

REALIZING UNIVERSAL HUMAN RIGHTS NORMS THROUGH REGIONAL HUMAN RIGHTS MECHANISMS: REINVIGORATING THE AFRICAN SYSTEM

George William Mugwanya*

I. INTRODUCTION

On December 10, 1999, the international community celebrated the 50th Anniversary of the Universal Declaration of Human Rights (UDHR). The UDHR, adopted by the United Nations General Assembly on December 10, 1948, is the centerpiece of the international human rights revolution. It is the first comprehensive statement enumerating the basic rights of the individual as promulgated by a universal international organization—the United Nations (U.N.). The Declaration states a common understanding of the peoples of the world concerning the inalienable rights of all members of the human family and constitutes an obligation for the members of the international community.

The successes that have been accomplished since the creation of the United Nations in 1945 and the adoption of the UDHR in 1948 must be applauded. On the other hand, however, it is very pertinent to step back and identify challenges hindering the human rights revolution and the possible ways to address them. The cardinal aim of the human rights revolution that began with the establishment of the U.N. Charter and the adoption of the UDHR, followed by a host of other international and regional human rights instruments, was to ensure, inter alia, the respect for and protection of human rights and fundamental freedoms of the entire human family everywhere. The ultimate aim was to ensure that human rights were translated into reality at the grassroots (within each state's jurisdiction) and be meaningful in people's lives.

The purpose of this Article is to examine the promise of regional human rights systems in the realization of universal norms. Of particular pertinence, the Article analyzes and appraises the role and effectiveness of the African regional human rights system in the realization of universal human rights. The challenges facing the African system are examined and the possible ways to

* Doctoral Candidate (JSD), Notre Dame Law School, Indiana; Advocate of the Uganda Courts of Judicature and Lecturer, Faculty of Law, Makerere University (Kampala, Uganda); LL.B. (*Hons*) (MUK), LL.M. (*With Merit*) (PRET), Dip. L.P. (LDC), Cert. (Int. Hum. Rts) (Strasbourg), Cert. (Chiedu) (Strasbourg), Cert. (Int. Buss. Trans.) (ILI). An earlier version of this paper was presented to the Northwestern University Law School (Chicago) Conference (organized by the Midwest Coalition for Human Rights) in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights, December 4-5, 1998. I would like to thank the Center for Civil and Human Rights at Notre Dame Law School and Professors Barbara and Edda for their help.

reinvigorate the system are identified. The Article argues that while in the protection and realization of human rights focus ultimately falls on what happens at the grassroots, the role of supra-national instruments, institutions, and structures at the global and regional levels cannot be overemphasized. The Article underscores the pivotal role of the global system, but demonstrates that regional human rights systems are better placed, and can therefore be more effective than systems with universal scope in impacting and influencing the realization of human rights at the grassroots. In this regard, the efforts by the United Nations to encourage and support the creation of regional arrangements must be saluted.

Following this Introduction, a brief commentary is made on the human rights revolution, its successes, prospects, as well as its challenges—the human rights *problematique*. The promise of the regional human rights systems in general and the status quo of the African system in particular, constitute Part III of the discussion. Part IV addresses the strengths and challenges of the African human rights system. The discussion appraises and assesses the effectiveness of the African human rights system and identifies the challenges facing the system. Part V offers proposals to reinvigorate the African regional human rights system.

II. THE GLOBAL HUMAN RIGHTS REVOLUTION: SUCCESSES, PROSPECTS, AND CHALLENGES

The adoption of the U.N. Charter in 1945 set in motion a human rights revolution that culminated in the internationalization and humanization of international law. Due to the widely shared conviction in the course of World War II prior to and in the course of which millions were mercilessly persecuted and killed by the Nazis in effectuating Hitler's Third Reich government policy of eliminating all Jews (euphemistically labeled the "final solution to the Jewish Question"), the Allied powers fought the war to vindicate human rights and fundamental freedoms "for all." Human rights issues were no longer to be viewed as an exclusively domestic issue; they were to be viewed collectively as a matter of common interest born out of man as a human being regardless of national boundaries. The horrors of the Second World War and the consequent awareness of the close connection between respect for human dignity and peace motivated the U.N. Charter's qualitative leap towards the promotion of human rights "for all." The conviction in the universal respect for human rights was above all carried forward with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, the International Covenant on Civil and Political Rights (ICCPR) with an Optional Protocol, the International Covenant on Economic, Social, and Cultural Rights (ICESCR)—the three of which are collectively known as the "International Bill of Rights"—and a host of other human rights

instruments.¹ The result is a vast body of legal norms, a veritable human rights code that gives meaning to the phrase "human rights and fundamental freedoms" and clarifies the obligations of member states imposed by Articles 55 and 56 of the U.N. Charter. Today, despite any controversies in which the concept of human rights may be enmeshed,² it is generally accepted that human rights are universal.³ They are inalienable and inherent birthrights that are due and enure to every human being in any society regardless of any distinction. Further, notwithstanding the fact that different implementation measures are called for as regards civil and political rights vis-à-vis economic, social, and cultural rights, this does not mean any divisibility or hierarchy of rights, but interdependence. States are under an obligation to give effect to

