures needed for the protocol to enter into force have been acquired¹³⁷.

¹³⁵ Lindholt L, *Questioning the universality of human rights: The African charter on human and peoples' rights in Botswana, Malawi and Mozambique*, p. 80

¹³⁶ See the Preamble of the Banjul charter

¹³⁷ Protocol on the statute of the African court of justice & human rights, status list, 27 Jan. 2011

3.5.2 The Evolution of the African Human Rights System

The evolution of the African human rights system as well as the other regional human rights systems began with the end of the Cold War in 1991 which was heralded by the fall of the Berlin wall in 1989. This brought about the 'new world order' (NWO) which indicated the end of the ideological division between the east and the west, signified by the tensions between the USSR and U.S from 1947-1991¹³⁸. During the Cold War, most of the independent African states were close allies to either the east or the west due to strategic, political, and economic reasons, but most importantly militarily, they were used to fight proxy wars that the two main players of the Cold War did not want to get involved with directly. However, following the end of the Cold War, the African states began to be losing their western and eastern allies, and started being penalized for their less than desirable human rights records which conveniently were not an issue during the 'great' ideological strife¹³⁹. Feeling abandoned by their former allies, the African states began forming regional and sub-regional coalitions which would help them to be integrated continentally¹⁴⁰. Thus the lack of interest by the industrialized western and eastern former allies of these African states in the strategic, political, economic and military benefits of the relationship brought about new pressures and conditions on the human rights records of their former African allies. They began using economic and military embargos, political isolation and political force, to show their

¹³⁸ Mugwanya G, *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003), pp. 20

¹³⁹ Eno W, 'The african commission on human and peoples' rights as an instrument for protection of human rights in Africa', (1998) *LLM Thesis University of South Africa*, p. 38

¹⁴⁰ *ibid*

reservations and opposition to certain governments' violation of human rights¹⁴¹. This approach however, played the role of a strong incentive that inspired the African governments who were initially more passive on issues of human rights to take on an active initiative in searching for more permanent ways to ensure that their human rights records are no longer issues of international concern, attracting less criticism and scrutiny. Perhaps the most significant demonstration of this new determination by African states to improve their human rights standards was the meeting of the African ministers of justice and attorneys general in Tunis, in November 1992. This meeting was held for the primary purpose of preparing an African position paper which was to be presented in the second world conference on human rights which was held in Vienna, Austria in 1993. At the end of the meeting in Tunis, the ministers of justice and attorneys general adopted an 'African declaration' of the regional meeting for Africa of the world conference on human rights, which emphasized the need for the protection and promotion of human rights everywhere in the continent, by all concerned groups, institutions, individuals, governments, national institutions, and non-governmental institutions amongst others¹⁴². The main objective of the Vienna conference was to define the parameters of international human rights law, which provided an answer for the debate about the universal nature of human rights. In the declaration and programme action of the conference, it was stated that "all human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same

¹⁴¹ *ibid*

¹⁴² Nowak M, *Introduction to the international human rights regime*, p. 26

emphasis”¹⁴³. This sort of emphasis on the standards of human rights globally pressured African governments to search for ways to eradicate human rights violations on the continent which were on the continuous increase following the political conditions in the various regions of Africa. Several meetings and conferences were held to this effect including the conference that led to the transformation of the OAU into the AU.

In September of 1999, Mummur Ghaddafi, the former President of Libya, called for a meeting of the OAU leaders in Sirte to discuss the challenges that the new millennium brought, and ways to deal with them. The Sirte declaration¹⁴⁴ was adopted in this meeting, and there the process of the establishment of the African Union was discussed among other things. The legal experts that were burdened with defining the legal parameters for the new African Union were instructed to ensure that the model emulates that of the European Union¹⁴⁵. Whether such a model would be effective in solving the distinctive cases of human rights violations in Africa, will be discussed elsewhere in this study. The significance of the transformation from the OAU to AU is that it brought about the further evolution of the African human rights system. For instance, the AU as a regional institution has more guiding principles that embody human rights provisions as opposed to that of its predecessor. The respect for human rights, the principles of democracy and the rule of law are also embodied in the AU’s constitutive act¹⁴⁶ as well as other principles that have human

¹⁴³ Vienna declaration and programme action, art.4

¹⁴⁴ OAU Doc. EAHG/Dec.1(iv) Rev1

¹⁴⁵ (1999) 36 *Africa Research Bulletin* 13678

¹⁴⁶ CAAU, Art. 4 (m)

rights implications such as gender equality¹⁴⁷, promotion of social justice¹⁴⁸, and rejection of unconstitutional change of government¹⁴⁹. Needless to say that the transformation of the OAU brought about a new dimension in the enforcement of human rights in Africa by a regional institution, which signifies a bold attempt at eliminating human rights violations in the region.

Another phenomenon which marks the evolution of the African human rights system is the establishment of the African court on human and peoples' rights which resulted from the ensuing debate about the inefficiency of the commission to deal with human rights issues in the continent. As already stated previously in this study, the establishment of the court was an effort that was necessary in order to provide an additional mechanism for the enforcement of human rights in Africa, as well as to support the commission in carrying out its protective and promotional mandates. A protocol creating a human rights court for Africa was adopted in 1997 at a meeting of ministers of justice in Cape Town, and was ratified by the summit of heads of states and governments in Burkina-Faso on June 9, 1998. The protocol was drafted by the OAU secretariat to emulate existing regional instruments that created the inter-American and European human rights courts, the report of the international law commission on the international criminal court, as well as the statute of the international court of justice¹⁵⁰. Even though it came into force on the 25th of January 2004, there was an immediate resolution by the AHSG to integrate the African court

¹⁴⁷ CAAU, Art. 4 (1)

¹⁴⁸ Ibid, Art. 4 (n)

¹⁴⁹ Ibid, Art. 4 (p)

¹⁵⁰ Nmehielle O, *The African human rights system* (2001), p. 255

of justice and the African human rights court into one institution¹⁵¹. The rationale behind this resolution was that merging the two courts would be financially reasonable as well as expedient for decision making. As a result of the prolonged negotiations regarding this merger, it was considered that the operationalization of the African human rights court should be discussed and to this effect, the first eleven judges were sworn in on the 2nd of July 2006¹⁵². The establishment of the African human rights court is considered an effort to create an effective regional mechanism for the promotion and protection of human rights in Africa¹⁵³. Moreover, there are also other phenomena that represent the evolution of the African human rights system including; the emergence of the new partnership for Africa's development (NEPAD), and the African peer review mechanism (APRM) although these will not be discussed in detail in this study so as not to deviate from the scope of the study and its objectives.

