

**THE AFRICAN UNION AND AFRICAN RENAISSANCE:  
A NEW ERA FOR HUMAN RIGHTS PROTECTION IN AFRICA?**

*Vincent O. Nmehielle\**

I. INTRODUCTION

The unpleasant post-colonial Africa's human rights history has often been the basis for evaluating the human rights future of the continent—leading to the thinking that history is always likely to repeat itself in the continent. After independence, many African countries did not practice what they preached against the colonialists in relation to their own peoples, but engaged in outrageous human rights violations under the not so watchful eyes of the Organization of African Unity (OAU), which was established in early independence years of many of such African countries in 1963.<sup>1</sup> Recalling the seemingly hopeless situation, one commentator observed that “like Nero’s Rome, African leaders fiddled while the edifice called “Africa” was engulfed in conflagrations. Increasing political repression, denial of political choice, restrictions of freedom of association, and other human rights violations met with 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.”<sup>2</sup> This statement resonates in the experiences of many victims of human rights violations in Zaire under Mobutu Sese Seko; Uganda, under Idi Amin and Milton Obote; under the various military regimes that overran Nigeria from 1966 shortly after independence, in Central African Republic under Bokassa; in Malawi under Kamuzu Banda; in

---

\* LL.B. *Hons.* (Rivers State, Nigeria) BL (Nigeria) LL.M (Notre Dame) S.J.D. (George Washington), Bram Fischer Chair of Human Rights Law at the School of Law, University of the Witwatersrand, Johannesburg, South Africa. Email: Nmehiellev@law.wits.ac.za. The author wishes to acknowledge and thank Anne Ndungu, an LL.M student for her invaluable research assistance in locating the materials used in this article.

1 The OAU was established in May 26, 1963 on the adoption of its Charter at the Summit Conference of then 32 Independent African States in Addis Ababa.

2 Nsongurua Udombana, ‘Can the Leopard Change Its Spots?’ *The African Union Treaty and Human Rights* (2001) 17 *Am. U. Int’l L. Rev.* 1177, at 1211.

Equatorial Guinea under Nguema, in Ghana under various military rules culminating in that of Rawlings; in Kenya under Arap Moi, and similar experiences in a host of other such countries.

The OAU, as a regional organization and institution did not use its position to engender an atmosphere of respect for human rights in the continent by its member states other than as Africa's liberator from colonial rule. As will be elaborated later in Part II of this paper, this was partly because of the weakness of its constitutive instrument, the Charter of the OAU (OAU Charter),<sup>3</sup> which endorsed the principle of non-intervention in the internal affairs of member states. OAU member states interpreted this principle to the letter and used in a manner that discouraged the organization from censuring "errant regimes in the sphere of human rights"<sup>4</sup> such that former President Toure of Guinea Republic is credited with the statement that the OAU not could sit in judgment as a tribunal on the internal affairs of any member state.<sup>5</sup> The outcome of this attitude in relation to the institutional effectiveness of the OAU in addressing human rights or other issues of the rule of law within member states was inaction in member states enumerated above and in others not mentioned that resulted in gross human rights violations and the break down of the rule of law. The OAU could only plead with member states in situations where lives and fundamental freedoms of former leaders that were persecuted by new regimes were in danger with an emphasis that it did not intend to interfere in the internal affairs of the states concerned.<sup>6</sup>

The adoption and entry into force of the African Charter on Human and Peoples Rights (African Charter or the Banjul Charter)<sup>7</sup> under the auspices of the OAU was a recognition of the need to give more serious attention to human rights instruments in the continent and to provide some institutional oversight for human rights promotion and protection. Indeed, some gains have been achieved in human rights promotion and protection since the African Charter entered into force, albeit minimally. Member states of the OAU still carried on with gross human rights violations and seemingly ignored the mechanisms established under the Charter without any repercussions from

---

3 The Charter of the Organization of African Unity, 49 U.N.T.S. 39/2, I.L.M. 766 (1963).

4 Udombana, *supra*, note 2 at 1210.

5 *Id.*

6 *Id.*, referring to OAU reaction to executions carried out in Ethiopia following the overthrow of Emperor Haile Selassie's government in 1974, which it was feared would include the deposed leader, and that Liberia under Samuel Doe who overthrew and executed President William Tolbert in 1980.

7 The African Charter on Human and Peoples Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 Oct. 1986). All member states of the OAU were parties to the Charter.

the OAU because they perceived that the mechanisms established under the Charter are weak. The subsequent adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights (Protocol on the Human Rights Court)<sup>8</sup> is an attempt to compliment the inadequacies of institutional human rights protection mechanism under the African Charter.

The lack of adequate continental human rights promotion and protection in the OAU era despite the existence of institutional mechanism for that purpose became an issue of concern in the quest to reinvigorate the OAU to deal with contemporary African problems. It became quite apparent that the institutional configuration and the constitutive authority of the OAU, as discussed in the next sub-section and in Part IV, were inadequate to deal with the problems, including human rights, hence the formation of the African Union (AU) to replace the OAU in the spirit of a renewed Africa, configured in the now very popular idea of African consciousness—*African Renaissance*, which will be elaborate upon in Part III. How the AU fits in this era, particularly in ensuring adequate human rights promotion and protection in line with commitment of African States under the African Charter and the Protocol on the Human Rights Court is the larger inquiry here. One would agree with the view that although significant changes within the African human rights system in the OAU era were made, they “remain[ed] minimal compared to the current initiative to qualitatively transform the OAU and to re-invent it as the African Union.”<sup>9</sup> An examination of the Constitutive Act of the African Union (AU Constitutive Act)<sup>10</sup> and initiatives currently being developed under it would reveal the reason for the optimism

8 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples, OAU.DOC.CAB/LEG/66.5 (1998). The Protocol is not yet in force. According Article 34(3), “The Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited.” The following 13 States have ratified or acceded to the Protocol as at December 2003: Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Lesotho, Libya, The Gambia, Mali, Mauritius, Rwanda, Senegal, South Africa, Togo and Uganda. See List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights as at 24 Nov. 2003 available at [www.africa-union.org/Official\\_documents/Treaties\\_Conventions\\_Protocols/](http://www.africa-union.org/Official_documents/Treaties_Conventions_Protocols/) (accessed last on 27 Dec. 2003). From all indications, the expectation is that the human rights Court would soon come into existence, as it remains only one such ratification for the required number of 15 under Article 34 to be achieved. See also African Union Press Release No. 114/2003 of 24 Dec. 2003.

9 Shadrack Gutto, ‘The Reform and Renewal of the African Regional and Peoples' Rights System’ (2002) 2 Af. Hum. Rts. L. J., 175.

10 Constitutive Act of the African Union, adopted at the Thirty Sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU, 11 July 2000 at Lome,

expressed above. However, we must also agree that good initiatives do not implement themselves.

A. *Origins and Background of the African Union*

On 10–12 July 2002 the African Union (AU) was officially launched in Durban, South Africa and effectively replaced the OAU.<sup>11</sup> The launch of the AU marked a realization of the vision originating from the 35<sup>th</sup> Ordinary Session of the OAU Summit in Algiers in 1999<sup>12</sup> where Heads of State and Government took stock of what the OAU had achieved during the period of its existence. The OAU was extolled as a uniting force in the continent in playing “an irreplaceable role in the affirmation of political identity and the realization of the unity of the continent.” The leaders committed themselves “to further this accomplishment, and to continue to make the OAU the vital instrument of our collective action both within Africa and in our relationship with the rest of the world.”<sup>13</sup> The Algiers Summit further identified new challenges for the future and urged that the continent together should “enter the Third Millennium with a genuine spirit of co-operation with restored human dignity and a common hope in an interdependent future for mankind.” Furthermore “[i]n this process, Africa, which is prepared to be the master of its destiny, will shoulder its share of responsibility.”<sup>14</sup>

This new resolve would receive a boost a little less than two months later when Muammar Gaddafi of Libya invited the OAU to hold its Fourth Extraordinary Session in Libya where the Assembly of Heads of State “deliberated extensively on ways and means of strengthening our continental organization to make it more effective so as to keep pace with political, economic and social developments taking place

---

Togo. *See* Decisions on the Establishment of the African Union and the Pan African Parliament, OAU Doc. AHG/Dec. 143 (XXXVI).

11 *See* The Durban Declaration in Tribute to the Organization of African Unity and on the Launching of the African Union, Durban, South Africa, 10–12 July 2002. AU. Doc. ASS/AU/Decl. 2 (1). The summit in Durban was the first ordinary meeting of the Assembly of the AU, which replaced the Assembly of Heads of State and Government under the Charter of the OAU.

12 *See* Declarations and Decisions Adopted by the Thirty-Fifth Assembly of the Heads of State and Government (Algiers Declaration) in Algiers, Algeria 12–14 July 1999. OAU Doc. AHG/Decl. 1 (XXXV).

13 *Id.*, at 3.

14 The most important of these challenges as highlighted in the Algiers Declaration include globalization; the marginalization of the United Nations (UN) and its role under its Charter for the maintenance of international peace and security; the importance of disarmament and the elimination of weapons of mass destruction; threats to the stability of society and the life of individuals such as terrorism, drug trafficking, and organized crime; and unfavorable world economic trends in Africa and the great majority of developing countries. *See Id.*, at 5–9.

within and outside our continent.”<sup>15</sup> This Summit produced the Sirte Declaration, which was based on frank and extensive discussions on “how to proceed with strengthening of the unity of our continent and its peoples.”<sup>16</sup> It contained a decision to “establish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organization and the provisions of the Treaty establishing the African Economic Community.”<sup>17</sup> The legal unit of the OAU rapidly produced a draft Constitutive Act of the African Union,<sup>18</sup> which the Assembly of Heads of State and Government in Lome, Togo on 11 July 2000 adopted as the AU Constitutive Act.<sup>19</sup> Following the adoption of the Constitutive Act the AU was formally established, at least as a concept or in principle in March 2001 in Sirte, Libya,<sup>20</sup> where the discussion for the establishment of the AU actually began in 1999. Curiously, although the AU was established in 2001, it only came into existence when launched in 2002 in Durban 2002.<sup>21</sup>

The evaluation of the OAU that took place in Algiers in 1999 and the follow-up extraordinary summits in Sirte, Libya and Lome, Togo leading to the adoption of the AU Constitutive act were a culmination of a new feeling and consciousness in the African continent among its leaders and citizenry, arising after the end of apartheid in South Africa. That feeling or consciousness is expressed in the term *African Renaissance*,<sup>22</sup> which encapsulates the need for Africa to arise from

---

15 See Declaration of the Fourth Extraordinary Session of the Assembly of Heads of State and Government, Sirte, Libya on 9 September 1999. OAU Doc. EAH/Decl. (IV) Rev. 1 (Sire Declaration).

