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## AFRİKA İNSAN HAKLARI SİSTEMİNİN BETİMSSEL DEĞERLENDİRMESİ

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### Öz

*Afrika insan hakları sisteminin bardağı, çoğu kez yarı-dolu olmaktan ziyade yarı-boş olarak görülmektedir. Tıpkı Avrupa İnsan Hakları sisteminin işleyişindeki hemen hemen her yorumcunun onu en üst düzeyde övmüş olduğu gibi, hemen hemen her yorumcu Afrika sistemini zayıf ve etkisiz olarak tanımlamıştır. Kullandığı belirsiz dil, sözleşmenin uygulanmasının taraf devletlerin inisiyatifine bırakılıyor olması, halkların hakları gibi insan hakları alanındaki geleneksel yaklaşımın tersi bir yaklaşım göstermesi, uygulamada zayıf olması, devletlerin mahkemenin yetkisini tanımaması durumunda yalnızca politik olarak kontrol edilen mekanizmalar içermesi sebebiyle çok fazla eleştiriye maruz kalmaktadır. Bu eleştiriler her ne kadar doğru olsa da, Afrika İnsan Hakları Sisteminin kendi güçlü tarafları da vardır. Geleneksel olarak farklı gruplara ayrılır ve kendi karakter ve uygulama potansiyellerine sahip olarak görülen çeşitli hakların karşılıklı bağımsızlık ve bölünmezliği fikrinin bir onayı olarak görülmektedir. Buna ek olarak, Afrika İnsan ve Halkların Hakları Sözleşmesi Üçüncü kuşak hakları (dayanışma hakkını) da içeren tek bölgesel insan hakları sözleşmesidir. Diğer bölgesel insan hakları sözleşmelerinden farklı olarak, genel sınırlandırma sebepleri öngörülmemektedir. Bu çalışma, zayıflığı ve gücü ile birlikte Afrika insan hakları sisteminin uygun bir özetini sunmaktadır. Dolayısıyla, bu makale daha geniş bir konu yelpazesini kapsamaya çalışmaktadır ve amacı her konuyu ayrıntılı olarak tartışmak değil, genel bir bakış açısı sağlamak ve Afrika İnsan Hakları sistemi hakkında bazı görüşleri sunmaktır.*

**Anahtar Kelimeler:** Afrika, AİHHS, AİHHM, denetim ve koruma mekanizması

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## DESCRIPTIVE OVERVIEW OF THE AFRICAN HUMAN RIGHTS SYSTEM

### Abstract

*The glass of African human rights system has too often been seen as half-empty rather than as half-full. Just as almost every commentator on the workings of the European human rights system has praised it in highest terms, almost every commentator has described the African system as weak and ineffectual. It has been subjected to much criticism for the vague language in which various rights have been couched, the over-broad claw-back clauses, the inclusion of non-traditional peoples' right and for the weak, politically controlled mechanisms provided for its enforcement. Be that as it may, the African human rights system has its own strong side. It can be viewed as an endorsement of the idea of interdependence and indivisibility of the various kinds of rights, which are traditionally classified into discrete groups and viewed as having their own character and enforcement potential. In addition to this, the African Charter on Human and peoples' Right Convention is the only regional human rights instrument to incorporate third generation rights (rights of solidarity). Unlike all regional and international human right instruments, it does not provide a general derogation clause. This study presents an appropriate summary of the African human rights system with its weakness and strength. The paper thus attempts to cover a wide spectrum of issues, and its purpose is not to discuss each issue in detail, but to present a review and offer some insights into the African Human Rights system.*

**Keywords:** Africa, ACHPR, ACHPRC, protection and enforcement mechanism

### INTRODUCTION

As part of developments in the international human rights movement, Africa has its own regional system for promotion and protection of human rights. Following the end of the Second World War, the international community has been working towards developing an international system for the protection of human rights that are binding on member states. Although the international human rights system is binding at the regional and national level, it is still difficult to adequately guarantee the protection of human rights only through an international system. Credible and effective regional as well as national system is needed for the promises of human rights to become a reality. That is among the reasons that Africa has developed a regional system for the promotion and protection of human rights.

Historically, the importance of human rights was not strongly recognized under the OAU Charter, which only made reference to the UN Charter and to the Universal Declaration of Human Rights. In contrast, the AU Constitutive Act confirms the importance of human rights by the adoption of guiding principles such as gender equality, participation of the African peoples in the activities of the Union, social justice, peaceful co-existence of the member states, and respect for democratic principles, human rights, the rule of law, and good governance. Following this, different important instruments were adopted which contribute a lot for the evolution of human rights protection at the regional level in Africa. In the first part of this paper, I try to discuss the historical backgrounds of African Human rights system.

