

THE GHOST OF THE ORGANIZATION FOR AFRICAN UNITY (OAU) HAUNTS AFRICA

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ABSTRACT

This article examines the compatibility of the African Charter on Human and Peoples' Rights (Banjul Charter) and the Constitutive Act of the African Union. It posits that the atmosphere that inspired the Banjul Charter in the 1970s and 1980s including the ideology of the Organization of African Unity (OAU) is past. The change in the aspirations of the African peoples ushered in a new political entity—the African Union (AU) which in principle, fundamentally differs from the OAU. At the heart of the Constitutive Act of the AU is a commitment to protect human rights—a sharp contrast with the OAU Charter. The result is a political document aspiring to protect human rights more than a human rights treaty. Much as the OAU is no more, its 'ghost' curtails efforts to protect human rights in the contemporary context. It is on this basis that I argue that perhaps, it is time to align the Banjul Charter with the Constitutive Act.

Of all ghosts, the ghosts of our old loves are the worst—Sir Arthur Conan Doyle¹

I. INTRODUCTION

The idea of human rights comprises norms, standards and principles which are implemented through institutions.² From the onset of the human rights movement, it aspired for universal application;³ evident in the drafting process of human rights treaties and declarations such as the Universal Declaration of Human Rights (UDHR).⁴ Hence, historically, human rights were solely enforced through international institutions

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1. ARTHUR CONAN DOYLE, *THE VALLEY OF FEAR* (2006).

2. HENRY J. STEINER & PHILLIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 131 (2000).

3. *Id.*, at 57.

4. The preamble to the UDHR refers to the “inherent dignity and of the equal and inalienable rights of all members of the human family” as “the foundation of freedom, justice and peace in the world.” *See also*, U. OJI UMOZUKURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS* 11 (1997).

such as the United Nations Security Council,⁵ the Commission on Human Rights⁶ and other treaty-monitoring bodies.⁷ The idea of the universality of human rights and international enforcement faces considerable resistance,⁸ which coupled with cultural relativism paved way for regional human rights systems. Regional systems tend to overcome universal shortcomings such as physical, economic, cultural, administrative and psychological diversity among people.⁹ This in part demonstrates the advantage regional systems enjoy over international bodies, which are characterized by a general trend of compromise.¹⁰

It is worth noting though that the UN Charter anticipated regional systems in the enforcement of international peace and security,¹¹ although it is silent on regional human rights cooperation.¹² This explains why the UN initially opposed regional human rights systems on suspicion that their creation was an attempt to oppose the universality of human rights¹³ by emphasizing regional cultures. The delay in the implementation of the International Covenant on Civil and Political Rights (ICCPR) however forced the UN to encourage the creation of regional human rights systems.¹⁴

5. Article 39 of the United Nations Charter (UN Charter) mandates the United Nations Security Council (hereinafter Security Council) to promote, maintain or restore international peace and security. This mandate has been interpreted as including maintenance of human rights since gross violations of human rights are a threat to international peace and security. It is on this basis that the Security Council adopted resolutions establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda. *See*, Security Council Resolution 955 establishing the International Criminal Tribunal for Rwanda, S.C. Res 955, and 49 U. It was established in 1994 in response to the murder of an estimated 800,000 Rwandans. *See also*, Security Council Resolution 827 establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 827, 48 U.N. SCOR, 48th Sess, U.N. Doc. S/Res/827 (1993).

6. This Commission was replaced by the Human Rights Council. *See*, GA resolution 60/251 establishing the Human Rights Council. Other institutions in this category include the Commission on Crime Prevention and Criminal Justice, the Commission on the Status of Women, and the Sub-Commission on the Promotion and Protection of Human Rights.

7. These include the Committee on Economic, Social and Cultural Rights (CESCR), the Human Rights Committee (HRC), the Committee Against Torture (CAT), the Committee on the Elimination of Racial Discrimination (CERD), and the Committee on the Rights of the Child.

8. STEINER & ALSTON, *supra* note 2, at 592.

9. *Id.*, at 781.

10. *Id.*, at 783.

11. *See*, Chapter VII of the UN Charter.