16 Sirte Declaration, ¶8.

17 *Id.*, ¶8 (i). On the history of the formation of the African Union, see Tiyajana Maluwa, ‘Reimagining African Unity: Some Preliminary Reflections on the Constitutive Act of the African Union’ (2002) *African Yearbook of International Law* 3-38; Nsongurua Udombana, ‘The Institutional Structure of the African Union: A Legal Analysis’ (2002) 33 *Cal. W. Int’l L. J.* 69.

18 This was after a compromise and a harmonization of efforts in view of an earlier draft already produced by Libya and presented at the Summit it hosted in Sirte. See Maluwa, *supra*, note 17, at 16-19.

19 Constitutive Act of the African Union, *supra* note 10.

20 Fifth Extraordinary Session of the Assembly of Heads of State and Government, 1-2 March 2001. See Decisions of the Assembly of Heads of State and Government on the African Union. OAU Doc. EAHG/Dec. 1 (V), ¶1.

21 See Maluwa, *supra*, note 17, at 22, who tries to comment on the implication of the situation as “an apparent distinction between” what he refers to as the “political birth” and the “legal birth” of the AU.

22 African Renaissance in its current expression is said to have been popularized by President Thabo Mbeki of South Africa when he was Deputy President in 1998. See Mbulelo Mzamane, *Where There is no Vision the People Perish: Reflections on the African Renaissance*, 1 (on file with author). Available online at [www.africavenir.org/FR/fulltext/fulltext01.html](http://www.africavenir.org/FR/fulltext/fulltext01.html) (last accessed October 11, 2003). See also, Statement by Deputy President Mbeki at the African Renaissance Conference, Johannesburg, 28 Sept. 1998 (Mbeki’s 1998 Speech, on file with author). Available online at

oppression, neocolonial subjugation, lack of continental accountability, in order to enable the continent to reach its greatest potential. The African Union as a new continental organization is thrust with a many faceted responsibility, a prominent aspect of which is a more serious promotion and protection of human rights and the rule of law in the continent. To this end, a number of commentators have expressed their opinion as to what the adoption and entry into force of the AU Constitutive Act portends for human rights protection in the continent. Udombana does not appear to believe that any meaningful advancement in human rights protection in the continent will be brought as a result of the adoption of the AU Constitutive Act and the replacement of the OAU with the AU when he observed that:

The AU Treaty is an old wine in a new wine skin; and the AU is a reincarnation of the OAU. As such, it is not likely to take human rights seriously—even though it is greatly desired— for the simple reason that a married woman does not recover her virginity by divorce. To hope that many of the present crops of rulers in African 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 that the euphoria of unity or, for that matter, human rights.<sup>23</sup>

This pessimistic observation is engendered by the long sad history of human rights violations bedeviling the African continent. Many observers would indeed sympathize with that observation, including this author. However, how long shall we continue to despair? Does the AU Constitutive Act really have nothing to offer? Is there nothing in it with which to engage the leadership of Africa and hold them accountable as a solemn promise and an international agreement for

---

[www.anc.org.za/andocs/history/mbeki/1998tm0928.htm](http://www.anc.org.za/andocs/history/mbeki/1998tm0928.htm) (last accessed on Oct. 11, 2003).

23 Nsongurua Udombana, *supra*, note 2 at 1258–9. Generally, on the possible impact of the AU's Constitutive Act on human rights in the continent, see Kithure Kindiki, 'The normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal' (2003) 3 *Af. Hum. Rts. L. J.*, 97–114; Evaritu Baimu, 'The African Union: Hope for Better Protection of Human Rights in Africa?' (2001) 2 *Af. Hum. Rts. L. J.*, 299–314; Evaritu Baimu, 'Human Rights in NEPAD and Its Implications for the African Human Rights System' (2002) 2 *Af. Hum. Rts. L. J.*, 301–319; Konstantinos D. Magliveras & Gino Naldi, 'The African Union- A New Dawn for Africa?' (2002) 51 *Int'l & Comp. L. Q.*, 415–425; Shadrack Gutto, 'The Reform and Renewal of the African Regional and Peoples' Rights System,' *supra*, note 9, 175–184; Shadrack Gutto, 'The Compliance to Regional and International Agreements and Standards by African Governments with Particular Reference to the Rule of Law and Human and Peoples' Rights', in *New Partnership for Africa's Development—Nepad: A New Path?* (Nairobi, 2002); J. Ohiorhenuan, 'NEPAD and Dialectics of African Underdevelopment' (2002) 7 *New Agenda*.

the benefit of ordinary Africans in view of the seemingly reawakened African awareness?

This article attempts to answer these questions by interrogating the larger symbol of the African Union and the new consciousness of African renaissance in the protection of human rights in the continent. It examines the issues by looking at the perspectives of human rights in Africa prior to the formation of the AU in a historical context, the notion of African Renaissance and its culmination in the African Union, the place given to human rights promotion and protection under the AU Constitutive Act, and the human rights challenges that face the AU in the new African era.

## II. PRE-AFRICAN UNION HUMAN RIGHTS PERSPECTIVES

Perspectives on human rights protection in Africa have continued to change over time. The intention here is not to delve into the controversy as to whether human rights as a concept existed in pre-colonial Africa, but to discuss the dynamic nature of perspectives on human rights practice in modern Africa in relation to where we are today—the metamorphosis of human rights in the continent. This will aid us in our inquiry as to whether or not there is any reason to hope for a new era in the promotion and protection of human rights in the continent as a result of the new consciousness that prompted the laying to rest of the OAU.

### A. *Response to Colonial Rule*

The struggle against colonialism was in itself a human rights issue, which many African leaders believed should receive international attention. The coming together of African States under the OAU banner OAU became an avenue for a united front in the fight against colonial oppression and exploitation of the African Continent, as expressed in the purposes and principle of the regional body<sup>24</sup> with an overall aim of ensuring respect for the right of self-determination of African peoples.

---

24 Charter of the OAU, art. II (1) listed as the purposes of the organization:

- (a) to promote the unity and solidarity of African States;
- (b) to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;
- (c) to defend their sovereignty, their territorial integrity and independence;
- (d) to eradicate all forms of colonialism from Africa; and
- (e) to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

Thus, for the most part, the OAU became preoccupied with decolonization rather than with homegrown human rights accountability of the then emerging and emergent African states.<sup>25</sup> To this end, the OAU coordinated the liberation of the rest of Africa through diplomatic support, the channeling of financial, military and logistic aids to liberation movements and spear-headed the recognition of the liberation movements in the United Nations until each African state that was under foreign rule was granted independence, the last of which was a miracle—the end of the monstrous apartheid regime in South Africa between 1990 and 1994, when the first democratic election was conducted.<sup>26</sup> The OAU stood behind African countries in defense of their sovereignty and territorial integrity: the stemming of early signs of disintegration in the Congo between 1964 and 1965; in Nigeria where the organization threw its weight on the side of the unity of the country in the wake of a three-year civil war from 1967 to 1970 that threatening the foundation of that country; in its condemnation of Israel's aggression and subsequent occupation of Egypt in 1967; in Guinea Bissau where Portugal's last ditch attempt at colonial comeback failed because the OAU offered financial and military assistance to Guinea to contain that attempt in 1973–1974; in Equatorial Guinea where its support enabled the young Republic to reinforce its newly won independence in 1968.<sup>27</sup>

The OAU's interest in protecting the sovereign integrity of African states culminated in the struggle against apartheid. Through the activities and actions of the African group at the United Nations (UN), vigorous campaigns were mounted against the entrenched racial discrimination in old South Africa, former Rhodesia (Zimbabwe) and former South West Africa (Namibia). The OAU fought for the recognition of apartheid as a crime against humanity, the cessation of South African membership of the Commonwealth and a number of specialized UN institutions, the barring of South Africa from the Olympic

---

25 One needs to recall that the Congress of African Jurists of 1961 in Lagos prior to the formation of the OAU to give direction to future African regional human rights promotion and protection regime (the famous Law of Lagos) failed to impress the founders of the OAU and as result, was not reflected in the OAU's Charter.

26 See, commentary on the Organization of African Unity, available at [www.itcilo.it/english/actrav/telearn/ilo/law/oau.htm](http://www.itcilo.it/english/actrav/telearn/ilo/law/oau.htm) (last accessed 11 Nov. 2003), (hereinafter Commentary on the OAU"). For detailed history of the OAU, see Zdenke Cervenka, *The Organization of African Unity and Its Charter* (New York: Praeger Publishers, 1968); Akindele, R.A. ed., *The Organization of African Unity, 1963–1988* (Ibadan: Vantage Publishers, 1998); El-Ayouty, Y., ed., *The Organization of African Unity After Thirty Years* (Westport: Praeger Publishers/Greenwood Publishing Group, 1994); Naldi, G.J., *The Organization of African Unity: An Analysis of Its Role* (London: Mansell, 1989); and the website: [www.oau-creation.com](http://www.oau-creation.com) (last accessed 11 Nov. 2003).

27 Commentary on the OAU, *supra*, note 26.



games and from international tennis tournaments among other sports activities.<sup>28</sup> All these efforts to expose the evils of colonial rule were indeed anchored on the human rights of African peoples to determine their own destiny and existence.

The fight against colonialism was anchored to a great extent on the provisions of the Universal Declaration of Human Rights (UDHR)<sup>29</sup> and the Charter of the United Nations (UN Charter)<sup>30</sup> as indicated in Article II (1) of the now moribund OAU Charter,<sup>31</sup> having earlier been emphasized in paragraph 8 of the preamble to Charter to the effect that that African States were “persuaded that the Charter of the United Nations and the Universal Declarations of Human Rights, the principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive co-operation among States.”<sup>32</sup> Despite this affirmation of the foremost human rights instruments, the OAU, however, perfected the principle of non-interference in its Member State’s sovereignty and internal affairs.<sup>33</sup> This principle was based on avoiding colonial type intrusions, but it eventually weakened the regional body’s resolve to challenge the squandering of the gains of Africa’s hard won independence by those entrusted with the sacred duty of leading Africans to the promised land of the milk and honey of self-rule. As a result, one African state after another began to lose the vision of a better life for its people who had borne the weight of colonial oppression and violation. Governance rather became an exalted position under which the people became accountable to the rulers rather than vice versa. The once hated dictatorship of the colonial “masters” had all of a sudden become home grown and manifestly owned by the new crop of African leaders. In many parts of the continent, particularly the Western, Central and Eastern parts, the military forayed into governance and would later create a culture of patronage that destroyed the vision of African development as envisaged in anti-colonial struggles. It was in this sense that this author and many of his compatriots learnt in primary and secondary schools that the

---

28 *Id.*

29 Universal Declaration of Human Rights, Adopted December 10, 1948, U.N.G.A Res. 217 (III 1948). Forty-eight states voted in favor of the Universal Declaration, one against and eight abstained from voting. The eight that abstained included Saudi Arabia, old South Africa, the former USSR and the former Yugoslavia.