While the concept of human rights in the West rests on the philosophy of protecting the individual against state intervention, in Africa, the concept of social relation and cultural relativism are taken as the basis for build human right standards. The African regional human

rights system attempts to reconcile the universal human rights standards and African values. It reflects a blend of international human rights standards and recognition to African cultural values. As a Consequence of this and other reasons, it acquires some distinctive feature. The second part this paper tries to examine distinctive features of ACHPR along with its normative values.

Recognition and incorporation of international human rights standards in the regional and national framework is a step towards in building a culture of human rights. However, such commitments will have a meaning only when an effective mechanism for protection and enforcement is in place. The ACHPR has established organs and procedures for the protection of human rights and monitoring states compliance. The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights are the two important organs for the promotion and enforcement of the rights contained in the Charter. The last part of this paper tries to evaluate the monitoring and enforcement mechanisms of the African Human rights system.

### **HISTORICAL BACKGROUND OF THE AFRICAN HUMAN RIGHTS SYSTEM**

In Africa, the issue of the protection of human rights and fundamental freedoms has long been considered as not an issue of the first priority.<sup>3</sup> During the colonial period, Colonial occupiers often justified their occupations in altruistic, moralistic and religious terms, but today it is well recognized that colonialism was primarily concerned with economic exploitation of the territories under control of the various colonial powers.<sup>4</sup> Since their system was ultimately aimed at the economic exploitation of the colonies, it had no time for the recognition and protection of human rights that would threaten or undermine its primary economic objective.<sup>5</sup> Because of this, the principal objectives of the OAU have been protecting Africa from colonial subjugation and defend the sovereignty and territorial integrity of its member states. The emphasis during the formation of the Organization of African Union was on the states rather than the individual. Consequently, the Charter does not contain any substantive provision for the protection of individual rights of the African people.<sup>6</sup> However, as provided in article 2/1/e of the OAU charter one of the purposes of the OAU is "to promote international cooperation, having regard to the Charter of the United Nations and the Universal Declaration of Human Rights." Therefore, even though it is not adequate, we can say that the Charter of OAU tries to address the issue of human rights by making reference to international human right instruments. A landmark development in the OAU's approach to human rights was the adoption of the African Charter on Human and Peoples Rights (usually called as the Banjul Charter), on 27 June 1981. With its coming into force in 1986, human rights were thus officially recognized. The position and emphasis given to the protection of human rights under the organizational transformation from the organization of African Union (OAU) to The African Union (AU) should not also be forgotten. The AU was established in 2002 replacing its predecessor the Organization of African Unity (OAU). The AU Constitutive Act, in regard to promotion of human rights, is seen as representing a significant departure from the 1963 OAU Charter.<sup>7</sup> It has made a clear stipulation

<sup>3</sup> Fatsah Ouguergouz, (2003) The African Charter on Human and Peoples right: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa, Martinus Nijhof, The Hague, pp.1

<sup>4</sup> Pierre De Vos, A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples' Rights, journal of Law democracy and Development, University of the Western Cape press, 2004, pp. 3

<sup>5</sup> De Vos, A new beginning(2004), PP. 3

<sup>6</sup> It is also well known that, even in recent years, states have been taking the principles of national sovereignty and non-interference in internal affairs to avoid all discussion of the human rights situation in their territory. According to some scholars this marginalization of the question of the rights of individuals by African country within their jurisdiction is first expressed in the Constituent Charter of the Organization of African Union adopted on 23 May 1963.

<sup>7</sup> Nega ewnwtu and Admasu alemayehu, The African Human Rights Law Teaching Material, Justice and Legal



that promotion and protection of human rights will be one of the objectives of the union. Some of the shortcomings of the OAU Charter as a true normative human rights instrument are now addressed by the Constitutive Act of the new African Union.<sup>8</sup> The Act has placed the promotion and protection of human rights on the agenda of the regional body. States were obliged to promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law.<sup>9</sup> Thus, apart from the individual obligation of member states to insure the guarantee of human rights within their jurisdiction, the AU has undertaken an institutional obligation to ensure the effective guarantee of human rights in Africa in general. In order to achieve this, the Union incorporated the African Commission on Human and Peoples' Rights in July 2002.<sup>10</sup> Another important progress in the development of the African human right system was the establishment of the African court of human and peoples' rights. The original African Charter did not provide for the institution of a court of human rights. In June 1998, the AU adopted the Supplementary Protocol on the African ACHPR to the Establishment of an African Court on Human and Peoples' Rights, which came into force 25 January 2004. This was later on followed by a series of declarations and conventions addressing particular areas and special categories of human rights such as on children, women, Youth and so on.

### **The African Charter on Human and Peoples' Rights (ACHPR)**

Scholars forward different factors as a reason for the coming into effects of ACHPR. The Pressure from United Nation for the formation of regional human rights mechanisms was the main puling factor for the formation of ACHPR.<sup>11</sup> Some scholar argued that African charter on human and peoples' right was established as a consequence of The Western administration use of human rights protection as a criterion for allocating economic aid to third world countries.<sup>12</sup> The attempt to make the allocation of such aid conditional on respect for human rights during the renegotiation of the Lome Convention<sup>13</sup> could be cited as strong evidence to this argument. Apart from this, some scholar claims that the desire of African leaders to gain legitimacy as a rights-respecting regime was another factor which contributed a lot to bring into being of ACHPR.<sup>14</sup> Pressure from NGO's and recognition by some African leaders themselves that human rights in another state as their own concern the non-existence of mechanism at the regional level for institutional coordination, supervision and implementation of human rights despite international commitments led into the adoption of the ACHPR.