1. These instruments have been adopted by the U.N. and its specialized agencies. See, e.g., Second Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No 49, U.N. Doc. A/44/49 (1990); Convention on the Rights of the Child, G.A. Res 44/25, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/736 (1989); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, U.N. Doc. A/RES/34/180 (1980); International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 244 (entered into force July 18, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII), U.N. GAOR, 18th Sess., Supp. No. 15, U.N. Doc. A/5515 (1963); Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277. See generally THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 58-78 (2d ed. 1995) (listing some of the major U.N. human rights treaties).

2. On some of these controversies, see generally Maurice Cranston, *Human Rights, Real or Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 43 (David Raphael ed., 1967) (arguing against the expansion of traditional human rights, which are civil and political in nature, into social and economic rights); *HUMAN RIGHTS: PROBLEMS, PERSPECTIVES AND TEXTS* (F. E. Dowrick ed., 1979) (examining human rights from a inter-disciplinary perspective); *HUMAN RIGHTS: FROM RHETORIC TO REALITY* (Tom Campbell et al. eds., 1986) (offering an analysis of various human rights issues, such as reproductive rights, medical treatment, criminal procedure, and labor issues); *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (Asbjörn Eide & August Schou eds., 1968) (acknowledging the need for more deliberate and expansive implementation of human rights measures worldwide).

3. On this consensus, see Vienna Declaration and Programme of Action U.N., GAOR, World Conf. on Hum. Rts., 48th Sess., 22nd plen. mtg. ¶ 15, U.N. Doc. A/CONF. 157/24, [hereinafter Vienna Declaration]; BUERGENTHAL, *supra* note 1, at 19; UNITED NATIONS, *HUMAN RIGHTS: QUESTIONS AND ANSWERS* 4 (1987); Francesco Francioni, *The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience*, in *ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS* 15, 16 (Benedetto Conforti & Francesco Francioni eds., 1997); Kofi A. Annan, *Strengthening United Nations Action in the Field of Human Rights: Prospects and Priorities*, 10 HARV. HUM. RTS. J. 1 (1997); Louis Henkin, *Rights Here and There*, 81 COLUM. L. REV. 1582 (1981).

both categories of rights.⁴

In order to implement human rights norms, and call on states to account for human rights violations, the international community has over the years put in place various institutions and mechanisms. The U.N. Economic and Social Council (ECOSOC) Resolution 1235 of 1967, followed by ECOSOC Resolution 1503 of 1970, laid the foundation of the U.N. Charter-based systems for the protection of human rights. By and large, all the various U.N. Charter organs and specialized agencies have played a direct or indirect role in the realization of human rights.⁵ The Charter-based mechanisms have been buttressed by treaty-based institutions and mechanisms for the promotion and protection of human rights. The mid-to-late 1970s witnessed the establishment of the U.N. Human Rights Committee as an enforcement mechanism for the ICCPR. Similarly, as regards the ICESCR, starting in 1976, the ECOSOC adopted a series of resolutions that culminated in the establishment of a Committee on Economic, Social, and Cultural Rights as a permanent body to promote the implementation of the Covenant. Further, the Committee on the Elimination of Racial Discrimination (CERD) came into being with the entry into force of the International Convention on the Elimination of Racial Discrimination. Various other treaty-based institutions such as the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Committee on the Rights of the Child are all in place, while specialized agencies of the U.N., such as the U.N. Educational, Scientific and Cultural Organization (UNESCO) and the International Labour Organization (ILO) have over the years adopted special mechanisms for dealing with human rights violations falling within their scope of competence.⁶

Further, the end of the Cold War reinforced the international human rights movement. It liberated international efforts to promote human rights from the ideological conflicts and political sloganeering of the past vices that had for decades forced the international community to close its eyes to massive violations of human rights committed by states. Recent efforts by the international community to hold individuals, and not only states, internationally criminally responsible for heinous human rights violations, the evolving emphasis on the protection of individuals belonging to minority groups, and the role the Security Council is beginning to play under Chapter

4. See Vienna Declaration, *supra* note 3, para. 5.

5. See Boutros Boutros-Ghali, *Introduction, in UNITED NATIONS, THE UNITED NATIONS AND HUMAN RIGHTS 1945-1995*, at 3, 9-18 (1995). See also B. G. RAMCHARAN, *THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, FORTY YEARS AFTER THE UNIVERSAL DECLARATION 246-58 (1989)* (concentrating on the main general organs of the United Nations, such as the Security Council, the General Assembly, the Economic and Social Council, and the Commission on Human Rights).

