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Edited by Malcolm Evans and Rachel Murray

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Introductory Preface

The African Charter and African Commission on Human and Peoples' Rights

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The process of the elaboration and adoption of the African Charter on Human and Peoples' Rights¹

More than thirty years passed after the adoption by the General Assembly of the United Nations of the Universal Declaration of Human Rights² before the African continent equipped itself with a regional mechanism for the promotion and protection of human and peoples' rights. However, the idea of drafting a human rights convention, with an organ charged with its implementation, began to take root in the 1960s. In effect, the proposal to create an African Commission on Human and Peoples' Rights was put forward for the first time during the first Congress of African Jurists organised on the continent – after the first states became independent – at the initiative of the International Commission of Jurists (ICJ) in January 1961,³ in Lagos, Nigeria. The Declaration that was adopted by the Congress⁴ called on African governments to adopt a convention on human rights with a court to which any individual under the jurisdiction of a state party could refer a case. However, nothing immediately followed this appeal. The Organization of African Unity (OAU), after

* Germain Baricako is a former Secretary of the African Commission. The views expressed in this chapter are those of the author and not the African Union. This chapter has been translated from the original French version.

¹ For ease of reference, 'African Charter' or 'the Charter' will be used in the text to refer to the African Charter on Human and Peoples' Rights, and 'Commission' to refer to the African Commission on Human and Peoples' Rights.

² The Universal Declaration of Human Rights was adopted on 10 December 1948.

³ African Congress on the Primacy of Law, Lagos, Nigeria, 3–7 January 1961. See International Commission of Jurists, *Report on the Work of the Congress*, Geneva, 1961, p. 9.

⁴ The Declaration of the Congress was called 'The Law of Lagos', 7 January 1961.

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its establishment,⁵ seemed to have other more pressing concerns, notably decolonisation, racial discrimination, economic development and African unity. It took three decades before the idea became concrete, in spite of the efforts of African jurists, the United Nations and non-governmental organisations (NGOs). The following developments summarise the long journey.

During a conference⁶ organised in Dakar, Senegal, the participants returned to the idea first raised in Lagos and adopted the Declaration of Dakar in which they asked the ICJ to examine, in consultation with relevant African organisations, the possibility of creating a mechanism for the protection of human rights in Africa. The participants went as far as proposing the idea of an Inter-African Commission on Human Rights with consultative powers and the power to make recommendations.⁷

The United Nations also took various initiatives with the view towards the adoption of an African Convention on Human Rights. The Secretary-General of the United Nations organised in Dakar, Senegal, a series of regional studies on human rights in developing countries.⁸ The participants examined the possibility of establishing an African mechanism for the protection of human rights but they did not reach consensus on the issue. Those who were hesitant or opponents invoked, in particular, the fact that African rulers were too jealous of their state sovereignty and that they were not ready to accept limitations by such an institution.⁹

Pursuing their efforts, the United Nations organised another seminar series three years later in Cairo¹⁰ on the creation of a regional Commission on Human Rights for Africa. The participants pronounced clearly on the urgent need to establish a Commission, and looked into essential issues

⁵ The OAU was established on 25 May 1963. The Charter creating the OAU was adopted on 25 May 1963 and entered into force on 13 September 1963.

⁶ This first Conference of Francophone African Jurists was organised by the Association Sénégalaise d'Etudes et de Recherches Juridiques and the ICJ from 5–9 January 1967; N. MacDermot, *Memorandum sur les Conclusions des Conférences de la CIJ à Lagos (1961), Dakar (1967) et autres régions, présenté à la Conférence des Juristes africains sur le thème "African Legal Process and the Individual"*, Addis Ababa (Ethiopia) 18–27 Avril 1971, ICJ Document S–2895(b).

⁷ See Declaration of Dakar, in *Bulletin de la Commission Internationale de Juristes*, No.29, March 1967, p. 11.

⁸ 'Seminar Series on Human Rights in Countries in the Process of Development', Dakar, Senegal, 8–22 February 1966; UN Doc. ST/TAO/HR/25, 1966.

⁹ *Ibid.*

¹⁰ The seminar series was organised by the UN in co-operation with the government of the United Arab Republic. See 'Seminar Series on the Creation of Regional Commissions on Human Rights with regard to Africa', UN Doc. ST/TAO/HR/38, 1970.