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System Research Institute, Addis Ababa, 2009, PP.19

<sup>8</sup> Ewnwtu and Alemayehu, the African Human Rights Law, 2009, PP.19

<sup>9</sup> Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000, available at: <http://www.refworld.org/docid/4937e0142.html> (accessed 26 October 2018)

<sup>10</sup> The African Commission on Human and Peoples' Rights was established in 1987 under the African Charter on Human and Peoples' Rights. But it was incorporated into the AU framework at the Durban Summit held in July 2002.

<sup>11</sup> In 1977, after the adoption of the International Covenants, the UN General Assembly appealed to States in areas where regional arrangements in the field of human rights did not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights. See GA. Res. 32/127, U.N. GAOR, 32nd Sess., Supp. No. 45, al 149. U.N. Doc. A132145 (1977). In September 1979, the UN once again convened a Conference, this time in Monrovia, to address the issue of human rights protections with special reference to Africa. The conference produced the "Monrovia Proposals for Setting-up of an African commission on human Rights". See U N Seminar on the Establishments of Regional Commissions on human Rights with Special Reference to Africa, U.N. Doc. ST/HR/SER.A/4 (1979).

<sup>12</sup> Ewnwtu and Alemayehu, the African Human Rights Law, 2009, PP.19

<sup>13</sup> The Lomé Convention is a trade and aid agreement between the European Economic Community (EEC) and 71 African, Caribbean, and Pacific (ACP) countries, first signed in February 1975 in Lomé, Togo. Available At. <http://www.acp.int/sites/acpsec.waw.be/files/Lome-Convention-I-en.pdf> (accessed 26 October 2018)

<sup>14</sup> Magdalena Sepúlveda And others (2004), HUMAN RIGHTS REFERENCE HANDBOOK case and commentator, University for Peace, Costa Rica, PP. 166

## THE DISTINCTIVE FEATURES OF ACHPR

In formulating the guaranteed rights and correlative duties, the African Charter is obviously animated by the Universalist vocation and naturalist principles which underlie human rights. But in many important respects, the African Charter has some specific characteristics whose inspiration is derivable solely from Africa's colonial history, philosophy of law, and conception of man.<sup>15</sup> The African Charter on human and peoples' rights differ from other regional counterparts, both in the catalogue of rights protected and in the means of implementation and protection.<sup>16</sup> This is because it was drafted to take in to account of the African culture and legal philosophy, and is specifically directed towards African needs. Blow some distinctive characters of ACHR has listed:

1. *Incorporation of third Generation rights:* Today's development of human rights has two dimensions.<sup>17</sup> The first is furthering the protection of existing rights at all levels - namely national, regional and international levels - by means of, *inter alia*, national legislation, interpretation of the provisions of the existing human rights treaties by supervisory bodies established in these treaties, reinforcing the implementation systems, and by adopting additional protocols to the treaties.<sup>18</sup> The second dimension of contemporary development of human rights is the extension of the list of human rights. Human right is not a static concept rather it is dynamic. Its dynamic nature can be clearly seen when a new generation of right emerged.<sup>19</sup> The African Charter is the only regional human rights instrument to incorporate third generation rights (rights of solidarity). ACHR provides the right to self-determination. Going far beyond the familiar UN covenants, it also includes rights such as the right to economic, social and cultural development with due regard to their freedom and identify and in equal enjoyment of the common heritage of mankind.<sup>20</sup> The Charter includes the right of peoples to national and international peace and security<sup>21</sup> and the right to satisfactory environment favorable to their development.<sup>22</sup> Clearly, these rights impose obligations on states not only to order their internal affairs to preserve and improve environmental factors, but they also require states to create particular forms of a foreign policy aimed to achieve such an end.<sup>23</sup>
2. *Incorporation of the concept of individual duties:* The African Charter adopts a dialectic approach by correlating rights with corresponding duties.<sup>24</sup> It is only in the African Charter that duties are imposed on individuals as a matter of international legal obligation. Paragraph 6 of the preamble of ACHPR indicates that the enjoyment of rights and freedoms also imposes

<sup>15</sup> Obinna Okere, The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141

<sup>16</sup> U.O.Umozurike(1997), the African charter on human and peoples rights (the Hague: Kluwer law international) at p 77

<sup>17</sup> Bülent ALGAN, Rethinking "Third Generation" Human Rights, Ankara Law Review Vol: I, No:1 (Summer: 2004), pp. 121

