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THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: SOME PRELIMINARY THOUGHTS

by

DANIEL C. TURACK*

I. INTRODUCTION

GENERALLY THERE IS a plethora of literature on human rights.1 Recently published research guides2 are most helpful in assisting the researcher and scholar who wants to be informed about this vital area of international law. However, with regard to research into human rights in Africa, there are some special problems to be encountered and a dearth of primary source materials in libraries.3

In reference to Africa, this focus is on the sub-Saharan states of the continent excluding the Republic of South Africa and Namibia. Before looking at the Charter, it is important to look at how the African states have recognized human rights and sought to provide the necessary protection, as well as their record of compliance. It is not the author’s intention, however, to catalogue the various human rights recognized in international law. The rights to be examined briefly will be freedom from genocide and torture.

Upon achieving independence, the African countries copied their former European colonial powers by becoming parliamentary democracies; they embedded protection and promotion of human rights and fundamental freedoms for their citizenry in their new constitutions. Soon after independence, however, the African leadership turned towards authoritarianism,4 and single-party5 systems now dominate sub-Saharan states.

Most of the anglophonic and francophonic African States came into ex-

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3I am grateful to Corinne Nyquist, Associate Librarian, Sojourner Truth Library, State University College, New Paltz, New York, for a copy of her draft paper entitled Library Resources and Research Problems on Human Rights in Africa, presented at the Conference on International Human Rights: DILEMMAS OF LIBERTY AND DEVELOPMENT IN AFRICA, May 7-8, 1982 at SUNY, Buffalo, N.Y.


5Of relevance is the INT'L COMM'N OF JURISTS, HUMAN RIGHTS IN A ONE-PARTY STATE (1978).

[365]
istence with constitutions containing provisions for the protection of fundamental freedoms. The Universal Declaration of Human Rights of 1948 had a great influence on the new African constitutions. Many of the rights enumerated in the Universal Declaration are embodied in these constitutions. However, the constitution which brought the state into existence was usually drafted by the departing colonial civil service and was imposed as a condition for independence. Thus, in essence these African constitutions have been of marginal significance when violations have occurred. The first formal attention given to a possible regional human rights convention in Africa arose due to the initiative of a non-governmental organization, the International Commission of Jurists. Under this body's auspices an African Conference on the Rule of Law was held at Lagos, Nigeria, during January 3-7, 1961. The 194 judges, practicing lawyers and teachers of law from twenty-three African nations and nine countries from other continents explored the prospects of an African convention on human rights. Their adoption of the resolution known as the Law of Lagos states, inter alia:

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

Between 1961 and 1979 other conferences and seminars were held in Africa


9Report, supra note 10, 11.

under the sponsorship of non-governmental organizations or the United Nations in cooperation with host African governments. These conferences centered on the themes of promotion and dissemination of knowledge about human rights, decolonization, condemnation of apartheid and non-discrimination.

II. SOME EVIDENCE OF A POOR HUMAN RIGHTS RECORD

A. Genocide

The Genocide Convention has mobilized the conscience of mankind by outlawing, under international law, the intentional destruction of racial, national, ethnical, or religious groups. Genocide is a crime. From the language of the Advisory Opinion of the International Court of Justice in Reservations to the Genocide Convention, it may be inferred that basic obligations of the Genocide Convention are binding on states as a matter of general international law. Hence, genocide is a crime when committed by persons in states that are not parties to the Convention as well as by persons in states that are parties to it. Moreover, the prohibition of genocide is also elevated to the status of jus cogens. During the International Law Commission’s drafting of the Vienna Convention on the Law of Treaties, and during discussions on the concept of jus cogens formulated in Articles 53 and 64, the prohibition of genocide was repeatedly mentioned as an example of a principle of jus cogens.