¹⁵¹ See paragraphs 4 and 5 of Assembly/AU/Dec 45 (III)

¹⁵² Viljoen F (ed), *The African human rights system: Towards the co-existence of the African commission on human and peoples' rights and the African court on human and peoples' rights*, (2006), p. iii

¹⁵³ See Amnesty International, *Credibility in question: Proposals for improving the efficiency and effectiveness of the African commission on human and peoples' rights*, AI index: IOP 63/02/1998

3.6 Conclusion

In this chapter, the historical foundations of human rights in Africa have been discussed as well as the emergence of the Organization for African Unity (OAU), the African human rights system, and the evolution to its current status under the AU. This chapter also provided a review of the definitions of the concept of human rights with the view of defining the concept in universal terms and in terms of how it is related to the African continent. It has been determined in this chapter and elsewhere in this study that the definition of the concept of human rights is a fleeting task because of its evolving nature, and that no single state or society can monopolize the respect for or violation of human rights. To this effect, this chapter has served to reinforce the argument that Africa has had a tradition of human rights even in pre-colonial societies, and thus that the concept in its entirety is not foreign to African people though some aspects of it may be.

In this chapter also one of the main arguments iterated that the philosophical foundations of the concept of human rights are what make the difference between the African and western notions of the concept, and that in spite of this, western scholars should not insist on the argument that Africa did not have a tradition of human rights prior to the colonial period.

This chapter reiterated that international human rights law is a branch of public international law whose main concern is the protection of individual and group rights and freedoms from an international platform. However, resulting from the divergence in the perception of the concept, it was recognized that regional systems are more efficient in enforcing human rights law in the different regions of the world.

Attention was also paid to the emergence and evolution of the African human rights system and the skeptical outlook of the OAU leaders on such a system which could undermine their state sovereignties that seemed to be more important to them at this time. Nevertheless, the change in position of the former western and eastern allies of the African states at the end of the cold war, and the sudden demonization of regimes with poor human rights records were seen to have positive impacts on the emergence of the African regional human rights system. At the risk of appearing anti-west, anti-American, or even seen to have a personal agenda, it is imperative to note that even though the human rights standards in Africa are not desirable as the study concurs with, other European and American states have had their own fair share of human rights abuses. Even the U.S that is supposedly the exemplary democratic state and fore-bearer of positive human rights standards has been and continues to be criticized for its human rights violation practices both within and outside their primary territorial jurisdictions. For instance the situation they have going on in the Guantanamo and Abu-Ghraib prisons. Some of these violations reach the magnitude of crimes against humanity, torture and other cruel, inhumane and degrading treatments, but many are more concerned with the racial compositions of human rights violators, and less on their practices.

The attempt by many African states to uphold desirable standards of human rights should be recognized and appreciated especially considering the political, economic, religious and social circumstances under which this struggle ensues. These circumstances differ when discussing the inter-American and the European systems, which will be analyzed in more details in the following chapter and further compared with the African system in terms of the norms, rules of procedure, and institutions for efficient enforcement of human rights in these regions.

Chapter 4

COMPARING THE AFRICAN, EUROPEAN AND INTER-AMERICAN HUMAN RIGHTS SYSTEMS

4.1 Introduction

The protection of human rights has become one of the most widely debated issues in international politics today, and this is owing to the fact that many individuals, groups, institutions and governments are increasingly becoming aware of the importance and significance of the subject of protecting human rights to the continued peaceful existence and sustainability of mankind¹⁵⁴. Before the Second World War and prior to the establishment of the United Nations, issues of human rights were considered to be strictly within the national jurisdiction and discretion of states at a time when national sovereignty was the protected policy and states tackled human rights issues as it benefitted the incumbent regimes. Azinge rightly observed that the internationalization of human rights issues was as a result of the adoption of specific human rights instruments such as the universal declaration of human rights which outlines that the promotion and protection of human rights would ultimately ensure the achievement of a peaceful international environment. To this respect, the UN is seen therefore as the main driver of the internationalization process, reinforced in the principles outlined in the UN charter itself-recognizing that

¹⁵⁴ Azinge E, 'Milestone decision on human rights' in Kalu & Osinbayo Y (ed), *Perspectives on Human rights* (1992), 12, p. 197

human rights are issues of universal concern and that the international community is entitled to immerse itself on such issues, and other significant human right instruments that are the bedrock for the operationalization of the institution. As stated elsewhere in this study, the proper enforcement of international human rights principles has to be undertaken regionally for more efficiency and expediency in terms of the financial, cultural and philosophical aspects of the law, and based on the principles of international human rights instruments. Thus parallel to the universal system of human rights represented by the UN, there exist three other credible human rights systems in Europe, America and Africa, and there are increased efforts to establish such systems in Asia and the Middle East, although so far there still remains to be seen, an operational system for the protection of human rights in these regions.

This study aims to provide recommendations and suggestions on how to enhance the African regional human rights system after careful comparison with the other systems and their instruments for human rights enforcement. Even though this study will focus on the African human rights system, it is not possible to review all its normative and institutional instruments in this single work otherwise the study will be extremely larger than intended, and impossible to complete. Thus the focus of the study will be limited to the analysis of the Banjul charter, the enforcement mechanisms it provides for, a comparison between the African and the European and inter-American systems where the focus will also be limited to the essential instruments for human rights protection in those regions like the charter and the conventions on human rights. Other institutional and normative mechanisms will be mentioned on the basis of their relevance to the subject matter of the present study.

In the context of human rights protection, all the above mentioned systems have regional instruments that ensure the protection of international human rights law and in the African case, the OAU charter can be said to be the first regional instrument that tackled the issues of human rights in the continent though in a limited capacity. The OAU charter has been effectively criticized for not expressly referring to the concept of human rights or its protection, and for making it a secondary objective alongside its primary objective of uniting independent African states, doing away with colonialism in the continent¹⁵⁵, and protecting the sovereignty of African states. The OAU's principle of non-interference in the internal affairs of its member states caused them to either ignore regimes that systematically violated the rights of its citizens, or pay inadequate attention to these state practices¹⁵⁶. An understanding of this problem drove Keba Mbaye-who is considered to be the father of the Banjul charter- to conclude that the pursuit of political stability and development in Africa at this time was put forth before the protection of human rights¹⁵⁷.

