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## Can the Leopard Change Its Spots? The African Union Treaty and Human Rights

Nsongurua J. Udombana

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# CAN THE LEOPARD CHANGE ITS SPOTS? THE AFRICAN UNION TREATY AND HUMAN RIGHTS

NSONGURUA J. UDOMBANA\*

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\* Senior Lecturer, Department of Jurisprudence and International Law, University of Lagos, Nigeria; former visiting Research Fellow, The Danish Center for Human Rights, Copenhagen, Denmark; LL.M., LL.B. (Lagos); Member of the Nigerian Bar; udombana@hotmail.com. Whereas the author is responsible for the errors that remain in this paper, he is, nevertheless, grateful to Prof. Darren Hawkins of Brigham Young University, Ayo Atsenuwa of the University of Lagos, and to the editors of AM. U. INT'L L. REV, for their valuable comments on the initial draft. Kim Bidstrup, Librarian at The Danish Center for Human Rights, Copenhagen, was particularly helpful in locating vital documents, for which the author is equally grateful.

"The process of erosion of rights is constant and unceasing, and when one awakens to the dangers, it is only an eroded right that remains to be protected."<sup>1</sup>

## INTRODUCTION

African 'rulers'<sup>2</sup> are at it again! They have presented Africans with a freshly baked cake. It is teasing and tempting, though one cannot, at the moment, determine if it is nutritious. This is true particularly as the African rulers did not involve the civil society—defined as comprising those associational bodies between the personal and the state<sup>3</sup>—in the baking. The Assembly of Heads of State and Govern-

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1. C.G. WEERAMANTRY, JUSTICE WITHOUT FRONTIERS: FURTHERING HUMAN RIGHTS 92 (1997) (explaining that when such erosion takes place, the entity responsible for the erosion will proceed further, as it gains as much strength as others lose).

2. The choice of the word 'rulers,' instead of 'leaders,' is deliberate, and will be so used in this paper, even though the words are literally synonymous. However, the former has a stronger emotive connotation than the latter; it is used here to indicate that the continent has had more 'dictators' than 'directors.'

3. See Paul Gifford, Book Review, 30 J. RELIGION IN AFR. 494, 495 (2000) (reviewing CIVIL SOCIETY AND DEMOCRACY IN AFRICA: CRITICAL PERSPECTIVES (Nelson Kasfir, ed., 1998) (considering how civil society is, today, the main analytical paradigm in African politics). It has become accepted contemporary wisdom to see this group as indispensable for democracy, and that the best way to achieve democratization is to strengthen such groups. See *id.*; Augustine Ikelegbe, *The Perverse Manifestation of Civil Society: Evidence from Nigeria*, 39 J. MOD. AFR. STUD. 1, 2 (2001) (discussing the wave of popular protests that has resulted in democratization since the early 1990s and the romanticism associated with these movements); see also CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA: CRITICAL PERSPECTIVES (John L. Comaroff & Jean Comaroff, eds., 1999) (revealing that it is important to stress that civil society could be multi-faceted in its many guises, inherently exclusive and egalitarian and susceptible to high-handed and parochial application in unfamiliar territory). See generally Jean-Francois Bayart, *Civil Society in Africa*, in POLITICAL DOMINATION IN AFRICA: REFLECTIONS ON THE LIMITS OF POWER 109, 109-25 (Patrick Chabal ed., 1986) (discussing notions of the state and civil society as they relate to political development in Africa); Naomi Chazen, *State and Society in Africa: Images and Challenges*, in THE PRECARIOUS BALANCE: STATE AND SOCIETY IN AFRICA 325, 325-41 (Naomi

ment of the Organization of African Unity ("OAU") recently adopted the Constitutive Act of the African Union<sup>4</sup> ("AU") to "replace the Charter of the Organization of African Unity."<sup>5</sup> The OAU Assembly adopted the Treaty, with glee,<sup>6</sup> during its thirty-sixth Ordinary Session held in Lome, Togo, from July 10 to July 12, 2000. The formal launching of the AU took place in Durban, South Africa, between July 9 and 10, 2002, which also coincided with the first ordinary session of the Assembly of the Union. In the Durban Declaration,<sup>7</sup> the Assembly, *inter alia*, paid tribute to the OAU "as a pioneer, a liberator, a unifier, an organizer, and the soul of [the African] continent",<sup>8</sup> and to "the founding leaders of the OAU" for "their tenacity, resilience and commitment to African Unity" and for standing "firm in the face of the decisive manipulations of the detractors of Africa and [fighting] for the integrity of Africa and the human dignity of all the peoples of the continent".<sup>9</sup>

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Chazen & Donald Rothchild eds., 1988) (discussing the State's problems, societal happenings, political changes, and the challenges faced by the States and society in Africa); Michael Bratton, *Beyond the State: Civil Society and Associational Life in Africa*, 41 WORLD POLITICS 407 (1989) (explicating a central hypothesis of the civil society paradigm is that it is the force for societal resistance to state excesses and the centerpiece organizationally, materially, and ideologically of the civil movements and protests for reform and change).

4. See Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 (July 11, 2000) (*entered into force* May 26, 2001) [hereinafter AU Treaty], available at <http://www.dfa.gov.za/for-relations/multilateral/treaties/auact.htm> (last visited June 25, 2002).

5. *Id.* art. 33(1) (stating that the OAU Charter would remain operational for a transitional period).

6. See, e.g., Dominic O. Obiaja, *The African Union: We Need Grassroot [sic] Ideology*, 4 THE FORUM 7, 7-8 (2001) (reporting that the Ouagadougou Conference Complex in Sirte, venue of the OAU meeting, was "festooned with a vast array of inspiring forward-looking slogans," among which was that "[t]here is no regional organization in the world that compares with the OAU").

7. *The Durban Declaration in Tribute to the Organization of African Unity and the Launching of the African Union*, AU Doc. ASS/AU/Decl. 2(1), Assembly of the AU, 1<sup>st</sup> Ord. Sess., Durban, South Africa, July 9-10, 2002 [hereinafter Durban Decl.], available at <http://www.africa-union.org/en/news.asp?newsid=175> (last visited Aug. 30, 2002).

8. *Id.* para. 14.

9. *Id.* para. 13. The Assembly also paid tribute "to all the Secretaries General and all the men and women who served the OAU with dedication and commitment." *Id.*

It was in 1999 that the OAU took the first decisive step towards the AU, with the adoption, by the Assembly, of the Sirte Declaration<sup>10</sup> providing, *inter alia*, for the establishment of an African Union in conformity with the ultimate objectives of the OAU Charter<sup>11</sup> and the Treaty establishing the African Economic Community.<sup>12</sup> That adoption occurred during the fourth Extraordinary Session of the OAU Assembly in Libya on September 6, 1999,<sup>13</sup> which coincided, not accidentally, with the celebration of Muammar Qadhafi's thirty years of autocracy.<sup>14</sup> Remarkably, by the time of the fifth Extraordinary Summit on March 2, 2001, the OAU "proudly" declared the establishment of the Union,<sup>15</sup> and that all fifty-three Member States of the OAU<sup>16</sup> had signed the AU Treaty.<sup>17</sup> In fact, as of July 2001,

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10. See *Sirte Declaration*, OAU Doc. EAHG/Decl. (IV) Rev.1 [hereinafter *Sirte Decl.*], available at <http://www.uneca.org/adfiii/riefforts/ref/other5.htm> (last visited June 19, 2002).

11. See Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39, 2 I.L.M. 766 [hereinafter OAU Charter].

12. See Treaty Establishing the African Economic Community, June 3, 1991, 30 I.L.M. 1241 (entered into force May 11, 1994) [hereinafter AEC Treaty], reprinted in DOCUMENTS OF THE ORGANIZATION OF AFRICAN UNITY 203 (Gino J. Naldi ed., 1992) (providing for the establishment of an African Economic Community, through a gradual process that would be achieved by coordination, harmonization, and progressive integration of the activities of existing and future regional economic communities).

13. See African Union Summit, *Transition from the OAU to the African Union* (noting that the purpose of the Extraordinary Summit was to amend the OAU Charter to increase the efficiency and effectiveness of the OAU), available at [http://www.au2002.gov.za/docs/background/oau\\_to\\_au.htm](http://www.au2002.gov.za/docs/background/oau_to_au.htm) (last visited Aug. 11, 2002). The Summit had as its theme: "Strengthening OAU Capacity to Enable It to Meet the Challenges of the New Millennium."

14. See Donna Abu-Nasr, *Gadhafi Marks 30 Years in Power with a Massive Display of Force*, SUN-SENTINEL, Sept. 8, 1999 (reporting that military contingents from African countries opened a parade in front of Qadhafi and two-dozen African rulers during the period, and quoting a commentator who stated that the Libyan hardware on display was at the disposal of all the countries in Africa, "to defend them against enemy attacks"); see also *Libya- Qadhafi Underlines His Conversion from Pan- Arabism to Pan-Africanism by Hosting an Extraordinary AU Summit*, 609 MIDDLE EAST INT'L 7 (Oct. 1999).

15. See *OAU Assembly Decision*, OAU Doc. EAHG/Dec.1 (V) (2001) [hereinafter *OAU Assembly Decision*].

barely one year after its adoption, forty Member States<sup>18</sup> ratified the Treaty<sup>19</sup> and also deposited the instruments of ratification with the General Secretariat,<sup>20</sup> while four other Member States—Angola, Cape Verde, Guinea Bissau, and Mauritania—“formally informed the General Secretariat that they had ratified the Constitutive Act and that the instruments of ratification would be deposited with the General Secretariat in due course.”<sup>21</sup> The pace of ratification by Member States is a record-setting event, considering the continent’s history of a general lack of enthusiasm in ratifying multilateral treaties,<sup>22</sup> with

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16. See BBC News, *OAU Considers Morocco Readmission* (July 8, 2001) (stating that the OUA is currently making efforts to restore the broken relationship with Morocco) at <http://news.bbc.co.uk/2/hi/world/africa/1428796.stm> (last visited July 25, 2002). Morocco is currently not a member of the OAU. *Id.* It withdrew from the OAU in 1984 after the Organization had recognized the Sahrawi Arab Democratic Republic. *Id.*

17. See *OAU Assembly Decision*, *supra* note 15, pmbl. para. 3 (stating number of signees).

18. Algeria, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Cote D’Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, The Gambia, Ghana, Lesotho, Liberia, Libya, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. See AU Treaty, *supra* note 4, art. 1 (listing the fifty-three nations that have ratified the AU Treaty).

19. See AU Treaty, *supra* note 4, art. 28 (providing that “[t]his Act shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States of the OAU”; therefore, thirty-six ratifications were needed for the Act to come into force). Nigeria was the 36<sup>th</sup> Member State to deposit its instrument of ratification, on April 26, 2001.

20. See *Report of the Secretary General on the Implementation of the Sirte Decision on the African Union*, para. 13, OAU Council of Ministers, EAHG/DEC.1 (V), CM/2210 (LXXIV), [hereinafter *Report of the Sec. Gen.*].

21. *Id.* para. 13.

22. See Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Jan. 30, 1991, 30 I.L.M. 773 reprinted in 1 AFR. Y.B. INT’L L. 268 (1993) (entering into force seven years after on April 22, 1998); AEC Treaty, *supra* note 12 (entering into force three years after it was adopted, on May 11, 1994); *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/TSG/Rev.1 (July 11, 1990) reprinted in 18 COMMONWEALTH L. BULL. 1112 (1992) (entering into force more than nine years later on November 28, 1999); *African Charter on Human and Peoples’ Rights*, OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (June

few exceptions.<sup>23</sup> The entry into force of the Act within so short a period of time is seen “as an expression of the political commitment of our leaders to regional integration, and beyond this, to a united Africa.”<sup>24</sup>

The OAU Charter was certainly overdue for a review,<sup>25</sup> as it had “the feeble compromises of the late 1950s and 1960s written all over it” and had consequently become “a dated instrument bearing very little likeness to today’s reality.”<sup>26</sup> However, its review “remained the captive of the competing national interests of any number of member states.”<sup>27</sup> Although the AU Treaty deals with various aspects of Africa’s political economy as well as social and cultural matters, this essay intends to investigate the Treaty’s implication on human rights in Africa. It seeks to discover if the adoption of the Treaty and the

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27, 1981) [hereinafter Banjul Charter] (entering into force over five years later on October 21, 1986); Convention Governing the Specific Aspects of Refugee Problems on Africa, Sept. 10 1969, 1001 U.N.T.S. 45, CAB/LEG/24.3 (entering into force about five years later on June 20, 1974).

23. See *African Convention on the Conservation of Nature and Natural Resources*, OAU Doc. CAB/LEG/24.1 (Sept. 15, 1968) (entering into force less than a year later on June 16, 1969); OAU Charter, *supra* note 11 (entered into force September 13, 1963, after being adopted less than four months earlier on May 25, 1963).

24. K. Y. Amoako, *Towards the African Union: A Development Perspective*, (July 5, 2001) (noting that more needs to be done to accelerate the integration process to improve production and productivity, encourage regional trade, and prepare national economies to become competitive in the global economy), available at [http://www.uneca.org/eca\\_resources/Speeches/amoako/2001/070501speech\\_amoako\\_lusaka.htm](http://www.uneca.org/eca_resources/Speeches/amoako/2001/070501speech_amoako_lusaka.htm) (last visited June 20, 2002).

25. See *Transition from the OAU to the African Union*, *supra* note 13 (“It had become evident and accepted as early as 1979, when the Committee on the Review of the Charter was established that a need existed to amend the OAU Charter in order to streamline the Organisation to gear it more accurately for the challenges of a changing world.”).

26. Editorial, *Sirte and the Rest of Us*, AFR. TOPICS (Nov. – Dec. 1999) at 3 (noting that the compromises were necessary to reach an agreement and produced an internal inertia that hampered reforms).

27. Jakkie Cilliers, *Commentary: Towards the African Union*, 10 AFR. SECURITY REV. (2001), available at <http://www.iss.co.za/Pubs/ASR/10No2/Cilliers.html> (noting Qadhafi’s belief in African integration, that “in the coming years, there will be changes towards further African integration”).

change of nomenclature will, in themselves, bring about greater respect for human rights in Africa or whether, on the contrary, the refurbished body of the AU will adopt the business-as-usual approach and sunshine policy of the erstwhile OAU towards Member States' treatment of their nationals. Can the leopard change its spots?

This essay is skeptical about the prospect of the AU Treaty, or the AU itself, bringing about a remarkably improved human rights culture in Africa and addressing "the nice calculation of what and how much and where—on which the welfare of society may depend."<sup>28</sup> The Treaty is merely rousing a desire without the possibility of real satisfaction, for the simple reason that Africa is a continent built out of barricades, one that slaps a bandage on its worst problems and gives up on the rest. The Treaty could actually provide a cover for Africa's celebrated dictators to continue to perpetrate human rights abuses. There are, after all, remedies that breed new diseases, regardless of whether they cure those to which they are applied. It is even doubtful whether, at the time of the adoption of the Treaty, African rulers sincerely imagined that there would be a paradigmatic shift towards a better human rights culture on the continent since they know, or are presumed to know, themselves!

As this essay will demonstrate in some detail shortly, the liberation of the continent from the yoke of colonialism did not automatically bring about peace and prosperity for Africa. A better life has only become a marginal reality in some parts of the continent and not others.<sup>29</sup> There has been little progress in the real enjoyment of fundamental rights and freedoms by Africans, despite the numerous treaties, resolutions, and declarations executed by the OAU in recent memory. Africa still faces serious challenges in its efforts toward the

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28. ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* 13 (Henry Hardy ed., 1990) (asking "Should a man resist a monstrous tyranny at all costs, at the expense of his parents or his children? Should children be tortured to extract information about dangerous traitors or criminals?").

29. See Jacob Zuma, *Significance of the Launch of the African Union*, Sowetan, July 3, 2002 (urging the AU to consolidate the gains of the OAU, continue to ensure unity while also accelerating the drive for sustainable economic development, peace and stability, and an improvement in the quality of life of all Africans), available at [http://www.au2002.gov.za/docs/key\\_sa/ausignif.htm](http://www.au2002.gov.za/docs/key_sa/ausignif.htm) (last visited Aug. 30, 2002)



realization of human rights for all due to impunity, lack of respect of the electoral process, poverty and underdevelopment, globalization, neglect of economic, social and cultural rights,<sup>30</sup> racism, xenophobia, the HIV/AIDS pandemic,<sup>31</sup> and neglect of the full realization of the rights of women.<sup>32</sup> The following self-indictment by the OAU is sobering:

In Africa, 340 million people, or half the population, live on less than [one U.S. dollar] per day. The mortality rate of children under 5 years of age is 140 per 1000, and life expectancy at birth is only 54 years. Only 58 per cent of the population have access to safe water. The rate of illiteracy

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30. See, e.g., *Decision on the Holding of a Ministerial Meeting on Employment and Poverty Control in Africa*, para. 3, OAU, AHG/Dec. 166 (XXXVII) (recognizing "the challenges facing African countries due to the current economic situation, globalization and technological changes as well as the increased risks of unemployment, underemployment and the resulting social exclusion").

31. See, e.g., *Resolution on HIV/AIDS Pandemic—Threat Against Human Rights and Humanity*, paras. 1-2, OAG African Commission on Human and Peoples' Rights, AHG/229 (XXXVII) (May 2001) (declaring that the HIV/AIDS pandemic is a human rights issue which is a threat against humanity and calling on African Governments, State Parties to the Banjul Charter, to allocate national resources that reflect a determination to fight the spread of the disease, ensure human rights protection for those living with the disease against discrimination, provide support to families for the care of those dying of AIDS, devise public health care programs including education, and carry out public awareness especially involving free and voluntary HIV testing, as well as appropriate medical interventions).

32. See Banjul Charter, *supra* note 22 (failing to sufficiently address the peculiar problems of women, such as guaranteeing the right of consent to marriage and equality of spouses during and after marriage and not explicitly addressing concerns that many customary practices, such as Female Genital Mutilation (FGM), are life threatening to women); Chaloka Beyani, *Toward a More Effective Guarantee of Women's Rights in the African Human Rights System*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 288 (Rebecca Cook ed., 1994) (noting that male attitudes towards the treatment of women dominate the conception of human rights and apply such rights to women in an equitable manner, resulting in women concluding that abstract human rights ideals were never intended to apply to women); Claude E. Welch, Jr., *Human Rights and African Women: A Comparison of Protection under Two Major Treaties*, 15 HUM. RTS. Q. 549 (1993) (comparing the Banjul Charter to the Convention on the Elimination of All Form of Discrimination Against Women). Happily, a Protocol to the Banjul Charter on the Rights of Women is currently being elaborated and is nearing adoption by the OAU. See *id.*; see also *Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, CAB/LEG/66.6 (2000).

for people over 15 is 41 per cent. There are only 18 mainline telephones per 1000 people in Africa, compared with 146 for the world as a whole and 567 for high-income countries.<sup>33</sup>

In the time between the writing and publishing of this paper, thousands of Africans, mostly women and children, will have died from avoidable conflicts, with several thousands internally displaced or becoming refugees<sup>34</sup> in hostile African countries. By the same reckoning, thousands of Africans will die from preventable diseases, such as malaria, tuberculosis, and even HIV/AIDS. Conflicts and poverty only exacerbate these diseases.<sup>35</sup>

This essay also considers the possible effects of the AU Treaty on existing and future African regional human rights institutions, such as the African Commission on Human and Peoples' Rights, ("African Commission" or "the Commission") established pursuant to the Banjul Charter<sup>36</sup> and the proposed African Human Rights Court—particularly in the light of the proposed Court of Justice for the conti-

33. *New Partnership for Africa's Development (NEPAD)*, para. 4, OAU, NEPAD Doc. (2001) [hereinafter NEPAD].

34. *See Decision on Refugees*, para. 1, OAU Council of Ministers, OAU Doc. CM/Dec. 574 (LXXIII) (2000) (expressing "its grave concern over the persistent and deteriorating refugee situation in Africa, a catastrophic situation for which Africans themselves should assume primary responsibility").

35. *See African Regional Dialogue I: General Report* 8, United Nations High Commissioner for Human Rights (UNHCHR) DOC. (2001) [hereinafter *UNHCHR, General Report*] (observing that "the HIV/AIDS pandemic, malaria and other infectious diseases are exacerbated by conflicts and poverty"); Bill Clinton, *The Struggle for the Soul of the 21st Century*, Richard Dimbleby Lecture 5 (2001), (arguing that AIDS "is largely a poverty disease"), at [http://www.bbc.co.uk/arts/news\\_comment/dimbleby/print\\_clinton.shtml](http://www.bbc.co.uk/arts/news_comment/dimbleby/print_clinton.shtml) (last visited July 25, 2002).

36. The Commission was established in July 1987 at the twenty-third OAU Assembly of Heads of State and Government, shortly after the Banjul Charter came into force. *See Banjul Charter, supra* note 22, arts. 30, 45 (stating that in addition to "any other tasks which may be entrusted to it by the Assembly of Heads of State and Government" of the OAU, the Commission performs three primary functions: to promote and protect human and peoples' rights and to interpret the provisions of the Banjul Charter). *See generally* RACHEL MURRAY, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S [sic] RIGHTS & INTERNATIONAL LAW* (2000); EVELYN A. ANKUMAH, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS* 18 (1996) (discussing the independence and impartiality of the convention).

ticularly in the light of the proposed Court of Justice for the continent. Part II examines the polemics of human rights in the AU Treaty, in light of the continental body's similar previous pronouncements. The essay will, thereafter, investigate the Treaty's wider implications on human rights, in Part III. It will reflect, *inter alia*, on the vexed doctrine of *reserve domain* that has found its way back into the Treaty; the proposed Court of Justice and what this portends for existing human rights institutions, particularly the African Human Rights Court that has already been conceived but is not yet born. Part III will also examine the implication of the huge paraphernalia of institutions created in the AU Treaty on the funding of existing and future human rights institutions and human rights activities on the continent (the AU Treaty provides for nine organs,<sup>37</sup> larger in comparison, than its equivalent provision in the OAU Charter).<sup>38</sup> The paper concludes in Part IV, asking the question of whether the leopard can truly change its spots.

## I. THE AU TREATY AND THE POLEMICS OF HUMAN RIGHTS

In theory, the AU Treaty "integrates political, economic, and human rights priorities."<sup>39</sup> Both its preamble<sup>40</sup> and its substantive provi-

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37. See *AU Treaty*, *supra* note 4, art. 5 (creating the following organs of the Union: the Assembly of the Union; the Executive Council; the Pan-African Parliament; the Court of Justice; the Commission; the Permanent Representatives Committee; the Specialized Technical Committees; the Economic, Social and Cultural Council; and the Financial Institutions).

38. See *OAU Charter*, *supra* note 11, art. 7 (providing for the Assembly of Heads of State and Government, the Counsel of Ministers, the General Secretariat, and the Mechanism for Conflict Prevention, Management and Resolution (MCMPR), established in 1993 to take over from the *ad hoc* Commission of Mediation, Conciliation, and Arbitration).

39. Chidi Anselm Odinkalu, *African States Make Human Rights Priority in New Treaty for African Union*, 13 INTERIGHTS BULLETIN 90 (2001).

40. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331 [hereinafter Vienna Conv.] (providing that the context for the purpose of the interpretation of a treaty shall comprise, *inter alia*, its preamble). Although the preamble is not a part of the substantive provision of a treaty, it could be taken into consideration when interpreting its provisions. Consideration of the preamble is normally necessary in cases of doubt.

sions show this integration. Member States, for example, eulogize their "common vision of a united and strong Africa and . . . the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among our peoples."<sup>41</sup> They pledge and express their determination "to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law."<sup>42</sup> There is a further determination "to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them [to] discharge their respective mandates effectively,"<sup>43</sup> an admission that all is not well with existing institutions.

The substantive provisions of the Treaty are equally rich in the polemics of human rights. Its fourteen objectives,<sup>44</sup> for example, include the achievement of greater solidarity among African countries and peoples.<sup>45</sup> The Treaty seeks to "encourage international cooperation, taking due account of the Charter of the United Nations ("U.N.") and the Universal Declaration of Human Rights;"<sup>46</sup> promote

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41. *AU Treaty*, *supra* note 4, pmbl. para. 8 (stating that the treaty is guided by this vision).

42. *Id.* para. 9.

43. *Id.* para. 10.

44. *See id.* art. 3 (listing the Treaty objectives).

45. *See id.* art. 3(a) (stating that the first objective of the Treaty is to "[a]chieve greater unity and solidarity between the African countries and the peoples of Africa").

46. *Id.* art. 3(e); *see also* U.N. CHARTER art. 1, para. 3 (stating that one of the principal purposes of the organization is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"). The Charter pledges "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set out in Article 55." *See id.* art. 56. It also places the organization under an obligation to encourage "respect for . . . human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *See id.* art. 56; *see also Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, pmbl. para. 8 (1948) (stating that it was adopted "as a common standard of achievement for all peoples

peace, security, and stability in Africa; and “promote democratic principles and institutions, popular participation and good governance.”<sup>47</sup> Significantly, the rhetoric of democracy, good governance, and sustainable development also emerged in the 1999 Algiers Declaration,<sup>48</sup> in which the OAU reiterated its

commitment to the protection and promotion of human rights and fundamental freedoms . . . emphasize the indivisibility, universality and interdependence of all human rights, be they political and civil or economic, social and cultural, or even individual or collective . . . are convinced that the increase in, and expansion of the spaces for freedom and the establishment of democratic institutions that are representative of our peoples and receiving their active participation, would further contribute to the consolidation of modern African States underpinned by the rule of law, respect for the fundamental rights and freedoms of the citizens and the democratic management of public affairs.<sup>49</sup>

The AU Treaty does not incorporate the regional human rights instruments, understandably, because it is not a program of action but a legal constitutional framework.<sup>50</sup> However, the Treaty seeks to “promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.”<sup>51</sup> Read alongside the relevant provisions of the NEPAD—which puts human rights at the center of democratic governance, rule of law, the creation of enabling environments for

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and all nations”). See generally ASBJORN EIDE, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* (1992).

47. *AU Treaty*, *supra* note 4, art. 3(g).

48. See *Algiers Declaration*, OAU Doc. AHG/Dec.1 (XXXV) (July 1999) [hereinafter *Algiers Decl.*].

49. *Id.* paras. 17-18; cf. *Lome Declaration*, pmbl. para. 13, OAU Doc. AHG/Dec.2 (XXXVI) (July 12, 2000) (stating that the OAU commits itself “to continue to promote respect and protection of human rights and fundamental freedoms, democracy, rule of law and good governance in our countries”); cf. *id.* pmbl. para. 22 (stating that the OAU is mindful of the fact “that development, democracy, respect for fundamental freedoms and human rights, good governance, tolerance, culture of peace are essential prerequisites for the establishment and maintenance of peace, security and stability”).

50. See *UNHCHR, General Report*, *supra* note 35, at 16.

51. *AU Treaty*, *supra* note 4, art. 3(h).

sustainable economic development, and the attainment and maintenance of peace and security<sup>52</sup>—the AU Treaty reinforces the economic, social, and cultural rights as well as the right to development in the Banjul Charter.<sup>53</sup> It is perhaps significant and is certainly touching that all Member States of the OAU<sup>54</sup> have ratified the Banjul Charter,<sup>55</sup> though a few States—Zambia, Egypt, and South Af-

52. See NEPAD, *supra* note 33, para. 202. Paragraph 202 states:

The objective of the *New Partnership for Africa's Development* is to consolidate democracy and sound economic management of the continent. Through the Programme, African leaders are making a commitment to the African people and the world to work together in rebuilding the continent. It is a pledge to promote peace and stability, democracy, sound economic management and people-oriented development, and to hold each other accountable in terms of the agreements outlined in the Programme.

*Id.*; see also *id.* paras. 7, 43, 49, 71, 79, 80, 183.

53. See *Banjul Charter*, *supra* note 22, pmbl. para. 8. Paragraph 8 states that:

[I]t is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

*Id.* NEPAD has also developed its own code of governance and system for "peer review". Known as the African Peer Review Mechanism (APRM), the document will be used by Member States of the AU "for the purpose of self-monitoring," and is aimed "to foster the adoption of policies, standards and practices that will lead to political stability, high economic growth, sustainable development and accelerated regional integration in the continent." See *Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD)*, OAU Doc. ASS/AU/Decl.1(1), para. 6, OAU Assembly of Heads of State and Government, 38<sup>th</sup> Ord. Sess., Durban, South Africa, July 8, 2002, available at <http://www.africa-union.org/en/commpub.asp?ID=106> (last visited Aug. 10 2002).

54. Compare *Banjul Charter*, *supra* note 22 (having the largest number of State Parties of the three regional human rights systems) with European Convention on Human Rights, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Dates of Ratification (showing that forty-one states are parties to the agreement), at <http://www.echr.coe.int/Eng/EDocs/DatesOfRatifications.html> Europe (last visited June 20, 2002); and Inter-American Commission on Human Rights, OAS, Signatures and Current Status of Ratifications (noting that there are twenty-five parties to the American Convention on Human Rights), available at <http://www.cidh.oas.org/Básicos/basic4.htm> (last visited June 20, 2002).

55. See *Banjul Charter*, *supra* note 22 (making no statement about what is to be done to those countries that have ratified the treaty but showed no commitment

rica—did so with reservations or *note verbale*.<sup>56</sup> Significantly too, most African States have ratified several other multilateral global human rights instruments, such as the International Covenant on Civil and Political Rights<sup>57</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>58</sup> Large numbers of African States have also ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>59</sup> the Convention

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to put in place appropriate domestic mechanisms); *African [Banjul] Charter on Human and Peoples' Rights: Ratification* (noting the number of parties who have ratified the Banjul Charter and showing that Eritrea was the last to ratify on January 14, 1999), available at [http://afronet.org.za/links/banjul\\_ratifl.htm](http://afronet.org.za/links/banjul_ratifl.htm) (last visited June 20, 2002).

56. See *Banjul Charter*, *supra* note 22. See HUMAN RIGHTS LAW IN AFRICA 1996 (Christof Heyns ed., 1996) (reporting that Zambia, which ratified the Charter on January 10, 1984, made reservations to articles 13(3) and 37; it amended art. 13(3) to read, “every individual shall have the right to access to any place, services or public property intended for use by the general public,” the purpose being to exclude any claimed right to use *all* public property other than what is fairly established). Similarly, Egypt, which ratified the Charter on March 20, 1984, made reservations to articles 8(3), 9, and 18(3), to the effect, *inter alia* that the rights enshrined in these articles should “be implemented in accordance with Islamic law.” *Id.*

57. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> (last visited June 30, 2002); see *Status of Ratifications of the Principal International Human Rights Treaties*, at <http://www.unhchr.ch/pdf/report.pdf> (last visited June 20, 2002) [hereinafter *Status of Ratifications*] (providing status of ratification by treaty). Forty-five African States have ratified the ICCPR as of June 13, 2002, while three countries – Guinea-Bissau, Liberia, and Sao Tome and Principe – have signed but have yet to ratify it. *Id.*

58. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], available at [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) (last visited June 30, 2002); see *Status of Ratifications*, *supra* note 57 (indicating that forty-five African States had ratified the ICESCR as of June 13, 2002, while three countries – Liberia, Sao Tome and Principe, and South Africa – have signed but have not yet ratified it).

59. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention], available at [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm) (last visited June 30, 2002). See *Status of Ratifications*, *supra* note 57 (indicating that thirty-five African States had ratified the Torture Convention as of June 13, 2002, while six countries – Comoros, The Gambia, Guinea Bissau, Madagascar, Sao Tome and Principe, and Sudan – have signed but are yet to ratify it).

on the Elimination of All Forms of Discrimination Against Women;<sup>60</sup> the International Convention on the Elimination of All Forms of Racial Discrimination;<sup>61</sup> and the Convention on the Rights of the Child.<sup>62</sup> The universal acceptance of the Banjul Charter and the wide ratification of these other human rights instruments arguably could strengthen the moral force of these instruments, in particular the Banjul Charter.<sup>63</sup> However, repressive regimes could also use the fact of ratification to white-wash human rights abuses; in which case mere ratification becomes a smoke-screen to hide the reality of repression.<sup>64</sup> After all, Hell is paved with good intentions. Besides, those who most loudly clamor for liberty do not most likely grant it.

Other objectives of the AU Treaty that have human rights colorations are the promotion of "sustainable development at the economic, social and cultural levels as well as the integration of African

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60. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 27 U.S.T. 1909, T.I.A.S. No. 8289, 1249 U.N.T.S. 14, *available at* <http://www.unhchr.ch/html/menu3/b/1cedaw.htm> (last visited July 25, 2002); *see Status of Ratifications*, *supra* note 57 (indicating that forty-eight African States had ratified the CEDAW as of February 6, 2002, while Sao Tome and Principe remains the only country which has signed but not ratified it).

61. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 85, *available at* [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm) (last visited June 30, 2002); *see Status of Ratifications*, *supra* note 57 (indicating that forty-seven African States had ratified the Race Convention as of February 6, 2002, while three countries – Comoros, Guinea-Bissau, and Sao Tome and Principe – have signed but have yet to ratify it).

62. Convention on the Rights of the Child, Nov. 20, 1989, 144 U.N.T.S. 123, 28 I.L.M. 1448, *available at* <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (last visited June 30, 2002); *see Status of Ratifications*, *supra* note 57 (indicating that all the African Member States of the U.N., except Somalia, have ratified the CRC as of June 13, 2002).

63. *See* Michelo Hansungule, *The African Charter on Human and Peoples' Rights: A Critical Review*, 8 AFR. Y.B. INT'L L. 265, 266 (2000) (observing that the Charter's universal endorsement was made possible by the "open door policy" of the OAU, which enabled any African State to accede to the Charter without questions about its state of democracy or human rights).

64. *See* Frans Viljoen, *Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997*, in HUMAN RIGHTS LAW IN AFRICA 47, 49 (Christof Heyns ed., 1999).



economies,"<sup>65</sup> and the promotion of "co-operation in all fields of human activity to raise the *living standards* of African peoples."<sup>66</sup> Living standards are anything but standard, as indicated earlier. Meanwhile, the AU hopes to "work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent."<sup>67</sup> These are refreshingly innovative provisions, compared to the OAU Charter. Although the Charter included economic cooperation and the achievement of a "better life for the peoples of Africa" amongst its purposes, the OAU mainly pursued the goals of promoting African solidarity and the eradication of colonialism in Africa,<sup>68</sup> to the neglect of these equally important needs.

The Executive Council's functions under the AU Treaty will include the coordination of operations and policies in the areas, *inter alia*, of environmental protection and humanitarian action and disaster relief and response.<sup>69</sup> Similarly, one of the functions of the AU Assembly will be to "give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace."<sup>70</sup> In theory, these are well focused for conflicts within and between African countries that

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65. AU Treaty, *supra* note 4, art. 3(j).

66. *Id.* art. 3(k) (emphasis added).

67. *Id.* art. 3(n); *cf. Decision on Malaria Prevention and Control Within the Context of Africa's Economic Recovery and Development*, OAU Doc. AHG/Dec.124 (XXXIV). Calling on Member States to mobilize:

all partners, public and private, local and foreign, to support the execution of malaria prevention and control activities as part of the economic recovery and development [and to] take vigorous action against malnutrition and the major endemic diseases, particularly, HIV/AIDS, and Malaria within the framework of a cooperation with specialized agencies and bilateral cooperation.

*Id.*

68. See OAU Charter, *supra* note 11, art. 2(1)(b) (stating that one of the Organization's purposes is "to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa"); see also Alfred Chanda, *The Organisation of African Unity: An Appraisal*, 21-24 ZAMBIAN L.J. 1 (providing an evaluation of the mandate of the OAU).

69. See AU Treaty, *supra* note 4, art. 13(1) (listing the areas of common interest to the Member States).

70. *Id.* art. 9(g) (listing powers and functions of the assembly).

have brought about death and human suffering, engendered hate and divided nations and families. Conflicts have forced millions of our people into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope. Conflicts have gobbled-up scarce resources, and undermined the ability of our countries to address the many compelling needs of our people.<sup>71</sup>

In what looks like a death knell on the doctrine of *reserve domain* or domestic jurisdiction, which will be discussed in Part III below, the AU Treaty provides for “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”<sup>72</sup> African leaders are possibly being hunted by their past failures to intervene in such “grave circumstances”, particularly the Rwandan genocide. Similarly, the Treaty gives Member States the right “to request intervention from the Union in order to restore peace and security,”<sup>73</sup> even though it does not provide for the tools or mechanisms that will implement, monitor or advance these ambitious but lofty ideals. The OAU does not have a standing force, like the North Atlantic Treaty Organization (“NATO”). The Mechanism for Conflict Prevention, Management and Resolution (“MCPMR”), established pursuant to the Cairo Declaration,<sup>74</sup> could, however, embark upon such intervention in order to facilitate resolutions of such conflicts. Civil or military observer groups may also be deployed, though such groups must be limited in scope and dura-

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71. *Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution*, para. 9, OAU Doc. AHG/Decl.3 (XXIX) (1993) [hereinafter *Cairo Decl.*], available at [http://www.up.ac.za/chr/ahrd/other\\_oau3.html](http://www.up.ac.za/chr/ahrd/other_oau3.html), reprinted in U.N. Doc. A/48/322; cf. *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, Report of the Secretary-General, Security Council, 52nd Sess., Agenda Item 10, at 4*, U.N. Doc. S/1998/318 (1998) [hereinafter *Report of Secretary General*] (stating that more than thirty wars since 1970 have been fought in Africa, which “have seriously undermined Africa’s efforts to ensure long-term stability, prosperity and peace for its peoples”).

72. AU Treaty, *supra* note 4, art. 4(h).

73. *Id.* art. 4(j).

74. See *Cairo Decl.*, *supra* note 71.

tion.<sup>75</sup> In any case of degeneration of conflicts, the assistance of the U.N. may be sought.<sup>76</sup>

The AU Treaty promises to make a key contribution to democracy, democratic institutions, and the rule of law, at least in theory. Consequently, the Treaty includes a democracy clause, according to which Governments that come to power through unconstitutional means would be given 'yellow cards'—they would not be allowed to take part in the Union's activities.<sup>77</sup> The OAU kick-started this theme during its Harare Summit in 1997<sup>78</sup> and reinforced it in 2002 in the "Declaration on the Principles Governing Democratic Elections in Africa".<sup>79</sup> The AU Treaty, however, does not define what constitutes

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75. See *id.* para. 15 (stating that "where conflicts have occurred . . . civil and military missions of observation and monitoring of limited scope and duration may be mounted and deployed").

76. See *id.* para. 16.

77. See AU Treaty, *supra* note 4, art. 30 ("Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union."); see also *Decision on Unconstitutional Changes of Government in Africa*, para. 4(2), OAU Doc. AHG/Dec. 150 (XXXVI) (reiterating "its condemnation of all types of unconstitutional change of Government as anachronistic and in contradiction of its commitment to the promotion of democratic principles and constitutional rule"). There has been a call for the expansion of this 'yellow card principle' to include seriously undemocratic and unconstitutional behavior, as well as gross violations of human rights by governments. See Zuma, *supra* note 29; cf. Charter of the Organization of American States, art. 9, (stating that democratic government is a prerequisite for the membership of the body and participation in cooperation and integration activities), available at <http://www.oas.org/juridico/English/charter.html> (last visited July 9, 2002). See generally Charter of the Organization of American States (as amended), Dec. 13, 1951, 119 U.N.T.S. 3.

78. See *Algiers Decisions on Unconstitutional Changes in Government*, OAU Doc. Dec. AHG/Dec.141 (XXXV) (1999) (revitalizing and expanding the issue of military adventurism, in which a common position was first taken at its Harare Summit in 1997 following the *coup d'etat* in Sierra Leone, and unanimously rejecting any unconstitutional change as an unacceptable and anachronistic act, which is in contradiction of its commitment to promote democratic principles and conditions).

79. See *OAU/AU Declaration on the Principles Governing Democratic Elections in Africa*, OAU Doc. AHG/Decl. 1(XXXVIII), para. 1, 4, OAU Assembly of Heads of State and Government, 38<sup>th</sup> Ord. Sess., Durban, South Africa, July 8, 2002, (reaffirming the principles of democratic governance in earlier instruments and asserting, *inter alia*, that "[d]emocratic elections are the basis of the authority

an “unconstitutional” change of government. Its “Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government” subsequently defined this phrase.<sup>80</sup> After articulating certain common values and principles for democratic governance in Africa,<sup>81</sup> the OAU gave the following definition of situations of unconstitutional change of government:

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of any representative government,”), available at <http://www.africa-union.org/en/commpub.asp?ID=106> (last visited Aug. 30, 2002). Also reaffirming:

[d]emocratic elections should be conducted: (a) freely and fairly; (b) under democratic constitutions and in compliance with supportive legal instruments; (c) under a system of separation of powers that ensures in particular, the independence of the judiciary; (d) at regular intervals, as provided for in National Constitutions; (e) by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics.

*Id.* para. 4.

80. See *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, OAU Doc. AHG/Decl. 5 (XXXVI) (2000) [hereinafter *Declaration on Unconstitutional Changes*] (expressing concern over the problem of *coup d'état* in Africa), available at <http://eas.un.org/ffd/policydb/PolicyTexts/aec-1.htm> (last visited June 20, 2002).

81. These are: (a) adoption of a democratic Constitution: its preparation, content and method of revision should be in conformity with generally acceptable principles of democracy; (b) respect for the Constitution and adherence to the provisions of the law and other legislative enactments adopted by Parliament; (c) separation of powers and independence of the judiciary; (d) promotion of political pluralism or any other form of participatory democracy and the role of the African civil society, including enhancing and ensuring gender balance in the political process; (e) the principle of democratic change and recognition of a role for the opposition; (f) organization of free and regular elections, in conformity with existing texts; (g) guarantee of freedom of expression and freedom of the press, including guaranteeing access to the media for all political stake-holders; (h) constitutional recognition of fundamental rights and freedoms in conformity with the [UDHR and the Banjul Charter]; (i) guarantee and promotion of human rights. See *id.* para. 10; cf. *Promotion of the Right to Democracy*, Commission on Human Rights Resolution 1999/57, U.N. Doc. E/CN.4/1999/Add.1 (1999) (showing the various rights of democratic governance). Such rights include: (a) the rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) the rights to freedom to seek, receive and impart information and ideas through any media; (c) the rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; (d) the right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) the right of political participation, including equal opportunity for all citizens to

military *coup d'état* against a democratically elected Government;

intervention by mercenaries to replace a democratically elected Government;

replacement of democratically elected Governments by armed dissident groups and rebel movements;

the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.<sup>82</sup>

The Declaration provides that whenever an unconstitutional change of government occurs in any Member State, then the incumbent Chairman of the OAU "Club" "should immediately and publicly condemn such a change and urge for the speedy return to constitutional order"<sup>83</sup> within six months<sup>84</sup>—a sufficient time for any smart regime to wreak havoc on the national treasury before disengaging, like General Abdulsalami Abubakar's regime in Nigeria.<sup>85</sup> Greed,

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become candidates; (f) transparent and accountable government institutions; (g) the right of citizens to choose their governmental system through constitutional or other democratic means; (h) the right to equal access to public service in one's own country. *Id.*

82. *Declaration on Unconstitutional Changes*, *supra* note 80, para. 12.

83. *Id.* para. 13.

84. *See id.* para. 15(a) (stating that during the six-month period, "the government concerned should be suspended from participating in the Policy Organs of the OAU," including "meetings of the Central Organ and Sessions of the Council of Ministers and the Assembly of Heads of State and Government"). Curiously, the Organization is careful to stress that such exclusion "should not affect the country's membership in the OAU and therefore will not preclude it from honouring its basic obligations towards the Organization including financial contributions to the OAU regular budget." *Id.* The question now is, could the receipt of "financial contributions" by the OAU from the illegitimate regime not amount to an act of legitimacy?

85. *See* Paul D. Ocheje, *Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000*, 45 J.A.L. 173, 174 (2001) (estimating that the regime of General Abdulsalami Abubakar—the caretaker Head of State after General Abacha's sudden death in June 1998—drew more than \$2.7 billion dollars of Nigeria's external reserves in less than a year,

more than anything else, is usually the *raison d'être* for *coup d'état* in Africa, as indeed elsewhere. Similarly, the spoils of office and the allurements of high life largely account for the sit-tight syndromes in the continent and the resultant civil conflicts.

Other than "discreet moral pressure on the perpetrators of the unconstitutional change in order to get them to cooperate with the OAU and facilitate the restoration of constitutional order in the Member State concerned,"<sup>86</sup> there is no sanctions committee to monitor compliance with decisions taken on situations of unconstitutional changes on a regular basis. However, the OAU reiterated the Council of Ministers decision, taken at its seventieth Ordinary Session, held in Algiers, in July 1997, mandating the Central Organ of the MCPMR to reactivate, "as a matter of urgency," the Sub-committee on Unconstitutional Changes of Government, "in order to finalize its work in the light of the Harare discussions, particularly as regards the measures to apply in *coup d'état* situations occurring in Member States."<sup>87</sup>

In sum, the AU Treaty is committed to the promotion and protection of human and peoples' rights, the consolidation of democratic institutions and culture, the promotion of good governance and the rule of law. There is no doubt that "the principles of good governance, transparency and human rights are essential elements for building representative and stable governments and can contribute to conflict prevention."<sup>88</sup> Development is also "impossible in the absence of true democracy, respect for human rights, peace and good

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"under questionable circumstances"); *The \$2.7 Billion Hole in the Bank*, 40 AFR. CONFIDENTIAL no. 8, at 1 (Apr. 10, 1999) (stating that \$2.7 billion were drawn from Nigeria's foreign reserves in a four month period during the regime of General Abdulsalami Abubakar).

86. *Declaration on Unconstitutional Changes*, *supra* note 80, para. 15(b).

87. *Id.* para. 5. The OAU has "agreed on establishment of a Central Organ sanctions sub-committee of 5 members chosen on the basis of regional representation," which "will regularly monitor compliance with Decisions taken on situations of unconstitutional changes and recommend appropriate review measures to the Policy Organs of the OAU." *See id.* para. 17.

88. *Id.* para. 7.

governance.”<sup>89</sup> There are, however, some question marks on this sudden outburst and revival. It is possible that this rhetoric on democracy, good governance and human rights could be a mere cosmetic exercise by the OAU's Member States to impress Western donor countries and international financial institutions—including the Bretton Woods institutions and the World Trade Organization (“WTO”)—in order to attract more development assistance and receive some debt palliatives. This may or may not be the actual explanation; but it certainly indicates a possibility.