12. STEINER & ALSTON, *supra* note 2, at 780.

13. *Id.*

14. *Id.* Note that the General Assembly adopted a resolution encouraging the creation of regional human rights systems in regions where they did not exist. *See*, GA Res. 32/127.

In 1981, four years after the adoption of the General Assembly resolution calling upon states to form regional bodies, the Banjul Charter, as an international human rights instrument was enacted with the intention of promoting and protecting human rights and basic freedoms on the African continent.¹⁵ The Banjul Charter is a reflection of post colonial struggles of Africa. It was inter alia inspired by the resolve to obtain utmost independence and state sovereignty through the total liberation of Africa from colonialism, foreign domination and occupation, aggression and apartheid. Although valid causes, Africa has since embraced new aspirations key among which is the protection of fundamental rights and freedoms.

II. THE OAU 'LIVES ON' IN THE BANJUL CHARTER

The African Human Rights system has been described as the "... least developed... most distinctive and the most controversial."¹⁶ In order to understand its controversy and distinctiveness, the historical factors that were at play at the time of adoption of the Banjul Charter must be analyzed. Prior to its adoption, African States had already organized themselves politically and had formed the OAU.¹⁷ The core mandate of the OAU was to safeguard the newly acquired independence of African states and territorial integrity of member states. The British Broadcasting Corporation (BBC) reported at the time that its mandate was to "decolonize the remaining bastions of white rule."¹⁸ This claim is illustrated by the absence of an effective provision for human rights enforcement.¹⁹ It is therefore no surprise that political considerations are depicted in the Banjul Charter and in part explains its distinctiveness.

The OAU faced criticisms throughout its tenure for what most described as double standards.²⁰ True to its mandate, the OAU played a vital role in opposing the apartheid regime in South Africa and supporting liberation movements in Zimbabwe

15. African Charter on Human and Peoples' Rights (Banjul Charter), adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986. *See particularly*, paragraph 2 of the preamble to the Charter.

16. STEINER & ALSTON, *supra* note 2, at 920.

17. Charter of the Organization of African Unity (OAU Charter) was adopted on May 25, 1963 by a Conference of Heads of State and Government.

18. *African States Unite Against White Rule*, BBC, May 25, 1963, available at <http://news.bbc.co.uk/onthisday/hi/dates/stories/may/25/newsid_2502000/2502771.stm> (last accessed on February 6, 2008).

19. PHILIP KUNIG & COSTA RICKY MAHALU, REGIONAL PROTECTION OF HUMAN RIGHTS BY INTERNATIONAL LAW 15 (1985).

20. *Id.*

and Mozambique,²¹ while ignoring human rights atrocities committed in Uganda, the Central African Republic and Equatorial Guinea.²²

In 1979, a resolution was adopted obliging member states to protect human rights.²³ The underlying reason for the resolution was to strengthen OAU's strong opposition to the racist regime of South Africa.²⁴ The resolution led to a conference in Banjul, Gambia in 1981 which drafted the Charter that was subsequently approved in Nairobi, Kenya.²⁵ Keba Mbaye; a well respected African scholar and Senegalese judge who led the team that drafted the Charter remarked that Banjul "was the best that could be achieved at the time." The Banjul Charter was what African States were willing to accept in 1981 and that it would be improved upon later through amendments or revisions.

III. TRACING OAU IDEOLOGY IN THE BANJUL CHARTER

The Banjul Charter is a political statement in many ways. Indeed, the working papers of the OAU during the drafting process bear witness to this claim.²⁶ The distinct and controversial features of the Banjul Charter are discussed in detail below:

A. Peoples' Rights

The idea of peoples' rights is not unique to the Banjul Charter.²⁷ What makes it more peculiar to the African Human Rights system is that it was innovated to form the basis

21. BBC, *supra* note 18.

22. KUNIG & MAHALU, *supra* note 19.

23. *Id.* The most instrumental organization in ensuring that a resolution was adopted was the International Commission of Jurists which issued a Lagos Plan in 1961. See, YASSIN EL-AYOUTY, THE OAU AFTER THIRTY YEARS 54 (1993).