<sup>18</sup> ALGAN, Rethinking "Third Generation" Human Rights pp. 121

<sup>19</sup> Demir Esra, İnsan Hakları Bağlamında Evrensellik ve Kültürel Relativizm Çatışması, 2006, İstanbul Üniversitesi, Sosyal Bilimler Enstitüsü, Kamu Hukuku Anabilim Dalı, (Yayınlanmamış Yüksek Lisans Tezi), s.100 dan aktaran Aydın TURHAN, İnsan Hakları Kuşakları Arasındaki Tamamlayıcılık İlişkisi, İnönü Üniversitesi Hukuk Fakültesi Dergisi Cilt: 4 Sayı:2 Yıl 2013, ss. 362

<sup>20</sup> Art. 22 of ACHPR.Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 10 april 2019]

<sup>21</sup> Art. 23 of ACHPR

<sup>22</sup> Art. 24 of ACHPR

<sup>23</sup> Javaid Rehman, international human rihgt law; a particular approach, 2003 pp.237

<sup>24</sup> Okere, The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: pp 142





the performances of duties on the part of everyone. In addition to this, it includes a special section on the duties of an individual. (Art.27-Art. 29 of ACHPR). According to JVAİD RAHAM, three general principles emerge from these provisions. “Firstly, every individual has duties towards his family and society, towards the state and international community. Secondly, the right and freedoms of each individual must be exercised with due regard to the rights of others, collective security, morality and common interest. Thirdly, everyone has the duty to respect and consider others without discrimination and promote mutual respect and tolerance.” Hence, the realization of individual rights can find their fullest expression and fulfilment only within the context of the community. The conception of an individual who is utterly free, such as to be irresponsible and opposed to society is not consonant with African philosophy; accordingly, the African Charter specifies the duties of the individual toward the community in which he lives, more particularly toward the family and state.

3. *Massive existence of ‘claw-back’ clauses:* This charter have been subject to criticism because substantive provisions of the African Charter are equivocally phrased or uses very general terms which may give rise to various interpretations and avoidance of the obligations on state party to the Charter.<sup>25</sup> Articles starting from 8 up to 13 provide certain limitations on enjoyment of human rights by putting phrases such as ‘subject to law and order’ (Art. 8), ‘within the law’ (Art. 9), ‘provided that the individual abides by the law (Art. 10 (1) and Art. 11-13 continue in a similar vein. Such extensive existence of ‘claw-back’ clauses in ACHPR make the enforcement of a human rights dependent on national laws or at the discretion of national authorities.<sup>26</sup>
4. *The Non-existence of general derogation clause:* Another distinguishing feature of ACHPR is the absence of provisions permitting the state party to derogate/suspension the rights protected in the Charter. According to some authors, the intention of the drafter of the African Charter was to not deprive the African states from any means of suspending the Human rights. Rather it is to assert the fundamental nature of human rights.<sup>27</sup>
5. *The existence of peoples right in an organized manner:* The concept of peoples right has got more importance nowhere than in Africa. The Charter is unique among international human rights treaties in its protection not only of individualistic human rights, but also of group rights. The African Charter includes group, collective or people’s rights as distinct rights in addition to civil and political rights and economic, social and cultural rights. Articles 19 through 24 include the rights to self-determination, to the equality of peoples and the non-domination of one people by another and the right to dispose of natural wealth and resources in the interest of the people. Other provisions include the right to recover dispossessed property, the right to adequate compensation, to cultural development, to international peace and security, and to a general environment favorable to development. The Charter was the first international instrument to lay down these rights in a way that approximates legally binding provisions.<sup>28</sup> Scholars provide two principal reasons for such emphasis in the African human right system. Some African scholars have provided African traditional way of living in which communal relationship is emphasized as a justification for the existence of peoples’

<sup>25</sup> Ewnwtu and Alemayehu, the African Human Rights Law, 2009, PP.20

<sup>26</sup> C.E Welch. Jr(1992) the African commission on human and peoples rights ‘a five year report and assessment’ 14 HRQ, pp. 46.

<sup>27</sup> Ewnwtu and Alemayehu, the African Human Rights Law, 2009, PP.21

<sup>28</sup> Pierre De Vos, A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples’ Rights, University of the Western Cape, PP. 7

right in ACHPR.<sup>29</sup> Because the communal way of living of the people of Africa ACHPR gives more importance for Group right. Other scholars argued that the colonial experience of African countries was the main pulling reason behind the existence of Peoples right in African human right system. The Charter's provision on the right of self-determination underscores the colonial experience and domination of Africa with a view of eliminating all vestiges of colonialism.<sup>30</sup>

