**The African Human Rights System: An eventful journey from doom and gloom**

**Background: An era of the unwilling horse(s)?**

Notwithstanding scholarly debates on the place of human rights in the pre-colonial societies that make up what is now known as Africa,[[1]](#footnote-1) the modern history of the African regional human rights system only dates back to the post-independence era.[[2]](#footnote-2) Torn between what could be described as a need to jealously protect newly gained flag independence along with the accompanying claim to sovereignty on the one hand, and the call by pan-Africanists for African states to integrate into a formidable ‘United States of Africa’ on the other hand, African leaders settled for a middle-ground-styled Organisation of African Unity (OAU). Founded in 1963, the OAU was supposed to allow African political leaders unite to pursue common goals without ceding newly acquired sovereignty or allowing any states to interfere with the domestic goings-on in any other state.[[3]](#footnote-3) Accordingly, article 3 of the Charter of the OAU declared the principles of the organisation to include: the sovereign equality of all member states; non-interference in the internal affairs of states; and respect for the sovereignty and territorial integrity of each state and its inalienable right to independent existence. In the struggle to find a balance amidst the tension, the promotion and protection of human rights received scant attention in the OAU scheme of things. Human rights only managed to find a place in the preambular acknowledgement that ‘freedom, equality, justice and dignity are essential objectives … of the African peoples’ and in the affirmation of adherence to ‘the Charter of the United Nations and the Universal Declaration of Human Rights’ which the leaders were persuaded, provides a ‘solid foundation for peaceful and positive co-operation among states’. Thus, even though optimistic views declare that the OAU ‘laid the foundation for future promotion and protection of human rights,[[4]](#footnote-4) it was not until nearly two decades after the founding of the OAU that an African regional human rights catalogue would emerge. The OAU was transformed into the African Union (AU) in 2001 when the Constitutive Act of the AU was adopted.

The African Charter on Human and Peoples’ Rights (African Charter or Charter), the normative framework upon which the African human rights system (AHRS) stands, was adopted in June 1981.[[5]](#footnote-5) Legal historians point out that the African Charter is the result of a series of non-state actors’ inspired seminars and meetings that began with the 1961 Law of Lagos Conference.[[6]](#footnote-6) According to at least one commentator, the meetings, seminars and conferences that followed the Law of Lagos Conference ‘were essentially led by African jurists, non-governmental organisations (NGOs), the United Nations (UN) and the OAU Secretary General’.[[7]](#footnote-7) Apparently, based on their perceived or actual attachment to the safeguard of their respective sovereignties, Africa’s post-independence political leaders were understood to have either been opposed to, or at least extremely reluctant to entertain the idea of adopting a regional human rights instrument. Thus, notwithstanding the fact that the actual process for the making and adoption of the Charter under the platform of the OAU was based on a motion by former President LS Senghor of Senegal, there is near consensus that the AHRS has developed in spite of, rather than because of the good intentions of Africa’s post-independence political leaders.[[8]](#footnote-8) Seeking to understand ‘why members of the OAU, a collective with a dismal human rights record and also so jealous of their state sovereignty, decide to draft and adopt the African Charter and so lay the grounds for the development of the African human rights system’[[9]](#footnote-9), scholars have offered a number of reasons that may solve the puzzle. According to Ssenyonjo, factors that drove Africa’s political leaders to adopt the African Charter include the emphasis that UN gave to the need for regional mechanisms to address regional human rights issues in Africa, a growing global awareness of, and focus on human rights in the 1970s, the fact that former President Carter of the United States placed emphasis on human rights in US international relations and a number of serious human rights abuses in African States such as the Central African Empire, Equatorial Guinea and Uganda.[[10]](#footnote-10) To these, Kufuor has added the anxiety of Africa’s political leaders to address a raging crisis of legitimacy and the ‘profound influence’ of NGOs which resulted in a compromise between political leaders and ‘an emerging class of NGO activists committed to human rights’.[[11]](#footnote-11) In other words, like the proverbial horse that can be dragged to the stream but may not successfully be forced to drink from the stream, Africa’s post-independence political leaders were late and unwilling converts to the idea of an African regional human rights system.