24. KUNIG & MAHALU, *supra* note 19.

25. The OAU decision to establish a human rights Charter was taken at its 16th summit Conference at Dakar, Senegal, Decision 115 (XVI). The subsequent conference elaborated on the Dakar draft at Banjul, The Gambia. This led to the Banjul draft that was subsequently adopted in Nairobi, Kenya July 1981.

26. See, OAU Doc. AHGS/102/XVII, Nairobi, at 22; See also, OAU Doc.CM/112/Part 1, Nairobi, at 31.

27. Art. 1(1) of the International Covenant on Civil and Political Rights (ICCPR), Art. 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 1(2) of the United Nations Charter all make reference to peoples especially in relation to the right to self determination.

of a major human rights treaty.²⁸ The Banjul Charter provides for collective or group rights which are referred to as ‘peoples rights’ in the document. The concept of ‘peoples rights’ affirms that it is an “anti-colonial movement or decolonization and liberation movement of then subject peoples.”²⁹

Another interpretation is that individual rights serve to protect individuals against violations from the state³⁰ whereas group rights can only be enjoyed as a group.³¹ By emphasizing human rights as an aspiration for “African peoples” and not individuals, the Banjul Charter fails to strike a balance between the universality of human rights and the desire to model human rights on the African experience.³² The African understanding of group rights must be distinguished from the socialist approach because the former is built on the dialect between the individual and the community whereas the latter makes human rights dependent on the interests of the State.³³

Whereas reference is made to African peoples in the preamble, the term “peoples” is not defined by the Banjul Charter, which makes it problematic. The definition was deliberately avoided because the concept has no uniform meaning, even though it is the foundation of African communities. Note that the concept is used differently in other international covenants.³⁴ Peoples’ rights have been hailed as a tool that could be used to fight and prevent the evils that inflict humanity.³⁵

28. GEORGE WILLIAM MUGWANYA, HUMAN RIGHTS IN AFRICA: ENHANCING HUMAN RIGHTS THROUGH THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM 211 (2003).

29. N. Barney Pityana, *The Challenge of Culture for Human Rights in Africa: The African Culture in a Comparative Context*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000 (Malcolm Evans & Rachel Murray eds., 2002).

30. U.O.Umozurike, *The African Charter on Human and Peoples’ Rights: Suggestions for More Effectiveness*, 13 ANN. SURV. INT’L & COMP. L. 180 (2007).

31. *Id.*

32. It is clear from the preamble of the Banjul Charter that human rights are viewed as very essential for the attainment of equality, justice and dignity for Africans as a race and not individual Africans. It appears that at the time, Africans sought equality and lost dignity against another group or race. The Banjul Charter was thus another tool to continue with the struggles which the OAU had already began.

33. The major distinction between the Marxist and the African approach to human rights is that the African approach is moralistic or spiritual whereas the Marxist approach is purely based on materialism.

34. The term ‘peoples’ in the ICCPR, ICESCR and the UN Charter, for instance, is used in relation to the right to self-determination to refer to people organized in states or non self governing peoples. See, the Quebec secession case cited in MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW, CASES AND COMMENTARY (American Casebook Series) (2006).

35. L. Sohn, International Law, cited in MUGWANYA, *supra* note 28, at 214. It should however be noted that the African Commission on Human and Peoples’ Rights has considered this question in relation to the right to self determination, say in the case of *Katangalese Peoples’ Congress v. Zaire*,

B. Duties

The insertion of duties in the Banjul Charter is also not unique as so do many other human rights treaties. The Banjul Charter's uniqueness is that it is the only instrument that details individual duties.³⁶ In fact it has been criticized as being too "state-centric."³⁷ The duties in the Banjul Charter are a reflection of extreme nationalism and patriotism of newly independent post colonial African States which had resolved to jealously guard statehood.³⁸

Moreover, duties also raise a question of enforcement,³⁹ because the Charter makes no provision for enforcement of duties or remedies that would accrue to an aggrieved State and/or the community. Inclusion of duties in the Charter may lead to the prioritization of duties where the rights and duties are in conflict.⁴⁰ In the past, several communist regimes in Eastern Europe invoked duties to negate the idea of human rights.⁴¹ It is therefore possible that the inclusion of duties was a compromise between several political ideologies which characterized the post colonial era—capitalist, socialist and mixed economy states. The question is whether such compromise is valid in contemporary African politics.