## INDIVIDUAL HUMAN RIGHTS GUARANTEED UNDER ACHPR

The African Charter on Human and Peoples' Rights virtually guarantees all the established civil and political rights (known as the first generation of rights), socio-economic and cultural rights (second generation right) and rights solidarity (third generation rights).<sup>31</sup> These categories of rights have been seen as different concepts and their differences have been characterized as a dichotomy. Accordingly, civil and political rights have been considered as rights which imposing negative obligations on the state. And they were considered as they do not require resources for their implementation. (Which, therefore, can be applied immediately) On the other hand, economic, social and cultural rights have been considered as rights which imposing only positive obligations on the state. The implementation of these rights is conditional on the existence of government resource. Because of this they were considered as rights which might not be implemented immediately but realized progressively. As a consequence of these alleged differences, it has been argued that civil and political rights are justiciable whereas economic, social and cultural rights are not. In other words, this view holds that only violations of civil and political rights can be adjudicated by judicial or similar bodies, while, economic, social and cultural rights are 'by their nature' non-justiciable. However, it is important to note that international human rights law stresses that all human rights are universal, indivisible and interrelated. Paragraph 5 of The Vienna Declaration on Programme of Action <sup>32</sup> which calls all human rights "universal, indivisible, interdependent and interrelated" specifies that states have the duty to promote and protect all human rights and fundamental freedoms regardless of their political, economic and cultural system. In addition to this, Paragraph 8 of the same declaration provides that, the promotion and protection of human rights should be universal and conducted without conditions attached.<sup>33</sup> According to PIERRE DE VOS the African charter on human and peoples right is an endorsement of the idea of the interdependence and indivisibility of the various kinds of rights, which are traditionally classified into discrete groups and viewed as having their own character and enforcement potential. Because it provides both civil and political rights as well as socio-economic and cultural rights in the same level of resonance. The indivisibility of human rights implies that no right is more important than any other. Taking in to account this fact, the United Nation adopts an Optional Protocol to the covenant on the economic

<sup>29</sup> J. Rehman, the concept of "peoples" in international law with referance to Africa in B.T bakut and S. Dutt (development of Africa for 21 century) (London palgrave) 2000,pp.201

<sup>30</sup> Rehman, the concept of "peoples" in international law with referance to Africa pp. 201

<sup>31</sup> But There are some notable omissions from the Charter. As Oloka Onyariga points out, striking omissions from the Charter includes the prohibition against being subjected, without Free consent, to medical or scientific experimentation, protected in art 7 of the ICCPR. The Charter also lacks more elaborate guarantees against arbitrary detention. Similarly, although the right to fair trial is covered by art. 7 of the Charter, it does not speak about trial in absentia. The issue of legal aid or the right to an interpreter are omitted. Compensation for the miscarriage of justice and protection against double jeopardy, which are covered by art 14 of the ICCPR are also omitted from the African charter.

<sup>32</sup> UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, available at: <http://www.refworld.org/docid/3ae6b39ec.html> [accessed 28 October 2018]

<sup>33</sup> Vienna Declaration on Human Right, Population Council, Population and Development Review, Vol. 19, No. 4 (Dec 1993) pp. 877-882 Available At. <http://www.jstor.org/stable/293842p> Accecd 10 april 2019



social and cultural rights on 10 December 2008.<sup>34</sup> This optional protocol acknowledges the interdependence and indivisible nature of Human rights and provides that Communications may be submitted by an individual or groups of individuals, by claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant.<sup>35</sup>

Part I of the African Charter, entitled "Rights and Duties," is divided into Human and Peoples' Rights, and Duties. The contracting States are obliged to "recognize the rights, duties and freedoms enshrined in this Charter,"<sup>36</sup> and to provide for their effectiveness within their territory through legislation or other domestic measures." Every individual is guaranteed certain enunciated rights without discrimination on any ground such as race, ethnic group, color, sex, language, religion, opinion, national and social origin, fortune, birth or other status.<sup>37</sup> This appears to be a general guarantee of non-discrimination on the basis of enumerated criteria.

The individual rights and freedoms enumerated for recognition and protection include: the right to equality before the law and equal protection of the law,<sup>38</sup> the right to life,<sup>39</sup> the right to juridical personality and protection against torture, slavery and other inhuman or degrading treatment or punishment,<sup>40</sup> the right to personal liberty,<sup>41</sup> the right to judicial protection, fair trial and freedom from *ex post facto laws*,<sup>42</sup> freedom of conscience and religion,<sup>43</sup> the right to receive information and the right to expression,<sup>44</sup> the right to free association,<sup>45</sup> the right of assembly,<sup>46</sup> the right to freedom of movement and residence including asylum<sup>47</sup> (mass expulsion of non-nationals is prohibited),<sup>48</sup> the right to participate in government,<sup>49</sup> the right of property,<sup>50</sup> the right to work,<sup>51</sup> the right to good health,<sup>52</sup> the right to education and to participate in the cultural life of the individual's community<sup>53</sup> and special measures of protection for aged or disabled persons.<sup>54</sup>

#### DUTIES OF THE MEMBER STATES

In addition to the general obligation provided in Art one and each specified provision of the conventions, Each Member State party to the African Charter undertakes the following duties: to promote and protect the morals and traditional values recognized by the community, to protect the health and morals of the family, to protect the rights of women and children as stipulated in international declarations and conventions, and to eliminate discrimination against women, to eliminate foreign economic exploitation, to act individually or collectively, to ensure the

<sup>34</sup> UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, available at: <http://www.refworld.org/docid/49c226dd0.html> [accessed 28 October 2018]

<sup>35</sup> Art. 2 of the Optional protocol.