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such as its composition, competence and its mandate, which would later be considered during the drafting of the African Charter. At the end of their work, the participants unanimously decided to:

- (1) request the Secretary-General of the United Nations to communicate their report to the Secretary-General and Member States of the OAU in order to take appropriate measures with a view to creating a regional Commission on Human Rights for Africa;¹¹
- (2) call upon the Secretary-General of the United Nations to accord all assistance required in support of the efforts aimed at creating a Commission on Human Rights for Africa;¹²
- (3) call on the Secretary-General of the United Nations to draw the attention of the Commission on Human Rights of the United Nations to the report of the seminar;¹³ and
- (4) facilitate consultations between the above mentioned Commission on Human Rights and the OAU with a view to discussing the possibilities of creating a Commission on Human Rights for Africa.¹⁴

Moreover, the United Nations Commission on Human Rights had already placed the issue on its agenda and discussion had taken place. During its 23rd Session held in 1967, the Commission set up an ad hoc working group to examine the question and make recommendations.¹⁵ During its 24th and 25th Sessions held in 1968 and 1970 respectively, the Commission examined the report of the working group. At its 26th Session, the Commission decided to ask the Secretary-General of the United Nations to facilitate contacts between itself and the OAU with a view to discussing the possibilities of creating a regional Commission of Human Rights.¹⁶

For its part, the United Nations Economic Commission for Africa organised a Conference of African Jurists on 'The African Legal Process and the Individual' in Addis Ababa, Ethiopia, from 19–23 April 1971. Among other things, the Conference urged for the adoption of an African Convention on Human Rights and for the creation of a consultative organ charged with interpreting the Convention.¹⁷

¹¹ *Ibid.*, p. 20, para. 65(a). ¹² *Ibid.*, p. 20, para. 65(c). ¹³ *Ibid.*, p. 20, para. 65(d).

¹⁴ *Ibid.*, p. 20, para. 65(e). ¹⁵ Resolution CHR Res.6 (XXIII) of 16 March 1967.

¹⁶ Commission on Human Rights, *Report of the Twenty-Sixth Session*, 24 February–27 March 1970, E/4816, pp. 39–42.

¹⁷ See *Report of the Conference of African Jurists on 'The African Legal Process and the Individual'*, Addis Ababa, Ethiopia, 19–23 April 1971; UN Doc. E/CN.14/521, 28 June 1971.

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Two years later, the United Nations organised another seminar¹⁸ in Dar-es-Salaam, Tanzania, on 'A Study of New Ways and Means of Promoting Human Rights with Special Attention to the Problems and Needs of Africa'. The participants returned to the question of the adoption of an African Convention on Human Rights and the creation of an African mechanism for the protection of human rights. Unfortunately they did not reach consensus on that question.¹⁹

Coming back to the issue, the Commission on Human Rights of the United Nations adopted a resolution²⁰ during its 34th Session in 1978, calling on the Secretary-General of the United Nations to consider the possibility of providing the OAU with all necessary assistance with a view to facilitating the establishment of a Commission on Human Rights for Africa. It is clear that the Commission reiterated, at its 26th Session, the recommendations of the seminar held in Cairo.²¹ The General Assembly of the United Nations approved the resolution of the Commission.²²

From 3–7 July 1978, a colloquium on 'Human Rights and Economic Development in Francophone Africa' was organised by the Institute of International Law and Economic Development (Washington DC) and the Faculty of Law of the National University of Rwanda in Butare, Rwanda.²³ The participants had suggested, among other things, the idea of an African Commission on Human Rights following the example of the European model, but the proposal was not accepted.²⁴ Another colloquium on 'Human Rights and Economic Development' was organised in Dakar in September 1978.²⁵ The participants considered further the proposal for a mechanism for the promotion and protection of human rights in Africa. They also proposed the adoption of a Pan-African Convention on Human Rights, with a structure to promote human rights on a continental scale and several organs for protection at the regional level.²⁶ Noting that these earlier colloquia and conferences had ended with pious

¹⁸ The seminar took place from 23 October–5 November 1973; UN Doc. ST/TAO/HR/48, 1973.

¹⁹ *Ibid.* ²⁰ Resolution CHR, Res.24 (XXXIV) of 8 March 1978. ²¹ See note 6 above.

²² Resolution AG, Res.33/167 of 20 December 1978.

²³ H. Hannum, 'The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis', *Universal Human Rights* 1(2) (April–June 1979) 63–81.