C. Anti-Colonialism Provisions

Almost all African States were colonized,⁴² and to some extent still face neo-colonialism.⁴³ Paragraph three of the preamble provides that, "Reaffirming the pledge

Eighth Activity Report 1994-1995, Annex VI (Documents of the African Commission). The Commission however did not decide or determine who the peoples were.

36. Pityana, *supra* note 29, at 64.

37. Olusola Ojo & Amadu Sesay, *The OAU and Human Rights: Prospects for the 1980s and Beyond*, 8 HUM. RTS. Q. 96 (1986).

38. Another measure taken to guard the newly independent States was the adoption of the principle of non-interference in the internal affairs of another State. The OAU at its 16th summit conference in Monrovia, Liberia, criticized Mr. Godfrey Binaisa (then President of Uganda) for raising the question of human rights violations in the Central African Republic. *See also, supra* note 25, at 23.

39. *Supra* note 29, at 65.

40. *Supra* note 18, at 50. *See also, supra* note 27, at 229.

41. *Id.*

42. Liberia and Ethiopia are arguably the only two countries that were not colonized. Ethiopia was colonized by Italy between 1935 and 1936, and regained independence soon after Italy lost in World War II (WW II).

43. Neo-Colonialism is a policy where a major power uses economic and political means to perpetuate or extend its influence over underdeveloped nations or areas: It is commonly manifested in economic relations between rich and poor countries, usually the latter are forced to adopt certain measures,

... made in Article 2 of the said Charter (OAU Charter) to eradicate all forms of colonialism from Africa ...” Paragraph 8 provides that, “Conscious of their (the African member states) duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions ...” From the reading of the above paragraphs, it goes without saying that the Banjul Charter was responsive to the political problems of the time.⁴⁴

D. Claw-back Clauses

Claw-back clauses have earned the Banjul Charter the most criticisms. The claw back clauses have two major implications: first, the rights enumerated in the charter are subject to the domestic law of the states parties; and second, domestic law which restricts the rights in the Banjul Charter should not be impugned.⁴⁵ Owing to claw back clauses, some commentators have dismissed the entire Charter as irrelevant to Africa’s political life,⁴⁶ while others have looked to Article 60 which implies that the Banjul Charter cannot be invoked to avoid state obligations that are enumerated in other international covenants.⁴⁷ In *Legal Resources Foundation v. Zambia*, the Commission emphasized that “...no state party to the Charter should avoid its responsibilities by recourse to the limitations and ‘claw back’ clauses in the Charter,” and added that “... the Charter cannot be used to justify violations of sections of it.”⁴⁸ The Commission’s

for example privatization of government parastatals in exchange of financial aid-this is commonly referred to as “tied aid.” Neo-colonialism has actually forced many former socialist and communist African countries to convert to capitalism. Art.21(5) of the Charter in response to neo colonialism, creates an obligation for member states to eliminate all forms of economic exploitation by international monopolies so as to enable peoples to fully benefit from their natural resources. Zionism was included because of the war between Israel and Arabs. Africa has many Arabs.

44. Namibia was the last African Country to acquire independence in 1990. This marked the end of the struggle against colonialism. The same year saw the release of Nelson Mandela from prison and the 1994 elections in South Africa marked the end of the apartheid regime. Arguably, the OAU had accomplished its major tasks. See also Uzomurike, *supra* note 53, at 93.

45. See *supra* note 27, at 268.

46. *Weekly West Africa*, cited in EL-AYOUTY, *supra* note 23.

47. Cees Flinterman & Catherine Henderson, *The African Charter on Human and Peoples’ Rights*, in AN INTRODUCTION TO INTERNATIONAL PROTECTION OF HUMAN RIGHTS 391 (Raija Hanski & Markku Suksi eds, 2000).