6. See, e.g., UNESCO 104 EX/Decision (1978).

VII of the U.N. Charter in dealing with massive violations of human rights, all point to a genuine maturing of approaches the international community is adopting in the struggle to foster the protection of human rights.

A. *The Human Rights Problematique*

The foregoing does not suggest that everything is running well and that both the international and national systems designed to ensure the respect for and the realization of human rights are all in place and working effectively. Despite the increased importance assigned to the pursuit of human rights during the latter part of this century, the commission of human rights violations has continued the world over, and in several instances such commissions have taken place on a massive scale. Indeed, this has been the case despite a predicated decrease in the incidence of human rights violations resulting from the dissolution of the Communist Soviet bloc in 1989 and the movement towards democracy.⁷ However, human rights conditions have been more precarious on the African continent.⁸ In spite of the optimism inspired by the attainment of independence, Africa has failed to achieve universal adherence to international human rights norms. The recent carnage in Rwanda, the ongoing political strife in southern Sudan, northern and western Uganda, Zaire, Lesotho, Burundi, and Somalia, that have left thousands dead, and caused a horrific violation of a host of other rights and fundamental freedoms, exemplify the all-too-familiar difficulties of human rights enforcement in Africa. Even within societies that may be described as "democracies," human rights remain illusory in the day-to-day lives of the majority. The world at large and Africa in particular, stands poised between the extremities of hope and despair.

B. *Implementation*

Against the backdrop of the human rights situation the world over, and more lamentably that in Africa, the basic challenge facing the human rights revolution is that of implementation. In the half century since the inception of the human rights revolution, one of the cardinal successes of this revolution has been in the elaboration of human rights norms, and the numbers of states bound by these norms. Today, it is generally agreed that there is no shortage of human rights norms. The most pressing problem is the implementation of these norms at the "grass roots" and making them meaningful in people's lives.

7. This hope was alluded to in the Charter of Paris for a New Europe, 1990, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 474 (Ian Brownlie ed., 3d ed. 1992).

8. *See generally* AMNESTY INTERNATIONAL, ANNUAL REPORT (1990) (reporting human rights abuse in all African states).

As Kofi Annan, the U.N. Secretary General has noted:

After the years invested in the elaboration of an international code of conduct in human rights—as embodied in international conventions and other legally binding instruments—the priority now is to translate these norms and standards into national legislation and national practices, thus bringing about real change in peoples' lives.⁹

The U.N. High Commissioner for Human Rights has also observed:

In general, I believe that we all agree that there is no shortage of international human rights standards. Nor, unfortunately, is there a shortage of situations demanding improvement of respect for human rights. Our basic challenge is to implement human rights standards and make human rights meaningful in people's lives.¹⁰

III. THE PROMISE OF REGIONAL HUMAN RIGHTS ARRANGEMENTS: THE STATUS QUO OF THE AFRICAN SYSTEM

The normative and institutional evolution of international human rights law at the global level played a prominent role in encouraging the creation of regional human rights systems in Europe, the Americas, Africa, and more recently the emerging systems in Asia and the Arab States. The U.N.'s role in encouraging the creation of regional human rights systems must be saluted.¹¹ Regional systems have served as both institutional and normative building blocks and instruments for the realization of human rights at the grassroots.

9. Annan, *supra* note 3, at 1.

10. U.N. ESCOR. 52d Sess., at 4, U.N. Doc. E/CN.4/1996/50/Add. 1 (1995).

11. At the U.N.'s beginning, it was believed that regional approaches to human rights might detract from the universality of human rights, and therefore the wisdom of encouraging the creation of regional human rights systems was to some extent doubted and resisted by the U.N. This view later changed, particularly as the European and Inter-American systems were evolving. In fact, through an ad hoc study group, the U.N. actually considered creating regional human rights regimes of its own. However, the U.N. ultimately concluded that the member states themselves bore the responsibility for forming regional human rights systems. Thus, via Resolution 32/127, the U.N. General Assembly asked states not belonging to human rights regimes "to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights." See G.A. Res. 32/127, 32 U.N. GAOR, 105th plen. mtg., U.N. Doc. A/32/458 (1977), reprinted in 31 U.N.Y.B. 740 (1977). Two subsequent resolutions reiterated the General Assembly's call: G.A. Res. 33/167, 33 U.N. GAOR, 90th plen. mtg., U.N. Doc. A/33/509 (1978), reprinted in 33 U.N.Y.B. 871 (1979). See generally Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987).