During civil wars in Africa there have been allegations of genocide. In 1960, during the conflict between the Central Government of the Congo and the Provincial Government of Katanga, the Secretary-General of the United Nations referred to flagrant violations of elementary human rights that “have the characteristics of the crime of genocide since they appear to be directed toward the extermination of a specific ethnic groups, the Balubas.” There


12Article III(a) of the Genocide Convention.


was also the genocidal rampage against the Ibos in Nigeria during the years 1966-1970, the period of the Biafran secession.\textsuperscript{20}

Official approval of genocide has existed even in the absence of civil war. The boundary-making process in Africa was fraught with the potentiality of conflict creation.\textsuperscript{21} Former colonial powers divided territories artificially\textsuperscript{22} and at times without regard to tribal adversaries; therein lies partial responsibility for the ensuing tribal massacres. This situation can be ascribed to what happened in neighboring Rwanda and Burundi. Between 1959 and 1964 in Rwanda, the Hutu massacred thousands of the Tutsi tribe and caused tens of thousands to become refugees.\textsuperscript{24} During 1972, in Burundi, the government under the control of the minority Tutsi tribe tried to eliminate the entire majority, the Hutu people.\textsuperscript{25} The international response to this savagery was practically imperceptible.\textsuperscript{26} In May 1972, for example, Diallo Telli, the Secretary-General of the Organization of African Unity (OAU) flew to Bujumbura and announced "the total solidarity of the secretary-general of the OAU with President Micombero," of Burundi. The next month when the OAU met at its annual conference, that organization refrained from any public statement on the


\textsuperscript{20}Other aspects of the Biafran attempted secession are reviewed in L. C. Buchheit, supra note 19, at 162; C. Aguolu, Biafra: Its Case For Independence (1969); J. Oynibo, Nigeria Crisis And Beyond (1971); A. Kirk-Greene, Crisis And Conflict In Nigeria (1971); Nayar, Self-Determination Beyond the Colonial Context: Biafra in Retrospect, 10 TEX. INT’L J. 321 (1975); C. Okeke, Controversial Subjects of Contemporary International Law 158 (1974).


\textsuperscript{22}See S. Touval, The Boundary Politics of Independent Africa 3-17 (1972). The status quo of these boundaries was confirmed subsequently by the OAU at its First Ordinary Session of the Assembly of Heads of State and Government, meeting in Cairo, United Arab Republic, in 1964; Resolution AGH/RES. 16(1) states, inter alia, that "[c]onsidering further that the borders of African States, on the day of their independence, constitute a tangible reality . . . [the OAU] solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence." OAU, Assembly of Heads of State and Government, Resolutions And Declarations of Ordinary and Extraordinary Sessions 31-32. See also Touval, supra note 22, at 82-98.

\textsuperscript{23}See generally A. Segal, Massacre in Rwanda (1964); R. Lemarchand, Rwanda and Burundi (1970); K. Glasier & S. Possony, Victims of Politics 142, 162, 284-5, 346, 528 (1979).

\textsuperscript{24}See Cowell, Rwanda’s or Uganda’s 45,000 Homeless People N.Y. Times, Jan. 21, 1983, § 1, at 5.


massacres.²⁷

In the catalogue of genocidal atrocities, one cannot omit the name of Idi Amin of Uganda. From 1971, when he overthrew the regime of Dr. Milton Obote, through 1978, he targeted the Lango and Acholi tribes for annihilation.²⁸ Despite the blatant excesses of the "black Hitler of Africa," no one has held him accountable²⁹ and he is a free man to this day.

B. Torture

The prohibition of torture³⁰ may be regarded as an integral part of customary international law, and it may be a peremptory norm of general international law.³¹ Torture is an international crime.³² As to what constitutes torture, one need only to consider the definition which appears in Article 1 of the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the General Assembly in 1975.³³

²²MEISLER, supra note 25, at 236.
³⁴LIESER, supra note 26, at 318.
³⁶For example, Article 3 of the United States Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides:

No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.


The absolute character of Article 3 can be said to be another example of the jus cogens. Its counterpart in the Universal Declaration of Human Rights is in Article 5, which reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."


1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

This synopsis of the African record on the issue of torture reports that it has been practiced blatantly in many countries for too many years. Amnesty International, in its first international review\textsuperscript{34} of the use of torture reported:

During their struggle for freedom, the nationalist movements of various African states were exposed to the use of torture on their militants, and on persons suspected of being their sympathisers . . . Notwithstanding the aspirations towards justice and the protection of the human person from torture or humiliating treatment which are incorporated into the constitutions\textsuperscript{35} of most African states, the use of torture seems undeniably to be employed by many of these countries, for a variety of motives and in a number of different ways . . .\textsuperscript{36}