48. Communication No. 211/98 (2001), para. 70.

decisions though authoritative, are not legally enforceable. In this regard, it may not be an easy task to remedy the shortcomings of the Banjul Charter by recourse to claw back clauses.

IV. THE CONSTITUTIVE ACT AND HUMAN RIGHTS

The creation of the African Union was first discussed at the fourth extra ordinary session of the OAU Assembly that was held in Sirte, Libya. Article 6 of the Sirte Declaration reads that:

*In order to ... effectively address the new social, political and economic realities in Africa and in the world (emphasis added), we are determined to fulfil our peoples' aspirations for greater unity in conformity with the objectives of the OAU Charter and the Treaty Establishing the African Economic Community. It is also our conviction that our continental Organization needs to be revitalized in order to be able to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances. We are also determined to eliminate the scourge of conflicts, which constitutes a major impediment to the implementation of our development and integration agenda.*⁴⁹

The hasty drafting process of the Constitutive Act compared with the years it took to draft the Banjul Charter demonstrates the commitment of African leaders to embrace a new era.⁵⁰ The Constitutive Act greatly impacted the Africa Human Rights System.⁵¹ The objectives of the African Union are broad. Most important for purposes of this scholarship is the express mandate of the Constitutive Act to promote human and peoples' rights. The tone of the Constitutive Act is less politically inclined than the OAU Charter.⁵² Article 4(h) provides that member states have a right to intervene in the internal affairs of a member state where there are grave circumstances such as war

49. Sirte Declaration, EAHG/Draft/Decl. (IV) Rev.1 1999 (emphasis added), available online at <http://www.chr.up.ac.za/hr_docs/african/docs/ahsg/ahsg64.doc> (accessed March 9, 2008).

50. Nsongurua J. Udombana, *Can the Leopard Change its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT'L L. REV. 1177 (2001-2002).

51. Chidi Anselm Odinkalu, *Africa's Regional Human Rights System: Recent Developments and Jurisprudence*, 2 HUM. RTS. L. REV. 99 (2002).

52. Alpha Fall, *The Impact of the Constitutive Act of the African Union on Human Rights* (LL.M Thesis, University of Notre Dame, 2002).

crimes, crimes against humanity and genocide. Article 4 (h) when read together with Article 23(2) demonstrates a very big ideological difference between the OAU and the African Union.⁵³

The Constitutive Act makes substantial reference to human rights. Article 3 (h) provides for the promotion and protection of human rights in accordance with the Banjul Charter. Article 4 (m) also makes reference to human rights by providing for the respect of human rights, democratic principles and the rule of law. Other notable developments include the obligations of states parties to promote gender equality and the sanctity of human life.⁵⁴ The changes introduced by the Constitutive Act have been lauded as a “new theoretical advancement in the democratization of the continent and a rupture to the debilitating concept of non-intervention into the affairs of member countries.”⁵⁵

A. *The Assembly of the Union*

The Assembly of the Union has close links to the African Commission on Human and Peoples’ Rights to the extent that Article 52 of the Banjul Charter mandates the former to inform the Assembly of Heads of State (under the OAU) in its report of any human rights violation. Since the Assembly of the Union replaced the Assembly of Heads of State and Government, Article 52 should be read with the necessary modification. In the alternative, the Commission may specifically make a recommendation to the Assembly of Heads of State and Governments (Assembly of the Union).⁵⁶ One of its major functions in this regard is to direct the Executive Council on how to manage conflicts, wars, and other emergency situations and the restoration of peace.⁵⁷

53. Article 23 provides that “any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.” Although the principle of non intervention is reaffirmed in the Constitutive Act, it is now clear that African States cannot invoke the Principle at the expense of human rights or national interests.

54. Art. 4(o), Constitutive Act.

55. Fall, *supra* note 52.

56. Art. 53, Banjul Charter.

57. Art. 1(9)(g), Constitutive Act.

B. The Executive Council

It comprises ministers of foreign affairs or other ministers from member states.⁵⁸ It mainly prepares materials for the Assembly of the Union.⁵⁹ General areas of its focus include, *inter alia*, social security, agriculture, transport and communications, food, water resources and irrigation, energy, industry and minerals, education and culture insurance and foreign trade.⁶⁰ When these issues are analyzed, there is no doubt that they are matters of human rights concern.