Over the years, regional systems, particularly those established in Europe and the Americas, have provided the necessary intermediary between state domestic institutions which violate or fail to enforce human rights and the global human rights system which alone cannot provide redress to all individual victims of human rights violations. At the global level, no permanent human rights court has thus far been created to allow individual complaints against governments for violations of human rights. It was at the regional level, in Europe, that the first system allowing for effective individual complaints against governments for violations of human rights was created. This system became the model of human rights realization in the other regional systems—the Inter-American system has a court, and the African system is in the process of creating one. Regional systems have served to fill gaps in the global human rights mechanisms. They have fruitfully complemented the global human rights system by impacting and influencing domestic human rights practice in member states. Although each regional system has its own issues and concerns arising out of diversity in each system's origins, all of them have elements of uniformity. All regional systems began as the global human rights system was developing and they were inspired by universal norms as embodied, *inter alia*, in the UDHR.

Regional systems are better placed and can therefore be more effective than systems with universal scope. Regional systems are flexible and have the ability to change as conditions around them change and sometimes do so quickly. This is because proposals for change in regional systems are likely to meet less resistance than those of the global system. The great number of states with different traditions that are involved in the global system make implementation more complicated. On the other hand, shared legal, political, socioeconomic, intellectual, and cultural traditions and aspirations within a regional setting are more likely and do serve as cardinal bases for particularized and effective human rights protections at the regional level. The drafters of the African Charter were well driven by this conviction.¹² Within the regional arena, shared traditions create homogeneity which facilitates debate over the substance of the rights protected and assist in the development of more or less familiar systems of redress, thereby enhancing the actual promotion and protection of human rights.¹³ Geographical

12. It was asserted:

All that could be said about this document [the Charter]. . . is that it strives to secure a certain equilibrium, and to emphasize certain principles and guidelines of our Organization [the OAU] as well as the aspirations of the African peoples. It seeks not to isolate man from society, but as well that society must not swallow the individual. Such is the wisdom that was to be recalled from the very beginning of the proceedings.

OAU Doc. AHG/102/XVII, Nairobi, June 1981, at 22.

13. See THOMAS BUERGENTHAL, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U. L. REV. 155, 156 (1980).

proximity and cultural propinquity inherent within a regional framework make more probable the investigation and remedying of human rights violations. In the absence of a regional or global police force or army or prison to enforce compliance with international human rights obligations, supra-national institutions have to rely more on shame and pressure mechanisms, such as economic sanctions, the severance of diplomatic relations, sport, and other ties against the recalcitrant state. These mechanisms are likely to be more effective in respect of those states in a regional arrangement where states are in constant contact. Geographical proximity in regional systems leads to socioeconomic, environmental, and security interdependence which more easily forces a recalcitrant state once isolated to comply with its international human rights obligations. These realities place regional human rights systems in a strong position to enforce universal human rights norms.

A. The African Charter on Human and Peoples' Rights¹⁴ and The African Commission Human and Peoples' Rights

From the foregoing analysis, it is clear that the adoption of the African Charter on Human and Peoples' Rights must, per se, constitute a fundamental input in the struggle for the realization of international human rights norms on the African continent. The system must strive to improve human rights on the African continent.

The African Charter was adopted by the Assembly of Heads of State Government in 1981 and came into force in 1986. As of January 1998, the Charter had been ratified by fifty-one states of the fifty-three Organisation of African Unity (OAU) members.¹⁵ The African system is designed to function within the institutional framework of the OAU. The Charter incorporates many of the rights as embodied in other supra-national human rights instruments. However, there are some differences between the Charter and the two regional systems. First, the Charter brings together the three dimensions of rights under one roof, namely civil and political rights; economic, social, and cultural rights; and "people's rights" (sometimes also called collective or solidarity rights—an individual can only enjoy these rights in a collective sense as a member of the community).¹⁶ Second, the Charter

14. See African Charter on Human and Peoples' Rights, O.A.U. Doc CAB/LEG/67/3/Rev.5 (entered into force Oct. 21, 1986), reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 551 (Ian Brownlie ed., 3d ed. 1992) [hereinafter African Charter].

15. Ethiopia and Eritrea have not ratified the Charter.

16. See Wolfgang Benedek, *The Rights of Peoples: The Main Issues*, 16 BULLETIN OF AUSTRALIAN SOCIETY OF LEGAL PHILOSOPHY 71-79 (No. 56, 1991). Under the Charter, people's rights include the right to existence, the right to self-determination, peace, and development, and the right to a general satisfactory environment. See African Charter, *supra* note 14, arts. 19-24, at 556-57.

incorporates the individual's duties towards the family and society, the state, and the international community.¹⁷ Third, apart from omitting some rights, many of the rights it enumerates are drafted with less judicial precision and permit more restrictions (claw-backs) than the two regional treaties.¹⁸ Additionally, the Charter omits a derogation clause. Last, the Charter does not create a court of human rights.¹⁹ Instead, it establishes an African Commission on Human and Peoples' Rights (the Commission). The Commission is invested with promotional and quasi-judicial functions. The promotional mandate is broad. It includes the power to undertake studies, convene conferences, initiate publication programs, disseminate information, and collaborate with national and local institutions concerned with human and people's rights.²⁰ The quasi-judicial powers of the Commission include so-called interpretative powers and powers applicable to the resolution of disputes involving allegation of human rights violations. The Commission has the jurisdiction to interpret "all the provisions of the . . . Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU."²¹ Unlike the other systems, in dealing with violations of human rights, the African system envisages not only inter-state and individual communications procedures, but also a special procedure for situations of gross and systematic violations.²²