²⁴ *Ibid.*, 82.

²⁵ This colloquium had been organised by the Association Sénégalaise d'Etudes et de Recherches Juridiques and the ICJ.

²⁶ I. Fall, 'Des structures possibles à l'échelon africain pour la promotion des droits de l'homme', *Revue Sénégalaise de Droit*, sur le Colloque de Dakar sur le développement et les droits de l'homme, 22 (December 1977) 71–7.

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vows, the participants at the colloquium set up a follow-up committee composed of African personalities to, as its name suggested, follow closely the implementation of the conclusions and recommendations that they had adopted.

This committee carried out a number of visits in Africa to explain to Heads of State and other political authorities in the countries visited that it was necessary and urgent for Africa to have a Commission on Human Rights. Following the visit of the committee to Dakar, President L.S. Senghor, at that time President of the Republic of Senegal, agreed to present at the next session of the OAU Assembly of Heads of State and Government a resolution on the establishment of an African Commission on Human Rights.

For its part, the United Nations, in compliance with the aforementioned Resolution 33/167 of the General Assembly,²⁷ organised a seminar in Monrovia (Liberia) on the creation of regional human rights commissions, in particular for Africa.²⁸ The participants at this seminar adopted a document entitled 'The Monrovia Proposal on the Establishment of an African Commission on Human Rights',²⁹ which laid the foundation for the creation of an African Commission on Human Rights. The seminar also called on the Secretary-General of the United Nations to transmit this document to the OAU and to its current Chairperson.³⁰ The results of this seminar were in line with the conclusions of the Cairo seminar.³¹

It is worth noting that two months earlier, the OAU Assembly of Heads of State and Government had adopted, in the same city of Monrovia, a decision³² requesting the Secretary-General of the OAU to convene as quickly as possible a meeting of African experts at the highest level, with a view to elaborating a draft of an African Charter on Human and Peoples' Rights, aiming at, among other things, the institution of organs for the promotion and protection of human and peoples' rights. This historic decision of the OAU, which was adopted unanimously, marked a turning point in the process of elaborating an African Convention on Human Rights.

²⁷ See note 18 above. ²⁸ The seminar was organised from 10–21 September 1979.

²⁹ See 'Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa', Monrovia (Liberia), 10–21 September 1971; UN Doc. ST/HR/SER.A/4, 1979.

³⁰ Who at that time was Dr William Tolbert, President of Liberia.

³¹ See note 6 above.

³² Decision AHG/Dec.115 (XVI), Rev. 1, of the Assembly of Heads of State and Government of the OAU, at its 16th Ordinary Session held in Monrovia, Liberia, from 16–20 July 1979.

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In accordance with this decision, and at the invitation of Senegal, the OAU Secretary-General organised a conference in Dakar, from 28 November to 8 December 1979, a conference bringing together about twenty African experts from six countries³³ under the presidency of the Honourable Judge Kéba Mbaye, then President of the Supreme Court of Senegal. It seems, at this stage, important to indicate that the President of Senegal, Léopold Sedar Senghor, opened the experts' meeting. His opening speech made apparent his wish to see the experts undertaking a work of good quality. He called on them 'to use their imagination and to draw inspiration from African traditions, bearing in mind the values of African civilisation and the real needs of Africa'.³⁴ He equally pleaded for a special place to be accorded to the right to development that, according to him, embraces economic, social and cultural rights as well as civil and political rights. He also insisted on the need to make provision for 'duties of the individual' which are in harmony with the rights granted by the society to which he/she belongs. These remarks and advice of President Senghor clarified to some extent the terms of reference of the experts, and certainly served as the basis of the document that they had elaborated. The experts were also inspired by the 'Monrovia Proposal'.³⁵ The Committee did remarkable work and succeeded, in about ten days, in drafting a text containing a Preamble and 65 Articles taking into account the political and ideological diversity of the OAU Member States, based on the principles constituting the foundation of the African traditions. The document then had to be submitted to a conference of plenipotentiaries organised by the OAU Secretary-General in Addis Ababa, Ethiopia, on 24 March 1980. Unfortunately, this conference did not take place, due to lack of quorum. This lack of quorum, far from being by chance, was the outcome of the hostility of certain governments which, without being able to express their position openly, did not support the adoption of a human rights charter by the OAU, seeing this as the start of a liberalism that they did not wish to see introduced in Africa. As a result, the first attempt by the OAU Secretary-General that aimed at an urgent adoption of the above-mentioned document ended in a failure.