This interpretation is reinforced by the NEPAD project, in which African governments have pledged democracy and good governance in exchange for international cooperation.<sup>90</sup> Earlier in 1996, the OAU Assembly pleaded their cause thus: “We hope our efforts in embarking on macro-economic and political reforms geared towards achieving greater equilibriums and creating an enabling economic environment for both local and foreign direct investments would be supported by a substantial reduction in debt and a major inflow of debt-free financial assistance.”<sup>91</sup> The combination is not accidental. A keen observer of the international scenery would notice that there is presently an intense competition for tourism, economic assistance, forgiveness of debt, and investments that produce needed products and provide employment.

In the last couple of years, explicit linkage between reported human rights violations and development aid has increased.<sup>92</sup> In 1992,

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89. See NEPAD, *supra* note 33, para. 79 (noting that Africa “undertakes to respect the global standards for democracy, the core concepts of which include political pluralism,” and fair elections that allow people to freely choose their leaders).

90. See *id.* para. 203 (“We affirm that the New Partnership for Africa's Development offers an historic opportunity for the developed countries of the world to enter into a genuine partnership with Africa, based on mutual interest, shared commitments and binding agreements”).

91. *OAU Declarations and Decisions on Good Governance: Yaounde Declaration (Africa: Preparing for the 21st century)*, para. 11, OAU Doc. AHG/Decl.3 (XXXII) (July 10, 1996), available at [www.nepad.org/Documents/AA0261501.pdf](http://www.nepad.org/Documents/AA0261501.pdf) (last visited June 20, 2002).

92. See Katarina Tomasevski, *Human Rights Violations and Development Aid: From Politics Towards Policy*, Hum. Rts. Unit Occasional Papers 3 (1990);

for example, the Council of Europe issued statements on Zaire, Togo, Burundi, Kenya, Algeria, and Equatorial Guinea on human rights situations with a view "to heighten public awareness of human rights issues and bring pressure to bear on the governments in question to change their attitudes."<sup>93</sup> "The threat of being branded a violator of human rights can damage a nation's well-being and personal prestige and monetary rewards of a corrupt or oppressive regime."<sup>94</sup>

All this gives cause for some unease; for it means, in the final analysis, that African leaders are not genuinely concerned with the cause and course of human rights in Africa. They do so only for convenience, as a means to an end, not as an end in itself. This flies in the face of sound philosophy. According to Immanuel Kant, for example, every human being should be treated as an end, not as a means.<sup>95</sup> Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instru-

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Agreement Amending the Fourth ACP-EC Convention of Lome Signed in Mauritius on 4 November 1995, art. 5 ("Cooperation shall be directed towards development centered on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights."), available at [http://www.acpsec.org/gb/lome/lome4\\_e.htm](http://www.acpsec.org/gb/lome/lome4_e.htm) (last visited July 9, 2002); see also *Resolution on Human Rights, Democracy and Development*, BULL. EC 11/1991 para. 10 ("The Community and its Member States will explicitly introduce the consideration of human rights as an element of their relations with developing countries; human rights clauses will be inserted in future cooperation agreements."), available at [http://www.idea.int/lome/background\\_documents/resolution.html](http://www.idea.int/lome/background_documents/resolution.html) (last visited July 9, 2002); Lars Adam Rehof, *Development Assistance from the Point of View of Human Rights*, in *HUMAN RIGHTS IN DOMESTIC LAW AND DEVELOPMENT ASSISTANCE POLICIES OF THE NORDIC COUNTRIES 19-20* (Lars Adam Rehof & Claus Gulmann eds., 1987) (arguing that development aid must not support systems that deprive citizens of equal opportunities to enjoy economic and other resources including education and political participation without discrimination).

93. See *Commission of the European Communities, Report on the Implementation of the Resolution of the Council and of the Member States Meeting in the Council on Human Rights, Democracy and Development*, SEC (92) 1915, final communiqué, Brussels, 21 October 1992, adopted on 28 November 1991.

94. See Jimmy Carter, *The Rule of Law and the State of Human Rights*, 4 HARV. HUM. RTS. J. 1, 8 (1991) (noting that international condemnation assists in reducing human rights abuses, as there is fierce competition for tourism, economic aid, debt forgiveness, and investments in developing countries).

95. See IMMANUEL KANT, *POLITICAL WRITINGS* 23 (Hans Reiss ed., 1991).



ments or objects of the will of others. This probably explains why Africa has yet to take human rights seriously, despite numerous treaties, resolutions, and declarations to the contrary. The next part examines these issues in some detail.

## II. THE AU TREATY AND THE PRACTICE OF HUMAN RIGHTS

Going by the human rights polemics in the AU Treaty, there is a strong temptation to conclude that Africans are in for a jolly and good time. Compared to the OAU Charter, the Treaty's forms appear much denser and defined, more tangibly visible. But there is still a need to provide further particulars, in terms of facts and figures, so as not to be carried away by the external appearances of documents that seem commendable, orderly, and logical. After some preliminary remarks on the *reserve domain* doctrine, this part will focus on the state of human rights in Africa before and after the coming into force of the Banjul Charter. The purpose is to determine if the record on ground gives Africans any cause to hope that the human rights polemics in the AU Treaty will be translated into practice or whether they will merely live on in desire. The last section will deal with the impact that the AU Treaty will have on supra-national human rights institutions in Africa, including the important question of funding of human rights in the continent.

### A. THE *RESERVE DOMAIN* IN A DYNAMIC WORLD

As noted previously, the AU Treaty restates the organization's traditional commitment to the cardinal principles of sovereignty, respect for the borders existing at independence—*uti possidetis juris*<sup>96</sup>—non-interference in the internal affairs of Members States,<sup>97</sup>

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96. See, e.g., *Frontier Disputes (Burkina Faso v. Mali)*, 1986 I.C.J. 554, 566-67 (Dec. 22) (emphasizing that *uti possidetis juris* constituted a general principle whose purpose was to prevent the independence and stability of new states from being endangered by fratricidal struggles provoked by the challenging of frontiers); see also Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996) ("The relevance of *uti possidetis* today is evidenced by the practice of states during the dissolution of the former So-

and peaceful resolution of conflicts.<sup>98</sup> In international law, a State's duty to refrain from intervention in the internal or external affairs of other states is a corollary of the independence and equality of states, and includes the illegality of the use or threat of force.<sup>99</sup> "The duty of non-intervention is a master principle which draws together many particular rules on the legal competence and responsibility of states."<sup>100</sup> Simply stated, the *reserve domain*, or domestic jurisdiction, is "the domain of state activities where the jurisdiction of the state is not bound by international law."<sup>101</sup>

The extent of the *reserve domain*, however, depends on international law and varies according to its development.<sup>102</sup> Thus, article

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viet Union, Yugoslavia and Czechoslovakia, apparently sanctifying the former internal administrative lines as interstate frontiers.").

97. See AU Treaty, *supra* note 4, art. 4(g) ("The Union shall function in accordance with the following principles: . . . non-interference by any Member State in the internal affairs of another"); cf. U.N. Charter, *supra* note 46 art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."). See generally Declaration on Principles of International Law Concerning Friendly relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) (emphasizing the principle concerning the duty of non-intervention in matters within the domestic jurisdiction of the state); INGRID DELUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 5 (1974) (noting that because international law regulates behaviors between members of the society of nations, it is necessary to have reciprocal rules restraining a state's power within its own borders in the interest of the community); EDWIN DE WITT DICKINSON, THE EQUALITY OF STATES (1972).

98. See AU Treaty, *supra* note 4, art 4(e) (requiring that the Union function in accordance with the principle that the Assembly may decide upon appropriate means through which peaceful resolution of conflicts among Member States of the Union can be achieved).

99. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 293 (1998) ("The corollary of the independence and equality of states is the duty on the part of states to refrain from intervention in the internal or external affairs of other states.").

100. *Id.*

101. *Id.* (noting that the domain's extent is dependant on international law and varies according to development).

102. See Rules of Procedure of the ICJ (noting, for example, that the United Nations is based on the principle of sovereignty and equality amongst its members,

2(7) of the U.N. Charter, which prohibits interference in the domestic affairs of Member States, contains a limitation clause allowing the Security Council to determine whether a matter is within a State's domestic jurisdiction or whether it is a threat to international peace and security under Part VII of the Charter. Moreover, law is not a solution in itself; rather, it is "a means of handling a particular situation."<sup>103</sup> In lawmaking, society speaks to its future, intending that, when the time comes, its future will listen to its past. It is also the duty of every age to strive to find its own truth. Consequently, changes in international relations necessarily bring about what Zelim Skurbaty calls "instant paradigm shifts."<sup>104</sup> In a society constantly faced with new situations, due to the dynamics of progress, "there is a clear need for a reasonably speedy method of responding to such changes by a system of prompt rule-formulation."<sup>105</sup>

The amazing development of human rights law in the second half of the twentieth century was a response to emerging global situations.<sup>106</sup> The "international community as a whole",<sup>107</sup> including the

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which must not be breached in matters that exist exclusively in a state's domestic jurisdiction), available at <http://www.ejil.org/journal/Vol2/No2/art1-01.html> (last visited June 20, 2002); see also *Nationality Decrees in Tunis and Morocco* (Tunis v. Morocco), 1923P.C.I.J. (ser. B.) No. 4 (Feb. 7), in MALCOLM N. SHAW, *INTERNATIONAL LAW* 202 (1997).

103. REBECCA WALLACE, *INTERNATIONAL LAW* 3 (1997).

104. See Zelim Skurbaty, *Instant Paradigm Shifts: Globalising Human Rights?*, in *HUMAN RIGHTS ON COMMON GROUNDS: THE QUEST FOR UNIVERSALITY* 91, 102 (Kirsten Hastrup ed., 2001) (stating that in order to keep up with current developments, international law paradigm shifts should occur rapidly).

105. *Id.* (quoting MALCOLM SHAW, *INTERNATIONAL LAW* 66 (1991; 4<sup>th</sup> ed. 1997)).

106. See generally LOUIS HENKIN, *THE AGE OF RIGHTS* 13-14 (1990) (explaining that nations started looking to how people of other nations were treated when governments became offended by violations of the rights of their citizens while in other countries).

107. See James Crawford, et al, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12(5) E.J.I.L. 963, 973 (2001) (noting that the International Law Commission's draft articles on State Responsibility article 34 prefers the phrase 'international community as a whole', instead of simply 'international community', on the ground that the former is a more inclusive one). It does not consist exclusively of States, but includes non-State entities towards whom obligations may exist, e.g., the UN, the

United Nations, soon realized that the time for flogging dead paradigms was past; that the very basis for the development of human rights was that States will become the perpetrators of human rights violations unless they are properly restrained.<sup>108</sup> Thus, soon after the adoption of the U.N. Charter, and notwithstanding its article 2(7), human rights were no longer regarded as “essentially” within the *reserve domain* of States.<sup>109</sup> Gradually, the international community, including the U.N. organs, began to pierce through the skins of the onions and, to borrow a familiar phrase of company lawyers, to ‘lift the veil’ of the *reserve domain*. With regards to human rights, the *reserve domain* is now being treated, at best, as merely an academic ideal that no longer reflects the reality of today’s globalized world.<sup>110</sup> Recently, the U.N. Secretary-General, Kofi Annan, while delivering his acceptance speech for the Nobel Peace Prize, declared that, “the

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OAU, the European Communities, and the International Committee of the Red Cross. *Id.* The formulation, however, does not imply that there is a legal person, the international community, a fallacy exposed by Judge Fitzmaurice in his dissenting opinion in the Namibia advisory opinion case; Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 241, para. 33 (June 21).

108. See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 220 (2001) (stating that development of human rights is based on the belief that “the state is a predator that must be contained, otherwise it will devour and imperil human freedom.” *Id.*).

109. See Louis Henkin, *Human Rights and “Domestic Jurisdiction”*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD, 21, 23 (Thomas Buergeenthal ed., 1977) (stating that there are circumstances in which infringements upon human rights by one nation are the legitimate concern of other states and international organizations, although human rights violations were at one time considered to fall within a nation’s domestic jurisdiction); see also Felix Ermacora, *Human Rights and Domestic Jurisdiction*, 124 RECUEIL DES COURS 371, 390-409 (1968) (discussing the problems and conflicts that exist between domestic jurisdiction and human rights).

110. See, e.g., United Nations World Conference on Human Rights: *Vienna Declaration and Program of Action*, U.N. Doc. A/CONF. 157/24 (Part I, paras. 1, 4, 5), Oct. 13, 1993, reprinted in 32 I.L.M. 1661 (1993) (to the effect that human rights now assume priority over national sovereignty).

sovereignty of states must no longer be used as a shield for gross violations of human rights.”<sup>111</sup>

Europe eloquently illustrates this changing structure of international human-rights law. In Europe, a state must be democratic and must be willing to respect the rule of law in order to be allowed to join “the human rights club of nations.” The Council of Europe operates a rather restricted criterion on the admission of members to the Council and, *a fortiori*, the European Convention on Human Rights.<sup>112</sup> Consequently, “[e]very member of the Council of Europe must accept the principles of the rule of law and the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council.”<sup>113</sup> Any European State that is deemed to be able and willing to fulfill the provisions “may be invited to become a Member of the Council of Europe by the Committee of Ministers.”<sup>114</sup>

These strict entry requirements help to ensure that governments in Europe generally respect the rule of law, while individual rights and civil liberties are guaranteed and respected in most spheres. If the need arises, Member States of the Council of Europe or the European Union (“EU”), as the case may be, are prepared to use force to pun-

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111. See BBC News, *Annan Backs Individuals Over State* (Dec. 10, 2001) (trumpeting the need for concentration on the rights of the individual) at <http://news.bbc.co.uk/2/hi/world/europe/1701605.stm> (last visited July 25, 2002); cf. Report of the Secretary-General on an Agenda for Peace, U.N. Doc. S/24111 (June 17, 1992), reprinted in 31 I.L.M. 953, para. 17 (1992) (arguing that “the time of absolute and exclusive sovereignty” has passed).

112. See Statute of the Council of Europe, May 5, 1949, art. 1(a), 87 U.N.T.S. 103, Europ. T.S. No. 1 (stating that the Council’s aim was, and remains, “to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress”). The Council seeks to pursue this aim “through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.” *Id.* art. 1(b).

113. See *id.* art. 3 (explaining Council membership requirements).

114. See *id.* art. 4 (stating that any “State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute”).

ish dictatorial governments that are suspected or guilty of committing crimes against their own people. Such was the case in Milosevic's Serbia, even if done under the guise and umbrella of NATO.<sup>115</sup> When, as early as 1967, the Greek military overthrew their civilian regime, suppressed representative institutions, and detained political opponents, the Council decided to suspend Greek membership in conformity with the organization's adherence to the observance of human rights.<sup>116</sup> At the Forty-Fifth Session of the Committee of Ministers of the Council of Europe, on December 12, 1969, when the Committee was discussing certain recommendations of the

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115. See United Nations Daily Press Briefing of Office of Spokesman for Secretary-General, New York (Mar. 25, 1999) (stating that the UNHCR estimates that 450,000 people, the great majority of them civilian Kosovar Albanians, were displaced or expelled from Yugoslavia). The briefing also notes that NATO launched an air campaign against Yugoslavia on March 24, 1999 in order to bring an end to thirteen months of massacres. See *id.* See also Richard Caplan, *International Diplomacy and the Crisis in Kosovo*, 74 INT'L AFF. 745 (1998) (accounting the modes of repression of the Kosovar Albanian population under Milosevic). See generally Tonny Brems Knudsen, *Humanitarian Intervention And International Society: Contemporary Manifestations Of An Explosive Doctrine* 357 (1999) (unpublished Ph.D. dissertation, University of Aarhus). Milosevic is currently standing trial for charges of war crimes at the International Criminal Tribunal at The Hague, the first head of state to be so charged after the Nuremberg trials.

116. See *The Greek Case*, 12 Y.B. EUR. CONV. HUM. RTS. (1969) (containing the Report of the European Commission of Human Rights on the "Greek Case," and the resolution adopted by the Council of Ministers of Europe on April 15, 1970 relating to the case). The four applications alleged that the Greek Government, which came into power in April of 1967, had violated its obligations under the ECHR. See *id.* They referred to the suspension of certain articles of the Greek Constitution and other legislative measures and administrative practices, alleging that these acts violated the ECHR. See *id.* The Applicant Governments also submitted that the derogation made by the Greek Government under article 15 of the Convention, permitting a government to take measures derogating from its obligations under the Convention in time of war or public emergency, was not justified. See *id.* In March 1968, the three Scandinavian Governments added new allegations, alleging numerous cases of torture or ill-treatment of political prisoners amounting to an administrative practice, contrary to article 3 of the Convention; alleging that the Constitutional Act of July 11, 1967 constituted retroactive penal legislation, contrary to article 7, and introduced measures of confiscation, contrary to article 1 of the First Protocol; and, finally, that the absence of free elections, which prevented the people from freely expressing their opinion in the choice of the legislature, was contrary to article 3 of the First Protocol. See *id.* The case could not be concluded as Greece withdrew from the Council of Europe before its conclusion. See *id.*

Consultative Assembly relating to the situation in Greece, the military regime anticipated matters by denouncing the Statute of the Council of Europe and the European Convention of Human Rights ("ECHR").<sup>117</sup> Greece returned, like the Prodigal Son, to the Council on November 28, 1974, after the fall of the dictatorship and the restoration of a democratic civilian government, a return that marked the disappearance of the last authoritarian regime in Western Europe.

Portugal made its debut to the Council on September 22, 1976, two years after its peaceful revolution of April 1974 that ended forty-eight years of Salazarist dictatorship.<sup>118</sup> Similarly, General Franco's death in 1975 eventually led to Spain's accession to the Council in 1977.<sup>119</sup> Meanwhile, a new crisis arose in 1981 when the Parliamentary Assembly, in response to the military coup *d'état* a few weeks earlier, withdrew the Turkish parliamentary delegations' right to their seats. The Turkish delegation only resumed its place in 1984, after the holding of free elections.<sup>120</sup>

The next section examines the state of human rights in Africa, in particular the attitude of the OAU to the *reserve domain* doctrine in the realm of human rights.

## B. THE STATE OF HUMAN RIGHTS IN AFRICA

Surely, the OAU's adoption of the Banjul Charter in 1981 and its subsequent entry into force five years later, in 1986, was and remains the single most important event in the evolution of human rights in Africa. The Charter was, the first serious and potentially significant

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117. See *id.* at 78-84 (noting that in accordance with article 65(1) of the ECHR, the Greek denunciation had the effect that Greece ceased to be a party to the Convention on June 13, 1970).

118. See *Crisis Strengthen Democracy*, COUNCIL OF EUR. (discussing various crises the Council of Europe has overcome since its inception) at <http://www.coe.int/T/E/Communication%5Fand%5FResearch/Contacts%5Fwith%5Fthe%5Fpublic/About%5FCouncil%5Fof%5FEurope/a%5Fshort%5Fstory/Crises/> (last visited July 10, 2002).

119. See *id.* (relating various European political events that later resulted in democracy).

120. See *id.*

attempt by African leaders towards 'taking rights seriously'. It was presumably, Africa's trumpet of liberty blowing over the land of the living. The Charter has been described as

one of the finest gems, designed by Africa with a view to endowing itself with proper self-awareness, creating a new image in the chain of peoples of the world, giving itself a place of choice in the concert of nations, and playing, henceforward, a significant role in the management and conduct of the world's affairs.<sup>121</sup>

This section will examine the human rights scorecard of the OAU, using the Banjul Charter as the benchmark for analysis. In other words, the paper will examine the state of human rights in Africa before and after the coming into force of the Charter.

### *1. The State of Human Rights Before the Entry into Force of the Banjul Charter*

There is no doubt that the OAU occupies a place of honor in the liberation struggles that led to political independence of many African countries, including an end to an inglorious apartheid regime in South Africa. As the OAU boasted, "[t]hrough huge sacrifices and heroic struggles, Africa has broken the colonial yoke, regained its

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121. Isaac Nguema, *Africa, Human Rights and Development*, 7 REV. AFR. COMM'N HUM. & PEOPLES' RTS. 91 (1998). *Contra* Makau Mutua, *The African Human Rights System in a Comparative Perspective*, 3 REV. AFR. COMM. HUM. & PEOPLES' RTS. 5, 11 (1993) (presenting a very pessimistic assessment of the Charter, and describing it as "a façade, a yoke African leaders have put around our necks"). Mutua calls on like-minded peoples and interests to "cast it off and reconstruct a system that we [Africans] can profoundly proclaim as ours." *Id.* See also Richard Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22 VA. J. INT'L L. 667 (1982) (writing that the Charter is "incapable of supplying even a scintilla of external restraint upon a government's power to create laws contrary to the spirit of the rights granted"); Gino J. Naldi, *Future Trends in Human Rights in Africa: The Increased Role of the OAU*, in *THE AFRICAN CHARTER AND HUMAN AND PEOPLE'S RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000* 1, 8 (Malcolm Evans & Rachel Murray eds., 2002) (describing that Charter as "a statist document"); Paul Amoah, *The African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights?* 4 RADIC 226 (1992).



freedom and embarked upon the task of nation-building.”<sup>122</sup> African leaders have expressed similar sentiments in the Durban Declaration.<sup>123</sup> With regard to the protection of individual rights in the continent, however, the story will clearly be written differently, and there are many reasons for this.

When the OAU was formed in 1963, certain principles were considered basic, sacrosanct, and uncompromising. One of these was full respect for state sovereignty.<sup>124</sup> Kwame Nkrumah underscored this point during the founding OAU summit in Addis Ababa, Ethiopia in 1963, in the following words: “*Without necessarily sacrificing our sovereignty, big or small*, we can here and now forge a political union based on Defense, Foreign Affairs and Diplomacy, and a Common citizenship, an African Currency, an African Monetary Zone and an African Central Bank.”<sup>125</sup> Thus, OAU was born “in the context of nearly untrammelled state sovereignty, in which heads of states sought sedulously to safeguard the independence so recently won.”<sup>126</sup> This principle, together with the non-interference principle—the *reserve domain*—became the identity symbol of the organi-

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122. See *Algiers Decl.*, *supra* note 48, para. 3 (explaining that this is an achievement that brings profound and legitimate pride).

123. See, e.g., Durban Decl., *supra* note 7, para. 3. Paragraph 3 provides that:

The common identity and unity of purpose engendered by the OAU became a dynamic force at the service of the African people in the pursuit of the struggle for the total emancipation of the African Continent in the political, economic and social fields. Nowhere has that dynamic force proved more decisive than in the African struggle for decolonisation. Through the OAU Coordinating Committee for the Liberation of Africa, the Continent worked and spoke as one with undivided determination in forging an international consensus in support of the liberation struggle. Today, we celebrate a fully decolonised Africa and Apartheid has been consigned to the ignominy of history.