The aim of this chapter is to examine the other regional human rights systems vis-à-vis the African system all of which function within the context of the universal human rights instruments as well as their own regional instruments. The African system is considered to be the youngest and least effective of the existing systems¹⁵⁸,

¹⁵⁵ Mangu AMB, 'The changing human rights landscape in Africa: Organization of African Unity, African Union, New Partnership for Africa's Development and the African Court', (2005), *Netherlands Quarterly of Human Rights*, pp. 379-381

¹⁵⁶ Smith R K M, *Textbook on International Human Rights*, (2005), p. 132

¹⁵⁷ Mbaye K & Ndiaye B, 'The organization of African Unity' in Vasak K & Alston P (eds) *The International Dimensions of Human Rights*, (1982), 2, pp. 583, 593

¹⁵⁸ Churc J, et al, *Human Rights from a comparative and International law perspective*, (2007), p 259

and thus as a consequence, this chapter will include a comparative analysis of the African system with its European and inter-American counterparts. The focus of this comparison will be on the main instruments of the systems, the rights entrenched, and the enforcement mechanisms established, as these will facilitate the establishment of the originality of the African charter, and the disparity between the African system and its predecessors in other regions in order to make more precise recommendations for the reform of the system.

4.2 The Main Human Rights Instruments

The African human rights system has a unique feature in the sense that it rests upon a single normative instrument which is the African charter on human and peoples' rights (Banjul charter, 1981) and the protocols attached to it. The European system's normative instruments include; the European convention on human rights (1950) and the European social charter, and the universal system of human rights is grounded on multiple instruments including; the charter of the United Nations (1945), the universal declaration of human rights (UDHR 1948), the international covenant on civil and political rights (ICCPR, 1966), and the international covenant on economic, social and cultural rights (ICESCR, 1950). Similar to the universal system, the inter-American system is grounded also on multiple normative instruments including; the charter of the organization of American states (the OAS charter, 1948), the American convention on human rights (AmCHR, 1969) and the American declaration of the rights and duties of man, which was the first international instrument on human rights and although technically it is not a treaty that is legally binding, it is still considered by the inter-American court of human rights and the inter-American commission on human rights to be a credible source of human rights provisions that member states must abide by. The regional human rights systems share a certain

degree of similarity in the formats of their charters as each mirrors the provisions outlined in the others, as well as other related aspects, but there are also some significant characteristics that on close examination, differentiates these systems from one another. These similarities and differences will be discussed subsequently.

4.3 Similarities and Differences between the African, Inter-American and European Systems of Human Rights

4.3.1 Similarities

Firstly, it is important to mention that one significant difference between the African, the inter-American and European systems of human rights stems from the fact that the regional arrangements for the protection of human rights in Europe are extensive including; the European Union (EU), the Council of Europe (CofE), and the Organization for security and cooperation in Europe (OSCE). These inter-governmental institutions all have specific mechanisms and instruments that embody the principles of human rights and its protection, although the longest standing instrument belongs to the council of Europe which is the 1950 convention for the protection of human rights. Conversely, the African system is established within a single inter-governmental institution known as the African Union- formerly the OAU, whose main normative instrument is the 1981 charter on human and peoples' rights and its protocols¹⁵⁹. The significance of this difference is that while there is a kind of division of labor in Europe between these institutions in terms of the protection of human rights, in Africa, the responsibility is borne by a single institution following the provisions of a single instrument which makes it rather difficult to take on several cases of human rights violations simultaneously and

¹⁵⁹ Available at <http://bankok.ohchr.org/programme/other-regional-systems.aspx> last accessed on 15 August 2012

effectively. In spite of this difference, the African system still manages to attain measurable similarities with the European and inter-American systems of human rights. These similarities include; the existence of an avenue for the judicial settlement of disputes through the courts in these systems- the European court of human rights, the inter-American court of human rights and the African court on human and peoples' rights which is soon to be merged with the African court of justice to become the African court of justice and human rights as soon as the necessary states ratify the merger protocol.

In the inter-American, European and African systems of human rights, there is a standing requirement that for a case to be considered admissible in the courts, all local remedies must be exhausted before the respective courts can handle the cases. The rules of procedures require that the commissions in the three systems are responsible for accepting complaints from a state, group or individual and then presenting it to the court when the court's jurisdiction and the admissibility of the case has been established. In essence, it is the responsibility of the commission to ensure that all local remedies have been exhausted before the case can be brought to the court, a principle embodied in articles 50 and 56 (5) of the African charter, 35 of the European convention on human rights, and 46 (1) of the American convention. Furthermore, there is a provision for the constant lodging of national reports to the commission as stated in article 62 of the African charter which requires each state that is party to the present charter to submit a report every two years which establishes a more permanent reporting system. In the European system, there is a provision for national reporting from states only when the secretary general of the Council of Europe requests for it which establishes a conditional reporting or a non-permanent reporting system. In the inter-American system, there is a provision for

the submission of reports to the commission although unlike in the African system, there is no yearly requirement for this provision and unlike in the European system, the national reports are not provided only on the request of the secretary general. According to article 44 of the American convention “Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the organization, may lodge petitions with the commission containing denunciations or complaints of violation of this convention by a state party”¹⁶⁰.

Similarities between the three systems of human rights also include the provision for the request of advisory opinions from the human rights courts in these systems. This provision requires the court to provide an advisory opinion on certain human rights issues or other issues where it has jurisdiction per request from the commission. The inter-American court has an advisory jurisdiction which requires it to provide advisory opinions on the provisions of the American convention as well as other treaties that relate to the protection of human rights in the American states¹⁶¹. In the European system, there is a limitation however to this provision as the court’s advisory opinion can only be rendered on legal questions concerning how the convention and the protocols attached to it are interpreted¹⁶². In the African system, advisory opinions from the court can be provided on any legal matter that relates either with the charter or any relevant human rights instrument in general. To this

¹⁶⁰ See Art. 44 of the American Convention on human rights

¹⁶¹ See Buergethal T, ‘The advisory practice of the inter-American human rights court’, *American Journal of International Law*, (1985), 79, pp. 1-27; Valerio de OLIVEIRA MAZZUOLI, *The inter-American Human Rights Protection System: Structure, Functioning and Effectiveness in Brazilian Law*, *Anuario Mexicano de Derecho Internacional* (2011), XI, pp. 347

¹⁶² See art. 47 of the European court of human rights

respect, the African human rights system appears to contain more comprehensive references and more constant rules of procedure¹⁶³.