³³ 'Project on the Report of the Rapporteur of the Conference of African Experts on the Pilot Project of an African Charter on Human and Peoples' Rights', Dakar, Senegal, 28 November–8 December 1979; OAU Doc. CAB/LEG/Draft/Rapt/Rpt.

³⁴ Speech by His Excellence Léopold Sedar Senghor, President of the Republic of Senegal; OAU Doc. CAB/LEG/67/5.

³⁵ See note 29 above.

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The OAU Secretary-General then had the idea of asking one of the most democratic countries of Africa where human rights were the most respected, The Gambia, to invite the OAU to hold a ministerial session in Banjul, with a view to adopting the draft Charter elaborated in Dakar by the Committee of Experts. The President of the Republic of The Gambia welcomed this idea enthusiastically, and invitations were sent out for the OAU Council of Ministers of Justice – not for a plenipotentiaries' conference – to meet in Banjul.³⁶ The session was opened in Banjul on 9 June 1980.

The work took place in an extremely strained atmosphere; the debates were marked by several incidents. It seemed that, since the start of the session, the representatives of certain countries reproached the Committee of Experts in Dakar for having adopted a peculiar draft, not taking into account certain African beliefs, and containing ideas that were too capitalist. By the end of the session, the experts had only examined the Preamble and 11 Articles. The Charter was under threat. Before leaving, the participants had nonetheless agreed on the principle of holding another meeting to continue their work.³⁷

After this first session, everything was put in place to thwart the efforts of those against the Charter. It was thus on the occasion of its 35th Ordinary Session, held in Freetown, Sierra Leone, in June 1980, that the Council of Ministers urgently called on the Ministerial Conference to do everything to complete the consideration of the draft Charter during its second session in Banjul, with a view to submitting it to the 18th Ordinary Session of the OAU Assembly of Heads of State and Government, which would be held in Nairobi, Kenya, in June 1981.³⁸ At this juncture, the OAU Secretary-General convened a new conference, in Banjul from 7–19 January 1981. This Ministerial Conference regrouped a number of the most important states, and there was no attempt to block the proceedings. The session took place in a relaxed atmosphere, and the work was completed well before the set date. The Conference adopted a text of 68 Articles³⁹ as well as a Preamble. In view of these historic circumstances, the African

³⁶ Council of Ministers, *Report of the Secretary-General on the Draft of an African Charter on Human and Peoples' Rights*, 37th Ordinary Session, 15–21 June 1981, Nairobi, Kenya; OAU Doc. CM/1149 (XXXVII).

³⁷ *Ibid.*

³⁸ Resolution CM Res.792 (XXXV) of 23 June 1980, 35th Ordinary Session of the Council of Ministers of the OAU.

³⁹ See African Charter on Human and Peoples' Rights, 'Ministerial Meeting of the OAU on the Drafting of the African Charter on Human and Peoples' Rights', Banjul, The Gambia, 7–19 January 1981; OAU Doc. CAB/LEG/67/3/Rev.5.

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Charter was given the appropriate title of 'the Banjul Charter'. The draft was then submitted to the OAU Council of Ministers,⁴⁰ but the Ministers were not able to come to an agreement on the draft document.⁴¹ In spite of the obstacles at the level of the Council of Ministers, the draft Charter was submitted in good order to the OAU Assembly of Heads of State and Government, which adopted it without debate.⁴²

As a result of these numerous events, the African Charter on Human and Peoples' Rights was born on 28 June 1981 in the Kenyan capital. It entered into force on 21 October 1981, three months after its ratification by the absolute majority of OAU Member States.⁴³ Today, it counts 53 States Parties who are also Member States of the AU.

The above historical background shows that the process of creation, maturation and materialisation of the African Charter on Human and Peoples' Rights has been punctuated by a series of seminars, conferences and colloquia essentially driven by African jurists. The determination of NGOs, the commitment of the United Nations, the tireless efforts of African jurists, the strong support from non-African observers and the crucial role of the OAU Secretary-General at that time created a synergy, without which it would have been difficult to overcome the manoeuvres of those opposing the African Charter.

It seemed necessary to retrace the background to the elaboration of the African Charter in order to highlight the restricting circumstances and the difficult environment in which the process took place, as well as the invaluable investment of certain actors to make it succeed.