Since its inception, the Commission has endeavored to discharge its mandate.²³ In general, the Commission started off very cautiously.²⁴ Gradually, however, the Commission has established itself as an institution of some importance.²⁵ Over the years, the Commission has augmented its role beyond the likely intention of the drafters and has displayed features of

17. See African Charter, *supra* note 14, arts. 27-29, at 558. Duties include the duty to serve one's national community, preserve and strengthen national independence and territorial integrity, preserve and strengthen social and national solidarity, and not to compromise national security. *Id.*

18. See *infra* Part IV.

19. The African system is now in the process of establishing a human rights court. See June 8, 1998, Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights, OAU/LEG/EXP/AFCHPR/PROT (III), *reprinted in* 9 AFR. J. INT'L & COMP. L. 953 (1997) [hereinafter Draft Protocol].

20. See African Charter, *supra* note 14, art. 45(1)(a), at 561.

21. See *id.* art. 45(3), at 561.

22. See *id.* art. 58, at 564.

23. See EVELYN A. ANKUMAH, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES* (1996).

24. In its very first session in Addis Ababa, the Secretary-General cautiously set the pace of the Commission by exhorting the members on the sensitivity and difficulties that are encountered in the promotion of human rights in Africa. See 24 AFR. RES. BULL. 8387, 8387-88 (1987).

25. See ANKUMAH, *supra* note 23.

activism in enforcing human rights. The ability of the Commission to write its own rules of procedure has enhanced its functioning and allowed it to expand its role considerably.²⁶ In its First Annual Report, the Commission "felt that the magnitude and complex nature of the tasks it had to carry out demanded that it should stand on a solid foundation."²⁷ There are a number of instances of activism on the part of the Commission. It suffices to mention a few: Article 58 of the Charter limits the protective role of the Commission by confining it to cases that reveal a series of gross and systematic violations—the Commission is mandated to draw the attention of the OAU Assembly, and the Assembly may then instruct the Commission to undertake an investigation and draw up a report. It appears that a literal reading of the Charter excluded from the Commission's jurisdiction separate individual cases unless they were of an urgent nature.²⁸ Notwithstanding these constraints, the Commission from its third session entertains individual complaints that do not reveal a series of violations. This approach, which has bolstered the Commission's protective role, was mandated by its Rules of Procedure.²⁹ Other areas include "completing" the right to fair trial in Article 7,³⁰ freedom of association,³¹ as well as furnishing content to the right to self-determination.³² The Commission, drawing on precedents established by the

26. See Rules of Procedure of the African Commission on Human and Peoples' Rights, Doc. ACHPR/RP/XIX (1996).

27. At para. 15 of the Report.

28. See Rachel Murray, *Decisions by the African Commission on Individual Communications Under the African Charter on Human and People's Rights*, 46 INT'L & COMP. L.Q. 412 (1997).

29. Commission Rules of Procedure adopted at its 2nd Ordinary Session.

30. In its 11th Session, the Commission adopted a resolution on the Right to Recourse Procedure and Fair Trial. It stressed, inter alia, that the right includes the right to be informed promptly at the time of arrest in a language one understands of the reason for the arrest and of any charges, the right to be brought before a judicial officer promptly after arrest or detention, and the right to be brought to trial within a reasonable time or to be released. It further clarified that the right to defense includes the right to have adequate time and facilities for the preparation of that defense, and the right to communicate in confidence with counsel of one's choice. The right also includes the right to free assistance of an interpreter at the trial.

31. Under Article 10(1) of the Charter, the right to freely associate is conditional on the requirement that one "abides by the law." See African Charter, *supra* note 14, art. 10(1), at 554. The wide powers of states to infract the right are limited by the Commission's resolution on the right to associate (adopted at its 11th session). The Resolution calls on states not to "enact provisions which would limit the exercise of this freedom." (Fifth Annual Activity Report). Further, state regulation of the right "should be consistent with the States's obligations under the Charter."