30 Charter of the United Nations, signed in San Francisco on June 26, 1945 and entered into force on October 24, 1995, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153.

31 Charter of OAU, *supra*, note 3. As observed in the earlier part of this work, the Constitutive Act of the African Union replaced the Charter, but it is expected that for some, reference will continue to be made to the OAU Charter, particularly in comparative perspectives with the AU Constitutive Act.

32 Preamble to the Charter of the Organization of African Unity, ¶18.

33 See Charter of the OAU, art. III.

OAU was a “toothless bulldog.” Africa would over time become a battle ground between its citizens because of either political marginalization of various groups, autocratic rule, or blatant repression by subsequent rulers of independent African States. Examples abound from Rwanda to Burundi, from Liberia to Sierra Leone, from Democratic Republic of Congo to Cote d’Ivoire, among many others that are internally brewing but yet to visibly erupt to international attention.

The gory history pained above makes the despair expressed by Udombana and various other commentators about the seriousness of human rights violations in continental Africa understandable. These scholars may not see any thing in the new African Union dispensation warranting optimism, given past antecedents of African States. The whole African experience, as unpalatable as it is, however, must be placed in the context of the historical and political development of the continent, including those atrocious practices that have adversely impacted our development. We must come to a point where we can begin to actually pinpoint a desire for a change on the part of those who might have been quite guilty of the atrocities that we decried and still do decry, and hold them to their words.

#### B. *The “Middle Ages” of African Human Rights Consciousness*

The middle ages of historical times “paved the way for the ideas that would become the beginning of the Renaissance in world history,”<sup>34</sup> leading to the industrial revolution. The term “middle ages” is used here not to indicate a great length of time in African human rights history, but to denote a period of African human rights consciousness, no matter how short, that serves as a precursor to the present ideals of human rights that African states and citizenry aim to espouse.

The beginning of this period can be located in the early 1980s when Africa began to seemingly look inward up to the early 1990s when Apartheid ended in South Africa. It represents a shift from responding to human rights as a colonial issue to laying down norms for domestic human rights accountability of African States. The period extends up to 1995, when discussions within the OAU based on civil society pressure, of ways to strengthen human rights in Africa beyond the mechanism provided under the African Charter<sup>35</sup> gained ground. This period no doubt may have consisted of a number of trials and errors and may have even appeared seemingly directionless; it nevertheless helped to shape the new emergent consciousness.

---

34 See ‘The Middle Ages’ available online at [www.mnsu.edu/emuseum/middleages](http://www.mnsu.edu/emuseum/middleages) (last accessed 11 Nov. 2003).

35 The African Charter on Human and Peoples Rights, *supra*, note 7.

The failure of the initiative for an early direction on the future of African regional human rights protection regime under the Law of Lagos in 1961<sup>36</sup> and other such initiatives<sup>37</sup> notwithstanding, their spirit still haunted the continent. Governance in Africa during this era was brutal, attracting international condemnation and pressure and internal resistance on a number of fronts. In 1979 the Conference of OAU Heads of State and Government resolved to initiate the preparation of an African Charter on Human and Peoples' Rights and called upon the Secretary-General to embark on the preparation of a preliminary draft by organizing a meeting of qualified experts.<sup>38</sup> The African Charter or the Banjul Charter<sup>39</sup> would later be adopted in 1981 and entered into force in 1986.

The adoption and entry into force of the African Charter opened a new chapter in human rights discourse in the African continent. The Charter contained elaborate provisions for substantive protection of human rights in all areas without being hampered by the traditional divide between civil and political rights,<sup>40</sup> and economic, social and cultural rights.<sup>41</sup> It extended human rights protection to what has been termed "group" or "collective rights" that ordinarily were not classified as falling either within civil and political rights, or economic, social and cultural rights.<sup>42</sup> The Charter established the African Commission on Human and Peoples Rights (The African Commission) as its supervisory organ<sup>43</sup> with a broad mandate to "promote human and peoples' rights ... Ensure the protection of human and peoples' rights under conditions laid down by this present Charter. Interpret

---

36 See generally, International Commission of Jurists, *The African Conference on the Rule of Law* (Geneva, 1961).

37 For example, the 1966 Seminar on Human Rights in Developing Countries that was held in Dakar, Senegal, the 1969 Cairo Conference on the need to establish regional human rights commissions with specific reference to Africa, the Addis Ababa 1971 Economic Community for Africa Conference on the Legal Process and the Individual, the Dar-es-salaam 1973 Seminar on the Study of the New Ways and Means for Human Rights with Specific Reference to the Problems and Needs of Africa; the 1979 Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa organized by the United Nations in Monrovia, Liberia in 1979, etc. See Osita Eze, *Human Rights in Africa: Some Selected Problems* 201–201 (Lagos: The Nigerian Institute of International Affairs/Macmillan Publishers, 1984); B.G. Ramchran, 'The Travaux Préparatoires of the African Commission on Human Rights' (1992) 13 Hum. Rts. J. 307 all reprinted in Vincent O. Nmeielle, *The African Human Rights System: Its Laws, Practice, and Institutions* 67–73 (The Hague/London/New York: Martinus Nijhoff Publishers, 2001).

38 See Dec. 115 (XVI), Assembly of Heads of State and Government, Sixteenth Ordinary Session, Monrovia, Liberia, 17 to 20 July 1979.

39 The African Charter on Human and Peoples Rights, *supra*, note 3.

40 See, the African Charter, *supra*, note 7 arts. 2–14.

41 *Id.*, arts. 15–18.

42 *Id.*, arts. 19–24.

43 *Id.*, art. 30.

all provisions of the present Charter at the request of a State Party, an institution of the organization of African Unity or an African organization recognized by the OAU. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.”<sup>44</sup>

In effect, the African Charter established an African human rights system<sup>45</sup> along the lines of the European and Inter-American human rights systems. The African Commission is empowered to receive and review reports from States Parties, as well as inter-state complaints.<sup>46</sup> The most attractive function of the Commission, which was its own innovation at its first session, was the assumption of jurisdiction over individual complaints under Article 55 of the Charter even though that provision, which deals with “other communications” that the Commission is empowered to receive, does not specifically refer to individual petitions, communications, or complaints.

The African Commission—effectively, the African human rights system—has been in existence for 16 years since its first session in 1987 in Addis Ababa. The effectiveness of the Commission over this period of time in dealing with human rights matters has received extensive scholarly commentaries.<sup>47</sup> The commentaries vary from concerns on

44 *Id.*, art. 45.

45 For a general and more detailed study on the African human rights system, see M.D. Evans & R. Murray, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge, 2002); Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions*, *supra*, note 27; Rachael Murray, *The African Commission on Human and Peoples' Rights and International Law* (Oxford: Hart, 2000); Evelyn Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (The Hague: Martinus Nijhoff Publishers, 1996); N.S. Rembe, *The System of Protection of Human Rights Under the African Charter on Human and Peoples' Rights* (Lesotho: National University of Lesotho, 1991).

46 The African Charter, *supra*, note 7 arts. 62 and 47.

47 See generally, C. E. Welch, ‘The African Commission on Human and Peoples' Rights: A Five Year Assessment’ (1992) *Hum. Rts. Q.* 43; Wolfgang Benedeck, ‘The African Commission on Human and Peoples' Rights: How to Make it More Effective’ (1993) *Netherlands. Q. Hum. Rts.* 25; P. Amoa, ‘The African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights?’ (1992) 4 *Afr. J. Int'l & Comp. L.* 226; Makau wa Mutua, ‘The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformulation’ (1993) 5 *Legal F.* 31; Makau wa Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of Language of Duties’ (1995) 35 *Va. J. Int'l. L.* 339; A.E. Anthony, ‘Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa’ (1997) 3 *Tex. Int'l L. J.* 511; I.A. Badawi El-Sheik, ‘The African Commission on Human and Peoples' Rights: Prospects and Problems’ (1989) 7 *Netherlands. Q. Hum. Rts.* 272; Badawi El-Sheik, ‘The African Commission on Human and Peoples' Rights: A Call for Justice’ in *International Justice 283* (Kalliopi Koufa, ed. Sakkaoulas Publications, 1997); C. Ayangwe, ‘Obligations of States Parties to the African Charter on Human and Peoples Rights’ (1998) 10 4 *Afr. J. Int'l & Comp. L.* 625; C.A. Odinkalu, ‘The Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary Assessment’ (1998) 8 *Transnat'l. L. & Cntep. Probs* 359; C.A. Odinkalu & C. Christensen, ‘The African Commission on Human and Peoples' Rights: The Development of Its Non-State Communication Procedures’ (1998) 20 *Hum. Rts. Q.* 235; Makau wa Mutua,

the weak start of the African Commission; lack of adequate resources for the effective functioning of the Commission, lack of interests on the part of Member States of the OAU in meeting their obligations under the African Charter and in respecting the mandate of the Commission, particularly with regard to state reporting; weakness of enforcement mechanism and lack of effective remedy under the African Charter- to occasional commendation of the Commission for beginning to show signs of improvement in recent years. There is no doubt that African Commission grappled with all the issues raised above in its attempt to entrench itself as a human rights supervisory organ of the OAU, especially in the face of double standards of African States with regard to respect for human rights. Of course, human rights practice of African States left much to be desired and still does. The point, however, remains that this whole process is still part of the metamorphosis of African human rights consciousness- a point in time of African human rights history that is bound to lead to another era. The end of apartheid, the one human rights issue that all Africa was united against, and the enthronement of non-racial democracy in South Africa in 1994 became the turning point, albeit symbolically in African history that would affect the way things would subsequently proceed in the continent. Some might say that it was a mere coincidence that apartheid ended at a time when African leaders were beginning to re-evaluate their continental human rights commitment and that they were doing so in the midst of contradictory practice standards in their various domestic jurisdictions.