*Id.*

124. See OAU Charter, *supra* note 11, art. III(2) (stating the principles of the OAU).

125. Cited in Jonathan Derrick, *Towards the African Union*, AFRICAN TOPICS 4, 5 (Nov. – Dec. 1999) (emphasis added).

126. See Claude E. Welch, Jr., *The African Commission on Human Rights and Peoples' Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43, 43 (1992) (discussing the birth of the OAU and noting that the founders did not focus on human rights policy in the original OAU Charter).

zation. Regrettably, the OAU never bothered to define what constituted "internal affairs of another"—the same mistake that has been repeated in the AU Treaty—leaving Member States to give whatever interpretations that suited them best.<sup>127</sup>

The OAU Charter also facilitated the unwillingness of states to intervene, by not providing for any enforcement mechanism to uphold its principles—like the current AU Treaty. Rather, it merely emphasized cooperation among Member States and the peaceful settlement of disputes, through negotiation, mediation, and conciliation.<sup>128</sup> Even with that, its Commission on Mediation, Conciliation, and Arbitration never became operational and was, before its abolition, restricted to interstate conflicts.<sup>129</sup> Furthermore, although the OAU Charter reaffirmed, in its preamble and purposes, the principles of the U.N. Charter and the UDHR, as does the AU Treaty,<sup>130</sup> many African presidents came to think that those principles were enunciated without their participation and hence do not reflect the African vision of human rights. They contended that to impose those princi-

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127. See U.O. UMOZURIKE, *INTRODUCTION TO INTERNATIONAL LAW* 235 (1993) (arguing that a matter should be denied the character of internal affairs if it amounts to a breach of international law, a threat to international peace, or a gross violation of human rights and self-determination); see generally A. Bolaji Akinyemi, *The Organization of African Unity and the Concept of Non-Interference in Internal Affairs of Member-States*, 46 BRIT. Y.B. INT'L L. 392, 392 (1972-73) (discussing how the effectiveness of the OAU could be improved if it stops hiding behind the non-interference clause of Article III(2)); Obi Okongwu, Comment, *The O.A.U. Charter and the Principle of Domestic Jurisdiction in Intra-African Affairs*, 13 INDIAN J. INT'L L. 589 (1973).

128. See OAU Charter, *supra* note 11, arts. II(2), II(4), VII(4), XIX (noting the stated goals of the OAU); cf. AU Treaty, *supra* note 4, art. 4(e) (enjoining "peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly"); *id.* art. 4(f) (recognizing a "[p]rohibition of the use of force or threat to use force among Member States of the Union"). See generally Tunde Adeniran, *Pacific Settlement Among African States: The Role of the Organization of African Unity*, 2 CONFLICT Q. 8 (1981) (analyzing the patterns of conflict among African states and the role of the OAU with regard the settlement of such disputes).

129. See Osita C. Eze, *Background Paper*, SEMINAR ON THE ESTABLISHMENT OF REGIONAL COMMISSIONS ON HUMAN RIGHTS WITH SPECIAL REFERENCE TO AFRICA, Sept. 10-21 1979, U.N. Doc. HR/Liberia/1979BP/3.

130. Cf. AU Treaty, *supra* note 4, arts. 3(e), (h) (taking account of the U.N. charter and recognizing the need to promote and protect human rights).

ples on them was another form of colonialism, or to put in a more appropriate language, neo-colonialism. It has even been suggested that African leaders later found recourse to 'tradition' and 'culture' in the Banjul Charter<sup>131</sup> in order to stop the floodgate of interference into what they regarded as their internal affairs, namely the issue of how states treat their own citizens.<sup>132</sup>

This strong emphasis on the *reserve domain* and sovereignty contributed to the Member States' reluctance to take human rights seriously and their persistent unwillingness to criticize one another, even in the face of flagrant human rights abuses.<sup>133</sup> It was used, implicitly and explicitly, to discourage OAU censure of errant regimes in the sphere of human rights. As a former Chairman of the African Commission wrote—referring to article III(2) of the OAU Charter—"with regard to breaches of human rights, even of a grave nature such as genocide, the OAU has been bogged down by the domestic jurisdiction clause."<sup>134</sup> President Sekou Toure even claimed that the OAU was not "a tribunal which could sit in judgment on any member state's internal affairs."<sup>135</sup> Even on the question of liberation from

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131. See Banjul Charter, *supra* note 22, at pmb. para. 4 (eulogizing that "[t]he virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights"); see also Makau Mutua, *The African Human Rights System in a Comparative Perspective*, 3 REV. AFR. COMM'N ON HUM. & PEOPLES' RTS. 5, 8 (1993) (criticizing the Charter for assuming the existence of a permanent and static "African Culture," contending that cultural values are socially and historically constructed, expressing their values in the context of continuous and permanent social and political struggles over resources and power relations in a given society).

132. See Olusola Ojo, *Understanding Human Rights in Africa*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 115, 122 (Jan Berting et al. eds., 1990) (noting that international laws concerning human rights in Africa have been initiated because of international pressure and the terrible experiences with the tyrants Idi Amin of Uganda, Francisco Macias Nguema of Equatorial Guinea, and Jean Bokassa of the Central African Republic).

133. See CHRISTOPHER CLAPHAM, *AFRICA AND THE INTERNATIONAL SYSTEM: THE POLITICS OF STATE SURVIVAL* (1996).

134. See U.O. Umozurike, *The Domestic Jurisdiction Clause in the OAU Charter*, 78 AFR. AFF. 197, 202 (1979) (noting that the only two exceptions to this are when questions of colonialism or apartheid arose).

135. See U. O. Umozurike, *The African Charter on Human and Peoples' Rights*, 77 AM. J. INT'L L. 902, 903 (1983) (noting that the members emphasized the prin-

Portuguese, white Rhodesian, and minority South African rule, on which there was apparent consensus, at least since 1963, African states still used their unfettered sovereignty to go against the majority view, as did President Banda of Malawi and Houphouët-Boigny of Ivory Coast.<sup>136</sup>

Like Nero's Rome, African leaders fiddled while the edifice called "Africa" was engulfed in conflagrations. Increasing political repression, denial of political choice, restrictions on freedom of association, and other human rights violations met with rare murmurs of dissent from within the OAU. Constitutional governments were routinely overthrown in many African countries, while opponents of autocratic regimes were imprisoned or banished and, in some cases, physically eliminated. It is significant that the overwhelming majority of refugees in Africa have fled independent states because of political reasons.<sup>137</sup> The massacres of thousands of Hutu in Burundi in 1972 and 1973 were neither discussed nor condemned by the OAU. The Organization also did nothing about the Sudanese Civil War, the atrocities by Idi Amin in Uganda,<sup>138</sup> Jean-Bedel Bokassa in ex-Central African Republic, Mobutu Sese Seko's Zaire, and Macias Nguema in Equatorial Guinea—in spite of the enormous cost to

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ciple of noninterference in the internal affairs of other member states especially when it came to human rights violations).

136. See Derrick, *supra* note 125, at 5.

137. See, e.g., Es'kia Mphahlele, *Africa in Exile*, 3 DAEDALUS 29, 29 (1982) (discussing the many "exiles" that live in Africa, due in large part to numerous political upheavals).

138. See Claude E. Welch, Jr., *The OAU and Human Rights: Towards a New Definition*, 19 J. MOD. AFR. STUD. 401, 405 (1981) (noting that Idi Amin later became the Chairman of the OAU in 1975 at its Kampala summit, although he was responsible for the mass expulsion of twenty thousand foreigners and the brutal killing of three hundred thousand Ugandans in 1972). Only a handful of African States—Botswana, Tanzania, and Zambia—boycotted the meeting. See *id.* Furthermore, Mozambique sent a delegation of low-ranking officials, rather than its President at the time, Samora Machel, and that was only because the summit afforded it the first opportunity to participate as a new member of the OAU. See *id.* In protest, the Tanzanian Ministry of Information and Broadcasting, on July 25, 1975, stated that: "Africa is in danger of becoming unique in its refusal to protest crimes committed against Africans, provided that such actions are done by African leaders and African governments." See *id.*

lives.<sup>139</sup> When the OAU's first and two-term Secretary-General, Diallo Telli, was murdered at the hands of Sekou Toure's regime in Guinea, the Organization did nothing.<sup>140</sup>

In 1974, Emperor Haile Selassie of Ethiopia was deposed, followed by the execution of fifty-seven former officials of the imperial regime. Following reports of impending further executions, including that of the deposed Emperor, the African Group at the U.N. made a public appeal to the new Ethiopian authorities to spare his life and those of the other detainees. In a statement to the General Assembly, Salim Ahmed Salim, then Chairman of the African Group and subsequently Secretary-General of the OAU, pointed out that the action was being taken "in conformity with our collective concern for human life and fundamental freedom," emphasizing that "*we have no desire to intervene in the domestic affairs of that brother state.*"<sup>141</sup> Similarly, in April 1980, President William Tolbert of Liberia was killed in a coup that overthrew his regime. Ten days later, thirteen former ministers and high-ranking officials in his regime were publicly executed by firing squad—an example that Rawlings of Ghana was to follow a few years later. These actions prompted the Council of Ministers of the OAU, meeting in Lagos, to appeal to the new military regime of Sergeant Samuel Doe to exercise restraint. Surprisingly—and this is the point—the Ministers acknowledged and affirmed "the right of any member state to change its government *in any way it sees fit.*"<sup>142</sup>

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139. See generally BILL BERKELEY, *THE GRAVES ARE NOT YET FULL* (2001) (discussing the horrific massacres that have occurred in Africa over the past twenty years).

140. See Edward Kannyo, *The OAU and Human Rights*, in *THE OAU AFTER TWENTY YEARS* 155, 156 (Yassin El-Ayouty & I. William Zartman eds., 1984) (noting the sole two instances in which African leaders have interceded on humanitarian grounds).

141. See Edward Kannyo, *The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background*, in *HUMAN RIGHTS AND DEVELOPMENT IN AFRICA* 128, 133, 149 (Claude E. Welch, Jr. & Ronald I. Meltzer eds., 1984) (emphasis added); see also U.N. Doc. A/PV.2301 (emphasis added) (noting that the former Emperor died in 1975 from what the Ethiopian authorities described as natural causes).

142. See *Liberia: Coup Topples Tolbert*, 17 AFR. RES. BULL. 5639, 5649 (1980) (emphasis added) (quoting a statement made by the OAU Ministerial Council ap-

In the cases where the OAU intervened, such as the "Congo Crisis" (1964-65), the Nigerian Civil War (1967-70), the Angolan Civil War (1975-76), and the Chadian Civil War (1965-78), the presence of a threat of foreign intervention and consequent regional instability have been of more direct concern to the OAU than human rights concerns.<sup>143</sup> Even its performance in these isolated cases was not outstanding, as these conflicts were terminated only with the protagonists' military victory.<sup>144</sup> In fact, the thirty-year Angolan Civil War has only just ended after the UNITA rebel leader, Jonas Savimbi, was killed in the fighting,<sup>145</sup> paving the way for a peace agreement between the government and the rebels.<sup>146</sup> In other cases, the Organization intervened only when the Member State itself invited aid to deal with a domestic crisis—like President Julius Nyerere's (Tanzania) invitation to the OAU to provide troops to replace British forces that had quelled the army mutiny in 1964.<sup>147</sup> Where such conditions did not exist, the OAU did not intervene on humanitarian or human rights grounds. Other cases of intervention in recent memory have been undertaken by sub-regional bodies, like the Economic Commu-

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pealing to Samuel K. Doe to exercise restraint in dealing with officials from the former government).

143. See MICHAEL WOLFERS, *POLITICS IN THE ORGANIZATION OF AFRICAN UNITY* 128 (1976). See generally S. Azadon Tiewul, *Relations between the United Nations Organization and the Organization of African Unity in the Settlement of Secessionist Conflict*, 16 HARV. INT'L L. J. 259 (1975) (exploring the possible roles that the U.N. and OAU can, or should, play in assisting African countries to settle their conflicts in a more pacific manner).

144. See ZDENEK CERVENKA, *THE UNFINISHED QUEST FOR UNITY: AFRICA AND THE OAU* 84 (1977) (explaining the OAU involvement in the Congo crisis).

145. See BBC News, *Text: Savimbi Death Announcement* (Feb. 23, 2002) (reporting the text of the statement by the Angolan government announcing the death of Savimbi), at [http://news.bbc.co.uk/1/hi/english/world/monitoring/media\\_reports/newsid\\_1837000/1837364.stm](http://news.bbc.co.uk/1/hi/english/world/monitoring/media_reports/newsid_1837000/1837364.stm).

146. See BBC News, *Angolans Celebrate Peace Deal* (Apr. 5, 2002) (reporting on the signing of a peace agreement between the Angolan government and rebel factions on April 4, 2002, and the subsequent celebration by the Angolan people), at <http://news.bbc.co.uk/2/hi/world/africa/1912761.stm> (last visited July 25, 2002).

147. See Wolfers, *supra* note 143, at 259.

nity of West African States ("ECOWAS")<sup>148</sup> in Liberia and Sierra Leone, and the South African Development Community ("SADC") in Lesotho and by East African states in Burundi. All this came from the periphery, not the center.

Thus, while African dictators were, and are still in power, the OAU turned a blind eye to their repressive and atrocious regimes, notwithstanding that an organization has an undeniable "right to demand that its members shall fulfill the obligations entered into by them in the interest of the good working of the organisation."<sup>149</sup> In the 1970s and 1980s, Colonel Ghaddafi of Libya applied his financial resources in supporting insurgencies, *coup d'états*, and radical governments all over sub-Saharan Africa, and the OAU did nothing. It was in Libya that Charles Taylor trained<sup>150</sup> and recruited his initial

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148. See generally REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS (M. Weller ed., 1994) (describing how ECOWAS, originally designed as a sub-regional organization for the pursuit of economic and social goals, became involved in an internal conflict within Liberia, eventually helping to resolve the conflict through the establishment of the ECOWAS Mediating Standing Committee in 1990). The text further notes that not all ECOWAS members participated in the force, though decisions, which included calling for a cease-fire between the warring parties and establishing a cease-fire observing force called the ECOWAS Military Observer Group (subsequently approved by the ECOWAS Heads of State and Government), were taken on behalf of the Authority of the Heads of State and Government. See *id.* See generally Edward Kwakwa, *Internal Conflicts in Africa: Is there a Right of Humanitarian Action?*, 2 AFR. Y.B. INT'L L. 9, 9-45 (1994) (examining the law and policy issues involved in situations where there is internal conflict within a domestic jurisdiction and intervention of the international community); Frans Viljoen, *The Realisation of Human Rights in Africa Through Sub-Regional Institutions*, 9 AFR. Y.B. INT'L L. 185, 197-98 (2001).

149. Acquisition of Polish Nationality (Reparation case), I.C.J. 174, 184; 16 I.L.R. 318, 328.

150. See Morten Boas, *Liberia and Sierra Leone – Dead Ringers? The Logic of Neopatrimonial Rule*, 22 THIRD WORLD Q. 697, 721 n.38 (2001) (noting that Taylor is the son of a Liberian mother and an American father who was raised in Liberia but educated in the United States, where he also worked). Taylor returned to Liberia after Doe's coup in 1980 and was given a cabinet post. See *id.* However, soon after, Taylor was accused of stealing nearly one million dollars from the Liberian treasury and subsequently fled, first to the United States and then to Libya, where he received military training. See *id.* Later, Taylor returned to West Africa where he built support for his anti-Doe army. See *id.*

military force—the National Patriotic Front of Liberia (“NPFL”).<sup>151</sup> Foday Sankoh’s Revolutionary United Front of Sierra Leone (“RUF”) was also largely the creation of dissidents living and/or training in Libya.<sup>152</sup>

The military intervention in Chad<sup>153</sup> was, undoubtedly, Libya’s most significant external involvement. Northern groups in Chad, reacting to the repression of a government run by Southerners, formed the National Liberation Front of Chad, with Libyan support. Ghaddhafi’s regime conducted a broad intervention, ranging from significant financial and military support for various armed factions within Chad to the large-scale involvement of Libyan armed forces. Tripoli claimed sovereignty over the Aouzou strip, a region of 114,000 square kilometers in the Libyan-Chadian border area within potentially rich mineral deposits (especially uranium), on the basis of an un-ratified treaty of 1935 between Italy and France. After an initial tactical alliance, Chadian leader Hissene Habre, himself a dictator and gross human rights violator,<sup>154</sup> broke with Ghaddhafi and won support from France and the United States in opposing Tripoli’s hegemonic designs on Aouzou. Habre’s forces successfully defeated Libya’s clients in 1987.<sup>155</sup>

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151. See Stepehn Ellis, *Liberia’s Warlord Insurgency*, in AFRICAN GUERRILLAS 160 (Christopher Clapham ed., 1998).

152. See Ibrahim Abdullah & Patrick Muana, *The Revolutionary United Front of Sierra Leone*, in AFRICAN GUERRILLAS 175, 175-77 (Christopher Clapham ed., 1998).

153. See generally VIRGINIA M. THOMPSON & RICHARD ADLOFF, CONFLICT IN CHAD # (1981); JOHN WRIGHT, LIBYA, CHAD AND THE CENTRAL SAHARA (1989) (discussing the role Libya has played in the development of Chad and the Central Sahara).

154. See Frederic L. Kirgis, *The Indictment in Senegal of the Former Chad Head of State*, ASIL INSIGHTS, Feb. 2000 (stating that on February 4, 2000, a Senegalese court indicted the exiled former dictator of Chad, Hissene Habre, on charges that he committed egregious and systematic abuses of human rights while he ruled from 1982 to 1990), at <http://www.asil.org/insights/insigh41.htm> (last visited July 25, 2002). The article further notes that Habre may be put on trial in Senegal or sent back to Chad to face charges there. See *id.*

155. See Asteris Huliaras, *Qadhafi’s Comeback: Libya and Sub-Saharan Africa in the 1990s*, 100 AFR. AFF. 5, 7 (2001) (recognizing that Habre broke with Qadhafi and won support from France and the United States because he opposed Trip-



Today, Ghaddafi is the new champion of the AU and the host and toast of the OAU. He is being recompensed by a warm mutual approval. The Organization recently paid "deserving tribute to Brother Muammar Al Ghaddafi . . . for his role and efforts as the son of Africa" and reaffirmed the confidence of the Organization in his determined efforts at realizing Africa's "collective vision for unity, cooperation, development, peace and security in [the] continent."<sup>156</sup> It further praised "the initiatives taken by Brother Muammar Ghaddafi to strengthen the unity, cohesion and solidarity of our peoples and continent . . . [b]earing in mind, the immense contributions made by the Libyan people and leadership, to the advancement of the objectives of the continent, in the area of peace, security, stability and development."<sup>157</sup>

Since the OAU has historically been led by Heads of States who have been responsible for massive human rights abuses, inter-state condemnation of violations was not likely in such a context.<sup>158</sup> These Heads of States lacked the moral courage to stand up to their colleagues and condemn them publicly for violations of their people's rights. With heavy logs in their eyes, they could not see, let alone remove, the specks in their brothers' eyes.<sup>159</sup> There were a few notable exceptions. Julius Nyerere of Tanzania, for example, waged a lone crusade to relieve Idi Amin of his job in Uganda,<sup>160</sup> acting on the

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oli's hegemonic ideas concerning Chad). See generally Rene Lemarchand, *The Case of Chad*, in *THE GREEN AND THE BLACK: QADHAFI'S POLICIES IN AFRICA* 106 (Rene Lemarchand ed., 1988) (discussing the involvement of Qadhafi in Chad).

156. *Special Motion of Thanks to the Leader of the Great Socialist Libyan Arab Jamahiriya Brother Muammar Al Ghaddafi*, paras. 1-2, OAU, EAHG/Dec.4 (V) (2001).

157. *Id.* pmb. paras. 1-2.

158. See, e.g., Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and People's Rights*, 31 HOW. L.J. 643, 645 (1988) (noting that the OAU has never condemned any state for the treatment of its people).

159. See *id.* (commenting upon the fact that many African leaders lead authoritarian and dictatorial regimes, which makes it difficult for them to condemn the actions of other African leaders who violate human rights).

160. Amin was forced into exile in Saudi Arabia when Tanzanian forces, responding to an earlier Ugandan invasion, not only expelled the invaders from Tanzanian territory but continued up to the Ugandan capital, Kampala, to reinstall Milton Obote, who had been deposed by Idi Amin.

controversial principle of humanitarian intervention.<sup>161</sup> Kenneth Kaunda, Seretse Khama, and Samora Machel also opposed Amin; in fact, in 1977, President Dawada Jawara of The Gambia condemned the deaths of Archbishop Janani Luwum of the Anglican Church in Uganda and two cabinet Ministers while under the custody of Amin's agents.<sup>162</sup> These exceptions, however, came from the periphery, not the center. The bottom line generally has been: "Watch me kill my people, and I will watch you kill yours." The result has been apathy and irresponsible silence. Julius Nyerere once described the OAU as a "trade union of the current Heads of State and Government, with solidarity reflected in silence if not in open support for each other,"<sup>163</sup> even when one of them was involved in organized brutality against his own people. It has even been suggested that a less hypocritical title for the Organization would have been "the Organisation of African Heads of State."<sup>164</sup>

Remarkably, the AU Treaty recalls "the heroic struggles waged by our peoples and our countries for political independence, human dig-

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161. See Michael J. Smith, *Humanitarian Intervention: An Overview of the Ethical Issues*, 12 ETHICS & INT'L AFF. 63, 77 (1998) ("Individual state sovereignty can be overridden whenever the behavior of the state even within its own territory threatens the existence of the elementary human rights abroad and whenever the protection of the basic human right of its citizens can be assured only from the outside."). *Contra* Peter Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 12 EUR. J. INT'L L. 437 (2001) (arguing that the prohibition on the use of force may constitute, in the end, a better protection for the weak than its abandonment prompted by an over-enthusiastic belief in the virtues of intervention). See also Mahmood Monshipouri & Claude E. Welch, *The Search for International Human Rights and Justice: Coming to Terms with the New Global Realities*, 23 HUM. RTS. Q. 370, 378 (2001).

162. See *Jawara Condemns Uganda 'Massacre'*, 17 AFR. DIARY 8409, 8410 (1977) (recognizing that President Jawara was the first African head of state to condemn the deaths and noting that Jawara suggested the OAU should place "special emphasis" on defending human rights in Africa).

163. NASILA S. REMBE, *THE SYSTEM OF PROTECTION OF HUMAN RIGHTS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: PROBLEMS AND PROSPECTS* 105 (1991).

164. See *Sirte and the Rest of Us*, *supra* note 26, at 3 (stating that the OAU summit is an occasion for African heads of states to "play big man to one another and thereby reinforce each other's sense of self worth").

nity and economic emancipation.”<sup>165</sup> That era of liberalization and independence should have seen the spirit of struggle for freedom continue to ensure the cultural, economic, and social freedom for the citizens.<sup>166</sup> Political independence offered a special opportunity for African rulers to organize and maintain societies and legal systems. African rulers, however, did not seize this opportunity, hence the changing of guards at the Government House from white to black had little substantive meaning. The complete reversal of expectations was not surprising because the seeds of deception and confusion that the departing colonial overlords implanted were bound to lead to a toxification of power. Consequently, like their former colonial masters,<sup>167</sup> the inheritance elite, rich, black rulers continuously taunted and looked down upon the poor people they ruled, a colonial heritage forcefully and admirably portrayed in Chinua Achebe’s novel, *Ant-hills of the Savannah*.<sup>168</sup> Instead of lightening the yokes of colonialism, the inheritance elite added to it by chastising the people not only with whips but also with scorpions.<sup>169</sup> Multi-party systems were consolidated into single party systems, then into one-man systems and, sometimes, no system at all; with time, their names became synonymous with their countries.