The friendly settlement of dispute is also provided for in the European, inter-American and African systems of human rights which is another similarity between these systems. The procedure for the friendly settlement of disputes outside the courts, facilitated by the commissions, are allowed for in article 47 of the European convention on human rights as well as in article 9 of the African charter and paragraph (f) of article 48 of the American convention.

It is imperative to note that the rule of law in the European, inter-American and African human rights systems cannot be interpreted in an abstract sense and therefore it should be understood that the similarities between these systems simply reflect the socio-economic and political environments within which these systems exist, and in reality would be ineffective and absurd if the environment is not a determinant factor¹⁶⁴. In other words, the social, economic, and political realities in the different regions where these human rights systems are located are considered when establishing the rules of procedure and the guiding principles for the systems being analyzed. Moreover, for the intents and purposes of this study, not all the differences and similarities between these systems will be discussed here because it would cause the work to be larger than intended. Having said this, one cannot overlook the unique bearing that historical, social, cultural and political aspects have on these systems as the background and orientation of the member states of the different systems also

¹⁶³ See art.4 of the protocol to the ACHPR

¹⁶⁴ Eze O, *Human rights in Africa: Some selected problems* (1984), p. 79

differ. As stated elsewhere in this study, the philosophical foundations of the concept of human rights in these regions occurred differently and thus do not tally with those that inform the other systems.

4.3.2 Differences

Maybe the first significant observation to make at this juncture is that considering strictly from a normative aspect, the African charter on human and peoples' rights is different from the charters that established the institutions in the European and inter-American systems of human rights, because it is not restricted to such narrow foundations as its predecessors¹⁶⁵. The charter incorporates the three generations of human rights, and creates a link between the concepts of human rights, individual rights, and peoples' rights¹⁶⁶. Furthermore, as Okere noted:

It is however in the area of the machinery for the protection of the guaranteed rights that the greatest difference appears as between the African charter on the one hand and the American and European conventions on the other¹⁶⁷.

Based on his own observation, Okere noted that the difference between the African system and the European and inter-American systems is that the African charter provides for the diplomatic settlement of dispute and places less emphasis on the use of judicial arbitration unlike its European and American counterparts¹⁶⁸. This

¹⁶⁵ Mutua M, 'The African human rights system: A critical Evaluation', (2005), p. 5; See also Mutua M, 'The African human rights system in a comparative perspective', (1993) 3 *Review of the African Commission on human and peoples' rights*

¹⁶⁶ Mutua M, 'The African human rights system: A critical Evaluation', (2005), p. 5

¹⁶⁷ Okere B, 'The protection of human rights in Africa and the African charter on human and peoples' rights: A comparative analysis with the European and American systems', (1984)6 2 *Human rights Quarterly*, p. 156

¹⁶⁸ *ibid*

argument cannot however be taken literally in this sense because the African system has also achieved the use of judicial arbitration in the settlement of dispute through the African court of human and peoples' rights, owing to the fact that many states and individuals or groups involved in cases of human rights violations rarely prefer the diplomatic settlement of such disputes. Thus rather than consider this point a disparity between the systems, one should consider it more as a similarity regardless of the fact that it is not provided for in the normative instrument of the African system. The African states unlike Okere suggests, are no longer primarily interested in protecting their sovereignties due to the international concern placed on the protection of human rights globally and thus, have conceded to establishing an international judicial organ of the African system which will have the primary responsibility of playing the role of an arbiter on cases of human rights in the region.

There also exists other differences in the instruments and enforcement mechanisms of the three systems being discussed here including the fact that in the African and inter-American systems, the charter provides for the commission and the courts in these systems to be the main enforcement mechanisms, while in the European system, following the adoption of protocol 11 in November of 1998, the European commission as well as the former court of human rights were replaced with the European court on human rights (ECHR)¹⁶⁹. In many ways, there are notable similarities between the inter-American and African systems of human rights, as opposed to the European system which appears to be operating under some unique set of rules and guiding principles. For instance, the *jurisdiction ratiōe materiae* of the European court of human rights differs from that of the inter-American and

¹⁶⁹ Agarwal H O, *International Law and Human Rights* (2003), pp. 795

African systems. In the European court, the court's jurisdiction is restricted to matters that concern interpreting and applying the provisions and principles of the European convention and the protocols attached to it, and because the commission is no longer in existence, the court only considers cases directly submitted by individuals, states or groups who are victims of human rights violations. In the inter-American system, the jurisdiction of the court is much broader than that of the European court including interpreting and applying the "provisions of the convention as well as the provisions of the treaties concerning the protection of human rights...as well as a contentious jurisdiction, suitable for the trial of concrete cases, when some of the state parties of the American convention is alleged to have violated any of its precepts"¹⁷⁰. Unlike in the European system that currently lacks a commission, and individuals and other groups are allowed to refer cases directly to the court, the commission in the inter-American system is responsible for referring cases to the court, a duty that can also be performed by another member state as long as the state that is being accused of violating the principles of the convention previously accepted the jurisdiction of the court to act in this context¹⁷¹. In any case, the functions and responsibilities of the inter-American commission vis-à-vis that of the European system (or lack thereof) cannot be underrated. As Valerio observes, the inter-American commission plays a multi-functional role of both referring cases to the court, and acting in its capacity as a party to the cases that it already established

¹⁷⁰ Valerio de OLIVEIRA MAZZUOLI, *The inter-American Human Rights Protection System: Structure, Functioning and Effectiveness in Brazilian Law*, *Anuario Mexicano de Derecho Internacional* (2011), XI, pp. 347