To mention a few of the atrocities: First, in Equatorial Guinea between 1972-1979, during the regime of Francisco Macias Nguema, methods of torture used upon detainees in prison included “hanging prisoners in chains which cut through their flesh, and pouring (gasoline) into open wounds”;\textsuperscript{37} Second, the rule of Jean Bedel Bokassa, the self-proclaimed emperor of the Central African Empire (now Central African Republic), was a paradigm for severity in the violation of human rights. His regime of brutality, which has been documented,\textsuperscript{38} included the massacre of more than 100 schoolchildren in April, 1979. Finally, there is President Mobutu of Zaire whose violations of the Zairean constitution’s prohibitions against the use of torture and arbitrary detention were endemic. Between 1975 and 1979 “Kitawalistes” or Jehovah’s Witnesses were placed in detention for practicing their faith. Other detainees were held without charge or trial, suffered amputation or other physical disfigurement, or were starved to death.\textsuperscript{39} For the most part, the OAU remained mute while aware of these occurrences within its Member States.

Perhaps the turning point was the outrage of the killing of the schoolchildren in Central African Empire. Under the initiative of a summit conference of Franco-African heads of state, an inquiry was ordered into the killings,

\textsuperscript{34}Amnesty International, Report On Torture (1975). For details as to how Amnesty International gathers its information and some of the factors which may influence a human rights report, see Human Rights In Africa, Hearing before the Subcommittees on Africa and on International Organizations of the Comm. on Foreign Affairs, 96th Cong. 1st Sess. 34 (1980).

\textsuperscript{35}See Ackerman, supra note 33, survey of world constitutions for provisions regarding or relating to torture or other forms of cruel and unusual punishment at 691-702, and the categorization of countries by constitutional provisions at 703-707.

\textsuperscript{36}Amnesty International, supra note 34, at 117.


\textsuperscript{39}Human Rights in Africa, supra note 34, at 29-31; See also Political And Economic Situation In Zaire-Fall, 1981, Hearing before the Subcomm. on Africa of the Comm. on Foreign Affairs. 97th Cong. 1st Sess. 39-44 (1982).
resulting in a report highly critical of that government's culpability. Significantly, this is the first report concerning human rights problems made by African jurists who were appointed by African heads of state.  

III. THE OAU CHARTER AND A CONCISE DRAFTING HISTORY OF THE AFRICAN CHARTER

The Preamble of the OAU Charter includes both tangential and direct references to human rights among its aims. Paragraph two of the Preamble states: "[C]onscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African people." The eighth paragraph reads: "Persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the principles of which we affirm out adherence, provide a solid foundation for peaceful and positive co-operation among States." Moreover, the OAU undertakes "to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights."  

As previously noted, the OAU has remained mute to some of the most flagrant violations of human rights in modern African history. However, the OAU has been responsive to other heinous human rights violations involving racial discrimination and breach of the right of self-determination in Southern Africa. This inconsistent approach has led a number of writers to criticize  

49Human Rights In Africa, supra note 34, at 36. Earlier, in 1976, the OAU did investigate the massacre of Comorians in Madagascar and submitted a report that was highly critical of the Malagasy authorities; Id. at 48.


4Id.

4The significance of these references is borne out when one considers the great care and time spent in drafting the Preamble. According to T.O. Elias "almost half the time spent on considering the Charter as a whole had been devoted to this preamble alone, so much store had been set by the African leaders on the postulates enunciated in the preamble of the Charter." Elias, The Charter of the Organization of African Unity, 59 AM. INT'L L. 243, 246 (1965).

4"Article II(1)(e) of the OAU Charter, supra note 41.

4The OAU and the United Nations have been and are continually concerned with apartheid in Southern Africa. As to the apartheid practiced in South Africa, see generally, J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 55 (1978); K. ROSKAM, APARTHEID AND DISCRIMINATION (1960); H. VENTER, APARTHEID (1960). Apartheid practices in Namibia are discussed by S. SLONIM, SOUTH WEST AFRICA AND THE UNITED NATIONS: AN INTERNATIONAL MANDATE IN DISPUTE (1973); R. TAUBENFELD & H. TAUBENFELD, RACE, PEACE, LAW AND SOUTHERN AFRICA (1966). There is a voluminous literature on the efforts of OAU Membership and the UN to eradicate apartheid in Southern Africa; an excellent synopsis recently published is found in M. McDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 532-560 (1980).