Whatever the case was, the year 1994 marked the beginning of a new dispensation in the mission to strengthen institutional mechanisms for human rights protection; this brought to fruition the vision of the 1961 Conference of African Jurists on the Rule of Law in Lagos.<sup>48</sup> The Assembly of Heads of State and Government of the OAU in their 1994 Summit in Tunis, Tunisia, called on the Secretary-General in a

---

'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 Hum. Rts. Q. 342; G.W. Mugwanya, 'Examination of State Reports by the African Commission: A Critical Appraisal' (2001) 2 Afr. Hum. Rts. L. J. 268; C.A. Odinkalu, 'The Role of Case and Complaint Procedures in the Reform of the African Regional Human Rights System' (2001) 2 Afr. Hum. Rts. L. J. 225; Shadrack Gutto, 'The Reform and Renewal of the African Regional Human and Peoples' Rights System,' *supra*, note 9; C. Heyns, 'The African Regional Human Rights System: In Need of reform?' (2001) 2 Afr. Hum. Rts. L. J. 155; K.S. Acheampong, 'Reforming the Substance of the African Charter on Human and Peoples' Rights: Civil and Political and Socio-Economic Rights' (2001) 2 Afr. Hum. Rts. L. J. 185; G.J. Naldi, 'Interim Measures of Protection in the African System for the Protection of Human Rights' (2002) 2 Afr. Hum. Rts. L. J. 1; Nsongurua Udombana, 'Can the Leopard Change Its Spots?' *The African Union Treaty and Human Rights*, *supra*, note 2.

48 The Law of Lagos, *supra*, note 36.

resolution on the African Commission on Human and Peoples Rights to “convene a meeting of government experts to ponder in conjunction with the African Commission on Human and Peoples’ Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples’ Rights.”<sup>49</sup> The resolution emphasized that the OAU was aware of the “need to strengthen the African Mechanism for the protection of human rights”<sup>50</sup> and was “Concerned by the situation obtaining in the area of human and peoples’ rights”<sup>51</sup> in the continent. I believe that this was a genuine concern. Within a little more than a year, the Secretary-General, collaborating with the government of South Africa convened a meeting of government experts in Cape Town, South Africa<sup>52</sup> in which the first draft of the Protocol to the African Charter on Human and Peoples’ Rights for the Establishment of an African Court on Human and Peoples’ Rights (Protocol) was produced. Subsequent meetings in that regard and in which subsequent drafts of the Protocol were produced were held in Nouakchott, Mauritania<sup>53</sup> and Addis Ababa<sup>54</sup> in 1997 before the approval of the Protocol by the Conference of Ministers of Justice/Attorneys-General on 12 December 1997 in Addis Ababa, the OAU Council of Ministers in February 1998, and finally the Assembly of Heads of State and Government which adopted the Protocol in June 1998.<sup>55</sup> Thus, the official Protocol on the Human Rights Court<sup>56</sup> was born and opened for signature and ratification.

The adoption of the Protocol on the Human Rights Court while in itself does not change the African human rights landscape, but nevertheless, is a step in the right direction. One would agree that the eventual entry into force of the Protocol and the constitution of the court is sure to have an impact on the future behavior of African states. The adoption of the Protocol is thus both the end of an era and

---

49 Resolution on the African Commission on Human and Peoples’ Rights, AHG/Res. 230 (XXX), ¶4, Thirtieth Ordinary Session of the Assembly of Heads of State and Government of the OAU, Tunis, Tunisia from 13–15 June 1994.

50 *Id.*, preambular ¶6.

51 *Id.*, preambular ¶7.

52 The meeting took place from 6 September to 12 1995. See Report of the Government Experts Meeting on the Establishment of an African Court on Human and Peoples’ Rights, LEG/EXP/ACHR/RPT, cited in Nmehielle, *supra*, note 37, at 255.

53 The Nouakchott meeting was the second experts meeting and took place from 11–14 April 1997.

54 The Addis Ababa meeting included diplomats and held from 8 to 11 Dec. 1997.

55 The Protocol was adopted at the 34<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government in Ouagadougou, Burkina Faso, from 8 to 10 June, 1998.

56 The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples Rights, *supra* note 8.

the forerunner to the current consciousness that is expressed in the African Union based on the notion of *African Renaissance*.

### III. THE NOTION OF AFRICAN RENAISSANCE AND AFRICAN UNION

The term 'renaissance' could well be translated into the following meanings: rebirth, new start, new beginning, resurgence, revitalization, revival, regeneration, recovery, and reawakening.<sup>57</sup> In the context of Africa, its renaissance is a consciousness that in its earliest formulation originally emerged from Africans in the Diaspora in response to mistreatment of the *Negro* in the Americas and in other places where Africans were carried off to slavery.<sup>58</sup> The spirit of the concept would later find expression in the mother continent in *Pan Africanism*, a concept for a united Africa and for the liberation of its peoples from colonialism. Kwame Nkruma, the first President of Ghana, was in the forefront of the consciousness within the continent.<sup>59</sup> To this end Mzamane observes,

... with the long eye of history, we are able to see the African renaissance in proper perspective, not as a single event or some once-off occasion. It is an episodic and cumulative story of the rise of a once enslaved people across the globe. It is continuing revolution that unfolds toward the total liberation of people of African origin in the political, economic, cultural, educational, technological and social spheres. In its wake, it liberates those Frantz Fanon describes as the 'wretched of the earth,' wherever they may be and in every sphere of life.<sup>60</sup>

The current expression of African renewal as postulated by President Mbeki of South Africa is not far removed from the sentiments in this quote. It—however—focuses on the situation of the peoples of continental Africa. In his famous 1998 speech at the African Renaissance Conference, Mbeki said "... we must make foreign to Africa the disempowerment of the masses of our people. To borrow a slogan from the South African liberation movement, we would accordingly proclaim that—the people shall govern! By tasking this position, we would be saying that we want to see an African continent in which people participate in systems of governance in which they are truly

---

57 As formulated in the English Language Thesaurus tool available on Microsoft Word—word processing application.

58 Mzamane, *supra*, note 22, 4–14.

59 *Id.*, at 15–17.

60 *Id.*, at 18.

able to determine their destiny and put behind us the notions of democracy and human rights as particularly “Western” concepts.”<sup>61</sup>

Mbeki believes that one cannot speak of an African renaissance where there is still an endemic dimension of corruption in the continent as a feature of both the public and private sector.<sup>62</sup> Similarly, one of the central aims of African renaissance must be the provision of a better life for African masses to enable them to enjoy and exercise their right to determine their own future.<sup>63</sup> Mbeki anticipates an African Renaissance that “must therefore address the critical question of sustainable development which impacts positively on the standard of living and the quality of life of the masses of our people.”<sup>64</sup>

Though he made his initial speech as Deputy President of South Africa, Mbeki continued to articulate the new African consciousness as he went around the continent after he became president in 1999. Two of such occasions, which have been given prominence by one commentator, are worthy of note: his Abuja Address of 3 October 2000<sup>65</sup> and that of Accra Ghana.<sup>66</sup> The speeches hinged on nurturing and consolidating democracy in the continent and on the need for an integrated Africa in various areas, particularly in economic development.<sup>67</sup> It is important to note that it was within this period of Mbeki’s articulation of what a renewed Africa should be that the whole idea of an African Union was taking root along side a new initiative that would later become the New Partnership for Africa’s Development (NEPAD)—a blueprint for Africa’s political, economic, and social recovery—a special program of the AU.

The notion of a reawakened or a reborn Africa was indeed a sentiment that was central to the formation of the AU. As has been indicated in the introductory part of this paper, the proposal by Colonel Muammar Ghaddafi of Libya during the 35<sup>th</sup> Ordinary Session of the Assembly of Heads of State of the OAU in Algiers in 1999 to convene an extraordinary OAU summit to revamp the organization was done in the spirit of early Pan Africanism. That call set the tone for the AU in the spirit of the renaissance that President Mbeki sold and continues to sell to the continent—a politically united Africa

---

61 Mbeki’s 1998 Speech, *supra*, note 22.

62 *Id.*

63 *Id.*

64 *Id.*

65 He made the speech at the Nigerian Institute of International Affairs, which was titled “Democracy and Renaissance in Africa: In search of an Enduring Pax Africana,” cited in *Mzamane, supra*, note 22, at 20.

66 The Accra speech was organized under the auspices of Ghana-South Africa Friendship Association on 5 Oct. 2000 and the title of that speech was “The African Renaissance: The Challenge of Our Time” cited in *Id.*

67 *Mzamane, supra*, note 22, at 20–31.



that would in modern times advance a collectively defined agenda that is meaningful for the development of its peoples rather than as dictated by its colonial past.<sup>68</sup> One would agree with Maluwa that:

the Sirte Declaration represents a significant step in the long march towards the renewal, consolidation and repositioning of the OAU. It was born out of the perceived need to strengthen the continental organization and to rekindle the aspirations of the African people for further unity, solidarity and cohesion in a larger community transcending linguistic, ideological, ethnic and national differences. In adopting the declaration, African leaders apparently recognized that the continent would be stronger, and the collective voice of African nations more effective, if all African were involved in the establishment of "a community of peoples." This holds out the promise of a role for civil society and popular participation in the construction of the new continental organization and in advancing the project of Africa's economic and political integration.<sup>69</sup>

#### A. *The New Partnership for Africa's Development*

An evidence of the economic and political integration that Maluwa talks about, as a mark of African rebirth is the NEPAD initiative. For our purposes, the NEPAD is discussed insofar as it constitutes a component part of this new African consciousness in relation to how it affects African human rights protection in this era. A brief historical development of NEPAD is instructive.

The initiative was anchored in President Mbeki's African Renaissance theory and began as the *Millennium Partnership for the Africa Recovery Programme Plan* (MAP)<sup>70</sup> that was articulated by Mbeki himself, President Obasanjo (Nigeria) and President Bouteflika (Algeria);<sup>71</sup>

---

68 Maluwa endorses this position and agrees that "... the adoption of the Sirte Declaration and, subsequently, the Constitutive Act of the African Union is but an aspect of the historic quest for a united Africa, whose origins can be traced back to the pioneers of Pan-Africanist movement in the pre-independence era: Marcus Garvey, George Padmore, Kwame Nkruma, Nnamdi Azikiwe and Julius Nyerere, among others." See Maluwa, *supra*, note 17, at 12.

69 *Id.*, at 21.