A consequence of the foregoing narrative is that the AHRS along with its normative and supervisory frameworks was widely considered to be doomed from the onset. For instance, some early commentators held the view that ‘the Charter is evidently too state-centric. There is too much emphasis placed on the role of the state that it is questionable whether individual rights will be adequately protected now or in the future under the present Charter’.[[12]](#footnote-12) Others were concerned about the inclusion of duties of the individual in the Charter, leading to the observation that ‘It is not clear whether a state would be entitled to refuse to respect the rights of certain individuals who have failed to carry our any of the individual rights owed to the national community’.[[13]](#footnote-13) In fact, for some, it was ‘doubtful whether the Charter will ever come into force in the 1980s given the apparent lack of enthusiasm on the part of the vast majority of African states in ratifying the document’.[[14]](#footnote-14) Representative of the early concerns, these commentators were equally worried about the enforcement potential of the Charter and the AHRS generally. Against the expectation of some stakeholders, the Charter only provided for an African Commission on Human and Peoples’ Rights (African Commission or Commission) – a quasi-judicial supervisory body with a mandate to promote and protect human rights and interpret the Charter. In the words of Umozuruike, ‘an avalanche of criticism greeted the Commission from its inception’.[[15]](#footnote-15) Regarding enforcement as ‘one of the basic problems’ of the African Charter, Amoah questioned ‘How, do the ordinary Africans whose rights have been enshrined in the Charter realise them in practice?’[[16]](#footnote-16) In relation to the Commission’s protective mandate, some took the view that ‘the provisions made for petition by non-state actors, especially individuals, are to say the least, inadequate. Such petitions will be entertained only if it (sic) secures a simple majority of the eleven men commission. … Given the fact that members of the African Commission are in the final analysis nominees of their national governments, this requirement could easily open them to undue political pressure or influence’.[[17]](#footnote-17) One commentator is quoted to have’ regarded the Commission as “a façade, a yoke that African leaders have put around our necks” which deserves to be cast away’.[[18]](#footnote-18) In summary, while there were optimistic views regarding the prospects of the AHRS generally and the Charter specifically, a common view was that Africa’s political leaders who had cajoled, forced and hounded into accepting an African regional human rights system had bobby-trapped the system and set it up for failure.

**The Current State of the System: Not yet Uhuru but a long way from doom and gloom**

To be fair, early sceptics had good reason to be sceptical about the prospects of the AHRS. Viewed from a comparative lens, particularly one that was based on a reading of the socio-political realities that prevailed in the post-independence era, the fears expressed were definitely not unfounded. In fact, three decades after the entry into force of the African Charter, human rights issues abound in nearly all African states. However, bearing in mind that no human rights system has successfully eliminated cases of human rights violation within every state in its system, it is important to evaluate the current state of the AHRS as it has evolved over the years. The evolution of the AHRS will be considered in five broad subheadings that capture ways in which African states, the Commission (and to a limited extent, the African Court on Human and Peoples’ Rights (African Court) and national civil societies have contributed to the advancement of the system.

**The reinforcing role of African states and Africa’s political leaders**

Despite the initial criticism that Africa’s political leaders were unwilling participants in the regional human rights protection project, these actors have contributed in no small way, to reinforcing the place of human rights protection in the continental scheme of things. This has occurred in two broad ways: (i) reaffirmation of commitment to the African Charter through universal ratification and the expansion of the AHRS by adoption of new instruments and establishment of more invasive supervisory/implementation mechanisms and; (ii) reproduction of Charter obligations (and reinforcement of individual rights) in other regional and subregional contexts.