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165. See AU Treaty, *supra* note 4, at pmb. para. 3; cf. *Sirte Decl. supra* note 10, para. 4 (using the same language as the AU Treaty).

166. See Ibrahim Badawi El-Sheikh, *Human Rights and their Development in Africa*, 2 REVUE DE LA COMMISSION AFRICAINE DES DROITS DE L’HOMME ET DES PEOPLES [REV. AFRICAN COMM’N. HUM. & PEOPLES’ RTS.] 46, 54 (1992).

167. See Art Hansen, *African Refugees: Defining and Defending Their Human Rights*, in HUMAN RIGHTS AND GOVERNANCE IN AFRICA 139, 161 (Ronald Cohen et. al. eds., 1993) (noting that the African states themselves represented the strongest and most apparent example of the African states’ unwavering reliance on colonial European political forms).

168. See generally CHINUA ACHEBE, *ANTHILLS OF THE SAVANNAH* (1987) (describing the Kangan struggle for a successful form of postcolonial self-government through the experience of three friends who are intricately involved in the Kangan government). The author depicts the new native government adopting the imperialist rhetoric for oppression of the poor. See *id.* at 37.

169. Cf. *1 Kings* 12:1-16 (King James) (describing the story of King Rehoboam who was a more stringent ruler than his father, King Solomon, despite the Israelites expectation of more leniency). The new King stated “[a]nd now whereas my father did lade you with a heavy yoke, I will add to your yoke: my father hath chastised you with whips, but I will chastise you with scorpions.” *Id.* at 12:11.

This "period of disillusionment"—the 1970s and 1980s—represents for Africa and Africans a "pyramid of agony, misery, and failure."<sup>170</sup> The Ugandan President Museveni aptly summed up the OAU's lackluster attitude towards human rights at his address to the OAU General Assembly in 1986. Referring to the regimes of Idi Amin and Milton Obote, Museveni stated:

Over a period of 20 years three quarters of a million Ugandans perished at the hands of governments that should have protected their lives . . . I must state that Ugandans . . . felt a deep sense of betrayal that most of Africa kept silent. . . . The reason for not condemning such massive crimes has supposedly been a desire not to interfere in the internal affairs of a member State, in accordance with the Charters of the OAU and the United Nations. We do not accept this reasoning because in the same organs there are explicit laws that enunciate the sanctity and inviolability of human life.<sup>171</sup>

## 2. *The State of Human Rights After the Entry into Force of the Banjul Charter*

Have things changed for the better after the coming into force of the Banjul Charter? Certainly, some windows of change have been opened in some African countries allowing the fresh air of freedom to come in. However, such progress has been limited. Nigeria offers an example of such marginal improvement in human rights situation—after the years of military authoritarianism, particularly

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170. See COLIN LEGUM, AFRICA SINCE INDEPENDENCE 52 (1999) (reporting that the World Bank predicted an increase of one hundred million in the Sub-Saharan poverty rate while predicting a decrease of four hundred million in the developing world); Paul Clements, *Challenges for African States*, 36 J. ASIAN & AFR. STUD. 295, 295 (2001).

171. AMNESTY INT'L, "Index: IOR/63/02/91," 3 (1991); see MENNO T. KAMMINGA, INTERNATIONAL STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS 63 (1992) (quoting Ugandan President Godfrey Binaisa, expressing his disapproval of the United Nation's inaction with respect to human rights atrocities in Africa); see also Demetrios James Marantis, *Human Rights, Democracy, and Development: The European Community Model*, 7 HARV. HUM. RTS. J. 1, 6 (1994) (stating that the European Community was unable to effectively address human rights violations in Africa). The perception of a contractual obligation to Uganda prevented the European Community from responding to the notorious abuses of Idi Amin. See *id.*

Abacha. Although there have been fresh human rights concerns in Nigeria in recent months,<sup>172</sup> in general, many obnoxious decrees have been repealed, together with the removal of restrictions on the freedom of movement and association.<sup>173</sup> A limited number of African nations will experience similar improvements, but they are still the exception, not the rule. The OAU acknowledges that a considerable amount of work must be done in order for the developments to meet the level of its own expectations and the aspirations of the people.<sup>174</sup>

Thus, though the Banjul Charter has entered into force and Member States of the OAU have even laboriously developed other human rights instruments, such as the African Child Charter and the Protocol to the Banjul Charter on the Rights of Women, which is still under construction, their practice of human rights has been contradictory. It has, thus, been asserted that "[t]he adoption of the African Charter ... has largely proved to date to be a false dawn for the promotion and protection of human rights in Africa".<sup>175</sup> African leaders

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172. See, e.g., Letter from Peter Takirambudde, Human Rights Watch, to Assistant Secretary of State for Africa, Walter Kansteiner (July 23, 2002) (drawing the attention of the Secretary of State to human rights concerns in Nigeria (and Angola), including attacks on political opponents, primarily carried out by thugs hired by rival candidates; serious human rights abuses by vigilante groups such as the Bakassi Boys—responsible for public and very brutal executions, systematic torture and unlawful arrests and detentions, often with the active support of state government authorities—and the O'dua People's Congress (OPC)—responsible for repeated acts of violence, including killings of unarmed civilians), *available at* <http://hrw.org/press/2002/07/walter0723-ltr.htm> (last visited Aug. 30, 2002). Others include systematic and widespread human rights violations by the Nigerian police; increase in inter-communal violence across Nigeria, resulting in the death of thousands of innocent persons; massacres of unarmed civilians and destruction of homes by the Nigerian military—as reprisals for killing of some soldiers during inter-communal violence—; and the imposition of Sharia law in several northern states of Nigeria, leading to the handing down, and in some cases the implementation, of cruel punishments, after trials which are almost certainly unfair, with limited rights of appeal and sometimes no legal representation. *Id.*

173. See *ATTACKS ON JUSTICE: THE HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS* 290-91 (Mona Rishmawi ed., 2000).

174. See *Algiers Decl.*, *supra* note 48, para. 17 (stating that the OAU is aware of their limitations and is determined not to recede from efforts to defeat these barriers).

175. Naldi, *supra* note 121, at 3-5 (arguing also that though the OAU has erected a comprehensive framework for the promotion and protection of human

still entertain intensive social relations among themselves and tend to show a sort of group solidarity toward the outside world. On several occasions, African States have interpreted international concern for human rights as a pretext for undermining their sovereignty. Thus, in a communication submitted to the UN Human Rights Committee against Equatorial Guinea, the latter, though recognizing the jurisdiction of the Committee, argued, *albeit* unsuccessfully, that the communication constituted an interference in its internal affairs.<sup>176</sup>

Throughout the 1990s, and even in this new millennium, there has been no great seismic shift for human rights prospects on the continent. The African Commission recently regretted "that the human rights situation in many States continues to cause concern."<sup>177</sup> And as a notable African jurist, Kayode Eso, observed, human rights—

abuse has changed for the worse. . . . The picture of Rwanda, the old and defunct Mobutu Sese Seko's Zaire, the genocide of Tutsis by the Hutus, the surreptitious support by the Government of Zaire, the genocidal war, the death, the hunger, the mass movement of people in Central Africa, running from a wrath to come, but yet to certain death, the feud and fratricidal killings in Liberia and Sierra Leone, the atrocities in South Africa before the demise of apartheid, the gun-totting soldiers who invaded democracy and nearly perpetuated autocracy in Nigeria and elsewhere.<sup>178</sup>

By almost any criteria, Africa still "highlights the stark gap between theories of universal human rights and the continued practices

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rights in Africa, much still remain to be done to bring about the realization of these standards).

176. See *Mika Miha v. Equatorial Guinea*, No. 414/1990, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, Annex IX, U.N. Doc. A/49/40 (1994); see also Statement made by Swaziland to the UN Human Rights Commission in 1997, UN Doc. E/CN.4/1997/SR.4, paras. 46-7.

177. See *Resolution on Human Rights Situation in Africa, Thirteenth Annual Activity Report of the African Commission on Human Rights and Peoples' Rights*, para. 1, OAU Doc. AHG/222(XXXVI) Annex IV (1999-2000) [hereinafter *Thirteenth Report*].

178. HUM. RTS. NEWSLETTER 10, 12 (Apr.-June 2001) (including extracts of Kayode Eso's *The Role of the African Human Rights System and Civil Society in the African Union*, a paper delivered at the NGO Forum organized by the African Center for Democracy and Human Rights Studies, preparatory to the twenty-ninth Ordinary Session of the African Commission).

of human wrongs.”<sup>179</sup> Prison conditions are still life threatening in many African countries; ethnic and religious violence has led to loss of several thousand lives, women still suffer physical abuse and discrimination, and torture is still an instrument of state policy. Sadly, these atrocities are not limited to the center, as the average citizen suffers from the petty tyranny and arbitrariness or extortion of local policemen—who glory in unmediated power<sup>180</sup>—the chief and even judicial officers. Ralph Nader puts it well when he says that, “power can corrode and corrupt regardless of what crucible—corporate, government or union—contains it.”<sup>181</sup>

Next, this paper will illustrate the enduring examples of the *reserve domain* doctrine in Africa and the concomitant abuses of human and peoples’ rights that continue even in this new millennium in which the OAU metamorphoses into the AU.

#### a. Non-Intervention in Recent Conflicts

In recent years, internecine conflicts in Africa have resulted in “war crimes, genocide, and crimes against humanity,” to quote article 4(h) of the AU Treaty. Examples include the barbaric carnage in Rwanda,<sup>182</sup> Somalia,<sup>183</sup> Sierra Leone,<sup>184</sup> Burundi,<sup>185</sup> Liberia,<sup>186</sup> and the

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179. Paul Williams, *Indifference and Intervention: International Society and Human Rights in Africa*, 5 INT’L J. HUM. RTS. L. 140 (2001).

180. See Niels Uldriks & Piet van Reenan, *Human Rights Violations by the Police* 2 HUM. RTS. REV., 64, 72 (2001) (noting that in many parts of Africa, “hard, repressive conduct on the part of the police is regarded as legitimate” by many; and such attitude “increases the likelihood of police violations of human rights”).

181. See RALPH NADER, ACTION FOR CHANGE 15-16 (1971).

182. See Helen M. Hintjens, *Explaining 1994 Genocide in Rwanda*, 37 J. MOD. AFR. STUD. 241 (1999) (examining the genocide by looking at the manipulation by external forces, domestic pressures, and psychological pressures, as well as the nature of the Rwandan state itself); see also GERALD PRUNIER, *THE RWANDA CRISIS 1959-1994: HISTORY OF GENOCIDE* 41- 206 (1995) (discussing genocide in Rwanda from 1959 through 1994).

183. See *Some 10,000 Somali Refugees Flee Into Kenya*, XINHUA NEWS AGENCY, May 10, 2002 (reporting that Somalia has experienced a civil war among rival warlords since the 1991 ousting of Mohammed Siad Barre), available at 2002 WL 20237850.

Democratic Republic of Congo ("DR Congo"). The DR Congo is presently "the epitome of the collapsed state, whose descent into hell has set loose a congeries of rival factions fighting wars on behalf of half a dozen African states."<sup>187</sup> The OAU has done little or nothing to physically stop this carnage. The only way it has addressed the issue is through a handful of pious declarations, decisions,<sup>188</sup> and peace talks that often fail to bring peace because warring parties have no desire to listen to the voice of reason, which is not surprising, because in conflicts, as in temptation, passion is opposed to reason. In the DR Congo, for example, peace agreements have been signed and killed off before delivery, then reviewed, and ultimately discarded.

The Rwandan genocide undoubtedly remains a deplorable example of the international community's disinterest in the African conti-

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184. See ABDUL KOROMA, *SIERRA LEONE: THE AGONY OF A NATION* (1996) (noting that Foday Sankoh's army of red-eyed teenage and child fighters were spreading savagery, murdering, and mutilating tens of thousands).

185. See *Grass-roots development and empowerment bringing peace to Burundi's villages*, THE CANADIAN PRESS, Apr. 4, 2002 (reporting that the conflict between the Hutu and Tutsi in Burundi have left over 200,000 people dead), *available at* 2002 WL 19246800.

186. See Human Rights Watch, *Deteriorating Human Rights Situation in Liberia: Human Rights Watch Calls on U.N. Security Council to Act Decisively*, Hum. Rts. Watch (July 19, 2002) [hereinafter Hum. Rts. Watch, *Deteriorating Human Rights Situation in Liberia*] (calling on the Security Council to condemn abuses committed by all sides in the conflict in Liberia; to take steps to end Guinea's role in providing logistic assistance to the Liberian rebels; to strengthen the mandate of the U.N. Peace-Building Support Office in Liberia (UNOL), increase its staffing and funding to enable the placement of human rights monitors to investigate abuses; and to request the Secretary General to fill the vacant position of representative in Liberia, with a mandate to report to the Security Council and make recommendations to resolve the conflict), *available at* <http://hrw.org/press/2002/07/liberia-071902.htm> (last visited Aug. 30, 2002).

187. RENÉ LEMARCHAND, *THE DEMOCRATIC REPUBLIC OF CONGO: FROM COLLAPSE TO POTENTIAL RECONSTRUCTION 2* (2001).

188. See e.g., *Decision on Sierra Leone*, para. 2, OAU Doc. AHG/Dec. 147 (XXXVI) (July 2000) (calling on the RUF to adhere to the Lome Peace Agreement and implement its terms). This adherence would include disarmament, voluntary demobilization, and a cessation of attacks on UNAMSIL and hostage taking. See *id.*; cf. *Decision on Sierra Leone*, OAU, CM/Dec. 580 (LXXIII) (using similar language).



ment,<sup>189</sup> for while the Western powers were commemorating World War II and the holocaust in 1994, they ignored the unleashing of similar atrocities Africa.<sup>190</sup> But what did the OAU do on its part? The regional states and the OAU equally failed to decelerate the slide towards genocide, and to halt the mass killings once they were underway. One commentator, however, has graciously commended the OAU by listing among its successes, "the deployment of an observer mission to Rwanda in 1994."<sup>191</sup> Such action should be considered a failure in the face of genocide. It might be more plausible to explain that failure to deal with the grave situation in terms of the OAU's lack of economic and military means—a lack that the Western powers could have filled but were unwilling.

Certainly, if missions to war-torn African countries were to be the yardstick for assessing the OAU, then of course it has performed wonderfully well. The OAU Central Organ sanctioned many observer missions and neutral investigations during the past decade with the intention of moving towards a larger U.N. mission as well as to demonstrate an African commitment commensurate with that of the United Nations.<sup>192</sup> But where has all this left Africa? Today, more than a dozen conflicts, both old and new, still ravage the continent, a clear indication that current methods do not sufficiently tackle the problems. Is it not time to try other solutions?

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189. See ARTHUR J. KLINGHOFFER, *THE INTERNATIONAL DIMENSION OF GENOCIDE IN RWANDA* 5 (1998) (arguing that the OAU, regional states, the United Nations, and other world powers failed to thwart the movement toward genocide and mass killings in Rwanda).

190. See Hinyjens, *supra* note 182, at 282.

191. Martha Bakwesegha, *From Unity to Union*, 2 CONFLICT TRENDS 28, 32 (Feb. 2001) (implying that the deployment mission was a result of developments in the regions conflict management mechanism), available at <http://www.accord.org.za/web.nsf>, Conflict Trends database (last visited June 29, 2002).

192. See Cilliers, *supra* note 27, at 3-4 (listing observer mission to Burundi from 1993-1996, the Comoros from 1997-1999, and Ethiopia and Eritrea from 2000 to the present, and pointing to a group of neutral investigators who went to the Democratic Republic of Congo from 1999 to the present to maintain the Lusaka Peace Accord).

b. Extra-judicial Executions, Torture, Degrading Treatment and Slavery

African States still relish and cherish the use of torture as instruments of state policy. In Liberia, for example, members of the government army and pro-government militias have executed numerous civilians in their current conflicts. They have shot and beaten to death males of all ages for resisting conscription, carried out widespread rape of women and girls as young as twelve, subjected hundreds of civilians to forced labor, and restricted the movement of hundreds of civilians intending to flee as refugees into neighboring Sierra Leone and Guinea.<sup>193</sup> In Guinea, “[e]ach time political opponents or citizens have dared to show their dissatisfaction with the government, the security forces have not hesitated to fire on crowds of demonstrators, disregarding the genuine risk of loss of human life”.<sup>194</sup> An instance of such cases of police brutality occurred in December 2001, when the security forces fired live bullets on students for demanding better conditions of study in several towns throughout the country. Three people were killed.<sup>195</sup>

In Mauritania, Colonel Sid Ahmed Ould Taya’s regime is engaged in a “campaign of terror, by which tens of thousands of black citizens have been forcibly tortured and killed.”<sup>196</sup> Although difficult to imagine, slavery continues to endure in Mauritania.<sup>197</sup> As the last

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193. See, e.g., Hum. Rts. Watch, Deteriorating Human Rights Situation in Liberia, *supra* note 186.

194. Press Release, Amnesty International, Guinea: Contempt for the Right to Life (May 17, 2002) (reporting on how the security forces in Guinea use excessive armed force on civilians in circumstances where neither their lives, nor the lives of anyone else, were in immediate danger), available at <http://web.amnesty.org/ai.nsf/Index/AFR290032002?OpenDocument&of=REGIO NS\AFRICA> (last visited Aug. 30, 2002).

195. *Id.*

196. Garba Diallo, *Mauritania—Neither Arab nor African*, 2 NEWS FROM THE NORDIC AFR. INST. 5 (2000) (noting that despite the white Moors minority status, they continue control eighty percent of the power positions over the black Haratine Africans), available at <http://www.nai.uu.se/newsfromnai/arkiv/00/no2/dialloeng.html> (last visited June 16, 2002).

197. See *id.* (noting that Mauritania’s population is comprised of forty to forty-five percent slaves and descendents of slaves).

country to abolish slavery on earth, Mauritania officially abolished slavery in 1980<sup>198</sup> and ratified the Race Convention on December 13, 1988.<sup>199</sup> In the case of *Malawi Africa Association et al. v. Mauritania*,<sup>200</sup> a complaint about the enslavement of the black African population of Mauritania by the minority population of Arab descent, the Commission noted that:

At the heart of the abuses alleged in the different communications is the question of the domination of one section of the population by another. The resultant discrimination against Black Mauritians is, according to the complaints . . . the result of a negation of the fundamental principle of the equality of peoples as stipulated in the African Charter and constitutes a violation of its article 19.<sup>201</sup>

Significantly, these “crimes of modern slavery, ethnic cleansing and violent military rule could never have taken place and continued on this scale without direct support or condoning by the local elite [and] neighbouring African countries . . . .”<sup>202</sup>

In very recent years, the African Commission has been seized with complaints of torture, degrading, and inhumane treatment. In *Malawi African Association, Amnesty International, Ms. Sarr Diop/UIDH/RADDHO, Collectif des veuves et ayant-droit and Association Mauritanienne des Droits de l'Homme v. Mauritania*,<sup>203</sup> the allegations of torture included keeping the detainees permanently inside small, dark, underground cells, making them sleep on cold floors in the desert winter at night, and starving prisoners deliberately. Others included denying prisoners access to medical care, plunging their heads in water until they lapsed into unconsciousness, spraying their eyes with pepper, and administering high voltage electric current to their genitalia. The security agents also burned

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198. *See id.*

199. *See Status of Ratifications, supra* note 57.

200. *Malawi Africa Association et al. v. Mauritania*, Communication 54/81.

201. *Id.* para. 142.

202. *See Diallo, supra* note 196, at 6.

203. Communications 54/91, 61/91, 98/93, 164/97, 210/98, in *Thirteenth Report, supra* note 177, Annex V; 8 IHRR 268 (2001).

detainees, buried them in sand of the desert to die a slow death, routinely inflicted general beating, and in the case of female prisoners, raped.<sup>204</sup> The Government of Mauritania did not produce any argument to counter these facts. According to the African Commission, “[t]aken together or in isolation, these acts are proof of widespread utilization of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of Article 5 [of the Banjul Charter].”<sup>205</sup>

In *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Africa v. Sudan*,<sup>206</sup> the African Commission observed “that the citizens of Sudan have endured a lot of suffering.”<sup>207</sup> Here, the alleged acts of torture included forcing detainees in cells measuring 1.8 meters wide and 1 meter deep, deliberately flooding the cells and frequently banging on the doors so as to prevent detainees from lying down, forcing detainees to face mock executions and prohibiting them from bathing or washing. Other acts of torture included burning them with cigarettes, binding them with ropes so as to deliberately cut off blood circulation to parts of their body, and beating them with sticks until their bodies were severely lacerated and then treating the resulting wounds with acid.<sup>208</sup> The Government of Sudan did not refute any of these acts, thus leading

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204. *Id.* paras. 115-17.

205. *Id.* para. 118.

206. Communications 48/90, 50/91, 52/91 and 83/98, in *Thirteenth Report, supra* note 177, Annex V; *see also* 8 IHRR 256 (2001) [hereinafter Sudan cases].

207. *Id.* para. 83, (adding, per the African Commission, that “[t]o change so many laws, policies and practices [in Sudan] will of course not be a simple matter”). Sudan’s penal code is based upon the government’s interpretation of Shari’a (Islamic law) and includes a number of penalties, such as limb amputation, death and death followed by crucifixion all of which could be regarded as “cruel, inhuman or degrading punishments and therefore inconsistent with international human rights law and Sudan’s obligations.” Press Release, Amnesty International, Sudan: Alarming Increase of Executions in Darfur Region (June 28, 2002) (reporting on the sharp increase in executions and the use of the death sentence as punishment in Darfur region, Western Sudan), available at <http://web.amnesty.org/ai.nsf/Index/AFR540112002?OpenDocument&of=REGIO NS\AFRICA> (last visited Aug. 30, 2002).

208. *See id.* para. 5.

the Commission to find the government responsible for violations of the provisions of Article 5 of the Banjul Charter.<sup>209</sup>

The Commission also held that deaths resulting from acts of torture or from its trials concluded in breach of the due process guarantees in article 7 of the Banjul Charter also violated the prohibition against arbitrary deprivation of life in article 4 of the Charter. Noting that allegations that "prisoners were executed after summary and arbitrary trials and that unarmed civilians were also victims of extra-judicial executions" had been "upheld by evidence from the report of the United Nations Special Rapporteur,"<sup>210</sup> the Commission continued:

In addition to the individuals named in the communications, there are thousands of other executions in Sudan. Even if these are not all the work of forces of the Government, the Government has a responsibility to protect all people residing under its jurisdiction (see ACHPR/74/91:93, *Union des Jeunes Avocats v Chad*). . . . The investigations undertaken by the Government are a positive step, but their scope and depth fall short of what is required to prevent and punish extra-judicial executions.<sup>211</sup>

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209. *Id.* para. 57; see also Banjul Charter, *supra* note 22, art. 5 (prohibiting all forms of exploitation and degradation of man, particularly slavery, torture, and cruel, inhuman or degrading punishment or treatment); cf. Torture Convention, *supra* note 59. Torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity).

*Id.* See also Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Dec. 9, 1975, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, art. 1(2), Annex, U.N. Doc. A/10034 (1975).

210. See Sudan cases, *supra* note 206, para. 48.

211. *Id.* paras. 50-51.