<sup>36</sup> Article 1 of ACHPR

<sup>37</sup> Article 2 of ACHPR

<sup>38</sup> Article 3 of ACHR

<sup>39</sup> Article 4 of ACHR

<sup>40</sup> Article 5 of ACHR

<sup>41</sup> Article 6 of ACHR

<sup>42</sup> Article 7 of ACHR

<sup>43</sup> Article 8 of ACHR

<sup>44</sup> Article 9 of ACHR

<sup>45</sup> Article 10 of ACHR

<sup>46</sup> Article 11 of ACHR

<sup>47</sup> Article 12(1), (2) & (3), of ACHPR

<sup>48</sup> Article 12/5 of ACHR

<sup>49</sup> Article 13 of ACHR

<sup>50</sup> Article 14 of ACHR

<sup>51</sup> Article 15 of ACHR

<sup>52</sup> Article 16 of ACHR

<sup>53</sup> Article 17/1 and 2 of ACHR

<sup>54</sup> Article 18/4 of ACHR



exercise of the right to development, to prevent anyone given asylum from engaging in subversive activities against his country of origin or against any other State party to the African Charter. Moreover, there is an obligation not to allow their territory to be used as a base for subversive or terrorist activities against the people of any party State, to promote respect for the rights, freedoms and obligations of the African Charter through teaching, education and publication and to make certain of their being understood, and finally, to guarantee the independence of the courts and to allow the establishment and improvement of national institutions which will promote and protect the guaranteed rights and freedoms.<sup>55</sup>

### Monitoring and Enforcement Mechanisms

Any law, national or international, is useful to the community only if it can be enforced. It does not serve any good purpose to have beautifully constructed and phrased human rights instruments which cannot be put into action. In other words, recognition and incorporation of international human rights standards in the regional and national framework is a step towards building a culture of human rights. However, such commitments will have meaning only when effective mechanism for protection and enforcement is in place.<sup>56</sup> Having defined the rights and duties, the African Convention provides for a monitoring and enforcement mechanism in Part II, to ensure effective compliance. Despite this, the African charter on human and peoples right has been subjected to much criticism for its weak, ineffectual and politically controlled mechanisms provided for its enforcement. Pursuant to Art. 30 of the Charter, An African Commission on Human and Peoples' Right is to be established within the OAU.

### The commission

When the charter was drafted, the African Commission on Human and Peoples' Right was created as the most important mechanism for the promotion and enforcement of the rights contained in the Charter. Apart from the duties which may be assigned to the Commission by the Assembly of Heads of State, Articles 30 and 45 of the African Charter assign three main duties to the Commission 1. Promoting human and peoples' rights in Africa, 2. protecting those rights and 3. Interpreting provisions of the charter upon request by a state party, organs of the AU or individuals.

**Promotion:** Article 45 of the African Charter on human and peoples' right envisages information and research, consultation and cooperation with similar institutions and consideration of the periodical reports from states as a promotional mandate of the commission. Among other things, the Commission's task will be to collect documents, undertake studies and research on African problems in the field of human and peoples' rights, to organize seminars, symposia and conferences, to disseminate information and to encourage national and local bodies concerned within human and peoples' rights. The other function of the commission is visiting member states. During the visit, it encourages member states for universal ratification of human right treaties and timely submission of state reports. They use such visits to make recommendations for necessary changes and improvement in the law and practice of the country visited. Such visits are also used to gain a picture of the situation of human rights in the country visited and indicate issues of concern in their report. The commission can issue non-binding resolutions, and it has delivered so many recommendations via resolutions and communication since it began its work. It has also engaged in a number of promotional missions. So far, however, its powers of persuasion and influence have not always been effective.<sup>57</sup>

<sup>55</sup> From Art 18-25 of ACHPR

<sup>56</sup> Obiora Chinedu Okafor, The African human rights system, activist forces, and international institutions, York University Toronto, pp 72

<sup>57</sup> M. Killander and A. Abebe, Human rights developments in the African Union during 2010 and 2011, African Human Rights Journal 2011, pp. 222



**State Reporting Mechanism:** Reporting has been designed to serve as a mechanism of monitoring member states compliance to obligations that emanate from membership to the ACHPR and other regional human rights treaties. Article 62 of the ACHPR requires state parties to submit a report on the legislative and other measures employed to ensure the realization of human rights and freedoms enshrined in the charter. The objective of the reporting is to discuss the extent to which human rights enshrined in the charter are implemented or fulfilled and to identify challenges encountered. Nonetheless, the system has been less effective because African states extended little support and respect to it. After many years of being in operation, only a small number of states have discharged their Charter obligations by submitting periodic state reports and sending their representatives to respond to the commission's questions on their reports.<sup>58</sup>