70 The MAP is also severally referred to as the Millennium Africa Recovery Plan.

71 Dani W. Nabudere, *NEPAD: historical background and Its Prospects* 5 (Paper Presented at the African Forum for Envisioning Africa, 26-29 April 2002, and on file with author). The paper is available online at [www.worlsummit2002.org/texts/DaniWNabudere.pdf](http://www.worlsummit2002.org/texts/DaniWNabudere.pdf) (last accessed 24 Aug. 2003). More generally on the NEPAD, see *Baimu, supra*, note 13, at 302; NEPAD: Realizing the Renaissance? (Paper on file with this author), available at [www.ynepad.virtualactivism.net.Mathews\\_article.pdf](http://www.ynepad.virtualactivism.net/Mathews_article.pdf) (last accessed 19 Nov. 2003); Henning Melber, 'The New African

and President Wade's (Senegal) *OMEGA Plan for Africa* (OMEGA Plan),<sup>72</sup> which had the same sentiments as the MAP.

The MAP and Omega plans were presented as separate initiatives to the OAU Heads of State and Government at its Fifth Extraordinary Summit in Sirte, Libya in 2001, and later endorsed the plans in its Declaration on the New Common Initiative (Common Initiative Declaration)<sup>73</sup> as "work done regarding the Revival and Development of Africa" by the various presidents involved. Both plans were, however, merged to create "a single coordinated and inclusive plan for Africa's renewal based on the two initiatives" and adopted as the "New African Initiative (NIA)" with a programme of action.<sup>74</sup> The document resulting from the merger became the NEPAD document and the name of the initiative was changed from NIA to NEPAD at the meeting of the Heads of States and Government Implementation Committee (HSGIC) in Abuja, Nigeria on 23 October 2001.<sup>75</sup> It should be noted that the NEPAD initiative was not without some controversy, particularly as to why it should exist as a parallel initiative with its own structures, to the overall regional umbrella of the AU. To assuage the suspicion that they had a hegemonic agenda, the initiators of NEPAD presented it as an AU program and regularly sought AU's approval and adoption of its framework as evidenced by OAU's Common Initiative Declaration<sup>76</sup> at the 37<sup>th</sup> Ordinary Session in Lusaka prior to the inauguration of the AU in Durban in July 2002. Any doubt as to whether NEPAD is really a part of the AU was finally erased at the Second

---

Initiative and the African Union: A Preliminary Assessment and Documentation' (2001) 25 *Current African Issues*, 4–9; The New Partnership for Africa's Development Document (NEPAD Document, October 2001 on file with author). The NEPAD Document is also available online at [www.nepad.org/](http://www.nepad.org/) (last accessed 10 Oct. 2003).

72 The OMEGA Plan for Africa is available at [www.sarpn.org.za/NEPAD/OMEGA.pdf](http://www.sarpn.org.za/NEPAD/OMEGA.pdf). (Last accessed 19 Nov. 2003).

73 Declaration on the New Common Initiative (MAP and OMEGA, hereafter, the Common Initiative Declaration), AHG/Decl. 1 (XXXVII), ¶4, adopted at the 37<sup>th</sup> Session of the Assembly of Heads of State and Government of the OAU from 9 to 11 July 2001 in Lusaka, Zambia. Included in the commendation contained in the Sirte Common Initiative Declaration was Hosni Mubarak of Egypt who later would be identified with presidents Mbeki, Obasanjo, Bouteflika, and Wade as the original initiators of NEPAD.

74 *Id.*, ¶¶5, 8, and 9.

75 NEPAD has its own elaborate structures, which cannot be fully discussed within the ambit of this paper. The HSGIC comprises of the five heads of state originators of NEPAD and 15 others. See the *Nepad Document*, ¶200. The number of the additional heads of state was initially 10 until it was increased to 15 during the First Ordinary (inaugural session) of the African Union in Durban, South Africa in July 2002. The reason for the increase in number was to achieve regional representation based on the regions of the AU. See Declaration on the Implementation of the New Partnership for Africa's Development, ASS/AU/Decl. 1 (1), ¶14, adopted by the Assembly of the African Union, First Ordinary Session, 9–10 July 2002, Durban, South Africa.

76 Common Initiative Declaration, *supra*, note 73.

Ordinary session of the AU in Maputo, Mozambique where the AU mandated NEPAD's HSGIC to integrate NEPAD into the structures and processes of AU within a three-year time frame.<sup>77</sup>

NEPAD is broadly seen as a strategic policy framework that has as one of its long-term objectives, the eradication of "poverty in Africa and to place African countries, both individually and collectively, on a path of sustainable growth and development and thus halt the marginalisation of Africa in the globalisation process."<sup>78</sup> The initiative is a collective African response to globalization, which seeks to assert Africa's equality with the rest of the world, particularly the developed countries and the various international development and financial agencies in a partnership that recognizes mutual commitments and obligations.<sup>79</sup>

#### B. NEPAD and Governance

As a condition and means of achieving its overall goals and objectives, NEPAD endorses peace, security, democracy and political governance because "African leaders have learned from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development. They are making a pledge to work, both individually and collectively, to promote these principles in their countries and sub regions and on the continent."<sup>80</sup> Because of their experiences in the above regard, NEPAD requires African leaders to take responsibility for "Promoting and protecting democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at the national and subnational levels."<sup>81</sup>

Though NEPAD may be seen as a *grande* African economic initiative, its emphasis on democracy and human rights underscores a renewed desire for a holistic African development. One prominent aspect of NEPAD's instruments that is aimed at achieving this is the African Peer Review Mechanism (APRM), which is "[a]n instrument voluntarily acceded to by Member States of the African Union as an African

---

77 See Declaration on the Implementation of the New Partnership for Africa's Development (AU Maputo NEPAD Declaration), ¶8–10, Assembly/AU/Decl.8 (II), Assembly of the African Union Second Ordinary Session, 10–12 July, 2003, Maputo, Mozambique.

78 NEPAD Document, *supra*, note 71, ¶67.

79 Baimu, *supra*, note 23, at 303, citing Ohiorhenuan, *supra*, note 23, at 10.

80 NEPAD Document, *supra*, note 71, ¶71.

81 *Id.*, ¶49.

Self-monitoring mechanism.”<sup>82</sup> This article does not seek to evaluate the merits of the APRM; that will be reserved for another day. Suffice it to say that the mechanism falls within the new era that we hope could add to a better human rights environment in the continent. The APRM Objectives Standards, Criteria and Indicators, state that the primary purpose of the APRM is “[t]o foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs of capacity building.”<sup>83</sup>

The essence of the APRM is captured in the Declaration on Democracy, Political Economic and Corporate Governance (Governance Declaration).<sup>84</sup> The Governance Declaration is bolstered by the Memorandum of Understanding on the African Peer Review Mechanism (The APRM MOU),<sup>85</sup> the actual instrument which member states of the AU are encouraged to accede to voluntarily.<sup>86</sup> The Governance Declaration reiterates and emphasizes the importance of all rule of law initiatives undertaken on a regional basis under the auspices of the OAU<sup>87</sup> and obligations that Member States of

82 Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (APRM Objectives, Standards and Indicators), § 1.1, NEPAD/HSGIC-03-2003/APRM/Guidelines/OSCI. Available at [www.iss.co.za/AF/RegOrg/nepad](http://www.iss.co.za/AF/RegOrg/nepad) (last accessed 19 Nov. 2003).

83 *Id.*

84 Declaration on Democracy, Political Economic and Corporate Governance (Governance Declaration), AHG/235 (XXXVIII) Annex I, Assembly of Heads of State and Government, Thirty-Eighth Ordinary Session of the Organization of African Unity, 8 July 2002, Durban, South Africa. Incidentally, this session was both the last OAU session and the inaugural session of the AU. The Governance Declaration was specifically related to the NEPAD framework in terms of its democracy and good governance objectives and goals.

85 Memorandum of Understanding on the African Peer Review Mechanism (The MOU), NEPAD/HSGIC/03-2003/APRM/MOU. See also The African Peer Review Mechanism Base Document, AHG/235 (XXXVIII) Annex II (all on file with author) and available at [www.nepad.org](http://www.nepad.org). (Last accessed 11 Oct. 2003).

86 As at the time of writing the following 16 countries have acceded to the APRM: Republic of Algeria, Republic of Burkina Faso, Republic of Cameroon, Republic of Congo, Democratic Republic of Ethiopia, Republic of Mozambique, Federal Republic of Nigeria, Republic of Ghana, Republic of Kenya, Republic of Rwanda, Republic of Senegal, Republic of Uganda, Republic of Gabon, Republic of Mauritius, Republic of Mali, and Republic of South Africa. See *List of Countries that Have Acceded to the APRM*, available at <http://www.iss.co.za/AF/RegOrg/nepad/apramaccede.htm>. (Last accessed 10 Nov. 2003).

87 These include The Lagos Plan of Action, and the Final Act of Lagos (1980); The African Charter on Human and Peoples Rights (1981); The African charter for Popular Participation in Development (1990); the Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World (1990); the African Charter on the Rights and Welfare of the Child (1990); the Abuja Treaty Establishing the African Economic Community (1991); the 1993

the AU have entered into in the context of the United Nations.<sup>88</sup> Though participation in the APRM is voluntary and its processes not rigidly binding, its process is designed “as an African self-monitoring mechanism” that involves a constructive peer dialogue and persuasion “in order to encourage improvements in country practices and policies in compliance with agreed African best practices where recommended.”<sup>89</sup>

We are not certain as to whether the APRM will succeed, be effective or not in ensuring better human rights protection in Africa as well as the larger objective of helping to ensure democracy and good governance among African States that choose to participate in the process. Only time will tell. We, do, however, agree that it is a new African effort that breaks with the past of non-interference in the internal affairs of member states, aimed at objective and constructive criticism that is bound to affect state practice in various areas to accord with international best practices elsewhere. I believe that the whole process is bound to have effect on human rights one way or the other, but more on the positive side because international best practice would not be otherwise. This is more so because the African Union is very much interested in seeing a new Africa in all respects as contained in the AU Constitutive Act. The Constitutive makes particular emphasis on the promotion and protection of human rights.

#### IV. THE AU CONSTITUTIVE ACT AND HUMAN RIGHTS

One enduring criticism of the OAU is that its Charter never placed any significant emphasis on human rights protection in the continent beyond the entrenchment of freedom from colonization as the main

---

Declaration Establishing the Mechanism for Conflict Prevention, Management and Resolution; The Protocol on the Establishment of an African Court on Human and Peoples' Rights (1998); the 1999 Grand Bay Declaration and Plan of Action for the Protection of Human Rights; the Framework for an OAU Response to Unconstitutional Changes of Government (2000; 1999); the Conference on Security, Stability, Development and Cooperation Solemn Declaration (2000); and the Constitutive Act of the African Union (2000). See the Governance Declaration, *supra*, note 84, ¶3.