Notwithstanding the slow pace of ratification in the early days of the African Charter, enough states ratified it for it to come into effect within five years of its adoption. However, even more commendable is the fact that as at May 2016, all fifty four (54) member states of the AU have voluntarily ratified or acceded to the African Charter.[[19]](#footnote-19) With such universal ratification of the Charter, citizens of all AU member states potentially enjoy the protection of guaranteed by the Charter and as supervised by the African Commission. In addition, either on their own initiative or at the prompting of other stakeholders, African states under the leadership of the continent’s political leaders have managed to make and adopt more dedicated region-specific human rights instruments. In this regard, human rights instruments adopted on the auspices of the AU include:

Apart from adopting new instruments, Africa’s current crop of political leaders have equally established additional (and often more invasive) supervisory mechanisms for the enforcement of the African Charter and the host of newly adopted other human rights instruments. Prominently, the African Court on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child (African Children Committee) stand out as dedicated human rights supervisory bodies established and empowered by African states to monitor and recommend and/or trigger sanctions for non-implementation of rights. These institutions which, together with the originally established African Commission, are funded by the states through the AU, extend the enforcement regime of the AHRS. Although, these new instruments have not yet achieved universal ratification, states have responded fairly in terms of ratification and accession. For instance, the African Charter on the Rights and Welfare of Children in Africa (the African Children Charter) attracted forty four (44) signatures but has been ratified by forty seven (47) states. For its part, the Protocol to the African Charter on Human and Peoples’ Right on the Right of Women in African (African Women Protocol) has been signed by 49 African states but has only been ratified by thirty seven (37) states. In a similar manner, the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights (African Court Protocol) has been signed by fifty two (52) of the fifty four (54) member states of the AU. However, only thirty (30) states have ratified the African Court Protocol out of which eight (8) have made the declaration required for the African Court to be directly accessible to individuals and NGOs.[[20]](#footnote-20) In essence, Africa’s political leaders have begun to show something akin to enthusiasm towards the AHRS.

Further, African states have taken the Charter and its norms beyond any institutional boundaries that its founding fathers may have dared to dream. Beginning with express and robust extension into the Constitutive Act – a paradigm shift from the scant mention of human rights in the Charter of the OAU, contemporary political leaders in Africa have either directed or at least, accepted and endorsed the transmutation of the Charter and its normative content into other AU initiatives such as New Partnership of Africa’s Development (NEPAD)’s African Peer Review Mechanism (APRM). The African Charter has equally been made relevant in the context of the African Economic Community, creating the path for further adoption of the Charter as a common African standard[[21]](#footnote-21) in the regional economic communities (RECs) in Africa. Currently, at least two of Africa’s RECs have explicitly (in the case of the Economic Community of West African States (ECOWAS) or implicitly (in the case of the East African Community (EAC) developed budding human rights regimes partly hinged on the African Charter.[[22]](#footnote-22) Significantly, by allowing direct or indirect use of the African Charter as the catalogue of choice in human rights and rights-related claims before the subregional courts, African states in East and West Africa have to an extent, neutralised the limiting effect of the requirement for a specific declaration for individual and NGO access under the Protocol establishing the African Court.[[23]](#footnote-23) Further, RECs have also become platforms for encouraging states to ratify continental human rights instruments.[[24]](#footnote-24)

**Overcoming Charter obstacles for rights protection: The strides of the African Commission**

Although the popular perception has been that ‘the Commission has clearly been designed to accomplish very little’,[[25]](#footnote-25) there are at least two clear ways in which the Commission has advanced the course of the AHRS. Recalling that the Charter has been criticised for its vagueness and state-centeredness, evidenced by the clawback clauses, the inclusion of duties and lack of textual clarity on the individual complaints mechanism, one way in which the Commission has advanced the system has been in the brave adoption of an expansive and purposive approach to interpretation of the Charter. Taking advantage of articles 60 and 61 of the Charter which allows it to draw inspiration from far and near, the Commission has, in appropriate cases, resorted to progressive interpretations that favour protection of alleged victims of human rights violation.[[26]](#footnote-26) In so doing, the Commission pushes the boundaries of the Charter, tilting towards quasi-judicial lawmaking that avoids the perils of intergovernmental treaty making. In this regard, for instance the Commission invoked the principle of implied rights in the matter of *SERAC v Nigeria* to establish a right to food.[[27]](#footnote-27) The Commission has also applied its function of interpretation to whittle down what would have been the severely limiting effect of clawback clauses in the Charter.[[28]](#footnote-28) Finally, on this point, as some commentators have pointed out, the Commission’s individual communications procedure has evolved out of the Commission’s creative and bold interpretation of ‘other communications’ as individual communications.[[29]](#footnote-29) By adopting such progressive and purposive interpretative approach, the Commission has gradually allayed the early fears held on the Charter, albeit with acquiesce of the political leaders who put up no active resistance to the actions of the Commission.