32. See Communication 75/92 (*Katangese People's Congress v. Zaire*). The applicants requested the Commission to declare the right of the Katangese "people" to complete sovereign independence, thus enabling them to secede from Zaire (now DRC). The Commission in rejecting the communication noted, inter alia, that self-determination can be attained in various ways, including independence, federalism, confederalism, local government, and unitarism, and that to allow an action incompatible with a state's territorial integrity, there must be "concrete

European Commission of Human Rights and Inter-American Commission on Human Rights, has made findings crucial to the realization of human rights in Africa. These include continuity of obligations notwithstanding change of government,³³ the presumption of the truth of the allegations if government fails to respond,³⁴ and state responsibility for failure to act.³⁵ In 1990, in order to expand the Commission's reach throughout the continent, the Commission adopted a resolution on the establishment of committees on human rights and other similar organs at national, regional, and sub-regional levels.³⁶ It also encouraged member states to take appropriate measures to establish human rights institutions. Other innovative steps which are gradually developing include the Commission's sanctioning of provisional measures despite a lack of specific reference to such measures in the Charter,³⁷ on-site visits,³⁸ special rapporteur reports (e.g., one on summary and extra-judicial killings), and follow-up actions.³⁹

evidence of violations of human rights to the point that the territorial integrity of the state should be called to question." Although the Commission may be criticized for setting a very high standard (thereby "overprotecting" the territorial integrity of states at the expense of human rights), it endeavored to give content to the right. From the findings of the Commission, it is clear that the right operates not only against "colonizer" but against any oppressor. The right extends to groups within a state who are persecuted and consistently denied a say in government.

33. See Joined cases 83/92, 91/93 *Jean Yaovi Degli (On behalf of Corporal N. Bikagani), Union Interfricaine des Droits de l'Homme, Commission Internationale de Juristes v. Togo*.

34. See, e.g., Communications No. 25/89, 47/90, 56/91, 100/93, *World Organization Against Torture, Lawyer's Committee for Human Rights, Union Interfricaine des Droits de l'Homme, Les Temoins de Jehovah v. Zaire*. Annex VIII, at 7 [hereinafter *World Organization Against Torture*]. A similar approach is embodied in Art. 42 of the Regulations of the Inter-American Commission on Human Rights.

35. In Communication 74/92, *Commission Nationale des Droits de l'homme et des Libertes v. Chad*, the Commission found that if a state neglects to ensure the rights in the Charter, this constitutes a violation. The Commission found that Chad was in violation of the Charter for failing to provide security and stability in the country, thereby allowing massive violations to take place. This approach, similar to that taken in the Inter-American decision in *Velasquez Rodriguez* (I. - A. Court H. R., Series C: Dec. & Jug. No. 4, 1988) has expounded on the state duty provided for under Art. 1 of the Charter.

36. See Annex VIII, 11 HUM. RTS. L.J. 401 (1990).

37. See Rule 111 of the Commission's Rules of Procedure (1996).

38. For example, the Commission has sent missions to Nigeria, Sudan, Burundi, Mauritania, and Rwanda.

39. For instance, the Commission's endeavor to verify that its recommendations to the state to remedy violations (e.g., release of victims), has been complied with by bringing the file to the defendant state during a commission's mission. See Case 87/93, *The Constitutional Rights Project in re Zamani Lakwot & 6 Others v. Nigeria*.

IV. STRENGTHS AND CHALLENGES OF THE AFRICAN HUMAN RIGHTS SYSTEM: AN APPRAISAL

On the one hand, the Charter, when compared to her sister systems in Europe and the Americas, shows some advantages in some respects both in its substantive and procedural provisions. For example, the Charter is the most comprehensive instrument in existence that embodies under one roof the three dimensions of rights; namely, civil and political rights; economic, social, and cultural rights; as well as people's rights, sometimes also called "solidarity or collective" rights, which an individual can only enjoy in a collective sense as a member of the community. By so doing, the Charter endeavors to give effect to the indivisibility and interdependence of human rights. Similarly, its inclusion of solidarity rights is an innovation that undoubtedly constitutes an essential development in the conceptualization of human rights in general. The Charter also provides more liberal access to its procedures than other international human rights instruments. Unlike the two regional systems which require state declaration of recognition of the competence of the implementing organs to receive petitions, the Charter does not request such declaration, and opens the doors for both individuals and non-governmental organizations (NGOs) whether national, African, or international, to file petitions. Apart from conferring quasi-judicial functions, the Charter bestows upon the Commission a promotional mandate that appears to surpass the mandates of the European and Inter-American Commissions.

On the other hand, the African system faces various challenges which have made it lag behind the two systems in Europe and the Americas. First, the adoption of the African Charter with its unabashedly "Africanist Philosophy"⁴⁰ has fueled the raging debate in international human rights circles on the universal pluralistic nature of human rights. It has been a question of much controversy as to whether the African Charter was meant to pursue a trend towards "African Culturalism" or to enforce "universal" human rights norms.⁴¹ It has also been argued that some positions are taken in regional and international human rights instruments which conflict with African cultural norms. These controversies have served as stumbling blocks for the African system to serve as a vehicle for the realization of universal norms. However, as already noted herein, like the other regional human rights systems, the African system has its own issues and concerns—which influenced its innovations and emphases. This notwithstanding, like the other

40. In the Preamble, the Charter bases itself on "the virtues of [African] tradition and the values of African civilization" and that the duty to promote human rights has to take into account "the importance traditionally attached to these rights and freedoms in Africa." See African Charter, *supra* note 14, at 551-52.