88 ¶4 of the Governance Declaration lists as “of particular significance” under the UN, the Charter of the United Nations, the Universal Declaration on Human Rights “and all conventions relating thereto, especially the Convention on the Elimination of All Forms of Discrimination against women and the Beijing Declaration.”

89 The APRM MOU, *supra*, note 85, ¶26. In this regard, the structure of the APRM consists of the Committee of Participating Heads of States (APR Forum), as the highest decision making authority; the Panel of Eminent Persons (APR Panel), as the overseeing body, the APRM Secretariat (APR Secretariat); and the Country Review Team (APR Team). For details on the specific functions of each of the component structure of the APRM, see The African Peer Review Mechanism Organisation and Process, NEPAD/HSCIC-3-2003/APRM/Guideline/O&P (2003) on file with author.

human rights issue<sup>90</sup> and the mention of the UN Charter and the UDHR as instruments that enhance the promotion of international cooperation.<sup>91</sup>

The AU Constitutive Act shows a serious departure from the OAU Charter according prominence to human rights in the continent. Early recognition of the place of human rights in the AU is reflected in preamble to its Constitutive Act as one of the bases of agreement for promulgating the Constitutive Act: a 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>92</sup> Among the 14 objectives of the AU, at least six address human rights issues directly or impliedly:<sup>93</sup> the objectives to “encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;<sup>94</sup> promote peace, security, and stability on the continent;<sup>95</sup> promote democratic principles and institutions, popular participation and good governance;<sup>96</sup> 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>97</sup> promote co-operation in all fields to raise the living standards of African peoples;<sup>98</sup> and work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.”<sup>99</sup>

In the same vein, the AU’s Constitutive Act makes elaborate provision on the guiding principles of the Union that transcend those of the OAU as far as human rights are concerned. Sixteen principles guide the AU unlike seven for the OAU of which only five reappear in the AU’s constitutive Act.<sup>100</sup> What is significant is that none of

90 See Nmehielle, *supra*, note 37 at 75, Kindiki, *supra*, note 22, at 100; Baimu, *supra*, note 23 at 306; and Udombana, *supra*, note 2, at 1208.

91 Charter of the OAU, *supra*, note 3, art. II (1) (e).

92

93 Unlike the five purposes of the OAU listed in Article II of its Charter that emphasize more on sovereignty, eradication of colonialism and the promotion of international cooperation.

94 AU Constitutive Act, *supra*, note 19, art. 3 (e).

95 *Id.*, art. 3 (f). Recall Article 23 of the African Charter on Human and Peoples’ Rights guarantees the right of peoples to national and international peace and security.

96 *Id.*, art. 3 (g). Compare the right of every citizen to participate freely in the government of his or her country “either directly or freely chosen representatives in accordance with the provisions of the law” recognized under Article 13 of the African Charter.

97 *Id.*, art. 3 (h).

98 *Id.*, art. 3(k).

99 *Id.*, art. 3(o).

100 These are the OAU principles of the sovereign equality of all member states, non-interference in the internal affairs of States, respect for territorial integrity of member states, peaceful settlement of disputes by negotiation, mediation or arbitration, and

the OAU principles deals with human rights whereas eight principles in the AU's Constitutive Act aim at consolidating respect for human rights, democracy and the rule of law. Particularly, the AU endorses "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>101</sup> This principle echoes and is aimed at tackling situations like the preventable genocide of 1994 in Rwanda and like atrocities. It is also a diffusion of the "non-interference by any Member State in the internal affairs of another" principle, which though is recognized by the AU<sup>102</sup> as indicated here, was elevated to an unprecedented height by the OAU to the detriment of human rights protection in the continent.

The AU also recognizes the "right of a Member State to request intervention from the Union in order to restore peace and security,"<sup>103</sup> a right which must be exercised for the benefit of the citizenry and which is endorsed by the AU.

Gender equality is now a principle that the AU is determined to promote<sup>104</sup>—a serious departure from the OAU and general African tradition. Beyond stating it as a guiding principle, the AU has taken concrete steps in realizing gender equality in its own activities. An example is the recent constitution of the AU Commission (Secretariat) in which half of the Commissioners are women.<sup>105</sup> Along the same line, the AU recently adopted a Protocol to the African Charter relating to the rights of women.<sup>106</sup> Similarly, recent amendments to the AU's Constitutive Act address gender inequality by adding as an objective of the AU, the need to "ensure the effective participation of women in decision-making, particularly in political economic

---

condemnation of political assassination as well as subversive activities. Compare Article III (1–5) with Article 4 (a), (b), (e), (g), and (o) of the AU's Constitutive Act.

101 *Id.*, art. 4 (h).

102 *Id.*, art. 4 (g).

103 *Id.*, art. 4 (j).

104 *Id.*, art. 4 (l).

105 *See* Decision on the Appointment of AU Commissioners, Assembly/AU/Dec.28(II) taken by the Assembly of AU at the Second Ordinary Session 10–12 July 2003, Maputo, Mozambique.

106 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol), adopted on 11 July 2003 by the Assembly of the AU its Second Ordinary Session 10–12 July 2003, Maputo, Mozambique. *See* Assembly/AU/Dec.19 (II). The Protocol is not yet in force and is required to enter into force 30 days after 15 ratifications. The Women's Protocol, Art. 29. As at 21 Nov. 2003, only Gambia, Ghana, Libya and Tanzania have ratified the Protocol. *See* List of Countries, which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women. Found at [www.africa-union.org/Official\\_documents/Treaties\\_Conventions](http://www.africa-union.org/Official_documents/Treaties_Conventions). (Last visited 21 Nov. 2003.)

and socio-cultural areas,<sup>107</sup> and ensuring the use of gender-neutral expressions in the Constitutive Act.<sup>108</sup>

Other human rights-centered principles of the AU include “respect for democratic principles, human rights, the rule of law and good governance,”<sup>109</sup> the promotion of social justice with the aim of ensuring a balanced economic development,<sup>110</sup> “respect for sanctity of life, condemnation and rejection of impunity.”<sup>111</sup> The seriousness of the AU in seeing the enthronement of democracy in the continent climaxed in the principle to condemn and reject “unconstitutional changes of government.”<sup>112</sup> The principle on unconstitutional changes of government is one of the novel ideas at the continent level that aims to address the incessant interference with governance in the continent by the military. This principle is anchored in Algiers Decision<sup>113</sup> of the OAU to that effect in 1999 and subsequently, the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lome Declaration on Unconstitutional Changes of Government).<sup>114</sup> The AU’s resolve in this regard was put to the test by military take-overs in Côte d’Ivoire in 2000<sup>115</sup> and more recently in Central African Republic,<sup>116</sup> Sao Tome and Principe<sup>117</sup> and Guinea-Bissau.<sup>118</sup> The AU condemned all the *coup d’etats* as unconstitutional

---

107 Protocol on Amendments to the Constitutive Act of the African Union (Protocol Amending AU’s Constitutive Act), Art. 3 (i), adopted on 11 July 2003 by the Assembly of the AU its Second Ordinary Session 10–12 July 2003, Maputo, Mozambique. See Assembly/AU/Dec.26 (II).

108 Article 2 of the Protocol Amending AU’s Constitutive Act replaces the words “founding fathers” found in the Preamble to the Constitutive Act with “founders”. Similarly, Article 6 of the new Protocol has substituted the word “Chairman” with “Chairperson” wherever it occurs in the Constitutive Act.

109 *Id.*, art. 4 (m).

110 *Id.*, art. 4 (n).

111 *Id.*, art. 4 (o). To what extent respect for sanctity of life means an abrogation of the death penalty at the Union level is still to be determined. The death penalty is still an issue that is very much within the domestic jurisdiction of member states of the AU.

112 *Id.*, art. 4 (p).

113 Declarations and Decisions adopted by the 35<sup>th</sup> Assembly of the Heads of State and Government of the OAU, AHG/Dec.142 (XXXV) 12–14 July 1999, Algiers, Algeria.

114 Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lome Declaration on Unconstitutional Changes of Government), AHG/Decl.5 (XXXVI), adopted at the 36<sup>th</sup> Ordinary Session of the Assembly of Heads of State of the OAU in Lome, Togo, 10–12 July 2000. Available at [www.africanreview.org/docs/govern/govchange.pdf](http://www.africanreview.org/docs/govern/govchange.pdf) (last accessed 21 Nov. 2003).

115 General Robert Guei overthrew the government of President Bédié two days before Christmas in 2000.

116 On 15 March 2003, former army chief of staff Francois Bozize overthrew President Ange-Felix Patasse of Central African Republic.

117 President Fradique Menezes of Sao Tome and Principe was toppled by the military in July 2003 while he was on a visit to Nigeria.

118 President Kumba Yala was deposed by the Army in a bloodless coup on 14 September 2003.



seizure of power<sup>119</sup> and initiated moves for restoration of power to the democratically elected government<sup>120</sup> or early return of power to a democratically elected government.<sup>121</sup>

The elaborate objectives and principles of the AU that emphasize human rights directly or indirectly mark a clear resolve on the part of the AU to accord human rights a prominence that was totally absent in the Charter of the OAU. The OAU embarked on activities that related to its purposes and principles and since human rights protection within the continent was not part of those purposes and principles, it was little wonder that they were not accorded any serious respect all over the continent, nor emphasized to a very great extent in the organization's dealings. Accordingly, one would expect that the AU would give a more serious attention to human rights in the continent since they are within its objectives and principles.

Despite it not being arguable that human rights fall within the objectives and principles of the AU, some authors continue to raise some concerns about whether the AU actually takes human rights implementation seriously in the continent on the basis of the lack of provision for a central human rights organ among the organs<sup>122</sup> of the AU. Kindiki contends that there seems to be no institutional organ "through which the AU can fulfill its specific objective to protect and promote human rights,"<sup>123</sup> and he suggests that "one way to address this question would be to utilize the Economic, Social and Cultural Council (ECOSOC) of the AU, established under article 22 of the AU Act."<sup>124</sup> Gutto believes that "Failure to anchor the African human rights system as a principal instrument of the newly created AU is likely to reproduce the marginalisation of the collective protection

---

119 See for example, Decision of the Executive Committee of the African Union on the Situation in the Central African Republic, EX/CL/Dec.42 (III).

120 This was the case of Sao Tome and Principe where various African leaders engaged the military in a negotiation that saw President Fradique Menezes return to power.

121 In Côte d'Ivoire, the intervention of the OAU resulted in the election that brought President Laurents Gbagbo to power. The Guinea-Bissau situation resulted in handing over power to a transitional government that would return the country to an elected democracy. The situation in Central African Republic remains quite challenging for the AU.