A second way in which the Commission has advanced the AHRS is by its resort to the use of special mechanisms for expanding the enforcement and supervisory work beyond what is possible in the context of an eleven man part time body that sits for only a limited period of time in the year.[[30]](#footnote-30) The African Commission currently has fourteen special mechanisms comprising of Special Rapporteurs, Committees and Working Groups. The operative special mechanisms include the Special Rapporteur on Prisons and Conditions of Detention; Special Rapporteur on Rights of Women in Africa; Special Rapporteur on Freedom of Expression and Access to Information; Special Rapporteur on Human Rights Defenders; Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons; Committee for the Prevention of Torture in Africa; Committee on the Protection of the Rights of People Living with HIV and Those Vulnerable to and Affected by HIV; the Working Group on Indigenous Population and Communities in Africa; Working Group on Economic, Social and Cultural Rights; Working Group on Specific Issues Related to the Work of the African Commission; Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa; Working Group on Extractive Industries, Environment and Human Rights Violations; and the Working Group on Communications.

Applying the special mechanisms in both its protective and promotional mandates, the African Commission has further developed and elaborated the African Charter through the adoption of supplementary instruments such as Declarations, General Comments, Guidelines, Model Laws and Resolutions.[[31]](#footnote-31) Significantly, the Commission has been able to undertake these initiatives with little or no resistance from the State Parties to the Charter, thereby enhancing dynamism of the Charter with little or no fanfare.

**Creative use and application of the Charter and Charter-based resources by ‘activist forces’.**

A third category of (generally unnoticed) stakeholder that has advanced the reach of the African Charter and the AHRS in general is what Prof Okafor has described as ‘activist forces’.[[32]](#footnote-32) While the supervisory mechanisms of the AHRS formally target the state as an aggregate, higher and lower level officials with critical decision-making powers at the national level remain under the radar of the mechanisms and commonly have no direct or indirect interactions with the Charter and its procedures. As Okafor eminently points out, although this does not happen frequently enough, critical ‘activist forces’ at the national level including lawyers and judges have begun to creatively bring the Charter and its consequences indirectly into some national legal systems even without formal domestication (translation) by government actors. Invoking Charter provisions and the jurisprudence of the African Commission, the African Court and to a limited extent, the African Committee of Experts directly before national institutions, these ‘activist forces’ have also contributed to expanding the reach of the Charter and the system.

**Milestones and achievements of the African human rights system**

Despite the challenges identified and fears expressed at the inception of the AHRS, a number of milestones and significant achievements have been recorded by the system as a whole. In general terms, the human rights discourse has been centralised in the agenda of the AU, forcing a move from the periphery such that human rights issues are directly and indirectly addressed at the highest level of political decision making on the continent. Relatedly, the evolution of the AHRS has forced a paradigm shift within continental structures causing an abandonment of fierce attachment to the principles of sovereignty and non-interference in the domestic affairs of other states.[[33]](#footnote-33) The AHRS has also witnessed the subtle expansion of both its normative and supervisory framework, including the commandeering of non-human rights organs and institutions of the AU and RECs for the use of the AHRS. Further, from a regime of isolation of civil society actors from the core procedures of the system, the AHRS now witnesses an explosion of NGO and CSO participation in all aspects of the work of its main mechanisms.

In more specific terms, the African Commission has successfully consolidated and strengthened its protective and promotional processes and procedures, particularly the individual complaints mechanism. With the operationalisation of the African Court in 2006, that Court has also begun to entrench itself as a formidable institution for human rights protection notwithstanding the fact that only eight (8) states currently allow for individual and NGO access to the court. As at June 2016, 101 cases have been filed at the Court, with 27 cases finalised and 4 cases transferred to the African Commission while 70 cases still pend. The Committee of Expert has also begun to improve its procedures, addressing communications while ironing out its position in the overall AHRS.