C. The African Court of Justice

The African Court of Justice of the African Union has its roots in Article 18 of the Constitutive Act which envisages its establishment. The Court was established by the Protocol of the Court of Justice of the African Union. According to Article 19 of the Protocol, the Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act. From its mandate, it is clear that there is plenty of room for the Court to litigate human rights issues. This is evident in the wording of the Protocol which for instance allows the Court to “interpret any question of international law.”⁶¹ Another basis for human rights jurisdiction of the Court under the Protocol is the mandate to “... interpret ... matters ... in other agreements.”⁶² The “other” agreements can be said to include the Banjul Charter.

However, the anticipation of the African Court of Justice as a forum for human rights litigation is quite ambitious in light of the Protocol to the Banjul Charter on the establishment of an African Court on Human and Peoples’ Rights. Interestingly, Article 4 mandates the African Court on Human and Peoples’ Rights to make advisory opinions to the OAU (read AU) on any matter relating to the Banjul Charter or any other treaty. In response to the potential duplicity of functions of the two courts, they were merged by the Protocol on the Statute on the African Court on Justice and Human Rights, which is not yet in force.

58. *Id.*, art. 10(1).

59. *Id.*

60. *Id.*, art. 13.

61. Art. 19(c).

62. Art. 19(e).

D. The Dilemma

Whereas the Constitutive Act is human rights oriented, it makes little reference to the Banjul Charter. What is even more surprising is the exclusion of the African Commission on Human and Peoples' Rights from the organs of the African Union. Given the importance of the Commission and the Court on Human Rights, there is need to forge a nexus. Gutto warns that, "the failure to anchor the African human rights system as a principal system of the ... AU is likely to reproduce the marginalization of the collective protection and promotion of human and peoples' rights on the continent."⁶³ The failure or difficulty in linking the two may be attributed to the difference in the theoretical approaches between the two "systems." The African Union as a political organ is much needed in human rights to the extent that it can be used as an enforcement mechanism. Possible suggestions or solutions to this problem are considered next.

V. NEW WINE, OLD SKINS: A CASE FOR RETHINKING THE BANJUL CHARTER

The resolve to safeguard human rights is a milestone in Africa's history and must not be curtailed by a defective human rights treaty. If not revisited, the repercussions are likely to be twofold: first, efforts to safeguard human rights by new institutions (African Court on Human and Peoples' Rights or the 'future' African Court of Justice and Human Rights) though well intentioned will follow in the footsteps of the African Commission—a trap laid by the OAU; and second, there is a real risk of over-legalization.⁶⁴ Over legalization takes two forms, that is that it changes the initial treaty bargains and the second is that it improves enforcement mechanisms.⁶⁵ Enforcement mechanisms should be very cautious because international law, which is essentially consensual,⁶⁶ and over-legalization may lead to the denunciation of a treaty.

63. Shadrack Gutto, *The Reform and Renewal of the African Regional Human and Peoples' Rights System*, 2 AFR. HUM. RTS L. J. 175 (2002).

64. Laurence R. Helfer, *Over-legalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

65. *Id.*

66. <http://www.law.uga.edu/~bodansky/courses/International_Law/class04.html> (accessed on April 10, 2008). Professor Bondasky explains that Consensualism, also known as voluntarism, is a theory of International law which states that international law is based on the free will of states. The rationale is that states are sovereign entities and hence they can only be bound by that to which they have consented. In other words, the State has a "will, moral authority, the power to consent, to enter into

A. Exorcizing the OAU Ghost from the Charter

Article 68 of the Banjul Charter provides for amendment. Some however favor reform through institutional practice citing the need for stability.⁶⁷ Proponents for institutional reform argue that necessary reforms of the Charter can be attained through institutions mandated to interpret it.⁶⁸ In support of that claim, the Commission's interpretation of claw back clauses is often cited.⁶⁹ However, by expansively interpreting the Charter in order to remedy its flaws, the Commission acts *ultra vires* and strips the Charter of its integrity.⁷⁰