### c. Persecution and Harassment of Human Rights Defenders

Human rights defenders have themselves been subjected to arbitrary detentions in many African countries.<sup>212</sup> Some human rights NGOs have been banned from functioning in their respective countries, like in Tunisia.<sup>213</sup> Indeed, whether in Angola, Burkina Faso, Burundi, Cameroon, Central African Republic, Cote D'Ivoire, DR Congo, Egypt, Eritrea, Ethiopia, Gambia, Ghana, or Tunisia, there is,

a pattern of growing intolerance on the part of African governments towards human rights defenders and continuing attempts to silence them across the continent. Many governments . . . persistently harass, intimidate and in some instances, kill or silence those who voice the concerns of and defend African victims of human rights abuses and their families.<sup>214</sup>

Liberia is one such country, where those who express concern about the government's poor human rights records live under constant threat of attack, arrest, detention, and torture by the authorities.<sup>215</sup>

### d. Denials of the Right to Freedom of Expression

There are widespread violations of the right to freedom of expression by States Parties to the Banjul Charter, "through the harassment, arbitrary arrest and detention of journalists, victimisation of media

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212. Communication 225/98 *Huri-Laws v. Nigeria* (finding the Nigerian government's harassment, persecution, arrest, and detention without a trial of human rights activists Olisa Abgakoba and Ogaga Ifowodo, was in violation of the Banjul Charter).

213. *Resolution on the Situation of Human Rights Defenders in Tunisia*, para. 5, AHG/229 (XXVII) (May 2001) (expressing concern over the decision of the Government of Tunisia to suspend the activities of the Ligue Tunisienne de Defense des Droits de l'Homme (LTDH), "one of the oldest human rights NGOs in Africa").

214. African Center for Democracy & Human Rights Studies, *A Brief Survey of the Situation of Human Rights Defenders in Africa During the Past 6<sup>th</sup> Months. (From April 2001 to October 2001 [sic]*, 13, ACDHRS/10-12/2001.

215. See *id.* at 9; see also Hum. Rts. Watch, *Deteriorating Human Rights Situation in Liberia*, *supra* note 186 (reporting that since the imposition of a state of emergency in February 2002, the government of Charles Taylor of Liberia has steadily imprisoned, harassed, and beaten individuals that have been critical of its policies).

houses deemed critical of the establishment, inadequate legal frameworks for regulating electronic media, especially broadcasting, and criminal and civil laws that inhibit the right to freedom of expression."<sup>216</sup> In The Gambia, which hosts the African Human Rights Commission, there is growing clampdown on the freedom of expression, including arbitrary arrest and detention, expulsion or threats of violence against journalists and other media practitioners.<sup>217</sup> The Gambian Parliament has also recently passed a National Media Commission Bill, several provisions of which are incompatible with The Gambia's international obligations under the ICCPR and, in particular, the Banjul Charter.<sup>218</sup> For example, the Bill gives the Media Commission the power to grant, suspend or withdraw registration of media practitioners and organizations. Such powers, it has been submitted, "might lead to the arbitrary closure or refusal of registration of newspapers".<sup>219</sup> The Bill also gives the Commission the right to investigate and try media practitioners and organizations. This includes the power to force the disclosure of sources and to issue warrants for the arrest of any person who fails to appear before the commission after having been served with a summons.<sup>220</sup> Furthermore, the Bill gives the Commission the power to impose sanctions of up to six months imprisonment as penalties for non-compliance with the provisions of the Bill. It can also impose fines for the publication or broadcast of any language, caricature, cartoon or depiction that is derogatory, contemptuous or insulting against any person or authority. It leaves the definition of such an offence to the arbitrary determination of the Commission. The Bill's provisions further ex-

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216. *Resolution on Freedom of Expression*, pmbl. para. 4, OAU Doc. AHG/229 (XXXVII) (May 2001).

217. *See, e.g.*, Press Release, Amnesty International, *Gambia: Growing Clampdown on Freedom of Expression* (Aug. 7, 2002) (expressing concern at increasing attacks on freedom of expression in The Gambia following the recent arrests of three journalists—Pa Ousman Darboe, Alhaji Yoro Jallo, and Guy-Patrick Massaloko—solely on the grounds of their legitimate professional activities), *available* at  
[http://web.amnesty.org/ai.nsf/Index/AFR270052002?OpenDocument&of=REGIO NSAFRICA](http://web.amnesty.org/ai.nsf/Index/AFR270052002?OpenDocument&of=REGIO%20NSAFRICA) (last visited Aug. 30, 2002).

218. *Id.*

219. *Id.*

220. *See id.* (pointing out that "[i]n addition to lacking any judicial guarantees of fair trials, this appears to usurp the functions of the criminal justice system").

clude the jurisdiction of any court or tribunal, a normal lifestyle of dictatorial regimes in Africa. Such ouster denies the citizens their right to effective remedy as provided for under the ICCPR and the Banjul Charter.<sup>221</sup> In the judgment of Amnesty International, “[t]hese restrictions are without justification. They constitute an affront to the right to freedom of expression and may muzzle and undermine the independence of the Gambian media.”<sup>222</sup>

In Zimbabwe, President Robert Mugabe has led his Parliament to pass a new information bill that will fine or imprison any journalist that is found “spreading rumours, falsehoods, or causing alarm and despondency under the guise of authentic reports.”<sup>223</sup> The few independent newspapers that dare to report political violence or the activities of the country’s opposition, known as the Movement for Democratic Change, have suffered arrest and the destruction of their properties.<sup>224</sup> The African Commission has stated that the right to freedom of expression is “a basic human right, vital to an individual’s personal development and political consciousness, and participation in the conduct of public affairs of his country.”<sup>225</sup> The setting aside of that right—as Zimbabwe is doing even though it has ratified the Banjul Charter—guaranteed at the international level,<sup>226</sup> makes its protection ineffective. Similarly, “[t]o permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole es-

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221. *Id.*

222. *Id.*

223. See Nicholas Watt, *Mugabe to Strangle Foreign Reporting*, THE GUARDIAN, Dec. 1, 2001, at 21 (explaining that reporters will be charged for spreading information that discredits people based on factors such as sex, race, age, language, religion, profession, or political beliefs), available at 2001 WL 31388711.

224. See *id.* (reporting the stoning of offices owned by two independent weekly newspapers, and attacks against vendors selling independent newspapers).

225. See African Commission, in Communication 141/94, in *Thirteenth Report*, *supra* note 177, Annex V, para. 36.

226. See, e.g., Banjul Charter, *supra* note 22, art. 9 (stating that every person has the right to retrieve information and express and disseminate opinions).



sence of treaty making.”<sup>227</sup> The crisis in Zimbabwe provides an early test of the willingness of African governments to hold each other accountable. Sadly, but typically, the OAU has only given a muted response. The Organization sees the problem largely as Western propaganda designed to destabilize the country and, hence, an unwarranted interference in the internal affairs of an independent African country.<sup>228</sup>

#### e. Denials of the Right to Fair Trials and Attacks on the Judiciary

Africa continues to have military regimes that are inclined to suspend the Constitution. The regimes govern by decrees with ouster clauses<sup>229</sup>—thereby creating “a legal situation in which the judiciary can provide no check on the executive branch of the government”<sup>230</sup>—and seek to oust the application of international obligations.<sup>231</sup> In many African countries, Military Courts and Special Tri-

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227. Communication 141/94, *supra* note 225, para. 40. However, there is no general agreement on the primacy of international over national law. Municipal courts generally are biased in favor of national law, while international courts are generally biased in favor of international law.

228. See *Statement on Zimbabwe*, OAU Doc. AHG/St. 1 (XXXVI) (July 2000) (expressing dismay at the report on a bill adopted by the Senate of the United States to prohibit assistance of debt relief from being extended by the United States to Zimbabwe and also the United States’ opposition to any assistance to Zimbabwe by the international financial institutions where the United States is a member); *cf.* *Decision on Development of Zimbabwe*, para. 6, CM/Dec. 554 (LXXII) Rev. 1 (June 2000) (deploring “the attempts by some foreign interests, through the massive injection of resources and manipulation of the media, to interfere in and influence the outcome of the [2000] elections, as a threat to national independence”).

229. See *Constitutional Rights Project, Civil Liberties Organization v. Nigeria*, para. 28, Afr. Commission on Hum. and Peoples’ Rts. Communications 140/94, 141/94, 145/95 (defining ouster clauses as legislative provisions that “prevent the ordinary courts from taking up cases . . . or from entertaining any appeals from the decisions of . . . special tribunals”).

230. *Id.* para. 29; see also *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, para. 18, Afr. Commission on Hum. and Peoples’ Rts. Communications 143/95, 150/96 (stating that “on their face, ouster clauses remove the right of court to review decrees”).

231. See *Civil Liberties Organization, Legal Defense Center, Legal Defense and Assistance Project vs. Nigeria*, para. 25, Afr. Commission on Hum. and Peoples’

bunals exist alongside regular judicial institutions. These Tribunals should ordinarily determine offenses of a purely military nature committed by military personnel<sup>232</sup> and should not try offenses that fall within the jurisdiction of regular courts. However, they extend their jurisdictions over civilians in contravention of the right to fair trial guaranteed under Article 7 of the Banjul Charter. Worse still they conduct most of these trials in secret,<sup>233</sup> contrary to international human rights norms.<sup>234</sup>

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Rts. Communication 218/98 (recognizing the inclination of some of Africa's military regimes to suspend their constitutions and oust the international organizations), available at <http://www1.umn.edu/humanrts/africa/comcases/218-98.html> (last visited July 17, 2002).

232. See *The Right to a Fair Trial and Legal Assistance in Africa*, paras. L(a)-(b), Afr. Commission on Hum. and Peoples' Rts. DCO/OS (XXX) 247 [hereinafter *Fair Trial*] (stating that "the purpose of Military Court is to determine offenses of a purely military nature committed by military personnel. While exercising this function, Military Courts are required to respect fair trial standards"); see also *Forum of Conscience vs. Sierra Leone*, paras. 17, 19-20, Afr. Commission on Hum. and Peoples' Rts. Communication 223/98 (holding that the rules and regulations governing court martials, to the extent that they do not allow the right of appeal, offend Article 7(1) of the Banjul Charter); cf. *Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, CCPR, 21st Sess., General Comment 13, para. 4 (1984) [hereinafter General Comment 13]. The Committee maintained that:

[w]hile the Covenant [ICCPR] does not prohibit such categories of courts [military or special courts which try civilians], nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantee stipulate in article 14.

*Id.*

233. See *Fair Trial*, *supra* note 232, para. 54.

234. See, e.g., General Comment 13, *supra* note 232, para. 6. Paragraph 6 states that:

[the] publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1 [of the ICCPR], acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons.

*Id.*

In *Media Rights Agenda v. Nigeria*,<sup>235</sup> for example, Niran Malaolu, the Editor of *The Diet*, an independent Nigerian daily newspaper, was arrested, arraigned, and tried by a Special Military Tribunal set by the late Nigerian military dictator, Sani Abacha, for his alleged involvement in a coup. After a secret trial, on April 28, 1998, the tribunal found Malaolu guilty of the charge of concealment of treason and sentenced him to life imprisonment. The African Commission held the trial to be in violation of Article 7 of the Banjul Charter—the right to a fair hearing<sup>236</sup>—and the basic principle of a fair hearing contained in Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary (“The U.N. Basic Principles”).<sup>237</sup> The Commission also found that establishing the tribunal for the trial of treason and other related offenses as impinging on the judiciary’s independence in that Nigeria recognizes such offenses as falling within the jurisdiction of the regular courts.<sup>238</sup>

Even some so-called democratic regimes have increasingly become intolerant with decisions of courts that are unfavorable to them, beside other crude manifestations of power. In Cote d’Ivoire, for example, the court system is used as a means to harass political opposition leaders and independent jurists. The judiciary has become “highly vulnerable” to executive interference.<sup>239</sup> Judge Zoro E. Ballo was, for example, accused by the Minister of Justice of being a “rebel judge” for issuing an Ivorian nationality certificate to Mr. Alasane Ouattara in September 1999. Although Mr. Ouattara had provided all the documents the Court required of him, his offense was that he had declared himself a future candidate in the 2000 presidential elections.<sup>240</sup> Subsequent to the issuance of the nationality certificate, the Minister of Justice asked the judge to cancel it. When the

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235. *Media Rights Agenda v. Nigeria*, Afr. Commission on Hum. and Peoples’ Rts. Communication 224/98 (detailing the arrest, arraignment, and trial of Niran Malaolu).

236. *See id.* para. 63 (finding a violation of the right to a fair trial).

237. *See id.* para. 64 (asserting that everyone has a right to trial by ordinary courts using established legal procedures).

238. *See id.* para. 63.

239. *See* ATTACKS ON JUSTICE, *supra* note 173, at 231.

240. *See id.* at 234.

judge refused, he was accused of forgery, alleging that there were irregularities in the documents. On November 12, 1999, the judge resigned after giving the following words in a press conference:

It was not a provocative attitude. I am a judge. The law gives me the power and the competence to make decisions. I do not have to refer to the head of state. The head of state is head of the executive. I am a member of the judicial power. In the name of the principle of separated powers, I am not bound by the head of state's declarations.<sup>241</sup>

In Zimbabwe, Robert Mugabe usually resorts to constitutional amendments to reverse Supreme Court decisions with which he disagrees and to attenuate the constitutional guarantees of human rights, including the rule of law.<sup>242</sup> Through successive legislative acts passed by the Parliament dominated by the ruling party, the benign dictator has grown excessively powerful, while the capacity of other governmental institutions to ensure accountability has declined.<sup>243</sup> The African Commission, while sympathetic to all genuine attempts to maintain public peace, has noted that, "too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform."<sup>244</sup> Nowhere is this truer than in Zimbabwe. By reason of "his irresponsible policies," Mugabe appears to have "lost some degree of control over the forces he has unleashed," given "the deteriorating political and economic situation in SADC's second most developed and fast collapsing economy."<sup>245</sup> "Power," says Reinhold Niebuhr, "sacrifices

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241. *Id.* at 235.

242. See Lord Lester of Herne Hill, *The Challenge of Bangalore: Making Human Rights a Practical Reality*, 3 E.H.R.L.R. 273, 277 (1999).

243. See Masipula Sithole, *Fighting Authoritarianism in Zimbabwe*, 12 J. OF DEMOCRACY 160, 161 (2001) (describing the increasing power of the presidency in Zimbabwe).

244. Communications 143/95 and 150/96, *supra* note 113, para. 33.

245. *SADC trembles as Zim threatens*, 386 AFRICA ANALYSIS 1 (2001) (indicating the instability existing in Zimbabwe and the inability to correct it).

justice to peace within the community and destroys peace between communities.”<sup>246</sup>

#### f. Absence of Genuine Democracies in Africa

Africa has yet to achieve a true democracy that will guarantee, even if minimally, the rule of law and human rights. On the contrary, all systems of government—pseudo-democratic, oligarchic, authoritarian, totalitarian, paternalistic, hierarchical, and monarchical, all forms of dictatorships—still find fertile grounds in this crisis-infested and afflicted continent. A substantial percentage of African countries are still essentially one-party systems, and military rule is not uncommon in at least a half-dozen nations. Transition in all of these is incomplete, or tenuous at best. The aged, imperial lords and unanointed African messiahs—Muammar Qadhafi of Libya, Arap Moi of Kenya, Robert Mugabe of Zimbabwe, Gnassingbe Eyadema of Togo, Paul Biya of Cameroon, Charles Taylor of Liberia, Lansana Conte of Guinea, Colonel Sid Taya of Mauritania—these, and others, have no respect for the rule of law and human rights. In their desperation to consolidate, and cling on to, power, they have become wholly addicted to the rule of force and the abuse of law and are influenced by the philosophy that “it is much safer to be feared than loved.”<sup>247</sup>

Many of Africa’s “big men”<sup>248</sup> of politics are still perching, like wolves, around the corridors of power; others sit, like tents, over the

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246. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 16 (Charles Scribner’s Sons 1960) (1932) (emphasizing the effect of intergroup conflict on the quest for peace); *see also id.* at 6, 21 (elaborating on the continuing struggle between power and peace in communities).

247. NICCOLO MACHIAVELLI, *THE PRINCE* 59 (Quentin Skinner & Russell Price eds., Cambridge University Press 1988) (debating the most effective way to rule people). *Cf.* NICCOLO MACHIAVELLI, *THE DISCOURSES* bk. III, ch. 21, para. 2 (Leslie J. Walker trans., Routledge & Kegan Paul 1975) (1950) (discussing the preference of ruling with fear instead of love).

248. *See* WILLY MUTUNGA, *CONSTITUTION-MAKING FROM THE MIDDLE: CIVIL SOCIETY AND TRANSITION POLITICS IN KENYA, 1992-1997* (1999) (providing a vivid description of the “Big Man” in African politics). Mutunga describes the “big man” in African politics thus:

panoply of power. Either way, they are busy dispensing authorities and giving orders to their victims. Daniel Arap Moi of Kenya, the self-styled “professor of politics” and “a master at wrongfooting his tribally-divided followers and opponents alike,”<sup>249</sup> has held on to power for the past twenty-three years “by manipulating ethnic and political loyalties . . . in a country where politics are dynastic as well as tribal.”<sup>250</sup> Moi, who “has never missed a church service since 1978,”<sup>251</sup> may be waving goodbye to power at the end of 2002, as the Kenyan Constitution stipulates,<sup>252</sup> but “he will be waving goodbye

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His face is on the money. His photograph hangs in every office in his realm. His ministers wear gold pins with tiny photographs of Him on the lapels of their tailored pinstriped suits. He names streets, football stadiums, hospitals and universities after himself. He carries a silver inlaid ivory rungu or an ornately carved walking stick or a fly whisk or a chiefly stool. He insists on being called doctor or conqueror or teacher or the big elephant or the number one peasant or the wise old man or the national miracle or the most popular leader in the world. His every pronouncement is reported on the front page. He sleeps with the wives and daughters of powerful men in his government. He shuffles ministers without warning, paralyzing policy decisions as he undercuts pretenders to his throne. He scapegoats minorities to shore up popular support. He bans all political parties except the one that he controls. He rigs elections. He emasculates the courts, he cowers the press. He stifles academia. He goes to church. The Big Man’s off-the-cuff remarks have the power of law. He demands thunderous applause from the legislature when ordering far-reaching changes in the constitution. He blesses his home region with highways, schools, hospitals, housing projects, irrigation schemes, and a presidential mansion. He packs the civil service with his tribesmen. . . His enemies are harassed by youth wingers from the ruling party. His enemies are detained or exiled, humiliated or bankrupted, tortured or killed.

*Id.* at 44. See generally CHINUA ACHEBE, *A MAN OF THE PEOPLE* (Anchor Books 1989) (1966) (fictionalizing an account of a “big man” ruler in Africa).

249. *Kenya’s Drastic Politics: Moi and His Band of Young Turks*, *THE ECONOMIST*, Dec. 15, 2001, at 40 (describing the way that Daniel Arap Moi has held on to power).

250. *Id.* (explaining the course taken by this one ruler to ensure his perpetuity).

251. John Kamau, *Moi: A Profile*, *NEW AFR.*, Jan. 2002, at 20.

252. KENYA CONST. ch. II, art. 9(1)-(2) (1998), (providing that the term of office of the President shall be five years from the date he is sworn in, and that no person shall be elected to hold office as President for more than two terms), available at <http://oncampus.richmond.edu/~jjones/confinder/Kenya.htm>.

also to most of the national projects he started that lie in ruins today."<sup>253</sup>

Meanwhile, on November 11, 2001, Lansana Conte of Guinea, who has been in power through a *coup d'état* since 1984<sup>254</sup>—Mugabe has served only four years longer than him in Zimbabwe—forced a referendum on the people to change a constitutional clause barring him from seeking a third term. The result of the referendum, which according to the Paris-based weekly, *Jeune Afrique*, was “computer generated,”<sup>255</sup> showing a massive 98.36 percent ‘yes vote’—on a more than 87 percent turn out<sup>256</sup>—in favor of the amendment to the Constitution. This effectively assures Conte of a third term when his current term expires in 2003. The referendum also extended the presidential mandate from five to seven years and lifts the age limit of seventy for presidential candidates, which would have barred Conte from standing again for election.<sup>257</sup>

Both dictators and unstable regimes tend to move toward increased repression. An authoritarian regime is often immune to the truth, with rulers living in the ivory tower of self-deception, surrounded by sycophants and hangers-on.<sup>258</sup> Interestingly, education and culture on the part of the victim population have not prevented these “trends towards omnipotence,” as Abacha’s Nigeria conclusively demonstrated.<sup>259</sup> This illustrates that this present generation is not different from the earlier historical ages, the advancement in

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253. Kamau, *supra* note 251, at 20.

254. Conte seized power in a coup in 1984, was elected president in 1993, and was re-elected in 1998.

255. Antoine Lokongo, *Tale of Two Countries*, NEW AFR., Jan. 2002, at 12 (relaying weekly report).

256. *See id.* (describing the journalists covering the event as reporting that “there were no long queues at the polling stations”).

257. *See id.*

258. *See* Carter, *supra* note 94, at 3 (describing the reality that surrounds authoritarian rulers as compared to the reality outside of their small world).

259. WEERAMANTRY, *supra* note 1, at 89 (pointing out the tendency of individuals or small groups that accumulate power to abuse it and tolerate nothing that stands in its way).

knowledge notwithstanding.<sup>260</sup> Similarly, “the spirit that endures the mere cruelties and caprices of an established despot is the spirit of an ancient and settled and probably stiffened society, not the spirit of the new one.”<sup>261</sup>

### III. THE AU TREATY, SUPRA-NATIONAL HUMAN RIGHTS INSTITUTIONS AND FUNDING

This segment briefly considers the likely impact of the AU Treaty on the existing and future supra-national human rights institutions, in the context of the current attitude of the continental organization to African human rights institutions. It will also discuss the problem of funding human rights programs in Africa, beginning with the African Commission.

#### A. THE AFRICAN HUMAN RIGHTS COMMISSION

It is not disputed that the AU Treaty was drafted without consultation with relevant human rights institutions in Africa. Besides, the Treaty fails to incorporate those institutions as part of the Organs of the Union. The African Commission is showing signs of unease about this *vis-à-vis* its mandate. And this is understandable, because the Commission has, over the years, been short-changed by the OAU. Member States of the OAU, with very few exceptions, have not always cooperated with the Commission in an effort to promote and protect human rights on the continent. There is a love-hate relationship exists between the Commission and the Member States, as the latter perceive the former as an irritant. The Commission appears to be an institution that is assumed and forgotten and remembered only by accident.

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260. See HENDRIK WILLEM VAN LOON, *THE LIBERATION OF MANKIND* 306 (1926).

It may flatter our pride to believe ourselves heirs to the ages. It will be better for our spiritual health if we know ourselves for what we are – contemporaries of the folks that lived in caves, Neolithic men with cigarettes and Ford cars, cliff-dwellers who reach homes in an electric lift.

*Id.*

261. G.K. CHESTERTON, *THE EVERLASTING MAN* 50-51 (1974) (comparing the ancient civilizations of Egypt and Babylon).



One example of this non-cooperative attitude of States Parties toward the Commission is in the submission of periodic reports. The Banjul Charter provides that: "Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter."<sup>262</sup> Only very few States have been faithful in this simple routine matter of state reporting. Many States have not submitted their initial reports years after ratification of the Banjul Charter. Only fifteen States have submitted all their reports,<sup>263</sup> as of September 2001, out of which thirteen have presented all their reports before the Commission,<sup>264</sup> while two have not presented all.<sup>265</sup> Twenty-three States have not submitted a single report to the Commission since their ratification of the Charter;<sup>266</sup> eleven States have submitted their preliminary report but have other outstanding reports;<sup>267</sup> while four States have submitted two or more reports but

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262. Banjul Charter, *supra* note 22, art. 62.