Despite these achievements, it has to be noted that the system continues to experience a slow pace of ratification, domestication and implementation of instruments and decisions of the AU organs and institutions exercising human rights mandates. There is also a perception that capacity and resources allocated by states do not match the numerous instruments adopted by the states. Most significantly, it would be observed that whereas Africa’s political leaders appear to have turned a corner in terms of their formalistic support for the system, there is no sign of enthusiasm in implementing treaty obligations and the decisions of supervisory mechanisms at the national level. Critically, the involvement of the wider civil society in the functioning of the AHRS remains unclear and unexplored, denying the system of a crucial ally in its bid to consolidate the gains of the last three decades.

**Cooperation and coordination with the OHCHR**

In the evolution of the African regional human rights system, the UN generally, and the Office of the High Commissioner for Human Rights specifically, have played significant roles in support of the budding system. As already shown, scholars agree that the UN’s encouragement of regional systems for human rights was a positive force for the adoption of the African Charter and the ultimate emergence of the AHRS. In more specific terms, the AHRS, particularly the African Commission, has benefited from close interactions and cooperation with the OHCHR and its procedures and mechanisms. All these were formalised in January 2012 with the adoption of a roadmap for cooperation between Special Procedures Mandate Holders of the UN Human Rights Council and the African Commission.[[34]](#footnote-34) In furtherance of this roadmap, a joint working group has been establishment and there has been appointment of focal points at the Secretariat of the African Commission and the Office of the UN High Commissioner for Human Rights. Officials and mandate holders in each system has participated in the activities of the other just as there has been collaboration resulting in joint activities, joint meetings and the conduct of joint visits to selected African states. There has also been fairly regular sharing of information between the two systems. Very importantly, the institutions have complemented each other in the follow up of recommendations. On the part of the African Court and the Committee of Experts, there is no evidence of the existence of an equivalently robust working relationship.

**Going forward: How can the OHCHR support the AHRS**?

Critical questions remain whether and how much access to regional bodies has improved since the adoption of the numerous human rights treaties. Whether and how a culture of respect for human rights can be enthroned on the African continent. In the meantime, consider who really owns and who takes ownership of the African human rights system? How does the system deal with unwilling and recalcitrant states? How can cooperation between the systems help to enhance effectiveness of the AHRS and promote its legitimacy?

1. See AE El-Obaid and A Appiagyei-Atua, ‘Human Rights in Africa – A New Perspective on Linking the Past to the Present’ (1996) 41 McGill LJ 819, who demonstrate that the scholarship on human rights in Africa can be classified into two broad groups – those who contend that pre-colonial conceptualization of human rights in African societies was communal and those who deny the idea that the concept of human rights predate colonialism. [↑](#footnote-ref-1)
2. Although, Ghana gained independence in 1957, becoming the first African country to do so, most African states gained independence from colonial authorities between 1960 and 1962. Also see M Ssenyonjo, ‘An introduction to the development of the African regional human rights system: 30 years after the adoption of the African Charter on Human and Peoples’ Rights’ in M Ssenyonjo (ed) The African Human Rights System () 5. [↑](#footnote-ref-2)
3. The tension between guarding sovereignty and pursuing the benefits of a united front is expressed in the preamble to the Charter of the OAU, which proclaims the need to unite yet expresses a determination to ‘safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states’. See generally F Viljoen, International Human Rights Law in Africa, (2012) (2nd ed) Oxford: Oxford University Press, 156 – 159; also see O Ojo and A Sesay, ‘The O.A.U and Human Rights: Prospects for the 1980s and Beyond’ (1986) 8 Human Rights Quarterly, pp.89–103.