4On the other hand the OAU was not responsive to Idi Amin's official racism against Uganda's Asian population which culminated in their expulsion in 1972; see Sharma & Woodridge, Some Legal Questions Arising From The Expulsion Of The Ugandan Asians, 23 INT'L & COMP. L.Q. 397 (1974); AM. SOC. INT'L L., PROCEEDINGS 122-140 (1973); HARRISON, UGANDA: THE EXPULSION OF THE ASIANS, in 4 CASE STUDIES ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: A WORLD Survey 287 (W. Veenhoven, ed. 1976).


and try to explain the double standard. 48

At the OAU 16th Ordinary Session of the Assembly of Heads of State and Government in Monrovia, Liberia, during July 1979, it was resolved to prepare an African charter on human and people's rights. The resolution 49 called upon the Secretary-General to prepare a preliminary draft charter which would provide, in particular, for the establishment of an organ for the promotion and protection of human and peoples' rights. Dakar, Senegal, hosted the meetings of experts during November 28-December 8, 1979. The preliminary draft charter was to reflect the African concept of human rights and distinguish it from other regional conventions 50 on human rights. The draft charter was then considered at two OAU Ministerial Conferences convened by the Secretary-General of the OAU at Banjul, The Gambia, during June 9-15, 1980, in which thirty-eight OAU Member States participated, and during January 7-19, 1981, in which forty Member States took part. At the meeting in Nairobi, Kenya, during June-July, 1981, the 18th Ordinary Session of Assembly of Heads of State and Government of the OAU adopted the African Charter on Human and Peoples' Rights. 51

IV. HUMAN AND PEOPLES' RIGHTS AND DUTIES, AND STATE DUTIES IN THE AFRICAN CHARTER

Part I of the African Charter, entitled "Rights and Duties," is divided into Human And Peoples' Rights, and Duties. The contracting States are obliged to "recognize the rights, duties and freedoms enshrined in this Charter," 52 and to provide for their effectiveness within their territory through legislation or other domestic measures. 53 Every individual is guaranteed certain enunciated rights without discrimination on any ground such as race, ethnic group, color, sex, language, religion, opinion, national and social origin, fortune, birth or other status. 54 This appears to be a general guarantee of non-discrimination on the basis of enumerated criteria.

The individual rights and freedoms enumerated for recognition and protection include: the right to equality before the law and equal protection of

49Reprinted in Weinstein, supra note 12, at 91.
52Article 1, Charter, supra note 51.
53Id.
54Article 2, Charter, supra note 51.
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the law; the right to life; the right to juridical personality and protection against torture, slavery and other inhuman or degrading treatment or punishment; the right to personal liberty; the right to judicial protection, a fair trial and freedom from ex post facto laws; freedom of conscience and religion; the right to receive information and the right to expression; the right to free association; the right of assembly; the right to freedom of movement and residence including asylum (mass expulsion of non-nationals is prohibited); the right to participate in government; the right of property; the right to work; the right to good health; the right to education and to participate in the cultural life of the individual’s community; and special measures of protection for aged or disabled persons.

Peoples’ rights include: the right of equality to other peoples; the rights of existence and self-determination; the rights of disposal of wealth and natural resources; the right to economic, social and cultural development; the right to peace; and the right to a satisfactory environment.

In addition to the individual’s rights, certain individual obligations or duties are listed, namely: duties to the family, society, the State, legally recognized communities and the international community; and a duty to respect other persons.
No duties for peoples are listed. Each Member State party to the African Charter undertakes the following duties: to promote and protect the "mores and traditional values recognized by the community;" to protect the health and morals of the family; to protect the rights of women and children as stipulated in international declarations and conventions, and to eliminate discrimination against women; to eliminate foreign economic exploitation; to act "individually or collectively, to ensure the exercise of the right to development;" to prevent anyone given asylum from engaging in subversive activities against his country of origin or against any other State party to the African Charter. Moreover, there is an obligation not to allow their territory to be used as a base for subversive or terrorist activities against the people of any party State; to promote respect for the rights, freedoms and obligations of the African Charter through teaching, education and publication and to make certain of their being understood; and finally, to guarantee the independence of the courts and to allow the establishment and improvement of national institutions which will promote and protect the guaranteed rights and freedoms.