**Inter-state communication:** The submission of communications to the Commission by State parties to the Charter alleging that another State party has violated the provisions of the Charter is governed by two procedures provided in articles 48-53 of the African Charter and Rules 93 to 101 of the Commission's Rules of Procedure. The first procedure contained in article 48 mandates the Commission to receive and consider a communication from a State only after the State has tried to amicably settle the dispute with the other State and failed. If after three months the dispute is not settled, either State can submit the communication to the Commission through the Chairman, and notify the other State. The second procedure allows a State which does not want to enter into bilateral negotiation with the accused State to refer a matter of human rights violations directly to the Commission, by addressing a communication to the Chairman of the Commission, the OAU Secretary-General and the other State concerned.

**Individual Communication:** In accordance with Article 55 Of the ACHPR, Any individual or NGO may bring a complaint to the attention of the African Commission on Human and Peoples' Rights alleging that a State party to the ACHR has violated one or more of the rights contained therein. Individuals and NGOs in Africa and beyond have over the years seized the Commission with complaints of this nature. Article 56 of the Charter stipulates the admissibility criteria to be applied to individual complaints. Accordingly,

1. The communication should indicate the author's name even if the latter request anonymity. The person submitting the complaint must, as a matter of principle, indicate his or her name.
2. The communication should be compatible with the Charter of the OAU<sup>59</sup> or with African charter on human and peoples' right. The Communication should invoke the provisions of the African Charter alleged to have been violated and/or the principles enshrined in the OAU Charter/AU Constitutive Act. In other words, a communication which does not illustrate *a prima facie* violation of the Banjul Charter or some of the basic principles of the OAU Charter/AU constitutive Act, such as "freedom, equality, justice and dignity", will not be examined.
3. The communication should not be written in disparaging or insulting language directed against the State concerned and its institutions or to the AU. The author should state the facts of his or her case without insulting anyone. Political rhetoric and vulgar languages are

<sup>58</sup> Halil kalabalık, insan hakları hukuk ders notları, değişim yayınları, İstanbul, 2004, ss. 183.

<sup>59</sup> Since the Organization of African Union is replaced by African Union in the year 2002, communications presented before the commission is required to be compatible with constitutive Act of African Union accordingly.

not necessary. Insulting language will render a communication inadmissible, irrespective of the seriousness of the complaint.<sup>60</sup>

4. The communication should not exclusively based on news disseminated through the mass media. The author must be able to investigate and ascertain the truth of the facts before requesting the Commission's intervention.<sup>61</sup>
5. The communication should be sent after exhausting local remedies if any, unless it is obvious that this procedure is unduly prolonged. The author must have taken the matter to all the available domestic legal remedies. However, if such remedies are not available, or if they are available but the procedure is unduly prolonged, for example, say by numerous and unnecessary adjournments, the complainant can submit the complaint to the Commission.<sup>62</sup>
6. The communication should be submitted to the Commission within a reasonable period of time after local remedies are exhausted. After the exhaustion of local remedies, or where the complainant realities that such remedies shall be unduly prolonged, he or she can submit the complaint to the Commission immediately. The Charter does not give a time limit but talks of reasonable time. It is always advisable to submit a complaint as early as possible.
7. The communication should not deal with cases which have been settled by these States involved in accordance with the principle of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provision of the present Charter.

Once a communication has been declared admissible, the Commission will proceed to consider the substantive issues of the case. That is to say, to examine the allegations made by the complainant and the response of the State concerned with due regard to the provisions of the Charter and other international human rights norms. The Secretariat of the Commission prepares a draft decision on the merits taking into account all the facts at its disposal. During the session, the parties are in liberty to make written or oral presentations to the Commission. Some States send representatives to the Commission's sessions to refute allegations made against them. NGOs and individuals are also granted an audience to make oral presentations before the Commission. The Commission puts complainants and the States which are alleged to have violated human and/or people's rights on an equal footing throughout the proceedings. After a careful study of the facts and the arguments put forward by both sides, the Commission may then decide whether there has been a violation of the Charter or not. If it finds a violation, it makes recommendations to the State party concerned. The major problem, however, is that The Commission has not laid down procedure to supervise the implementation of its recommendations. And there is no mechanism that can compel States to abide by these recommendations. Its recommendation remains upon the goodwill of the States.

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<sup>60</sup> Communication 65/92 where the communication was declared inadmissible for using words such as 'regime of tortures' and 'a government of barbarism'

<sup>61</sup> In communications 147/95 and 149/96, the government alleged that the communication should be declared Inadmissible because it was based exclusively on news disseminated through the mass media. The Commission however declared the communication admissible.