¹⁷¹ *Ibid*, p. 348

admissibility¹⁷². The case is similar in the African system where according to article 3 of the protocol to the African charter, the court is provided with a wide range of jurisdictional responsibilities in comparison with the European court. The responsibility of the African court includes the interpretation and application of the provisions of the charter, the protocols attached to it, and any other human rights instrument which has been ratified by the member states of the African Union. The commission in the African system also has a wide mandate including its promotional and protective mandates as well as the ability to act in its capacity to refer cases to the court, and creating an opportunity for the submission of reports by non-victims of human rights violations. In the African system, non-governmental institutions with observer status are also allowed to bring cases before the court in accordance with the provisions or article 34 (6) of the protocol to the African charter on human and peoples' rights. Having established the similarity between the African and inter-American courts in terms of its jurisdiction, and the functions and the responsibilities of the commission, it is important to note that there is a discrepancy in the *locus standi* of individuals in both systems. In the African system, article 5 of the court protocol allows that only the commission, state parties and inter governmental organizations can stand directly before the court, and a joint reading of articles 5 (3) and 34 (6) of the court protocol will provide an understanding that for NGO's and individuals to apply directly to the court, the matter must involve a state that has previously accepted the court's jurisdiction. However, in the inter-American system, only state parties and the commission are allowed to directly bring cases before the court and individuals can only lodge complaints via the commission to the court once the admissibility of the case has been established. Thus both systems are similar in

¹⁷² *ibid*

the sense that they both encourage the submission of cases by individuals through the commission, but diverge to the extent that in the African system, the individual can decide to sideline the commission and apply directly to the court depending on the will of the state party. What is noteworthy however, is that the courts in the African and inter-American systems are similar in terms of jurisdiction to the extent that they both allow for reports from non-victims of human rights violations through the commission or otherwise which makes them less limited in scope when compared with the European court.

On the other hand, the African and European courts share a similarity in terms of the composition of the courts and the terms of office, while the composition of the inter-American court, though similar in some ways, is distinctive in other ways. The European court of human rights is made up of the number of judges equal to that of the members of the Council of Europe (47), and no two judges may be nationals of the same state¹⁷³. Judges are elected for nine years and may be re-elected. Nonetheless, the terms of four members elected at the first election will expire after three years, and the terms of four members will expire at the end of six years¹⁷⁴. The composition of the African court on human and peoples' rights as explained in article 11 (1) of the protocol of the court resembles that of the European court, outlining that the court shall be made up of eleven judges who are nationals of the member states of the former OAU/AU members, and the court will not have more than one judge from a single member state. The judges shall have six year terms and may only be re-elected once. However, the terms of office of four judges elected during the first

¹⁷³ See art. 38 of the ECHR

¹⁷⁴ See art. 40 (1) of the ECHR

election shall expire at the end of two years, and the terms of four more judges will expire at the end of four years¹⁷⁵. Although the numbers and terms do not exactly tally in the European and African systems, the principles for the election of judges in these two systems are still similar when compared to the inter-American court. In the inter-American system, the court is composed of seven judges from the nationalities of the member states of the OAS, and they each have a six year term in office after which they can be re-elected only once¹⁷⁶. Admittedly, on first glance, one can notice the slight similarity between the courts in the three systems, owing to the fact that re-election can only be carried out once in all the systems and the nationality of the judges shall be from the member states of the members of these systems, conversely, there is a difference in the general composition of the courts in these systems which is represented by the fact that in the inter-American system, terms of office for only three judges ends after three years and the rest are allowed to stay in office for the duration specified in article 54 (1) of the American convention on human rights.

The list of rights outlined in the instruments of the European, inter-American and African systems make for a significant difference between these regional systems of human rights. The African charter incorporates civil and political rights as well as socio-economic and cultural rights. In the European system, these rights are

¹⁷⁵ See article 15 (1) of the protocol to the ACHPR establishing the African court on human and peoples' rights

¹⁷⁶ Valerio de OLIVEIRA MAZZUOLI, *The inter-American Human Rights Protection System: Structure, Functioning and Effectiveness in Brazilian Law*, *Anuario Mexicano de Derecho Internacional* (2011), XI, pp. 347

entrenched in different instruments including the European charter and the social charter. In the inter-American system, again the case is noticeably different because while part 1 of the convention outlines civil and political rights, the convention does not specifically outline cultural, social or economic rights.

It contains only a general prediction of such rights, which appears in article 26, which declares that ‘the state parties undertake to adopt measures, both internally and through international cooperation, especially those of economic and technical nature, with a view of progressively achieving, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the charter of the Organization of American States, as amended by the protocol of Buenos Aires...¹⁷⁷.

The derogatory clauses included in the charters and conventions establishing the European, African and inter-American systems also serve in differentiating these systems from one another. In this case, the European and inter-American systems both have certain similarities that the African system does not share, providing for the derogation of certain rights in times of public emergencies¹⁷⁸ although state parties are not allowed to derogate to the international labor convention even in times of public emergencies. The African charter on the other hand contains a serious flaw concerning its ‘claw back’ clauses and omission of derogatory clauses. “These clauses permeate the African charter and permit African states to restrict basic human rights to the maximum extent allowed by domestic law...the African charter does not contain a general derogation clause, making this omission all the more serious because the charter in effect permits states through the ‘claw back’ clauses to

¹⁷⁷ Valerio de OLIVEIRA MAZZUOLI, *The inter-American Human Rights Protection System: Structure, Functioning and Effectiveness in Brazilian Law*, *Anuario Mexicano de Derecho Internacional* (2011), XI, pp. 337

¹⁷⁸ See art. 27 of the AMCHR, 4 of the ICCPR, and 15 of the ECHR

suspend, de facto, many fundamental rights in their municipal laws”¹⁷⁹. According to Mutua’s own recommendation, if and when the charter is revised, provisions for non-derogable rights ought to be included as well as what rights and under what conditions certain rights are allowed to be derogable, so that in cases of emergencies or special circumstances, the state parties cannot disregard the provisions of the charter entirely.

The emphasis on the protection of life and liberty as the most fundamental aspects of human rights are seen in the African, European, and inter-American system’s normative instruments although the European and inter-American systems both include provisions concerning the abolishment of the death penalty in their conventions as well as separate instruments to eradicate torture and other cruel, inhumane and degrading treatments. In the European system, this provision is embodied in the European convention for the prevention of torture and inhumane or degrading treatment or punishment which was adopted in 1987 by the member states of the Council of Europe, and in the inter-American system, it is the 1985 inter-American convention to prevent and punish torture. In the African system of human rights, “the only qualification to the right of life is that ‘no one may be arbitrarily deprived of this right’¹⁸⁰, and as for a separate instrument protecting civilians from

¹⁷⁹ Mutua M, ‘The African human rights system in a comparative perspective’, (1993) 3 *Review of the African Commission on human and peoples’ rights*, pp. 7

¹⁸⁰ See Art. 4 of the ACHPR; Okere B, ‘The protection of human rights in Africa and the African charter on human and peoples’ rights: A comparative analysis with the European and American systems’, (1984)6 2 *Human rights Quarterly*, p. 153

torture, the African system is found to still be lacking in this aspect although that is not to say that the African charter does not provide for protection against torture which is explicitly stated in article 5 of the ACHPR, protecting civilians from not just torture, but also against slavery and other forms of cruel, inhumane and degrading treatments or punishment. According to Murray's observation on this aspect, even though some commissioners suggest that the death penalty is a violation of the right to life according to article 4 of the charter, the commission as a whole fails to also take such a position on the subject¹⁸¹.