Creation, composition, mandate and functioning of the African Commission on Human and Peoples' Rights

Creation and composition

The Commission had been created by virtue of Article 30 of the African Charter. It is composed of eleven members elected by secret ballot by the OAU/AU Assembly of Heads of State and Government for a period of six years renewable. They are drawn from a list of candidates presented by the States Parties to the African Charter, and chosen from among African

⁴⁰ The Council of Ministers met at its 37th Ordinary Session from 10–21 June 1981 in Nairobi, Kenya.

⁴¹ F. Ougurgouz, *La Charte Africaine des Droits de l'Homme et des Peuples* (Paris: Presses Universitaires de France, 1993), pp. 63–4.

⁴² *Ibid.* ⁴³ Article 63(3) of the African Charter.

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personalities of the highest reputation, known for their high morality, their integrity, their impartiality and their competence in human and peoples' rights.⁴⁴ At the time of the first elections, the Chairperson of the OAU Assembly of Heads of State and Government drew the names of four members who would have a mandate of two years, as well as the names of three others who would take a mandate of four years.⁴⁵ This process aimed at avoiding the expiration of the mandate of all members of the Commission at the same time.

The number of members of the Commission takes into account the OAU/AU principle of equitable geographical representation between the five regions of the north (two members), the east (two members), the west (three members), the centre (two members) and the south (two members) of Africa. Unfortunately, this initial regional balance was disturbed during other elections. Certain regions omitted to provide candidates, whereas others presented too many. Certain countries that were keen to have a national sitting on the Commission did everything to make sure that their candidate was elected, contrary to the total indifference of other countries. It would seem that the Heads of State elected the countries and not the candidates. It was noted time and time again that the very good candidates, with irreproachable CVs, failed at the expense of others less worthy. This state of affairs deserves to be corrected to ensure a better composition and good functioning of the Commission.

Regarding the independence of the Commission, there was much criticism relating to certain members of the Commission who were concurrently holding their membership of the Commission with incompatible functions at the national level. The Commission counted among its numbers Ministers, Ambassadors and other plenipotentiaries of their country of origin. Observers felt that certain offices did not allow members of the Commission to work with total independence and objectivity, and some of the members of the Commission shared this point of view. The members of the Commission have debated this issue often, but they have not been able to settle it over the years. The NGO community has equally raised this question with vehemence on many occasions.

Quite obviously, it is of major interest to the Commission to rule on this question and to define criteria to fulfill in order to avoid incompatible situations. If the African Commission fails to do so, the Commission of the African Union should take its responsibilities and draw the attention

⁴⁴ Articles 31, 33, 34 and 35 of the African Charter.

⁴⁵ Articles 36 and 37 of the African Charter.

of the Member States to such criteria, as it has done for the elections of members of the African Court of Human and Peoples' Rights, during the nomination of candidates to the African Commission. The attention of the AU Executive Council should equally be drawn to the question during the elections.

It is interesting to note that the current Chairperson of the Commission of the African Union, Professor Alpha Omar Konare, has already pronounced clearly on the need to put an end to incompatibilities within the African Commission. During the last presidential election in Malawi in 2004, the press spoke about the candidature of Commissioner Vera Chirwa to the Presidency. The Chairperson of the AU Commission immediately gave instructions to check the information with the interested Commissioner and to invite her to resign from the Commission if her candidature was confirmed. Commissioner Chirwa denied the news in the media. The initiative was very laudable and marked a new era.

Although not explicit in the African Charter, the principle of parity between men and women in the distribution of positions at the AU has over the years been reflected more and more within the African Commission, which now includes five women.⁴⁶

Mandate and functioning

Mandate

In addition to carrying out all the other tasks which may be entrusted to it by the OAU/AU Assembly of Heads of State and Government, the Commission is charged with three main missions:⁴⁷

- (1) the promotion of human and peoples' rights;
- (2) the protection of human and peoples' rights; and
- (3) the interpretation of the African Charter.

Organisation

The members of the Commission sit in their individual capacity (they do not represent a state) and in their own name (they cannot be represented by another).⁴⁸ They have total independence. The emoluments and allowances of the members of the Commission are charged to the

⁴⁶ The list of members of the Commission can be found on the website www.achpr.org. Accessed 12 September 2007.

⁴⁷ Article 45 of the African Charter. ⁴⁸ Rule 12 of the Rules of Procedure.