122 The organs of the AU under Article 5 of the AU's Constitutive Act include The Assembly of the Union, The Executive Council, The Pan African Parliament, The Court of Justice, The Commission, The Peace and Security Council (recently added by the Protocol on Amendments to the Constitutive Act of the AU), The Permanent Representative Committee, The Specialized Technical Committees; The Economic, Social and Cultural Council, The Financial Institutions, and other organs that the Assembly may decide to establish. For detailed analysis on the organs of the AU, see Udombana, 'The Institutional Structure of the African Union: A Legal Analysis' *supra*, note 17, at 69–135.

123 Kindiki, *supra*, note 23, at 101.

124 *Id.*, at 102. He goes on to suggest that lessons could be drawn from the UN ECOSOC in articulating functions of the AU ECOSOC in this regard.

and promotion of human and peoples' rights on the continent.<sup>125</sup> Baimu<sup>126</sup> suggests that the same thing that was done to the Mechanism for Conflict Prevention, Management and Resolution (Conflict Prevention Mechanism) in terms of its formal recognition as an organ of the AU should have been done to the African Commission.<sup>127</sup> He maintains that "Given the role of the two institutions (referring to the African Commission and the proposed African Human Rights Court) in the African human rights scene, it is important to establish their status within the AU."<sup>128</sup> Without disputing the relevance of the arguments that the above authors make in the quest to ensure a strong human rights implementation mechanism in the continent, I would differ on the fact that the absence of the human rights supervisory mechanisms as organs in the AU's Constitutive Act on its own, would not make them any less effective in human rights promotion and protection. I argue that that view is at best very narrow and takes away from the fact that the African Charter on Human and Peoples Rights and the Protocol on the African Human Rights Courts are treaty based institutions "established within the Organization of African Unity."<sup>129</sup> In the same vein, the AU has as one of its objectives, "to promote and protect human rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments."<sup>130</sup> It cannot be disputed therefore, that under the present situation in which the AU replaced the OAU and took over its assets and liabilities, the African Commission and the Human Rights Court when it comes into existence, are human rights organs of the AU via treaties that members of the AU are parties.

What should matter is how serious member states of the AU take their human rights treaty obligations and how the Union as a regional body pursues the achievement of its human rights objectives and principles. Regarding the Conflict Prevention Mechanism, it must

---

125 Gutto, 'The Reform and Renewal of the African Regional Human and Peoples' Rights System,' *supra*, note 9, at 170.

126 Baimu, 'The African Union: Hope for Better protection of Human Rights in Africa,' *supra*, note 13, at 312.

127 At the Lusaka Summit of the OAU, the Assembly of Heads of State and Government decided to "incorporate the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution as one of the organs of the Union in Accordance with Article 5(2) of the Constitutive Act of the African Union." See Decision on the Implementation of the Sirte Summit Decision on the African Union, AHG/Dec. 1(XXXVII), available at [www.africa-union.org/Official\\_documents/](http://www.africa-union.org/Official_documents/) (Last accessed 10 Nov. 2003).

128 Baimu, 'The African Union: Hope for Better protection of Human Rights in Africa,' *supra*, note 13, at 312.

129 The African Charter, *supra*, note 7, art. 30; Protocol on the Human Rights Court, *supra*, note, 8 art. 1.

130 AU Constitutive Act, *supra*, note, 19, art. 3(h).

be observed that it was established in 1993 by the Cairo Declaration (Cairo Declaration on Conflict Prevention),<sup>131</sup> which was not a treaty, and its central organ operated within the OAU. With the increasing emphasis on peace and security in the continent on the founding of the AU, it became important that the Central Organ of the Conflict Resolution Mechanism should appropriately become a central organ of the AU that would have some conventional backing rather than remain as an entity that has its legality from a declaration—hence the eventual replacement of the mechanism by the Peace and Security Council when it comes into existence via an amendment to the AU's Constitutive Act.<sup>132</sup>

Finally, the practice of the AU as an organization since its inauguration does not show that the human rights mechanisms under the OAU that it inherited would be treated as a second or third class entity within the ranks of its organs. At the recently concluded 34<sup>th</sup> Ordinary Session of the African Commission,<sup>133</sup> the AU was fully represented by the Commissioner in charge of political affairs within the Union under whose portfolio human rights fall—an indication of support for the work of the African Commission. This was not always the case under the auspices of the OAU.

#### V. HUMAN RIGHTS CHALLENGES FACING THE AFRICAN UNION

The African Union is a new regional entity with objectives and principles that transcend those of the OAU, which it replaced. One of the reasons for replacing the OAU is the new resolve and determination on the part of African leaders “to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world.”<sup>134</sup> While the AU Constitutive Act pays tribute to the OAU for its role in ensuring political independence for African countries, the AU is a larger project that aims at consolidating the gains of the OAU and taking it further in the light of times that we live in.

---

131 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, AHG/Decl.3 (XXIX) available at [www.africa-union.org/Official\\_documents/](http://www.africa-union.org/Official_documents/). (Last accessed 10 Nov. 2003).

132 See Protocol Relating to the Establishment of the Peace and Security Council of the African Union (Peace and Security Protocol), Art. 22, adopted by the Assembly of the African Union, 10 July 2002, Durban, South Africa; Decision on the Establishment of the Peace and Security Council of the African Union, Assembly/AU/Dec.3(I), available at [www.africa-union.org/Official\\_documents](http://www.africa-union.org/Official_documents) (last accessed 10 Nov. 2003).

133 The 34<sup>th</sup> Ordinary Session of the African Commission held from 6–20 Nov. 2003 in Banjul, The Gambia.

134 AU Constitutive Act, *supra*, note, 19, Preambular ¶6.

It is therefore wrong to perceive the AU as the OAU in another garb simply because a leopard does not change its spots as postulated by Udombana<sup>135</sup> in relation to the AU and human rights: an expectation that the AU would not do any better than the OAU. The AU must be judged on its own performance in relation to its objectives and the principles that it has identified within its constitutive instrument to guide it in achieving those objectives. In the area of human rights, what is important is that the AU having replaced the OAU, must be prepared to deal with issues that the OAU had left undone that have negatively impacted the realization of human rights in the continent. As African scholars or those with Africa interest, our role is to place before the AU the human rights challenges that confront it based on our experience with the OAU. It is in this light that I perceive the human rights concerns in the OAU era as the human rights challenges of the new AU, which must be presented as such to engage the AU's attention for the purpose of achieving better human rights promotion and protection in the continent in this new era.

#### A. *Institutional Empowerment*

There is need for institutional empowerment of human rights supervisory organs in the continent to enable them to function effectively. This would be inconsistent with the AU's 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>136</sup> The key words here are "powers" and "resources."

Taking the issue of resources first, the African Commission suffered funding neglect under the OAU. The Commission experience was one of inadequate financial and human resources<sup>137</sup> and depended on various occasions, on personnel seconded or funded from other organizations and these personnel occupied positions that were not within the budget of the Commission,<sup>138</sup> or interns from developed

---

135 Udombana, 'Can the Leopard Change Its Spots? The African Union Treaty and Human Rights,' *supra*, note 2, at 1258.

136 AU Constitutive Act, *supra*, note, 19, Preambular ¶11.

137 See Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (Thirteenth Annual Activity Report) 1999–2000, ¶54.

138 One example, among others, is the initiative under which the defunct African Society of International and Comparative Law (ASICL) usually provided two legal officers annually to work for the Commission. Though funding for at least one position under the initiative is continuing, one wonders how long that will be the case, since the ASICL appears to have gone out of existence. For a list other supporters of the Commission, see the Thirteenth Annual Activity Report, *supra*, note 127, ¶56–64.

countries. While there may be nothing wrong for personnel to be seconded to the Commission or for interns from developed countries to work for the Commission, they should not be the primary personnel of the Commission. The AU must endeavor to attract permanent skilled personnel for the Commission who will fall within its normal ranks of personnel. That will give those working for the Commission a sense of job security and tenure with the AU. The proposed Human Rights Court, as well as the African Committee of Experts on the Rights and Welfare of the Child (Committee of Experts on the Rights of the Child)<sup>139</sup> would also require adequate financial and human resources.

#### B. Human Rights Enforcement Powers

Similarly, the issue of according real "power" to regional human rights institutions is equally a challenge that the AU must meet. The OAU was never known to have prevailed on any of its member states to comply with the recommendation of the African Commission in terms of affording real remedies to complainants who make use of the individual communication mechanism. The Assembly of the AU is the ultimate enforcer of the recommendations that the African Commission makes within its mandate under the African Charter. The AU must therefore, develop a mechanism by which it will become centrally active in ensuring compliance by concerned member states with the recommendations of the African Commission. The practice under the European system where the Council of Europe's Committee of Ministers actively participates in ensuring compliance with European Court of Human Rights judgments<sup>140</sup> is quite instructive. Thus, the Executive Council of the AU would do well to play this role with regard to the recommendations of the African Commission and of the Committee on the Rights of the Child as envisaged under the Protocol on the Human Rights Court for the Human Rights Court.<sup>141</sup>

#### C. Member States Change in Attitude

The time has come for Member States of AU to regard the various human rights institutions as partners in the promotion and protection of human rights rather than as opponents. In the case of the African

---

<sup>139</sup> The Committee of Experts is the supervisory organ of the African Charter on the Rights and Welfare of the Child, (Child Rights and Welfare Charter), OAU Doc. CAB/LEG/24.9/49 (1990), which entered into force Nov. 29, 1999.

<sup>140</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4XI.1950 (as amended by Protocol 11), §46(2).

<sup>141</sup> Protocol on the Human Rights Court, *supra*, note 8, art. 29(2).