263. See *Statistics on States Initial/Periodic Reports (Sept. 2001)* 2, Afr. Commission on Hum. and Peoples' Rts. ADOC/OS (XXX) 24 1a (naming as examples Algeria, Benin, Burundi, Chad, Congo Brazzaville, Egypt, Ghana, Lesotho, Libya, Mali, Namibia, Rwanda, Swaziland, Togo, and Uganda).

264. See *id.* at 3 (naming as examples Algeria, Benin, Burundi, Chad, Congo Brazzaville, Egypt, Ghana, Libya, Mali, Namibia, Rwanda, Swaziland, and Uganda).

265. See *id.* (naming as examples Lesotho and Togo).

266. See *id.* at 1-2 (naming Botswana (7 overdue reports); Cameroon (6 overdue reports); Central African Republic (7 overdue reports), Comoros (7 overdue reports), DR Congo (7 overdue reports); Cote D'Ivoire (4 overdue reports); Djibouti (4 overdue reports); Equatorial Guinea (7 overdue reports); Eritrea (1 overdue report); Ethiopia (1 overdue report); Gabon (7 overdue reports), Guinea-Bissau (7 overdue reports); Kenya (4 overdue reports); Liberia (7 overdue reports); Madagascar (4 overdue reports); Malawi (5 overdue reports); Mauritania (7 overdue reports); Niger (7 overdue reports); Sahrawi Arab Democratic Republic (7 overdue reports); Sao Tome & Principe (7 overdue reports); Sierra Leone (7 overdue reports); Somalia (7 overdue reports); and Zambia (7 overdue reports)).

267. See *id.* at 2 (naming Angola (1 overdue report); Burkina Faso (1 overdue report); Cape Verde (2 overdue reports); Guinea (1 overdue report); Mauritius (2 overdue reports); Mozambique (2 overdue reports); Nigeria (4 overdue reports); Seychelles (3 overdue reports); South Africa (1 overdue report); Sudan (2 overdue reports); and Tanzania (4 overdue reports)).

owe more.<sup>268</sup> Some States, such as Seychelles,<sup>269</sup> submitted their reports but did not send anyone to present it.

Some States have the misconception that the state reporting system is a forum to embarrass them, although those that have presented reports before the Commission have realized that it is the best way for states to build confidence in, and a strong partnership with, the Commission.<sup>270</sup> Until recently, most states did not even send delegates to attend the sessions of the Commission.<sup>271</sup> Yet, as the U.N. Development Program reflected:

Whether the African Commission on Human and Peoples' Rights will be perceived as an effective institution for the protection of human rights in Africa will largely depend on how far and how much the State Parties to the African Charter take seriously, and respect, the Commission's views and recommendations. *So far, they have not.*<sup>272</sup>

The former Chairman of the African Commission has deplored the Treaty's conspicuous omission of the Commission as one of the organs of the AU, saying that "the omission is most regrettable."<sup>273</sup> He

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268. See *id.* (naming The Gambia (3 overdue reports); Senegal (4 overdue reports); Tunisia (3 overdue reports); and Zimbabwe (2 overdue reports)).

269. See *Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights 1998-1999* Annex IV OAU Doc. CAB/LEG/67.1 (1999) (indicating that the Republic of Seychelles submitted its initial report in 1994 but has never presented it before the Commission, despite the repeated reminders of the Commission, necessitating a resolution by the Commission condemning the action).

270. See *Information Sheet No. 4*, Afr. Commission on Hum. and Peoples' Rts.

271. See *Thirteenth Report*, *supra* note 177, at 2 (indicating that twenty-six States parties, with fifty-seven delegates participated at the twenty-seventh Ordinary Session of the Commission in Algiers, Algeria from April 27 to May 11, 2000, which the Commission acknowledged as "both significant and encouraging").

272. Human Development Report 2000: Background Paper, U.N. Development Programme (emphasis added) *reprinted in Human Rights Agreements in Africa, Europe, and the Americas*, BBC WORLD SERVICE at [http://www.bbc.co.uk/worldservice/people...arightto/four\\_b/treaties\\_regional.shtml](http://www.bbc.co.uk/worldservice/people...arightto/four_b/treaties_regional.shtml) (last visited June 20, 2002).

273. Professor E.V.O. Dankwa, Introductory Speech of Professor E.V.O. Dankwa, erstwhile Chairman of the African Commission, to the Fourteenth Annual

called on the Assembly to involve the Commission in matters affecting the Commission specifically and human rights generally.<sup>274</sup> Consequently, at its twenty-ninth Ordinary Session in Tripoli, Libya, the Commission, on May 7, 2001, adopted a "Resolution on the African Union and the African Charter on Human and Peoples' Rights."<sup>275</sup> The resolution expressed its total adherence "to the noble ideals, principles and objectives contained in the Constitutive Act of the African Union."<sup>276</sup> The Commission, nevertheless, decided to set up a working group on the issue, with a mandate "to initiate an in-depth discussion on all the implications of the entry into force of the Constitutive Act of the African Union on the African Charter and the African Commission on Human and Peoples Rights."<sup>277</sup> It has also decided to keep the AU issue on the front burner of its bi-annual meetings.<sup>278</sup>

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Activity Report of the African Commission on Human and Peoples' Rights, 2000-2001, at the thirty-seventh Ordinary Session of the Assembly of Heads of State and Government of the OAU. See *Fourteenth [sic] Annual Activity Report of the African Commission on Human and Peoples' Rights 2000/2001* 46 (2001) [hereinafter *Fourteenth Report*].

274. *Id.* However, the issue of non-inclusion was addressed by the decision of the OAU Council of Ministers, meeting in Lusaka, between July 5-8, 2001, calling for the incorporation of "organs, institutions/bodies which have not been specifically mentioned in the Constitutive Act."

275. See *Resolution on the African Union and the African Charter on Human Peoples' Rights* AHG/229 (XXXVII), Afr. Commission on Hum. and Peoples' Rts. (May 2001) [hereinafter *Resolution*].

276. *Id.* para. 1.

277. *Id.* para. 2; cf. *Decision on the 14th Annual Activity Report of the African Commission on Human and Peoples' Rights*, para. 2, OAU Doc. AHD/Dec. 162 (calling on the Commission "to pursue reflection on the strengthening of the African system for the promotion and protection of Human and Peoples' Rights to enable it to effectively meet the needs of the African populations within the context of the African Union, and submit a report thereon as soon as possible").

278. See *Resolution*, *supra* note 275, para. 32; see e.g. *Draft Agenda of the 30th Ordinary Session of the African Commission on Human and Peoples' Rights, 13-27 October 2001, Banjul, The Gambia*, DOC/OS (XXX) 235a Rev. 1, Item No. 10(1), at 2 [hereinafter "*Draft Agenda*"] (indicating that as of the 30th Ordinary Session, the Commission had not set up the Working Group, as the Chairman revealed during one of the public sessions, at which the author was present).

On second thought, it might be good for human rights if the Commission remains neutral, as its direct incorporation into the Organs of the Union might lead to some overbearing influences from the so-called "key organs" of the AU.<sup>279</sup> This might make the members of the Commission to be looking over their shoulders as they perform their duties. Such a development will greatly undermine the independence of the Commission and render it ineffective in carrying out its mandate. The last temptation, says T. S. Eliot, is the greatest treason: to do the right deed for the wrong reason. At any rate, the Commission is a creation of an existing treaty, the Banjul Charter, which is independent of the OAU Charter or, for that matter, the AU Treaty. The Banjul Charter defines the mandate of the Commission, and since the AU Treaty has made explicit reference to the Charter,<sup>280</sup> it duly recognizes the Commission. In light of the above, there is no doubt that the relationship that existed between the Commission and the Assembly, on the one hand, and the Secretary General on the other, will continue to exist, despite the transformation or change of nomenclature of the OAU.

## B. THE AFRICAN HUMAN RIGHTS COURT

As indicated earlier, the AU Treaty provides for the establishment of a Court of Justice as one of the Organs of the AU.<sup>281</sup> The Court has, however, not yet been set up because the enabling protocol is yet to be elaborated, in accordance with the AU Treaty.<sup>282</sup> Meanwhile, on June 9, 1998, at Ouagadougou, Burkina Faso, the OAU adopted a Protocol to the Banjul Charter on the establishment of the African

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279. See *Decision of the Assembly of Heads of State and Government on the Implementation of the Sirte Summit Decision on the African Union* OAU AHG/Dec. 160 (XXXVII), para. 4 (July 2001) [hereinafter Dec. on Implementation] (referring to the following as "key Organs" of the AU—the Assembly, the Executive Council, the Commission and the Permanent Representatives).

280. See AU Treaty, *supra* note 4, art. 3(h) (providing that one of the objectives of the Union will be to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments").

281. See *id.* art. 5(1)(d) (naming the Court of Justice as an organ of the Union).

282. See *id.* art. 18 (calling for the establishment of the Court of Justice and a protocol defining the statute, composition, and functions of the Court).

Human Rights Court.<sup>283</sup> The proposed Court will complement the protective mandate of the African Commission, as conferred upon it by the Banjul Charter.<sup>284</sup> The Protocol completes "the norms for the protection of human rights on the continent which began with the creation of the African Charter on Human and Peoples' Rights."<sup>285</sup> The Human Rights Court has also not been set up, as the requisite number of ratifications—fifteen—has yet to be realized.<sup>286</sup>

There is a great deal of confusion at the moment among the OAU's Member States with regard to the nature and scope of the future AU Court. This partly explains the reluctance of Member States in ratifying the Protocol on the Human Rights Court. As of October 2001, more than three years after the adoption of the Banjul Protocol, only five countries—Burkina Faso (31/12/98), Mali

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283. See *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT (III) [hereinafter Prot. to Banjul Charter] (establishing within the Organization of African Unity an African Court on Human and Peoples' Rights, the organization, jurisdiction and functioning of which shall be governed by the present Protocol), available at <http://www.dfa.gov.za/for-relations/multilateral/treaties/court.htm> (last visited July 10, 2002).

284. See *id.* at pmbl. (recognizing freedom, equality, justice, peace and dignity, as essential objectives in the OAU). Article 2 sets forth the relationship between the Court and the African Commission on Human and Peoples' Rights. *Id.* art. 2. For commentary on the Protocol, see generally Nsongurua J. Udombana, *Towards the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45 (2000) (providing commentary on the Court); Gino J. Naldi & Konstantinos Magliveras, *Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights*, 16 NETH. Q. HUM. RTS. 431 (1998) (analyzing the Protocol's provisions and drawing comparisons with other regional human rights judicial organs); Andre Stimmet, Comment, *A Future African Court on Human and Peoples' Rights and Domestic Human Rights Norms*, 23 S. AFR. Y.B. INT'L L. 233 (1998); John Mubangizi & Adreas O'Shea, Comment, *An African Court on Human and Peoples' Rights*, 24 S. AFR. Y.B. INT'L L. 256 (1999); Makua Mutua, *The African Human Rights Court: A Two-legged Stool?*, 21 HUM RTS. Q. 342 (1999).

285. See Edward Kofi Quashigah, *The African Court of Human Rights: Prospects, in Comparison with the European Court of Human Rights and the Inter-American Court of Human Rights*, 10 AFR. J. SOC. INT'L & COMP. L. 59, 60 (1998).

286. See Prot. to Banjul Charter, *supra* note 283, art. 34(3) (providing that "[t]he Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited").

(10/05/00), Senegal (29/09/98), The Gambia (30/06/99), and Uganda (16/02/01)<sup>287</sup>—have managed to ratify the Protocol. Many others have not even signed or acceded to the Protocol, let alone ratified it. This contrasts sharply with the zealous and asthmatic ratification of the AU Treaty. This worrisome development could mean one of two things. One is that African leaders deliberately refuse to mainstream human rights in their agenda, even though the Treaty alludes to the Banjul Charter. The other could be that African leaders intend the AU Court to supercede the Human Rights Court.

The AU Treaty provides that the AU Court shall exercise, *inter alia*, an interpretative mandate “with matters of interpretation arising from the application or implementation” of the Act.<sup>288</sup> Pending its establishment, such matters shall, however, be submitted to the Assembly of the AU, “which shall make decisions by a two-thirds majority.”<sup>289</sup> There is, thus, an absence of a political geometry, an independent force that can neutralize the excesses of the Assembly. A point to stress is that the elaboration of the various protocols should offer opportunities to Parties to the Banjul Charter, the NGO community, and the civil society in general to lobby for a strong human rights regime under the Union. That is the only way to ensure that the Banjul Charter and, in particular, the African Human Rights Court, is not pushed to the back burner.

A much more important issue is the duplication of judicial institutions in Africa, with no thought, it seems, given to the implications. For example, what will be the relationship between the AU Court and the Human Rights Court? Is there no real possibility of jurisdictional conflicts between the two courts, particularly as the AU Treaty also contains human rights provisions? Is there no possibility that both courts will give conflicting interpretations to the provisions of

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287. The Documentation Officer of the African Commission supplied information on current status of ratification to the author (on file with author).

288. See AU Treaty, *supra* note 4, art. 26 (explaining that the Court will be responsible for matters of interpretation and, pending the Court’s establishment, “such matters shall be submitted to the Assembly of the Union, which shall decide by a two-thirds majority”).

289. See *id.* (requiring that while the establishment of the Court is pending, the Assembly of the Union will deal with such matters).

relevant human rights instruments invoked before each Court, thereby thwarting, rather than developing, human rights jurisprudence? Unless the appointment and conditions of service of the judges of the AU Court are free from political pressures, its independence will be undermined, which in turn will affect its stand on human rights issues.

It is not only the AU Treaty that poses dangers to the proposed African Human Rights Court. Almost all sub-regional economic treaties in Africa provide for the establishment of courts of justice to interpret these treaties, many of which also proclaim human rights.<sup>290</sup> In the revised Economic Community of African States ("ECOWAS") Treaty of 1993,<sup>291</sup> for example, one of the fundamental principles of the organization relates to the "recognition, promotion and protection of human and [peoples'] rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."<sup>292</sup> Earlier, in 1991, the ECOWAS Member States adopted a Protocol setting up a Community Court of Justice.<sup>293</sup> The Court, which is retained in the Revised ECOWAS Treaty,<sup>294</sup> will interpret and apply the ECOWAS

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290. See, e.g., Treaty Establishing the Southern African Development Community, Aug. 17, 1992, 32 I.L.M. 116 (1993) (declaring, in its Preamble, that Member States are "mindful of the need to involve the peoples of the region centrally . . . in development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law"). Similarly, some of the principles that will guide the SADC are "human rights, democracy and the rule of law." *Id.* art. 4.

291. See Treaty of the Economic Community of West African States (ECOWAS), May 28, 1975, 14 I.L.M. 1200 (1975) (original ECOWAS Treaty; superseded by 1993 treaty); see also Economic Community of West African States (ECOWAS): Revised Treaty, July 24, 1993, 35 I.L.M. 660 (1993) [hereinafter Revised ECOWAS Treaty] (striving to accelerate the economic union of West Africa through effective economic cooperation and integration).

292. See Revised ECOWAS Treaty, *supra* note 291, art. 4(g) (stating that the high contracting parties agree to recognize, promote, and protect human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights).

293. See 8 AFR. J. SOC. INT'L & COMP. L. 28 (1996) [hereinafter ECOWAS Protocol] (reprinting the ECOWAS Protocol).

294. See Revised ECOWAS Treaty, *supra* note 291, art. 16 (establishing an Arbitration Tribunal and calling for a Protocol to set out its status, composition, powers, procedure and other issues).

Treaty. This will presumably include the interpretation and application of the human rights instruments relevant to the ECOWAS Member States,<sup>295</sup> such as the Banjul Charter to which the Treaty refers. What is even more problematic is that the ECOWAS Protocol enshrines the principle of exclusivity, providing that "no dispute regarding interpretation or application of the provisions of the Treaty may be referred to any other form of settlement except that which is provided for by the Treaty or this Protocol."<sup>296</sup> As this author argues, "[t]o hold tenaciously to this interpretation will be to hamstring the Human Rights Court."<sup>297</sup>

It is true that the European Court of Justice ("ECJ") and the European Court of Human Rights ("ECHR") have operated side by side without much difficulty. But many reasons account for this. First, both institutions are products of the movement toward European unification that started after World War II by emphasizing common traditions and common interests, "to have the European nations work together rather than just living together or working against one another, as in the past."<sup>298</sup> More than this, there has developed an informal understanding over the years between the two institutions leading to clear divisions of labor. The ECJ never had a human rights mandate or competence. It developed human rights jurisprudence, not on the basis of the European Convention on Human Rights, but based on general legal principles inherent in the constitutional order

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295. See *id.* pmb. (listing the original sixteen members of the ECOWAS); see also 2000 ECOWAS Executive Secretary's Report (explaining that currently there are only fifteen members, due to Mauritania pulling out, and that Mauritania was opposed to the ECOWAS's decision to establish a common currency by 2004 and was not ready to give up its own currency, the Ouguiya), available at <http://www.ecowas.int/sitecedao/english/kouyate-rep2000-3-5.htm> (last visited July 18, 2002).

296. See ECOWAS Protocol, *supra* note 293, art. 22(1); see generally Kofi Oteng Kufour, *Securing Compliance with the Judgments of the ECOWAS Court of Justice*, 8 AFR. J. SOC. INT'L & COMP. L. 1 (1996).

297. See Udombana, *supra* note 284, at 103 (discussing concurrent and conflicting jurisdiction in the African Court on Human and Peoples' Rights).

298. See Christian Kohler, *The Court of Justice of the European Communities and the European Court of Human Rights*, in SUPRANATIONAL AND CONSTITUTIONAL COURTS IN EUROPE: FUNCTIONS AND SOURCES 15, 18 (Igor I. Kavass ed., 1989) (discussing a common element between the two courts).



of each Member State.<sup>299</sup> It has even been argued that the initial motivation for the adoption of the terminology of fundamental rights by the ECJ was a desire to defend the supremacy of community law over national law.<sup>300</sup> However, the ECJ has, over the years, applied the ECHR as a yardstick for human rights compatibility of the European Community's (now EU) rules and actions.<sup>301</sup> Despite these mitigating factors, and in spite of extreme caution by the ECJ not to encroach on the competences of the ECHR, conflicts inevitably still occur.<sup>302</sup> Indeed, the issues that derive from the multitude of procedures and mechanisms have been major concerns of international lawyers in recent years.<sup>303</sup>

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299. See e.g., Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419 (1969) (reporting case in the European Court of Justice dealing with the application of a decision to all member states); Case 44/79, *Hauer v. Rheinland-Pfalz*, 1979 E.C.R. 3727 (1979) (reporting case in the European Court of Justice, dealing with a prohibition on the planting of new vines).

300. See Jason Coppel & Aidan O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 29 COMMON MKT. L. REV. 669, 669-92 (1992) (questioning whether fundamental rights are actually protected by the European Court of Justice).

301. See Albert Weitzel & Wolfgang Strasser, *The Relationship Between the European Convention on Human Rights and Other International Enforcement Mechanisms*, in THE BIRTH OF EUROPEAN HUMAN RIGHTS LAW 347, 349-50 (Michele de Salvia & Mark E. Villiger eds., 1998) (noting that the European Communities have recognized the need to protect human rights, and that the ECJ has assumed this responsibility). Over time, this became a standard of ECJ case law and was approved as an official policy of the Communities through a Joint Declaration of the European Parliament and the European Community Council and Commission, reaffirmed by resolutions of the European Parliament, and culminated with the Maastricht Treaty. See *id.* The Treaty transformed the European Communities into the European Union and, in articles F and K.2, refers to the Convention as a part of the general principles of EC law. See *id.*

302. See, e.g., Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, in III THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE: ESSAYS IN HONOUR OF HENRY G. SCHERMERS 219 (1994) (investigating the validity of the assertion that since human rights are protected, Community accession to the ECHR is only of theoretical interest, without much practical relevance).

303. See generally Tullio Treves, *Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals*, 4 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 215, 220-27 (2000) (commenting on differing interpretations of international law); Hugh Thirlway, *The Proliferation of In-*

A sensible approach in Africa will be to first establish and strengthen the African Human Rights Court before embarking on another court, if necessary. It is, of course, possible to have a single African Court of Justice that will have divisions, such as a Human Rights Division. Conversely, the jurisdiction of the Human Rights Court could be enlarged to cover the interpretation of the AU, given the lean purse of the organization. Either way, there is need for debate and lobby action on the part of NGOs and civil society to ensure that Africa's development agenda is premised on the existence of a strong human rights culture.

### C. THE AU TREATY AND FUNDING OF HUMAN RIGHTS IN AFRICA

The AU Treaty proclaims the determination of African rulers "to take all necessary measures to strengthen our common institutions and provide them with necessary powers and resources to enable them to discharge their respective mandates effectively."<sup>304</sup> However, it is obvious that this is just another polemic, since the lack of commitment of African rulers to the development of states has manifested itself, over the years, in their failure to adequately finance African institutions, particularly human rights institutions. For example, the OAU is not in a position, due to its bleak financial situation, to

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*ternational Judicial Organs and the Formation of International Law*, in INTERNATIONAL LAW AND THE HAGUE'S 750TH ANNIVERSARY 433 (W.P. Heere ed., 1999) (taking an optimistic view on international organs and international law); Symposium, *The Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999) (publishing symposium considering the implications of the recent and rapid proliferation of international courts and tribunals).

304. See AU Treaty, *supra* note 4, at pmbl. para. 10 (expressing determination to strengthen common institutions); cf. Durban Decl., *supra* note 7, para. 16. Paragraph 16 notes that African leaders commit themselves

to urgently establish all institutional structures to advance the agenda of the African Union and call on all Member States to honour their political and financial commitments and to take all the necessary actions to give unwavering support to all the Union's initiatives aimed at promoting peace, security, stability, sustainable development, democracy and human rights in our continent.

*Id.*

pay competitive salaries to attract and retain qualified technocrats for its many bodies and institutions. Only recently, the Council of Ministers had to call upon "the Secretary General to submit to the next Session of the Council within the framework of the Career Development Plan, comprehensive proposals to address motivation of Staff, including the review of salaries."<sup>305</sup> Encouragingly, the Council has also recently approved an "across the board" 15 per cent salary increment "to the entire staff" of the AU "retroactively, with effect from 1<sup>st</sup> March 2002".<sup>306</sup>

The African Commission, in particular, is suffering from chronic financial incapacities. Although the General Secretariat of the OAU is responsible for meeting the costs of the Commission's operations, including the provision of staff, resources, and services,<sup>307</sup> it has repeatedly failed to fulfill these basic obligations. The Commission is operating against the background of reiterated failure and incessant peril. As late as 2000, it still lamented its lack of needed human and material resources:

[T]he Commission would like to appeal to the competent bodies of the OAU to take due account of the vital needs in the area of personnel in the process of restructuring the Secretariat of the Commission. It is essential for the Commission to have a Documentation Centre and a sufficient number of Legal Officers. The current structure, unfortunately, makes no provision for the post of Documentalist, whose creation has been an es-

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305. See OAU Council of Ministers, *Decision on the Progress Report of the Secretary General on the Implementation of the Restructuring of the OAU General Secretariat - Doc. 2190 (LXXIII) Rev. 1*, CM/Dec. 554 (LXIII) (2001) (commending the Secretary General for the progress in the implementation of the decision to restructure the General Secretariat). The decision also urges the General Secretariat to keep Member States informed and to take recruitment exercises seriously in order to select the best candidates for the Organization. *Id.*

306. OAU Council of Ministers, *Decision on Improvement in the Conditions of Service of OAU Staff*, 76<sup>th</sup> Ord. Sess. June 28 – July 6, 2002, CM/Dec. 654, para. 2-3 (requesting "the General Secretariat to determine in absolute terms, the financial implications of the salary increase granted, and to take necessary steps to implement immediately the decision for the benefit of the current staff").