Having defined the rights and duties, the African Convention provides for an international machinery in Part II, "Measures of Safeguard," to ensure effective compliance. An African Commission on Human and Peoples' Rights is to be established within the OAU. The African Commission will consist of eleven members who are to possess the following qualities: (1) African descent; (2) the highest reputation; (3) high moral integrity; (4) recognized competence in matters of human and peoples' rights. Preference is to be given to persons with legal experience. Furthermore, the eleven members will serve "in their personal capacity," and hence not as representatives of any government. No two members may be nationals of the same State. Prior to the election of the members of the African Commission, each State party may nominate a maximum of two candidates but only one may be its national, whereas each must be a national of a State that is a party to the African Charter. At least four months before elections, the Secretary-General of the OAU is to invite the States party to the African Charter to nominate their candidates. He is to draw up an alphabetical list of the nominees and communicate it to the Heads

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* Article 17(3), Charter, *supra* note 51.
* Articles 18(1) & (2), Charter, *supra* note 51.
* Article 22(2), Charter, *supra* note 51.
* Article 23(2), Charter, *supra* note 51.
* Article 26, Charter, *supra* note 51.
* Article 34, Charter, *supra* note 51.
of State and Government at least one month before the election. The Assembly of the Heads of State and Government will then elect the members of the African Commission by secret ballot from this list of persons.

The members of the African Commission will hold office for six years, and they may be re-elected. However, the term of office for four of the members at the first election will be two years, while the initial term of the other three members will be four years. Immediately after the first election, the Chairman of the Assembly will draw lots to determine those members of the African Commission who will sit for four years and two years. Elected members will swear to "discharge their duties impartially and faithfully," and will hold office until a successor assumes office. The African Charter sets out a procedure to replace a member who dies, resigns or fails to discharge his duties.

To assist the African Commission in discharging its responsibilities, the Secretary-General of the OAU will appoint a Secretary of the Commission as well as staff and services, at OAU expense. A procedure is set out for: (a) election of the Commission's Chairman and Vice-Chairman; (b) a quorum; and (c) voting. The Secretary-General of the OAU can attend the Commission's meetings without the right of participation. The members of the African Commission are to enjoy the diplomatic privileges and immunities set out in the OAU's General Convention on the subject and will be paid out of the OAU's regular budget.

V. THE COMMISSION'S MANDATE AND PROCEDURE

The functions and powers of the African Commission are to promote and protect human and peoples' rights by engaging in research in the field, disseminating information, organizing fora to discuss issues and problems, encouraging interested national and local institutions, and providing its view or making recommendations to governments. This body is empowered to formulate rules and principles to resolve related legal problems, and to cooperate with other African and international institutions working within the field. It is authorized to interpret the African Charter if requested to do so by a State party, an institution of the OAU, or by any African organization recognized by the OAU. The Commission can be entrusted with other tasks assigned to

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91Article 35, Charter, supra note 51.
92Article 33, Charter, supra note 51.
93Article 36, Charter, supra note 51.
94Article 37, Charter, supra note 51.
95Article 38, Charter, supra note 51.
96Article 40, Charter, supra note 51.
97Article 39, Charter, supra note 51.
98Article 41, Charter, supra note 51.
99Article 42, Charter, supra note 51.
100Articles 43 and 44, Charter, supra note 51.
it by the Assembly of Heads of State and Government.\textsuperscript{102} It appears to have a broad investigative capacity in that it may utilize any appropriate method of investigation and may be contacted by anyone capable of enlightening it.\textsuperscript{103}

A. Inter-State Party Complaints

There are two ways in which the African Commission may be seized of a case based on inter-State action. First, any State party may draw another State party's attention to the latter's alleged violation of the African Charter by written communication. The applicant State must give this communication to the Secretary-General of the OAU and to the Chairman of the African Commission.

The alleged offending-State has three months in which to respond in writing to the complainant-State.\textsuperscript{104} If the matter is not resolved to the satisfaction of both States within three months from the date of the original communication, either State may submit the matter to the African Commission through its Chairman and notify other States involved accordingly.\textsuperscript{105} A second method, also involving an inter-State complaint, suggests that the complainant-State may approach the African Commission directly by lodging a complaint with the Commission Chairman and also serving notice on the Secretary-General and the alleged offending State.\textsuperscript{106}

Under either method, the Commission will not act until local remedies have been exhausted;\textsuperscript{107} when it does act it may request all relevant information and have the concerned States appear before it in an attempt to reach an amicable solution.\textsuperscript{108} If a satisfactory solution cannot be found, the Commission is to transmit a report of the facts, findings, and any recommendations to the Assembly of Heads of State and Government, with a copy of its report on the facts and findings also going to the States concerned.\textsuperscript{109}