Commission, states must be made to live up to their obligation under the African Charter<sup>142</sup> to periodically submit reports on measures they have taken to promote and protect human rights domestically. The obligation to submit periodic reports was flouted with impunity in the OAU era. A majority of the states never submitted their first reports on time; second and subsequent reports remain overdue and some do not even bother to submit any report at all like Botswana, Comoros, Central African Republic, Côte d'Ivoire, Djibouti, Equatorial Guinea, Ethiopia, Eritrea, Gabon, Guinea Bissau, Kenya, Liberia, Madagascar, Malawi, Niger, Sao Tome and Principe, Sierra Leone, and Somalia.<sup>143</sup> The AU must be prepared to seriously convey the message, which the African Commission frequently relays to states that:

... one of the primary objectives of the State Reporting system of the commission is to establish a framework for constructive dialogue between the Commission and the States. This dialogue however is not the final goal of the system, but a tool for achieving other goals. When the channel for dialogue has been established, it can be used in the enhancement of the mechanisms for promoting and protecting human and peoples' rights. As pointed out by the Commission, the States and itself are "both partners of one objective, which is the promotion and protection of the rights provided in the Charter". When a State realises this common goal, it becomes very easy for it to work with the Commission.<sup>144</sup>

States must not continue with "the misconception that the state reporting system is a forum to embarrass them" because "those that have presented reports before the Commission have realized that it is the best way to build confidence in, and a strong partnership with, the Commission."<sup>145</sup>

---

142 African Charter, *supra*, note 25, art. 62, which provides that "Each State Party shall undertake to submit every two years, from the date that the present Charter comes into force, a report on the legislative or other measures taken with a view to give effect to the rights and freedoms recognized and guaranteed by the present Charter."

143 For details on the practice of member states regarding periodic reports, see Status on the Submission of State Periodic Reports to the African Commission on Human and Peoples' Rights (as at May 2003), Doc/OS (XXXIII)/310a, available at [www.achpr.org/html/periodicreports.html](http://www.achpr.org/html/periodicreports.html) (last accessed 15 Nov. 2003).

144 The African Commission on Human and Peoples Rights, State Reporting Procedure: Information Sheet No. 4, (Information Sheet NO. 4) available at [www.achpr.org/ACHPR\\_inf\\_sheet\\_No.4.doc](http://www.achpr.org/ACHPR_inf_sheet_No.4.doc) (last accessed 15 Nov. 2003).

145 Udombana, 'Can the Leopard Change Its Spots? The African Union Treaty and Human Rights' *supra*, note 2, at 1241.

#### D. Proactive Human Rights Stance

Another area of challenge of related importance that the AU should tackle head-on would be its ability to take a proactive stance in encouraging a positive state of human rights practice by member states in their domestic settings. The scorecard of states' human rights practice before and after the entry into force of the African Charter tells a negative story that has warranted scholars to take a pessimistic view on the ability of the AU to make any dent on that image.<sup>146</sup> One such serious challenge is the situation in Zimbabwe where there is a complete break down of the rule of law, resulting in massive violations of the rights of the masses. Zimbabwe is not alone. While its situation may be one that has attracted more international attention, others continue to erupt and dampen the hope of the new African era: the Kingdom of Swaziland is also engulfed in an erosion of the rule of law, a situation other states that could or are facing. Addressing the issues related to good governance and the rule of law is indeed one of the greatest challenges to the ideals of larger AU objectives and NEPAD, as the AU's program that would lead to this era of Africa's rebirth.

#### E. Harmonization of Human Rights Instruments and Institutions

There remains yet another challenge: a cohesive harmonization of human rights institutions and initiatives of the AU to make for effective functioning of these institutions and initiatives. One early criticism of the OAU in this regard was the creation of the Committee of Experts on the Rights of the Child to implement the Child Rights and Welfare Charter<sup>147</sup> rather than bringing the Charter within the competence of the African Commission and eventually the Human Rights Court, which were seen as the preeminent human rights supervisory organs

---

<sup>146</sup> See *Id.*, at 1206–1238 where he catalogued human rights abuses ranging from war crimes, genocide, and crimes against humanity; extra-judicial executions, torture, degrading treatment and slavery; persecution and harassment of human rights defenders; denials of the right of freedom of expression; denials of the right to fair trial and attacks on the judiciary to absence of genuine democracies in the continent. Equally qualified to join the list of these violations include official and state-induced corruption that has eaten so deep into the fabric of the continent and has prevented need socio-economic development in individual states in the continent. One would hope that member states of the AU would quickly ratify and implement the recently adopted African Union Convention on Preventing and Combating Corruption (Corruption Convention), which was adopted in Maputo, Mozambique on 11 July 2003. See Assembly/Dec.27(II). See the text of the Corruption Convention at [www.africa-union.org/Official\\_documents/](http://www.africa-union.org/Official_documents/) (last accessed 10 Nov. 2003).

<sup>147</sup> Child Rights and Welfare Charter, *supra*, note 139.

within the OAU.<sup>148</sup> The drafters of the new Women's Protocol tried to avoid duplication of institutions by tying the Protocol to the African Charter in that "States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter ..."<sup>149</sup> The Protocol goes further to endow the proposed African Human Rights Court with the interpretative authority over its provisions and implementation.<sup>150</sup>

Similarly concerns arise regarding the human rights implications of the NEPAD initiative, particularly, the APRM and the mechanism under the Peace and Security Protocol<sup>151</sup> vis-à-vis already existing institutions.<sup>152</sup> The APRM though voluntary would implicate areas of governance and the rule of law that are provided for in the African Charter.

One is left to wonder when an adverse peer review of states practice could mature into inter-state complaint or form an issue that is subject to state reporting under the African Charter, which on their own are the avenues of encouraging member states of the AU to live up to their human rights obligations. In other words, the AU needs to ensure that APRM conforms to already existing normative instruments and norm-interpreting institutions that are part of the AU. The Peace and Security Protocol appears to recognize the need to work together with the African Commission and the AU should ensure that the commitment in this regard is carried out to the letter, as it is bound to enhance the cohesive working of AU institutions. The Peace and Security Protocol states that "The Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples' Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council."<sup>153</sup> This would mean that the emergency-cases powers of the African Commission under Article 58 of the African Charter could now be exercised in a manner that could ensure a

---

148 Nmehielle, *supra*, note 37 at 133; Gutto, *The Reform and Renewal of the African Regional Human and Peoples' Rights System*, *supra*, note 9, at 178.

149 The Women's Protocol, *supra*, note 106, art. 27.

150 Article 27 of the Protocol provides that "The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol."

151 Peace and Security Protocol, *supra*, note 132.

152 Baimu, 'Human Rights in NEPAD and Its Implications for the African Human Rights System,' *supra*, note 23 at 306–318.

153 Peace and Security Protocol, *supra*, note 132, art. 19.



quick and positive action rather than the in-depth study envisaged under the provision. This is because when the African Commission is confronted with cases that “reveal the existence of a series of serious or massive violations of human and peoples’ rights”<sup>154</sup> there is the tendency that the Commission would work with the Peace and Security Council (PSC), as such cases would likely fall within the PSC’s mandate.

#### F. Prompt Ratification of Human Rights Instruments

Finally, one urgent challenge of the AU is the prompt ratification of human rights instruments, particularly the Protocol on the Human Rights Court and the inauguration of the Court. The Protocol was adopted more than five years ago and is yet to come into force. Perhaps under the OAU, African states were not enthused about ratifying or acceding to the Protocol; yet they were quite enthusiastic about ratifying or acceding to the Statute of the International Criminal Court (ICC),<sup>155</sup> which was adopted a month and seven days after the Protocol on the Human Rights Court in the same year. In this AU era, African States can demonstrate similar enthusiasm by extending the gesture shown to the ICC statute to the Protocol on the African Human Rights Court so that the human rights court can come into existence.<sup>156</sup> They should go a step further by recognizing the competence of the Human Rights Court to receive individual and group complaints for human rights violations. They would do well to also to ratify the Women’s Protocol, the Corruption Convention, among others.

## VI. CONCLUSION

The rebirth of African unity in the AU, replacing the OAU, and in its program for Africa’s Development: NEPAD, is more than a divorce, through which a married woman does not regain her virginity as

---

<sup>154</sup> See The African Charter, *supra*, note 7, art. 58.

<sup>155</sup> Rome Statute of the International Criminal Court (ICC Statute), adopted 17 July 1998. Twenty-three African states are parties to the ICC Statute, eight more than the number required under Article 34(3) of the Protocol on the African Human Rights Court.

<sup>156</sup> One would hope that Member States of the AU would allow us to see the birth of the Human Rights Court early next year now that it remains only one ratification to obtain the number required (15 parties) for the Protocol on the Human Rights Court’s entry into force. Lesotho is the most recent Member State to ratify the Protocol for a total number of 14. See note 8, *supra*.

alluded to by Udombana.<sup>157</sup> It is quite true that “a married woman does not recover her virginity by divorce,” but so too that a married woman does not seek divorce because she wants to recover her virginity. The reasons for divorce are varied, ranging from weariness to irreconcilable differences that lead to irretrievable marriage breakdown, etc. On the AU’s part, I see this new era as an opportunity to deal with the challenges of the 40 years attempt at regional integration, particularly in the area of human rights. One runs the risk of being overly optimistic and to believe that when African leaders say “it is no longer business as usual” they are speaking the whole truth and would dare to mean what they say. Truly, the antecedent practice of African States and the old OAU makes optimism elusive. It becomes almost unimaginable to envision a new Africa where responsible democratic governance and uncompromising entrenchment of the rule of law becomes traditional.

Undoubtedly, these long-standing fears persist. But we must acknowledge that these are the challenges that Constitutive Act of the AU and the NEPAD initiative seek to address. Both instruments and initiatives have put African leadership on the spot in terms of what they have set out to achieve for the continent’s future, to which they must be held to account. We must relentlessly engage with the AU to promote the realization of African regional integration so as to keep pace with the social, political and economic developments that globalization engenders. The declaration at Sirte that democratization in Africa was critical in sustaining the continent’s efforts towards human rights promotion and protection, as well as respect for the rule of law becomes a sword that we need to wield in the fight to have the AU not tow the OAU line. Africa understands that despite contributions to the universalization of human rights, violations still continued in the continent, which seriously impeded the freedom and socio-economic development of African Peoples. We must engage the AU to prioritize human rights protection and to ensure the early establishment of the African Court on Human and Peoples’ Rights.

It is this author’s personal belief that the AU inaugurates a new era that promises better human rights promotion and protection in the continent, although challenges remain to translate it into reality, for the AU, African human rights scholars, practitioners and activists. Relying on the AU Constitutive Act and the NEPAD Document, the children of Africa are eagerly waiting for a new Africa where leaders serve rather than rule, where poverty is not identified as African,

---

157 Udombana, ‘Can the Leopard Change Its Spots? The African Union Treaty and Human Rights,’ *supra*, note 2 at 1258.

where accountability in governance is pursued as an objective, where peer review will be welcomed rather than politicized, where xenophobia is eliminated and productive free movement of goods and services is encouraged. With the necessary political will and a strong AU, it is more likely than not that a new human rights era is in the offing for the African continent. A proper evaluation in that respect lies in the future, as we watch the AU battle the legacy of the now defunct OAU—the failure to adopt a proactive human rights stance that characterized the past 40 years of its existence.