B. So, Exorcizing What Ghost?

All claw back clauses must be struck out of the Charter because they hinder effective enforcement of human rights. For example, Article 9 provides for the right to receive information and to express and disseminate opinions within the law,⁷¹ thus effectively subjecting the Banjul Charter to the national law. While the Commission has interpreted the phrase broadly,⁷² it in essence usurps the authority of the Charter. Heyns observes that:

This creative, if somewhat desperate move on the part of the Commission to save the Charter from itself, should be succeeded by necessary modification of the Charter, given that the words of the

relations to conclude agreements, to form associations." When this theory is adapted to the Africa Human Rights System, it would mean that as far as African States are concerned, they are committed to Human Rights Promotion and Protection only as far as the Banjul Charter provides. This is ironical because it is clear from the Constitutive Act and the Protocol Establishing the African Court that African States are more ready to promote and protect human rights contrary to what they were willing to do twenty one years ago (this is the time lapse between the Banjul Charter and the Constitutive Act).

67. Christof Heyns, *The African Regional Human Rights System: In Need of Reform?* 1 AFR. HUM. RTS L. J. 157 (2002).

68. *Id.*

69. *Id.*, at 284 (showing that the Commission derives its authority from other human rights instruments in accordance with Articles 60 & 61 of the Banjul Charter. Through this avenue, the Commission has been able to narrowly construe and claw back clauses).

70. *Id.*

71. Other rights include the right to property which is subject to the interest of the community (this has roots in the African understanding of society, which is communal) and in accordance with appropriate laws.

72. See, *Civil Liberties Organization v. Nigeria*, Communication 101/93.

Charter are no longer understood, at least by the Commission, to have their ordinary meaning ... Because the Commission could not follow the provisions of the Charter, the provisions of the Charter now have to follow the Commission.⁷³

The proposal to amend the Banjul Charter in this regard is rooted in the fact that the factors that prompted the claw back clauses, that is, the “jealous” guarding of the newly acquired independence have slowly faded away. The Banjul Charter was borne by an organization immersed in the most radical construction of state sovereignty.⁷⁴ State sovereignty when coupled with the non-interference principle led to a highly compromised human rights document.

The Banjul Charter excludes some internationally recognized human rights.⁷⁵ These include: the right to respect of private life, home and correspondence,⁷⁶ the right to freedom from forced or compulsory labor,⁷⁷ the right to equality in marriage, during and at dissolution,⁷⁸ the right to enter marriage with full and free consent of intending spouses,⁷⁹ the right to form and join trade unions and the right to vote.⁸⁰ Even the recognized rights such as minimum guarantees of an accused person are by far inadequate.⁸¹ The Commission or the Court may have to adopt a very expansive

73. *See supra* note 67, at 161.

74. *Supra* note 50, at 1207.

75. *Supra* note 29, at 344. *See also, supra* note 47, at 159.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Supra* note 27, at 159. It should however be noted that the Banjul Charter does make provision for what could reasonably be construed as the right to vote in Art.13 (1). The vagueness or indirectness of the provision has led some to consider the right non-existent in the Charter and to call for a more specific and clear provision.

81. Article 6 of the Banjul Charter merely states that; “Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.” Contrast the narrowly constructed Art. 6 above with the broad and elaborate Art. 5 of the European Convention on Human Rights which provides that:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;
 (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
 (c) the lawful arrest or detention of a person effected for the purpose of bringing him

interpretation of the right to a fair trial in order to apply the internationally recognized rights of an accused person in accordance with Article 60. The challenge with this approach is that only the Commission and not the Court is empowered to rely on other international instruments to interpret the Banjul Charter.⁸² The right to life provided for in Article 4 as the basis for the enjoyment of all other rights requires elaboration. The exact incidences when the right should be deprived should be laid down as witnessed in other international and regional human rights instruments.⁸³

before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation. Article 7 of the American Convention on Human Rights is equally elaborate and need not be reproduced and so is Article 9 of the International Covenant on Civil and Political Rights. Therefore, the Banjul Charter would do very well to give states the exact limits within which the right to liberty can be deprived, given the political turmoil in Africa and the rampant unlawful arrests and detentions especially of political opponents. *See also, MUGWANYA, supra* note 28, at 302.