41. See Makawu wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995).

regional systems, it was inspired by universal norms as enunciated in the UDHR and other international human rights instruments. The innovative aspects of the Charter merely enrich the human rights corpus and are not intended to detract from universal human rights norms. The Charter deferred to “universalism” in the Preamble⁴² and in Articles 60 and 61.⁴³ As seen above, in various cases, the African Commission has adopted doctrines established in the case law of other international human rights institutions.

Second, the Charter omits a multiplicity of rights and fails to interdict certain violations. For instance, the Charter does not protect the right to privacy (i.e., the right to respect for private and family life, home, and correspondence), nor interdict forced or compulsory labor. There is no right to vote and be elected in periodical elections by secret ballot, nor does the Charter embody democratic concepts such as universal suffrage and free and fair elections.⁴⁴ The right of a national not to be expelled and the right to

42. One of the objectives of the Charter is to “promote international cooperation having due regard to the United Nations and the Universal Declaration of Human Rights.” See African Charter, *supra* note 14, art. 45(3), at 561. In the Preamble, African states reaffirm “the adherence to the principles of human and people’s rights and freedoms contained in the declarations, conventions and other international instruments adopted by the OAU, the Movement for Non-Aligned Countries and the United Nations.” *Id.*

43. Under Article 60,

[t]he Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and Peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the specialized Agencies of the United Nations of which the parties to the present Charter are members.

African Charter, *supra* note 14, art. 60, at 565.

Under Article 61,

[t]he Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

Id. art. 61.

44. In its 19th session, the Commission adopted a resolution on “electoral process and participatory governance.” Applauding elections in Benin, the Sierra Leon, and the Comoros as part of the transition to democratic rule in these countries, the Commission asserted that elections are the only means by which people can elect democratically the government of their choice in conformity with the Charter. It called on governments to take measures to ensure the credibility of electoral processes, and stressed the duty of states to provide the material needs of the electoral supervisory bodies. Ninth Annual Activity Report, Annex VII at 9.

marry are omitted, while the right to fair trial⁴⁵ suffers various shortcomings.

The many claw-back clauses tend to water down the contents of the rights and give wide powers to states to derogate from their human rights obligations.⁴⁶ The Charter also omits a derogation clause.⁴⁷

The rather open access to communications is seriously undercut by a very lengthy procedure which communications have to undergo. Under Article 58 of the Charter, communications have to be brought to the knowledge of the state concerned. In the past, the Commission has interpreted the provision restrictively, deferring consideration of the case until the state reacted. The Commission's recent approach of presuming the truth of allegations from the silence of government and its proceeding to consider petitions notwithstanding a state's silence⁴⁸ must be saluted.

The lack of publicity of the Commission's work is a ghost that has

45. The Commission has tried to remedy some of the omissions in its resolution on Right to Recourse Procedure and Fair Trial. See *supra* note 29.

46. Many of the clauses embody nebulous and open-ended clauses, and are not qualified as "necessary in a democratic society" as found in the European and American Conventions. See Arts. 8-11 of the ECHR, and Arts. 15-16 of the AMCHR. For instance, some rights are to be enjoyed "subject to law and order," "within the law," if one "abides by the law." Some rights may also be restricted for the protection of "national security," "public order," or "public health." It is argued that although some of the phrases used are found in other international instruments, the African Charter "claw-back" regime tends to overemphasize the "exceptions" and gives wide powers to states at the expense of the rule. However, the developing jurisprudence of the African Commission tries to insist on the effective enjoyment of the rights. See Case 101/93, *Civil Liberties Organization, in re Nigeria Bar Association v Nigeria*, 9 - 10.

47. The Charter, in Part II (dealing with duties) merely mentions "collective security" but not "public emergency." See African Charter, *supra* note 14, art. 27(2), at 558. In view of the difference in character, scope, and circumstances in which limitations and derogations may be imposed, it is untenable to attempt to argue that the many limitation clauses (claw-backs) make a derogation clause unnecessary. For this argument, see, for example, Rose M. D'Sa, *Human and Peoples' Rights: Distinctive Features of the African Charter*, 29 JOURNAL OF AFRICAN LAW 72, 75-76 (1985). As to the nature of limitation and derogation clauses, see SUBRATA ROY CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY* (1989) (presenting an exhaustive and scholarly examination of the International Law Association's Paris Minimum Standards of Human Rights Norms in a State of Emergency that was promulgated in 1984); Gerald Erasmus, *Limitation and Suspension*, in RIGHTS AND CONSTITUTIONALISM, (Dawid van Wyk et al. eds., 1994); *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights 1984*, reprinted in 7 HUM. RTS. Q. 3-88 (1985) (consisting of commentary and working papers on limitation provisions and derogation clauses as compiled by a group of international law experts); JAIME ORAA, *HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW* (1992) (analyzing the main principles regulating human rights in emergencies as contained in the derogation clauses and in general international law). The Commission has held that the absence of a derogation clause in the Charter means that the Charter as a whole remains in force even during periods of armed conflict. See Communication 74/92, *Commission Nationale de l'homme et des Libertes v. Chad*, AHG/207 (XXXII) Annex VIII at 12). In practice, this may be impracticable; a derogation clause is necessary to regulate derogations.