Moreover, a case can be made for the originality of the African charter and its protocols which could challenge the separation of civil and political rights from social, economic and cultural rights as seen in the European and inter-American system's normative instruments, as well as that of the universal system of human rights. Right from the preamble to the African charter, it is explicitly stated that socio-economic and cultural rights cannot be dissociated from the first generation rights, and that for political and civil rights to be enjoyed, the second generation rights must also be satisfied. This portrays a statement from the African states and their understanding that the second generation rights are independent and indivisible as well. As long as we are still on the issue of the originality of the African charter, it is imperative to note that in consolidating their commitment to the incorporation of socio-economic and cultural rights in the charter, the African states have gone a step further to include the right of equal access to public property and services in article 13(3) of the ACHPR, which is not seen in the instruments of the other systems.

¹⁸¹ Murray R, 'Developments in the African human rights system 2003-04', (2006) 6/1 *Human Rights Law Review*, p. 169

Although there are rights guaranteed in the European and inter-American charters that are not seen in the African charter, the inclusion of individual rights in the ACHPR is another feature that establishes the originality of the charter from its predecessors. The charter dedicates a whole chapter to the duties imposed on individuals, which incidentally, shames the rather vague and meaningless obligations conferred on the individual in other regional and universal instruments. The European charter or conventions do not include such individual rights while the inter-American instruments do not ignore these duties, but refer to them in a single article which was so widely formulated that it is very difficult to comprehend the legal content of these individual duties prescribed in the charter¹⁸². At the universal level, it is seen that there is the mention of individual duties in article 29 of the universal declaration of human rights, but this is seen in more general terms as compared to the comprehensive attention paid to individual duties in the African charter.

This in many ways reinforces arguments presented previously in this work which identified that in African societies; the individual is awarded certain duties and rights which serves the interests of the entire community. Thus the African charter can be said to have been drafted in accordance with African traditions of the subordination of the individual to the community, as opposed to the European and inter-American systems where the human rights instruments were drafted to represent a tradition of using these rights as rules which allow the individual to defend himself against the entity representing it. Some may argue that while the originality of the African charter serves to establish the commitment by the African states to the protection and

¹⁸² Art. 32 of the American convention on human rights

promotion of human rights in the region, with principles relating to the historic antecedents and philosophies of the African continent, it causes the charter to fall short in the incorporation of certain universal principles and concepts necessary for the effective enforcement of human rights in Africa. For instance, with regard to the right of every human being to life, as stated previously, the charter recognizes this right but the vagueness of the definition of the concept of 'human being' has left loop holes for each state and indeed individuals to determine the meaning of the concept based on individual understandings, which has brought about difficulties in many policy areas including the issue of abortion. This inconsistency has led scholars like Murray to suggest that on such issues, the definition should include concepts and terms that would prevent extra judicial killings¹⁸³.

Furthermore, the enthusiasm of the African states to prove that the second generation rights should not be dissociated from the first generation rights, drove the drafting of the charter towards a different course and instead of clearly cataloguing and defining these socio-economic and cultural rights, the drafters were more interested in emphasizing the need for the independence and indivisibility of such rights. For instance, the African charter fails to mention such rights as the right to form or join trade unions, the right to social security and the right to strike, which are considered important socio-economic rights preserved in the instruments of the other systems including the ICESCR.

¹⁸³ Murray R, 'Developments in the African human rights system 2003-04', (2006) 6/1 *Human Rights Law Review*, p. 169

Also considered to be a low point for the African charter is that the non-clarification on the binding nature and character of the charter has caused states not to comply with specific obligations provided for in the charter an example of which is the neglect by African states to comply with article 62 of the charter which obliges them to submit regular reports to the African commission on the status of human rights protection within their jurisdictions. This shortcoming provides insight on the probable reason why the enforcement of human rights in the region has proven to be problematic. If the charter which is the only instrument under which the African systems functions does not clarify its binding nature, states may as well do as they choose-which they often do- save for the obligations awarded them in the universal human rights instruments which indicates their binding characters explicitly. Aside from this, the African charter also falls short in comparison with the instruments of the other human rights systems because it does not include provisions for the establishment of a judicial institution like a court which would handle cases of human rights violations. Even though the court exists in the African system, it is not an initiative that was called for by the charter. Scholars like Umozurike have argued in favor of this point stating that this could have been an intentional omission of the drafters of the charter, to uphold the African values of conciliation rather than adversarial settlement of disputes¹⁸⁴. The allegation made by others is that those who were burdened with the responsibility of drafting the charter were motivated to ensure that the charter reflects the African conception of human rights, and the

¹⁸⁴ Umozurike U, 'The African charter on human and peoples' rights', (1983) 77 *American Journal of International Law*, p. 909

African philosophy of law, which will better serve the needs of the African people¹⁸⁵. However, there have been great criticisms for this pretention, naïveté and assumption that conciliation instead of adversarial settlement of dispute would be a sufficient remedy to the cases of human rights violations which are proliferating, especially not so when at the domestic levels in many of the state parties, the adversarial settlement of disputes is at the centre of the legal procedure¹⁸⁶.

4.4 Conclusion

This chapter has outlined some of the similarities and differences between the African human right system and the European and inter-American systems, focusing on the comprehensive analysis and review of the key normative and institutional mechanisms and instruments of these systems. This comparative analysis allows one to see that the African human rights system-despite its infancy in comparison to the other systems and its degree of inefficiency- has achieved some positive attributes in its endeavor to ensure that the normative, institutional and jurisprudential aspects of the system are able to meet the demands for the development in terms of international human rights law. As stated in this chapter, there is need for a revision and review of some of the rights and duties contained in the African charter to ensure that they meet international standards, as well as a curtailment of the over ambitious provisions in the single normative instrument of the system especially as regards socio-economic and cultural rights, the claw-back and the derogative clauses. Certain

¹⁸⁵ See generally the *African charter on human and peoples' rights*, OAU DOC CAB/LEG/67/3, rev 5, 27 June 1981

¹⁸⁶ Mutua M, 'The African human rights system in a comparative perspective', (1993) 3 *Review of the African Commission on human and peoples' rights*, p. 342

provisions outlined in the charter though advanced and cutting-edged when compared to the instruments of the other systems, has made it more difficult for many people to properly understand the normative framework of the system and thus appears more complicated and difficult as it should be.