B. Other Complaints

The African Charter also provides for the African Commission to be contacted directly by non-State parties through communications from individuals or others. Before each session, the Secretary of the Commission will make a list of any of these other communications and will submit the list to the Com-

\textsuperscript{102}Article 45, Charter, \textit{supra} note 51.
\textsuperscript{103}Article 46, Charter, \textit{supra} note 51.
\textsuperscript{104}Article 47, Charter, \textit{supra} note 51.
\textsuperscript{105}Article 48, Charter, \textit{supra} note 51.
\textsuperscript{106}Article 49, Charter, \textit{supra} note 51.
\textsuperscript{107}Article 50, Charter, \textit{supra} note 51. The rule of exhaustion of domestic remedies is well known to international lawyers. For a discussion of this rule as it pertains to the international law of human rights, see Trindade, \textit{The Burden Of Proof With Regard to Exhaustion of Local Remedies In International Law}, \textit{9 REVUE DES DROITS DE L'HOMME} 81, 88 (1976); Trindade, \textit{Exhaustion Of Local Remedies Under The UN Convenant On Civil And Political Rights And Its Optional Protocol}, \textit{28 INT'L & COMP. L.Q.} 734 (1979).
\textsuperscript{108}Article 51, Charter, \textit{supra} note 51.
\textsuperscript{109}Articles 51 and 53, Charter, \textit{supra} note 51.
mission members, who will consider the communication if a simple majority agree. Article 56 of the African Charter sets out seven prerequisites which must be met before the communication will be eligible for consideration by the Commission:

1. Indicate their authors even if the latter request anonymity.
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter.
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity.
4. Are not based exclusively on news discriminated through the mass media.
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

Obviously, any communication addressed to the Commission should contain statements to indicate that the criteria have been met. Before substantive consideration of the communications, the Commission Chairman is obligated to bring them to the attention of the concerned State. If the Commission finds a series of violations, evidence of massive violations, or an emergency situation in any State, it must notify the Assembly of Heads of State and Government, which in turn may order the Commission to provide it with an in-depth study of the situation and make recommendations. Any cases or reports considered by the Commission, whether initiated by a party State, individual, or others, are to remain confidential, as are Commission reports, until the Assembly of Heads of State and Government decides that they should be published. Also, Assembly permission is required for publication of the Commission report on its activities which it will submit to each ordinary Session of the Assembly.

VI. OF MAJOR SIGNIFICANCE

Perhaps most important is the Preamble of this significant document. A
general reading of the Preamble shows that it was inspired by African legal philosophy, desires and needs. It is intertwined with the OAU Charter which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples." It is cognizant of the values of African civilization and historical traditions. The Preamble speaks in terms of total liberation of Africa, elimination of colonialism, neo-colonialism, apartheid, Zionism and aggressive foreign military bases. It notes that peoples are still struggling for their genuine independence. It is unique in that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone." Moreover, the party States pledge to "intensify their cooperation and efforts to achieve a better life for the peoples of Africa.'

The African Charter raises a multitude of questions that will not be analyzed at this time but are certain to ignite scholars who will bring forth a considerable literature. In the future this instrument will be analyzed both as a legal document and as a political document; it will be compared with its regional and universal counterparts in the field of human rights, and comparisons will also be made based upon the political ideology of the OAU Member States.

VII. SOME FINAL THOUGHTS

By becoming a party to the African Charter, the State not only undertakes to abide by all of the rights and obligations inherent within the Charter, but also reaffirms its adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the OAU, the movement of non-aligned countries and the United Nations. Indeed, the African Commission is to draw inspiration from the international law on human and peoples' rights as found in other related African international documents, the OAU Charter, the Charter of the United Nations, the Universal Declaration of Human Rights, and international instruments on the topic adopted by the United Nations and its specialized agencies, and by African countries. The African Commission will use these other international instruments, as well as African practices that are consistent with general international law, as susidiary sources to determine the principles of law binding on the party States.