48. See Communication No. 25/89/47/90, 56/91, 100/93, *supra* note 34.

dangerously assailed the human rights project. Under Article 59(1) of the Charter, all measures taken within the provisions of the Charter (on the procedure of the Commission) shall remain confidential until such a time as the Assembly of Heads of States and Government shall otherwise decide. Barring the Commission from reporting individual cases, the defendant states, or the stage reached by individual cases, denies vital protection to victims of human rights violations. Under Article 59(3), "[t]he report of 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."⁴⁹ It is unfortunate to vest a power in the Assembly to "veto" the Commission's publication of its annual report. The Commission's Rules of Procedure presuming that publication is permitted unless directed otherwise is commendable.⁵⁰

Until 1998 with the adoption of an Additional Protocol to establish a court,⁵¹ the African Charter did not create a court of human rights. Only a commission was put in place, and given a mandate with a number of lacunas.

V. THE WAY FORWARD: CONCLUSIONS AND RECOMMENDATIONS FOR REINVIGORATING THE AFRICAN SYSTEM

The adoption of the African Charter constitutes an important input in the human rights revolution on the African continent. Over the years, within the African system, like the two regional systems, some steps have been taken in the direction of complementing and reinforcing the global system in the realization of universal norms, while at the same time responding to the particular problems in the region.

However, there is a need for further normative, institutional, and procedural reforms to make the system more effective. There is a need to adopt additional protocols to supplement the Charter and add the rights omitted. Although the Commission has tried to expound on the protections in the Charter, this is not enough.

The Charter also needs revisions in various respects. There is a need to further streamline and reinvigorate the Commission's mandate. Provisions that inhibit the publicity of the Commission's work should be revised. Although the Commission was created by the OAU, its mandate should be

49. African Charter, *supra* note 14, art. 59(3), at 564.

50. See Rule 77 of the Commission's Rules of Procedure, *supra* note 26.

51. This Protocol is not yet in force. The African system is in the process of creating a court of human rights. See Draft Protocol, *supra* note 19, at 953. Under Article 34(3) of the Protocol, "[t]he Protocol shall come into force thirty days after fifteen instruments of ratification . . . have been deposited." *Id.* at 960. The competence of the Court to receive petitions is limited to those states that ratify the Protocol and also file a declaration accepting the competence of the Court. See *id.* art. 34(6), at 960.

expanded so that it becomes more accountable to the people rather than to the Heads of State and Government. The Commission's close association with the OAU is necessary—inter alia, the OAU serves as an outlet of the Commission and forms the medium through which the Commission's activities are brought to the attention of the people and the leaders. However, the Commission must remain independent from the Heads of State and Government—the members of which are often the targets of human rights claims—and the OAU must not impose restrictions that hinder or compromise its work. The Commission's financial dependence on the OAU hampers the Commission's general activities. The OAU's considerable control over the activities of the Commission and its say as to what activities the Commission may undertake need to be revised. In addition, vesting final decision making in the OAU Assembly of Heads of State and Government and not in the Commission, needs revision. The current working relationship between the Commission and the Assembly gives powerful states the ability to moderate or even silence the findings of the Commission.

Impartiality and independence of action are central to the effective functioning of an organ charged with the protection of human rights. Indeed, elected members of the Commission must take an oath of impartiality.⁵² However, the election of ambassadors or other officials from governments—governments that are the targets of human rights claims—to the Commission, renders the impartiality and independence of the Commission illusory and should be revised.

There is a need to address the various claw-back clauses that tend to water down the contents of the guarantees. A general limitation clause would be ideal. A derogation clause should be added to regulate state action before and during emergencies.

There is a need to establish additional bodies, particularly a court to complement the Commission. There is an urgent need for a judicial organ in the nature of a court to undertake effective adjudication of complaints, render enforceable judgements, offer remedies to victims, and make states more accountable for violations of human rights. Like the Commission, the court must be an independent institution and its activities must not be inhibited by the OAU.

Since its inception, the Commission has experienced serious financial constraints due to poor funding from the OAU and has had to rely on funding from external sources. The Commission should consistently call on the member states to deliver and respect their obligations under the Charter, notwithstanding the financial constraints they face. African governments have perpetually relegated meeting their human rights obligations at the periphery. The Commission must consistently fight this vice.

52. See African Charter, *supra* note 14, art. 38, at 560.