CE Welch, ‘The African Commission on Human and Peoples’ Rights: A five year report and assessment’, (1992) 14 Human Rights Quarterly 43. [↑](#footnote-ref-3)
4. Ssenyonjo, supra n 2 above, 6. [↑](#footnote-ref-4)
5. O.A.U. Doc. CAB/LEG/67/3/Rev. 5, reprinted in Report of the Secretary General on the Draft African Charter on Human and Peoples' Rights, O.A.U. Doc. CM/1149 (XXXVII) (Annex I1) (1981); 21 LL.M. 58 (1982). The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. [↑](#footnote-ref-5)
6. See UO Umuzoruike, ‘The African Charter on Human and Peoples’ Rights’ (1983) 77(4) American Journal of International Law, 902, at 903; KO Kufuor, The African Human Rights System: Origin and Evolution, (2010) Palgrave Macmillan, p 2. [↑](#footnote-ref-6)
7. Ssenyonjo, supra n 2 above, 5. [↑](#footnote-ref-7)
8. Generally see F Viljoen, International Human Rights Law in Africa, pp 156 – 159; [↑](#footnote-ref-8)
9. Kufuor, supra n 5, p 12 [↑](#footnote-ref-9)
10. Ssenyonjo, supra n 2 above, 6. [↑](#footnote-ref-10)
11. Kufuor, supra n 5, pp 31 – 33. [↑](#footnote-ref-11)
12. Ojo and Sessay, n 3 above, 97. [↑](#footnote-ref-12)
13. See Philip Amoah, ‘The African Charter on Human and Peoples’ Rights – An effective weapon for human rights?’ (1992) 4 African Journal of International and Comparative Law, 226. [↑](#footnote-ref-13)
14. Ojo and Sessay, n 3 above, 101. [↑](#footnote-ref-14)
15. UO Umozuruike, ‘The African Charter on Human and Peoples Rights: Suggestions for more effectiveness’ (2007) 13 Annual Survey of International and Comparative Law, 179, at 180. [↑](#footnote-ref-15)
16. Amoah, n 13 above, 227. [↑](#footnote-ref-16)
17. Ojo and Sessay, n 3 above, 97. [↑](#footnote-ref-17)
18. Makau wa Mutua, quoted by Umozuruike, n 15 above, 181. [↑](#footnote-ref-18)
19. South Sudan became the 54th state party to the African Charter on 19 May 2016 when it deposited the instrument of accession even though South Sudan had acceded on 23 Oct 2013. See the ratification table at [↑](#footnote-ref-19)
20. Generally see the ratification status of each of these instruments at www… [↑](#footnote-ref-20)
21. See Viljoen [↑](#footnote-ref-21)
22. Generally see ST Ebobrah, ‘Human rights realization in the [↑](#footnote-ref-22)
23. See art 34 (6) of the African Court Protocol. [↑](#footnote-ref-23)
24. For instance, of the 8 states that have made the art 34(6) declaration, 5 are West African states compulsorily subject to the human rights jurisdiction of the ECOWAS Court and generally encouraged on the ECOWAS platform to ratify regional and global human rights instruments. [↑](#footnote-ref-24)
25. See Viljoen, n above, 293 [↑](#footnote-ref-25)
26. For instance, see Legal Foundation Resources v Zambia (2001) AHRLR 84. [↑](#footnote-ref-26)
27. Some commentators decry the resort to implied rights as superfluous. [↑](#footnote-ref-27)
28. See for instance, Media Rights Agenda and others v Nigeria (2000) AHRLR 2000. [↑](#footnote-ref-28)
29. Umuzoruike [↑](#footnote-ref-29)
30. [↑](#footnote-ref-30)
31. For instance, the Robben Island Guidelines and the Model HIV Law are products of these special mechanisms. [↑](#footnote-ref-31)
32. See Okafor [↑](#footnote-ref-32)
33. Generally see the fundamental principles in the Constitutive Act of the AU, clearly showing a major shift away from the OAU era. [↑](#footnote-ref-33)
34. See the Outcome of the Dialogue between the Special Procedures Mandate Holders of the UN Human Rights Council and the African Commission on Human and Peoples Rights, meeting held in Addis Ababa, Ethiopia from 17 – 18 Jan 2012. [↑](#footnote-ref-34)