307. See Banjul Charter, *supra* note 22, art. 41 (providing that "[t]he Secretary-General of the Organization of African Unity shall . . . provide the staff and services necessary for the discharge of the duties of the Commission. The Organization of African Unity shall bear the costs of the staff and services").

established principle since 1997; only one additional post of Legal Officer has been created (making a total of two posts of Legal Officers) while the current volume of work of the commission demands at least six legal officers.<sup>308</sup>

As of the year 2001, “[v]ital personnel like Administrative Officer, Documentalist and two young lawyers continue to be paid from outside or non-budgetary sources.”<sup>309</sup> The Commission has survived on handouts from inter-governmental and non-governmental foreign institutions, such as the African Society of International and Comparative Law, the Danish Center for Human Rights, the Swiss Directorate of Co-operation for Development and Humanitarian Aid, the Government of the Netherlands, the Irish Government, the Friedrich Naumann Foundation, and the International Commission of Jurists.<sup>310</sup>

Budgetary constraints have often forced members of the Commission to give up the idea of organizing promotional activities, such as seminars, visits, and the like in States Parties. Financial matters and survival strategies have taken up substantial spaces at the Commission's bi-annual sessions,<sup>311</sup> instead of the Commission using those limited periods to deliberate on important aspects of its mandate. Fifteen years after its inauguration, the African Commission has yet to establish its permanent headquarters, and is still operating in a rented flat in The Gambia. The foundation stone for the permanent headquarters was only laid on October 24, 2001, during the Commission's thirtieth session—twenty years after the adoption of the Banjul Charter! Although the Government of The Gambia is funding a larger proportion of the cost of the headquarters,<sup>312</sup> it might take some

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308. See *Thirteenth Report*, *supra* note 177, para. 54 (discussing administrative and financial matters, and welcoming “additional funds provided . . . by the deliberative bodies of the mother Organization.”).

309. See *Fourteenth Report*, *supra* note 273, at 44-5.

310. See *id.* at 17-19.

311. See, e.g., *Draft Agenda*, *supra* note 278, Item No. 13, at 3.

312. See The Chairman of the Commission, Speech at the Laying of the Foundation Stone for the Permanent Headquarters in The Gambia (Oct. 24, 2001) (transcript available at the Secretariat of the Commission, in Banjul, The Gambia) (also on file with author). During the laying of the Foundation Stone for the permanent headquarters in The Gambia, which this author was privileged to physically wit-

years to complete, unless the AU collaborates with it towards an early completion.

Other institutions of the OAU are faced with similar financial crunches, such as the OAU Mechanism for Conflict Prevention, Management and Resolution. Recently, the OAU Council of Ministers expressed "its grave concern over the critical financial situation of the OAU Peace Fund and the negative implications for the work of the OAU Mechanism for Conflict Prevention, Management and Resolution."<sup>313</sup> The Council requested "the General Secretariat to pursue and intensify its efforts aimed at mobilizing additional resources for the Fund, from within and outside the Continent, and to adopt the most appropriate strategies, to that effect."<sup>314</sup> Indeed, the situation in Africa is like bread in a besieged city: every man gets a little, but no man gets a full meal.

The OAU has never been able to mobilize even a modest budget of \$40 million; its average annual budget in recent years is \$31 million.<sup>315</sup> More than half of the membership does not, or is not in a position to, pay its modest contributions.<sup>316</sup> The Council of Ministers

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ness, the Chairman of the Commission, in his speech, expressed the deep satisfaction of the Commission to the "Government and the People of The Gambia for this enterprise, which, we believe, is a proof of the commitment of the Government of the Republic of The Gambia for the promotion and protection of human and peoples' rights in Africa." *Id.*

313. See *Decision on the Report of the Secretary General on the Status of the OAU Peace Fund*, para. 1, OAU Doc. CM/2192 (LXXIII), CM/Dec. 556 (LXXIII) (April, 2001) (expressing grave concern over the critical financial situation of the OAU Peace Fund).

314. See *id.* para. 4 (requesting the General Secretariat to continue efforts to mobilize additional resources for the Fund, and to adopt the most appropriate strategies to do so).

315. See Cilliers, *supra* note 27, at 4 (expressing concern over the funding of the Union).

316. See OAU Charter, *supra* note 11, art. 23 (stating that the budget of the Organization is financed by contributions from Member States and that the contribution is apportioned on the basis of the scale of U.N. assessment). Furthermore, no member is assessed an amount exceeding twenty percent of the Organization's yearly regular budget, thus attempting to be equitable even if not equal. *Id.*; see also U.N. Charter, *supra* note 46, art. 17(2) (providing that "[t]he expenses of the Organization shall be borne by the Members as apportioned by the General Assembly"). The contribution is based on national income. *Id.*

has repeatedly expressed "serious concern about the increasing arrears of contributions, thus undermining the capacity of the Secretariat to carry out approved programmes and activities."<sup>317</sup> On the eve of the launching of the AU, the continental body was still owed a whopping \$54.53 million by 45 of its 54 member countries,<sup>318</sup> including Morocco, which, technically, withdrew its membership in 1984, although its arrears goes back to 1981. Only nine Member States have fully paid their dues, as of May 2002. These are Angola (which, ironically, has been in a civil war for three decades), Botswana, Cameroon, Ethiopia, Mauritius, Namibia, South Africa, Swaziland, and Zambia.<sup>319</sup> Those in arrears include such 'giants' as Nigeria (\$1,943,725), Egypt (\$1,943,725), Algeria (\$1,736,743), Ghana (\$2,013,170), and Libya—the flag bearer of the African Union—(2,058,822.80).<sup>320</sup> Curiously and less forgivably, The Gambia is presently hosting the Secretariat of the African Human Rights

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317. OAU Council of Ministers, *Decision on the Report of the Eighteenth Ordinary Session of the Committee on Contributors*, 76<sup>th</sup> Ord. Sess., June 28 – July 6, 2002, CM/Dec. 652, para. 2.

318. See Baffour Ankomah, *African Union in Danger of Being Stillborn*, NEW AFRICAN, June 2002, 16, 20 (listing defaulting countries).

319. *Id.* at 19; cf. *Decision of Congratulations to Member States Which are Up to Date in the Payment of Their Contributions to The Organization*, OAU Doc. CM/2188, CM/Dec. 551 (LXXIII) (April 2001) (stating that the eleven member states that are paid up are: Botswana, Ethiopia, Mozambique, Namibia, Senegal, South Africa, Swaziland, Togo, Mauritius, Lesotho, and Chad, as at Feb. 26, 2001); *Resolution*, CM/Res. 1279 (LII), para. 2(d); *Resolution*, CM/Res. 1311 (LII).

320. *Id.* at 20; cf. AU Treaty, *supra* note 4, art. 23(1). The AU Treaty provides that:

[t]he Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments, therefrom").

*Id.* See also *Decision on the Report of the Fifteenth Session of the Committee on Contributions*, para. 6(c), Doc. CM/2189, CM/Dec. 550 (LXXIII) (April 2001) (endorsing the recommendation that recruitment of nationals of the defaulting countries not be recruited as new staff members). The decision also states that the General Secretariat must comply with this measure for the recruitment of regular as well as temporary staff. *Id.*

hosting the Secretariat of the African Human Rights Commission but it owes the AU \$650,465.00.<sup>321</sup>

The failure of African States to meet their financial obligations to the AU is due to a variety of reasons, the obvious ones being corruption and mismanagement by African rulers. These rulers have flung their countries' scarce resources to the winds.<sup>322</sup> Africa's inheritance elites also have political infrastructures that are designed for economic extractions, with no tradition of accountability to the governed. Most of them are finding it hard to build and sustain consensus, maintain the pace of reform, and achieve demonstrable gains that convince their citizenry that the benefits of democracy outweigh other options. It is the inability to achieve both economic and democratic reforms together that seems to be the hallmark of African development. Even in this new millennium, there are no clear programs by which democratic institutions lead to more efficient government. Attempts at economic policy reforms in Africa have been stymied by political impasses, or *vice versa*, attempts at political reform have not been supported with appropriate and timely economic reforms and have foundered as a result. In Comoros, for example, the economy has not seen positive growth due to such separatist factors as the unilateral declaration of independence of Anjouan in 1997 and institutional factors such as the *coup d'état* in Moroni that brought Colonel Azali Assouman to power on April 30, 1999.<sup>323</sup> All this explains why Member States of the OAU have not been able to honor their

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321. *Id.*

322. See THE GUARDIAN (NIG.), Mar. 9, 2000, at 8 (reporting that Mobutu Sese Seko, former president of Zaire (now Democratic Republic of Congo), looted over \$10 billion from his country's treasury); THE GUARDIAN (NIG.), Feb. 8, 2000, at 1 (reporting that Nigeria's former dictator, General Abacha, looted approximately U.S. \$4.3 billion); see also James Rupert, *Corruption Flourished in Abacha's Regime; Leader Linked to Broad Plunder*, WASH. POST, June 9, 1998, at A1; Tom Masland & Jeffrey Bartholet, *The Lost Billions*, NEWSWEEK INT'L, Mar. 13, 2000, at 38.

323. See *Comoros: Poverty Bites*, 38 AFR. RESEARCH BULL. 14962 (Dec. 2001) (reporting that Youssouf Mbechezi of the UNDP office in Moroni said, "[t]he crisis being experienced by Comorans is the result of economic stagnation, the prevalence of poverty, the breakdown in social cohesion, the challenge presented to federal institutions, and political instability.").

commitments to their people or to the international bodies charged with promoting and protecting human rights.

Only recently, during the fourth Extraordinary Session of the OAU Assembly in Libya, on September 6, 1999, the Libyan government presented a cheque for \$4.5 million to the Council of Ministers to clear the arrears of seven Member States of the OAU.<sup>324</sup> Libya also made a grant of one million dollars to fund the process towards the Union.<sup>325</sup> For the purposes of funding the transitional period, the OAU has authorized its Secretary General to "explore the possibility of mobilizing extra-budgetary contributions from Member States, OAU Partners and others,"<sup>326</sup> a euphemism for begging! It has also authorized the Secretary General to "undertake studies, with the assistance of experts, to identify alternative modalities of funding the activities and programmes of the African Union, bearing in mind that the Union cannot operate on the basis of assessed contributions from Member States only, and to make appropriate recommendations thereon."<sup>327</sup>

It is already becoming clear that very little thought was given to how the AU will be funded. Yet, African rulers are creating new organs, with sometimes ill-defined or duplicate functions, thus making the confusion more confounded. What the OAU needs is to trim down its existing institutions, so as to finance them effectively and efficiently. But it has done the opposite, creating new institutions to add to those that are already moribund. It will be fascinating to see how the AU gets around this problem, particularly as its budget will be more substantial than, if not triple, that of the current OAU. One thing, however, is clear. The existing institutions, including the human rights institutions, are in danger of a total collapse. The possibility of the African Human Rights Court having the needed funds to kick-start is now remote.

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324. *See Libya Pays OAU Contributions for Seven States*, PANAFRICAN NEWS AGENCY, Sept. 7, 1999 (reporting that the seven states are Comoros, Guinea-Bissau, Equatorial Guinea, Liberia, Niger, Sao Tome and Principe, and Seychelles).

325. *See Cilliers, supra* note 27, at 4 (expressing concern about the AU budget).

326. *Dec. on Implementation, supra* note 279, para. 11(2).

327. *See id.*



As the former Chairman of the African Commission reflected:

Africa is in danger of not being taken seriously. If we cannot support a vital body like the African Commission on Human and Peoples' Rights established fourteen (14) years ago, how will we be able to create and maintain the many bodies envisaged under the Union? This dismissive attitude will be strengthened by serious breaches of the [Banjul] Charter.<sup>328</sup>

It is a question that can only be answered in time. In order to guarantee substantive ownership and leadership of regional integration and the implementation of the AU Treaty and NEPAD, innovative self-reliant ways of generating and utilizing resources will have to be developed within Africa. Special taxes and revenue generating initiatives and the creation of a special regional human rights and development fund have also been suggested.<sup>329</sup>

## CONCLUSION: CAN THE LEOPARD CHANGE ITS SPOTS?

It is obvious that the road to the realization of the ideals, in particular the human rights ideals, proclaimed in the AU Treaty or other similar treaties, does not lie in the proposed AU or in any other future contraption. The aim of the Union is admirable, however, "[i]t is in the implementation of the Act that the System must be known and seen to be active, constructive and unyielding. Declarations and Acts are not the 'be all,' nor the 'end all' of events."<sup>330</sup> Or, as St. Augustine puts it (if the author may be permitted to relish in amateur Latin): "*Aliud est de silvestri cacumine videre patriam pacis ... et aliud tenere viam illuc ducentem.*"<sup>331</sup> Any treaty or enactment by whatsoever name, international or municipal, that does not translate

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328. See *Fourteenth Report*, *supra* note 273, at 45.

329. See *UNHCHR, General Report*, *supra* note 35, at 9 (recognizing the need for initiatives in the creation of a special regional human rights and development fund).

330. See *Eso*, *supra* note 178, at 10.

331. ST. AUGUSTINE, *CONFESSIONS*, VII, xxi ("For it is one thing to see the land of peace from a wooded ridge . . . and another to tread the road that leads to it.").

into the advancement of the common good<sup>332</sup> of the continent's citizens is a mere ploughing of the sand and sowing of the ocean, a meaningless vanity and vexation of the spirit.

The below-average human rights records of most African rulers, past and present, make it difficult for Africans to repose any confidence in this new conception or, more appropriately, contraption. Such poor performances constitute the greatest threat to the survival of the newly conceived body. Africans should not be deluded into believing that a mere change of nomenclature—from OAU to AU—implies a paradigm shift toward a more progressive human rights culture in Africa. Mere change is not growth. Growth is the synthesis of change and continuity (in this case, the culture of respect for human rights), and where there is no continuity, there is no growth. The implicit assumption in the AU Treaty of a new quality of leadership in Africa is false. The truth is that the beautiful ones are not yet born.<sup>333</sup> It is difficult, but not altogether impossible, for an Ethiopian to change his skin or *the leopard its spots*.<sup>334</sup> These rulers, who contributed to making the OAU a mere paper tiger and, hence, irrelevant to the needs of Africans, are too 'enlightened' to permit the light of the UDHR and other human rights instruments—including their own Banjul Charter—to shine in a darkness that grows ever more oppres-

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332. Legal theorists, of diverse views and backgrounds, have espoused the cause of the common good in examining the essence of law. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1970) (detailing a theory of utility); LON FULLER, THE MORALITY OF LAW (1969) (demonstrating his purposive approach to law); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) (noting his theory of human basic good); JOSEPH RAZ, PRACTICAL REASONS AND NORMS (1957) (describing his idea of the function of the law); DERYCK BEYLEVELD & ROGER BROWNSWORD, LAW AS A MORAL JUDGMENT (1986) (stating the authors' notion of the essence of law); H. L. A. HART, THE CONCEPT OF LAW (1961) (explaining Hart's criteria for the existence of a viable social organization); TASLIM ELIAS, LAW IN A DEVELOPING SOCIETY (1972) (tracking the development of law); O. A. Obilade, *The Idea of the Common Good in Legal Theory*, in ISSUES IN NIGERIAN LAW (J. A. Omotola ed., 1990).

333. See AYI KWEI ARMAH, THE BEAUTIFUL ONES ARE NOT YET BORN (1968) (providing a sharp, sardonic observation of corrupt post-independence politics; a definitive expression of the modern African Diaspora/Enlightenment).

334. See *Jeremiah* 13:23 (NASB) ("Can the Ethiopian change his skin or the leopard his spots? *Then you also can do good who are accustomed to doing evil.*") (italics in original).

sive. They behave as if human rights and good governance are opposed to each other; yet, the African Commission has stated the obvious truth that "the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law."<sup>335</sup> It is when the rule of law is not firmly established that considerations of power dominate.

The problems of leadership and power struggle in Africa have become major impediments to the realization of a genuine *Uhuru*.<sup>336</sup> If confidence in the OAU or, for that matter the AU, is to be regained, then perception is as important as reality. Meanwhile, the attitude of most Africans towards the OAU could be summed up in these forceful words:

To most of us, therefore, when we think of the OAU as an institution, we see it as something sitting in Addis Ababa, remote from us and with no impact on our daily lives. Mostly, we think of the OAU as an event, an annual jamboree at which our heads of states, the elected, the imposed and the ridiculous, all gather to talk generalities and inanities. The OAU summit is the one short period when Africa's heads of state play the big man to one another and thereby reinforce each other's sense of self worth necessary for the survival of a mutual accolade club. Read all the past resolutions of the OAU, subtract the parts that condemned apartheid, and the rest means nothing to us, because true resolutions addressing our problems would in all probability begin by calling for the removal of all but a handful of the heads of states declaring.<sup>337</sup>

This is why the OAU Secretary-General cannot be taken seriously when he romanticized that, "when the African leaders decided to establish the African Union . . . they did not aim at establishing an organization which was going to be a continuation of the OAU by another name."<sup>338</sup> The AU Treaty is an old wine in a new wineskin; and the AU is a reincarnation of the OAU. As such, it is not likely to take human rights seriously—even though that is greatly desired—for the simple reason that a married woman does not recover her virginity

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335. See Sudan cases, *supra* note 206, para. 79.

336. Swahili for freedom.

337. See *Sirte and the Rest of Us*, *supra* note 26, at 3.

338. See *Report of the Sec. Gen.*, *supra* note 20, para. 26.

by divorce. To hope that many of the present crops of rulers in Africa will respect human and peoples' rights is as foolish and futile as hoping to have iced water in the middle of the Sahara. The adoption of the AU Treaty has more to do with the hysteria of globalization than the euphoria of unity or, for that matter, human rights.

However, though the leopard cannot, on its own, change its spot, it could and should be assisted to change, for its own good and for the good of humanity. The reason is because the human situation is not a condition but a conjuncture, and the future is determined by this flowing conjuncture of society that is, itself, the ever-changing resultant of infinity of actualities emerging from infinity of possibilities.<sup>339</sup> Happily, the citizens are increasingly becoming aware of the need for such change, as can be gauged by the current wave of struggles for constitutional and political reforms and democratization on the continent. They have realized that only a people-elected, oriented, accountable leadership—which is the meaning of democracy—will be able to deliver the continent's citizens from the monstrosities and buffooneries of power. The true ground of democracy is the belief that men are “so wicked that not one of them can be trusted with any irresponsible power over his fellows.”<sup>340</sup>

If the AU is to succeed in its self-appointed enterprise of taking rights seriously, then it has to replace “the culture of impunity with the culture of accountability .... That means making sure the nice words of its Constitutive Act and of NEPAD come to life and that there are consequences if states don't live up to what they say they will do.”<sup>341</sup> African tyrants have no right to continue to oppress their people, even if they do it within the confines of their borders. These borders are not sacrosanct and they lose their usefulness when they shield tyrants from external accountability. Similarly, “[t]he access to

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339. See generally Philip Allott, *Reconstructing Humanity -- New International Law*, 3(2) E.J.I.L. 219 (1992).

340. C.S. LEWIS, *THE WEIGHT OF GLORY* 168 (1980) (reprinting selected sermons delivered by C.S. Lewis during World War II, bringing hope and courage in a time of great doubt).

341. Human Rights Watch, *African Union Should Spotlight Human Rights*, (July 10, 2002), available at <http://hrw.org/press/2002/07/africanunion0710.htm> (last visited Aug. 30, 2002).

basic needs such as food security, electricity, water, roads, education, health facilities will send a message to Africans that the continent is indeed changing.”<sup>342</sup> All this poses challenges to the civil society, which must pressurize the AU to ensure that human rights are given due consideration by all the organs of the Union. It must be made to address human rights as an integral component of conflict resolution. The AU must ensure that all African governments ratify the Protocol to the Banjul Charter for the establishment of the Human Rights Court and accept individual and NGO access to the Court.<sup>343</sup> Finally, NGOs and all Africans should pressurize their governments to implement the Banjul Charter and ratify and implement other relevant human rights instruments.<sup>344</sup>

There is already a “Second War of Liberation” in Africa, an “explosion of anger against the abuse of power, violations of human rights, economic failure, and hardship, and a deep longing for peace and order.”<sup>345</sup> There is an optimism now pervading the continent, similar to that at the wave of independence in the late 1950s and early 1960s. The change, of course, will not occur suddenly, because the rot is deep and continuous. It will come as gradually as the tide lifts a grounded ship—slowly, steadily but surely. The inheritance

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342. Zuma, *supra* note 29.

343. See Prot. to Banjul Charter, *supra* note 283, arts. 5(3), 34(6) (mandating that NGOs and individuals can only have standing before the Court where a State Party to the Protocol has made a declaration to that effect).

344. See Press Release, Amnesty International, African Union: A New Opportunity for the Promotion and Protection of Citizen's Rights (June 28, 2002) (observing also that “[t]he fundamental principles enumerated in the Act must be translated into concrete action. It will only be through making human rights central to its work that the AU will be able to truly recommit itself to the principles of the Universal Declaration of Human Rights”), available at <http://web.amnesty.org/ai.nsf/Index/IOR100042002?OpenDocument&of=REGIO NS\AFRICA> (last visited Aug. 30, 2002); see also Hum. Rts. Watch, African Union Should Spotlight Human Rights, *supra* note 241 (calling on the AU to urgently finalize a strong protocol to the African Charter on women's rights, negotiations on which have been stalled for months, ratify the Protocol establishing an African Human Rights Court, which could award judgments against states for human rights abuse, and give Africa's existing human rights body, the African Commission, the resources and political backing needed to carry out its mandate).

345. See Legum, *supra* note 170, at 56 (discussing the period of realism, starting in 1988).

political elite might pretend not to notice the approaching tides of change (ignoring a possibility does not make it go away); but not so the citizens, who are concentrating their minds on what, for sure, is inevitable. The citizens are, and should be, resilient, the kind of resilience that often is the sole surviving element as society itself collapses. Africans are looking for a future that restores the ordering of their existence. Thus, it is only the oppressed who understand oppression, as only the poor understand poverty; and the desire for freedom and justice is a most potent force in the lives of suffering and oppressed people. The recent history of South Africa attests that many are often prepared, if need be, "to sacrifice themselves for the cause of the oppressed."<sup>346</sup>

Heraclitus was correct: things cannot stand still.

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346. See NELSON MANDELA, *LONG WALK TO FREEDOM* 106 (1994) (reflecting on the struggles, setbacks, and triumphs of working for civil rights in South Africa).