117Preamble, ¶ 2, Charter, supra note 41.
118Preamble, ¶ 6, Charter, supra note 51.
119Preamble, ¶ 3, Charter, supra note 51.
121Preamble, ¶ 9, Charter, supra note 51.
122Articles 60 & 61, Charter, supra note 51.
It has been difficult to obtain documentation surrounding the drafting of the African Charter. Until the travaux préparatoires become available it will not be possible to ascertain the reasoning for the use of certain language in the document, nor to consider the competing factors offered by the negotiating States in determining the meaning of the provisions as adopted by the party States. What groups, for example, are encompassed by the term “people”? What is the ambit of the phrase used in the Preamble’s call to party States “to dismantle aggressive foreign military bases.” Why does the Preamble ask the party States to eliminate Zionism when it has never been present on the continent? Does the “inalienable right to self-determination” mean political self-determination alone, or is it expansive, meaning economic self-determination and social self-determination as well? Will self-determination include the right of secession at some later date by the peoples who now make up South Africa’s “independent” homelands, and who currently enjoy some form of quasi-independence? What significance if any, is to be placed upon the absence of a derogation clause in the African Charter?

The African Charter will become effective three months after a simple majority of the OAU Member States, or twenty-six of the present fifty-one Members, deposit their ratifications with the Secretary-General of the OAU.

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112I am grateful to the Solicitor General & Legal Secretary for the Republic of The Gambia for his letter of March 2, 1983, in which he states that although Banjul hosted the Ministerial Conference, the OAU had not yet forwarded any verbatim or summary record of the discussion held at the Conference.


114Preamble, ¶ 7, Charter, supra note 51.


116Article 20(1), Charter, supra note 51.


119Article 63(3), Charter, supra note 51.
There is a view that by signing this multilateral treaty, Member States may already be considered to be under an obligation not to thwart the object and purpose of the treaty.\(^{12}\) One recent episode is apropos. Nigeria, a signatory of the African Charter, is also one of the fifteen signatories to the 1975 Treaty of Lagos which created the Economic Community of West African States;\(^{13}\) perhaps in accomplishing one of the aims of this latter organization concerning "the abolition as between Member States of the obstacles to the free movement of persons,"\(^{14}\) perhaps Nigeria did not strictly enforce its immigration laws so that the nationals of its neighbors illegally took up residence and employment in the country. The present global recession and economic stagnation as well as political pressures in Nigeria\(^{15}\) caused its Minister of Internal Affairs to announce on January 17, 1983, the expulsion of the illegal immigrants from Benin, Chad, Ghana, Mali, Niger, Togo and Upper Volta, who were forced to leave within two weeks.\(^{16}\) On February 14th, the Nigerian Minister of Internal Affairs announced that under the expulsion order, 1.2 million West Africans left the country.\(^{17}\) The African Charter specifically prohibits the mass expulsion of non-nationals;\(^{18}\) thus, Nigeria’s actions are not in compliance with its commitment or with the spirit of the African human rights movement.

Henkin has recently pointed out that "the universalization of human rights is a political fact.\(^{19}\) Just as the universal human rights package of conven-

\(^{12}\) Usually a treaty does not have legal effect before entry into force. However, Article 18 of the Vienna Convention on the Law of Treaties provides:

"A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."


\(^{14}\) Article 2, Charter. Article 27 of the ECOWAS Treaty states:

**ARTICLE 27**

**Visa and Residence**

1. Citizens of Member States shall be regarded as Community citizens and accordingly Member States undertake to abolish all obstacles to their freedom of movement and residence within the Community.

2. Member States shall by agreements with each other exempt Community citizens from holding visitors’ visas and residence permits and allow them to work and undertake commercial and industrial activities within their territories.

See also, Changani, Legal Status of ECOWAS Citizens, NIGERIAN FORUM 948 (Jan. 1983).


\(^{17}\) N.Y. Times, Feb. 15, 1983, § 1, at 5.


tions, covenants and declarations speak in terms of their recognition due to "their preexistence in some other moral or legal order," a fortiori the same concept prevades regionally. Although the party States to the African Charter are charged with duties concerning human rights, their failure to comply will not negate their obligations to the other OAU Member States, nor to the world community as a whole. An initial inspection of the African Charter may reveal some frailty of language as compared to other international instruments concerning human rights. However, the party States to the African Charter know that "[t]o advocate human rights is to inform people about their violation, to fortify the morale of certain resistance efforts, to create 'space' for human rights concerns within and without the governmental apparatus, and to set in motion a positive transnational momentum on behalf of peace and justice in the world."

\[\text{Id., at 15. See also Henkin, International Human Rights as ""Rights,"" 1 Cardozo L. Rev. 425 (1979).}