This chapter has also established the existence and composition of the African court on human and peoples' rights along with its jurisdictional responsibilities, and although there is no segmentation of the courts rules of procedure, it has been stated that the court exists to compliment the efforts of the African commission in carrying out its mandate. The jurisprudence of the court has since its creation, experienced tremendous growth and development which is not to say that there is no room for improvement.

As this chapter has reviewed the similarities and differences between the African human rights system and its European and inter-American counterparts in terms of the instruments and enforcement mechanisms, it will provide the basis for recommendations and suggestions for the creation, change, development or abolishment of certain provisions or institutions that will ensure that the African human rights system is efficient and competent in its responsibility of tackling issues of human rights violations in the continent. These recommendations and suggestions will be discussed in the following chapter, which also provides a general conclusion on the findings of this thesis.

Chapter 5

GENERAL CONCLUSION

5.1 Introduction

The main motivation for this study has been the general review of the African human rights system to determine its degree of efficiency especially in comparison with the European and inter-American systems of human rights. A number of issues were raised and discussed throughout the course of this study including the normative and institutional aspects of the African system, as well as the historical antecedents and the philosophical background of the concept of human rights in Africa. The study has uncovered just like many before it, that there is need for an effective human rights system in the region as a result of the struggles that is faced by African states especially in the post-colonial era which brought about different uncertainties with the dawn of the 21st century. For reasonable standards of human rights to be achieved in the continent, there is also the need to focus resources at the regional level to ensure that human rights are promoted and protected according to the principles of international human rights law.

It is evident that since the African human rights system was established, there have been remarkable progress on both its normative and institutional mechanisms, but there is still a lot of work to be done. Many African leaders, people and even some international observers believe that there is a bright future for an effective human rights system in Africa, and therefore hold that the lack of enthusiasm and the

skepticism of some scholars or individuals towards this goal is both unwarranted and unnecessary.

As seen elsewhere in this thesis, there have been negative and positive debates about the concept of human rights in Africa and its origin, and the system itself regarding its past, present, and future. These kinds of debates are seen throughout this work, for instance in chapter 3, efforts were made to establish that the concept of human rights had roots in Africa irrespective of the African peoples divergent understanding of the concept. Hence, in chapter 3 of this thesis, scholars like Busia confirmed that the concept of human rights is neither foreign to Africans, nor was it imposed on Africans by western colonial powers as suggested by other scholars¹⁸⁷.

In order to further this study, some essential research questions were outlined in the chapter two of the thesis which directed the project, provided great insight on the normative and institutional aspects of the African human rights system, and aided in the comparison between the three systems that were discussed. The questions are as follows;

What is original in the African charter on human and peoples' rights?

Does the element of originality in the African charter make it a more or less effective normative instrument for the protection of human rights in Africa?

¹⁸⁷ See generally chapter two of the thesis where such arguments were presented especially by Busia K, 'The status of human rights in pre-colonial Africa: Implications for contemporary practices', in McCarthy-Arnolds E, et al. *Africa, human rights and the global system: The political economy of human rights in a changing world*, p. 49

What are the normative and institutional similarities and differences between the African regional human rights system and the European and inter-American systems?

In chapters three and four, sufficient answers to these questions were provided and it was found among other things that the originality of the African charter is undeniable as it differs from that of the other systems in the aspect that it is not restricted to narrow foundations especially with the incorporation of the three generations of human rights and the linkage between human, individual and peoples' rights. The 'claw-back' clauses and the omission of derogatory clauses in the African charter also serve to differentiate this normative instrument from its predecessors. To a certain degree, it was found that the element of originality in the African charter sets it apart as an efficient normative instrument for the protection of human rights in Africa as it contains and accords much attention to some rights that other systems' normative instruments fail to properly attend to, which are essential for the protection of all human rights. One can also consider the fact that the African charter was drafted according to African traditions as evidence that it is more efficient for tackling human rights issues on the continent. However, it has been argued that due to the fact that the authors of the charter paid much attention to the definition of second generation rights, and their emphasis on the independence and indivisibility of such rights, therefore failed to incorporate or define certain important rights such as the right to life, right to form and join trade unions, right to social security which are important socio-economic rights, among other things, makes the charter a less than efficient normative instrument for the protection of human rights in Africa. Chapter four of the thesis provides detailed outlines of the institutional and normative similarities and differences between the African regional human rights

system and the European and inter-American systems of human rights, which *inter alia* provides the answer to the last research question posed by the study.

Human rights have been and still are being violated in Africa, and despite the mandates of the commission and the court recently, these violations were not expressly condemned in the past. This was especially the case with the former OAU which played a rather passive role in curtailing human rights abuses and impunities in the region considering the great expectation by many that the institution would be a pace-setter and a pioneer in these efforts to protect and promote human rights in the continent. The failure of the OAU to address unequivocally the issues of human rights violations in Africa was criticized by Mangu who stated that:

The weak status of human and peoples' rights in the OAU charter had serious implications for their promotion and protection in Africa. The practice of most OAU member states was inimical to the promotion and protection of human rights on the continent. Years of authoritarianism, single party or military rule, rebellions and armed conflicts transformed Africa into a continent of 'human wrongs' instead of 'human rights'.¹⁸⁸

It is however commendable that the transformation of the OAU to AU, the establishment of the commission, and the creation of the court for human rights, have successfully began to change the landscape of human rights in the region¹⁸⁹. With these developments, it is almost impossible for individuals and states to engage in the systematic violation of human rights on the continent without facing the repercussion of such crimes even to a limited extent. The human rights system in Africa has thus

¹⁸⁸ Mangu A, 'The changing human rights landscape in Africa: Organization of African Unity, African Union, New Partnership for Africa's Development and the African Court', (2005) 23/3 *Netherlands Quarterly of Human Rights*, p. 388

¹⁸⁹ *ibid*

been on and is still on the path to consolidate efficiency, and has incidentally met with several challenges, some of which have been resolved while others persist.