82. *See supra* note 47.

83. Article 4 of the Banjul Charter reads: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. This should be contrasted with the Article 6 of the International Covenant on Civil and Political Rights which provides that:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Still on the normative content of the Banjul Charter, it needs to be strengthened in terms of state obligations and commitment. The new resolve and determination of states to respect human rights should be borrowed from the Constitutive Act. Paragraph 9 of the preamble to the Constitutive Act provides that, “DETERMINED to promote and protect human and peoples’ rights ...” This should be contrasted with Paragraph 11 of the preamble to the Banjul Charter which states that, “*Firmly convinced* of their duty to promote and protect human and people’ rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa...” The two paragraphs illustrate a variance in tone and the level of commitment to human rights in both instruments. This runs throughout the Banjul Charter, as noted by Heyns, Article 1 which lays down state obligations needs to be revisited.⁸⁴

The powers of the African Commission on Human and Peoples Rights need to be broadened and made clear.⁸⁵ The Commission needs to be free to operate without

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

The Banjul Charter by failing to lay down similar boundaries purports to take away the internationally accepted limits within which the right to life can be deprived, this is not withstanding the fact that Art.60 of the Banjul Charter provides for the use of other international instruments.

84. Heyns notes that Art.1 is “a very weak way” of establishing State obligations because it simply states that, “The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.” Heyns rightly suggests that the language should be much firmer and assertive or certain, say the Article should state, that “states parties undertake...” It should not be a mere promise or anticipatory obligation. See *supra*, note 67.

85. *Id.*

restrictions. Much as this is not the case in practice any more, the mandate of the Commission needs to be reflective of what is done in practice.⁸⁶ With regard to confidentiality of measures to be taken by the Commission, it has remedied this by publishing its decisions, recommendations and findings.⁸⁷ While the Commission has undertaken several functions such as monitoring compliance of member states with the Banjul Charter, it is not expressly mandated to do so.⁸⁸ Additionally, the Commission has developed a practice of remedying human rights violations. The Banjul Charter is however silent on the findings that can be made by the Commission and whether or not it can award remedies and if so, what kind of remedies?⁸⁹ Even more interesting, the Commission is not authorized by the Banjul Charter to consider state reports⁹⁰ but was authorized by the Assembly of States at its own request to consider state reports.⁹¹

The attempt to amend the Banjul Charter through informal agreements is ineffective because what is of most importance is what the Charter actually states. There is therefore an urgent need to clearly spell out what the Commission can or cannot do, otherwise for the Banjul Charter to say one thing and the Commission to do another, ‘mocks’ its legitimacy.

VI. CONCLUSION

The OAU was indeed “...a symbol and embodiment of age-old Pan-Africa yearnings ...”⁹² This article acknowledges the achievements of the OAU and recognizes that it arguably executed its mandate—which excluded human rights protection, effectively. Criticism of the Banjul Charter should therefore be grounded in a historical context, heeding the words of Keba Mbaye that it was the “best that could be achieved at the time.” The article traces the “age-old Pan-Africa yearnings” in the Banjul Charter and

86. Article 59 of the Banjul Charter provides that:

1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide. . .

2. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

87. Gutto, *supra* note 63, at 180.

88. *See supra* note 67, at 162.

89. *Id.*, at 160.

90. *Id.*

91. Franz Viljoen, *Overview of the African Regional Human Rights System*, cited in Heyns, *supra* note 47, at 164.

92. Centre for Human Rights, *The African Human Rights System*, available online at, <http://www.chr.up.ac.za/centre_publications/ahrs/oau.html> (accessed January 4, 2008).

holds them responsible for its flaws and challenges facing human rights enforcement in Africa. To its credit, the Charter left room for alteration in the hope that what could not be achieved then could be realized at a future time. The article argues that the time is ripe for alteration. Every last trace of the OAU ideology in the Charter must be replaced with a spirit commensurate with contemporary aspirations of the African peoples and the Constitutive Act so that the OAU ghost haunts Africa no more.