This background provides the basis for this study to provide recommendations on the strategies that could help strengthen the African regional human rights system to equip it to deal with the human rights realities on the continent. As stated elsewhere in this study, the African human rights system is not stagnant and therefore the debate is not about to end soon. Ergo, this study is merely an addition to the already existing debates about the process of reforming the system and consequently it is imperative to mention that the recommendations contained here are not conclusions in themselves and are partial because they are simply additions to the ongoing debate about the future of the African system of human rights.

Since each chapter of this study contains several different findings and several different conclusions on various issues relating to the subject matter, this final chapter will serve as a summation of all these conclusions and findings which are in accordance to the aims and objectives of the study as well as the research questions and hypothesis addressed throughout the course of the study.

5.2 Summary of Findings and Conclusions

The premise of this study is based on the fact that the human rights situation in Africa is exceptionally unsafe because many of the state parties to the former OAU and the new AU are simply not committed to carrying out the obligations conferred on them by both international and regional human rights norms. The study highlighted many of the problems and challenges that the African human rights

system faces as well as the opportunities for the effective enforcement of international human rights law in the region.

Also illuminated by the study is the fact that despite these challenges that weigh negatively on the enforcement of international human rights norms in Africa, there have also been some significant and positive contributions made in the area of international human rights law and if and when reforms are made, there are good prospects for the future and efficiency of the African system.

The above observations summarize the main findings of the study although as stated previously, there are specific findings and conclusions made in each chapter which are consistent to the aims, objectives and subject matter of this study. In summary, chapter one laid out the basic foundations for the study, introducing the subject matter and the research problem, and outlining the aims and scope of the study as well as the research methodology applied.

Chapter two conducted a review of the literature on the subject matter, paying attention to the major and minor trends discussed and pointing out questions that were either neglected in the literature reviewed or questions that were answered poorly. This chapter also formulated a number of research questions and hypotheses that were discussed throughout the course of this study.

Chapter three discussed a number of important aspects of the study including the philosophical and historical background of the concept of human rights in Africa, traversing through the pre-colonial, colonial, and post-colonial eras. The chapter also reinforced the arguments and counter-debates on the place of human rights in the continent, providing answers to questions relating to; whether the concept of human

rights is relevant to Africans; whether human rights is a western concept; the philosophical origins of human rights law in Africa and how it has evolved over time; the definition of the concept of human rights, as well as the origin and development of the African system of human rights.

Chapter four reviewed the normative and institutional similarities and differences between the African and the European and inter-American human rights systems. In the normative aspect, the chapter provided a comparative analysis of the charters of these three systems and other normative instruments that provide their operational norms and principles including; the European and inter-American covenants on human rights, and the conventions against torture and other cruel, inhumane and degrading treatments or punishments, among others. The institutional comparison was based on the functions, structure, composition, norms and general guiding principles of the human rights commissions in these three systems as well as that of the judicial organs.

Contrary to the belief held by many writers, the unique features of some of the normative and institutional mechanisms of the African system in no way undermine the viability or efficiency of the system. For instance, while it is true that the Banjul charter, which is the main normative instrument of the African system, is relatively a balanced document¹⁹⁰, it can also not be denied that “the density and originality of this document very often goes hand in hand with an equally remarkable technical poverty”¹⁹¹. The technical poverty of the charter is displayed by; the lack of

¹⁹⁰ Onguergouz F, ‘The African charter on human and peoples’ rights: A comprehensive agenda for human dignity and sustainable democracy in Africa’ (2003), p. 784

¹⁹¹ *ibid*

definition of concepts such as ‘human being’ or ‘people’; the absence of a derogation clause and the non-discriminatory use of the claw-back clauses; the lack of a precise formulation of some of the rights embodied in the charter; and the lack of specification on the binding nature of the document on state parties, among other things.

Regardless, the birth of the charter should be viewed in a positive light as it represents the best achievement that could have been attained at the time. Keba M’baye ‘the father of the charter’ stated that:

The charter constitutes the actual result which could be attained at the time of its adoption, bearing in mind the great disparity characterizing the political and economic situation of Africa. Powerful internal currents simmered away beneath the surface and the charter bears the stigma of these Animists, Islamic, traditional and Christian currents, to name only some of them. The charter gathered all these seeds to its breast and created a product which is a result of their cross-fertilization¹⁹².

There is no need then to re-state that the drafters of the present charter were faced with several complexities which they had to surmount at the pinnacle of which was the reconciliation of the universality and cultural relativism doctrines. Now that the charter has been adopted, it is the responsibility of the stake holders to ensure that it is implemented to the fullest possible extent.

The adoption of the protocol establishing the African court on human and peoples’ rights is proof that the intention was not for the charter to remain a static

¹⁹² M’baye K, *les droits de l’homme en Afrique* (1992), p. 267

instrument¹⁹³. Even though the establishment of the court provides for an additional mechanism for the protection and promotion of human rights in Africa, there is still the anticipation that the court and the commission- the two regional enforcement institutions- will be provided with the material support and the political will power of the state parties that will ensure the efficiency of the system, and thus there is need for a sort of synergy of many actors to strengthen the system and achieve this goal.

In a nutshell, most of the findings and conclusions of this thesis indicate that there is still a long journey towards achieving an effective regional human rights system in Africa, although there is an optimistic hope for the future of the system. Despite the challenges and setbacks that the system faces, there is the expectation that necessary reforms will be instrumental in improving the enforcement of international human rights law in Africa, and such reforms could be normative, institutional, financial or jurisdictional among others.

After careful consideration, it is evident that the human rights situation in Africa is a complex one in the sense that human rights violations in the region contrasts with the interest of the regional enforcement of international human rights law. Therefore there is need for cooperation among human rights institutions within and outside the continent and leaders of African states to create better conditions for not just human rights, but also democracy, equality, freedom and development in the region. Having stated this fact, it can now be appreciated that the regional human rights system would be more effective for the protection of human rights in Africa, particularly in

¹⁹³ Onguergouz F, 'The African charter on human and peoples' rights: A comprehensive agenda for human dignity and sustainable democracy in Africa', note 4 above, p. 791

light of the weaknesses of the universal system mentioned above. However, the African system of human rights has met with great criticism on its efficiency and faces great challenges which are outlined to a certain limit in this study as it relates to the subject matter and the scope of the research. The nature and scope of these challenges and possible remedies are issues that call for proper investigation and analysis.

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