<sup>62</sup> See communication 59/91 where communication was declared admissible where appeal has been pending before the courts for twelve years. This was considered to be unduly prolonged. Communication can also be declared admissible without the exhaustion of local remedy if the remedy is at the discretion of the executive or if the jurisdiction of the ordinary courts have been ousted by a decree or through the establishment of a special tribunal, see also communications: 60/91, 64/92. 68/92 and 78/92.



## AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

The African Court of human right was established to strengthen the regional human rights protection system which often was viewed as weak and ineffective.<sup>63</sup> Before the establishment of the court, the commission was the only organ responsible for monitoring compliance, but with only a recommendatory mandate. Unlike the European and Inter-American systems for human rights, the ACHPR does not make a provision for an African Human Rights Court. It only envisaged the establishment of the African Commission on Human and Peoples' Rights, a quasi-judicial body which cannot make a binding decision. Later, an African Court on Human Rights was created to complement the work of the commission and fill gaps created from the non-binding nature of the commission's resolution. It was established through a protocol to the ACHPR entered into force in 2004.<sup>64</sup> At the outset, the protocol provides that the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission.<sup>65</sup>

### COMPOSITION OF JUDGES

The Protocol on the Establishment of an African Court on Human and Peoples' Rights provides that jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights can be considered for the position of judge. (Article 11/1 of the Protocol) In addition to personal qualifications, the goal of having a balanced composition plays a crucial role. The judges must represent the five major African regions (South, West, East, North and Central), the various African legal systems of Islamic law, Common and Civil law, African customary law and South African Roman-Dutch law, as well as ensuring that African traditions are taken into account. Furthermore, the panel should have an equal representation of men and women (Art. 11-15 of the Protocol). Only AU states that ratified the protocol have a right to nominate candidate judges. These states can propose up to three candidates, at least two of whom must be nationals of that state. Thus, judges from states that are not a party to the protocol can also be nominated. The judges are selected by the Assembly of the AU, that is, all 53 member states. This seems fitting since the ACHPR is an organ of the AU and other states may ratify the protocol within the six-year term of office of the judges so that they would then also have a say in the composition of the panel of judges.

### JURISDICTION OF THE COURT

A. *Jurisdiction ratione personae*:- The Protocol on the ACHPR provides for two types of proceedings: on the one hand, contested judgments and on the other legal opinions, which can be requested by individual AU member states, executive bodies of the AU or any African organization recognized by the AU. Depending on who files suit, the court has mandatory jurisdiction, which every state automatically acknowledges on ratification of the Protocol. It also has discretionary jurisdiction, for which a corresponding additional declaration of recognition of jurisdiction is required. Mandatory jurisdiction applies if the proceedings are brought by; ▪ the African Human Rights Commission, ▪ the state party which has lodged a complaint to the Commission; ▪ the state party against which the complaint has been lodged at the Commission, ▪ the state party whose citizen is a victim of human rights violation, ▪ or African intergovernmental organizations and Individual or relevant non-governmental organizations (NGOs) with Observer Status before the Commission. But we have to born in

<sup>63</sup> Andreas Zimmermann and Jelena Bäumlér, Current Challenges facing the African Court on Human and Peoples' Rights, KAS INTERNATIONAL REPORTS 7-2015 pp 46

<sup>64</sup> Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998, available at: <http://www.refworld.org/docid/3f4b19c14.html> [accessed 16 November 2018]

<sup>65</sup> Art 2 of the protocol to the establishment of African court of human and peoples right

mind that, individuals can institute cases directly before the Court, **only** if the State party from which they come from has made a declaration allowing such direct applications.<sup>66</sup> Up to now (November 2018), Out of the 30 states who ratified the Protocol, only 8 States<sup>67</sup> (less than 10% of the State parties to the African Charter) had made a declaration allowing NGOs and individuals direct access to the court. In light of the fact that the states have been reluctant thus far to submit such declarations, the option for the African Human Rights Commission to initiate proceedings is all the more important. This method can be used to allow the court to rule on cases involving individuals, provided the person concerned lodges a request for proceedings with the Commission and the Commission passes the case on to the court. At the same time, it could relieve pressure on the court if the Commission forwards only cases with a certain likelihood of success.

- B. *Jurisdiction ratione materiae*: - As provided in Art. 3 and 7 of the protocol the court has the competence to rule on suits which are based both on a breach of the Banjul Charter and on contravention of any other treaty on the protection of human rights that the state in question has ratified. At the regional level the court has competence to rule on suits which are based on a breach of the additional protocols to ACHPR. On the universal level, this includes the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. This comprehensive material competence of the ACHPR did not by any means get universal approval.<sup>68</sup> Some argued that the possibility of being able to base a breach of human rights on every treaty or convention signed by the state in question, could result in a greater degree of implementation of contractual obligations is generally a positive thing. On the other hand, there is a risk that this could lead to diverging interpretation, for instance, if the ACHPR reaches a different outcome from the United Nations Human Rights Committee – a legal uncertainty that could, overall, result in a weakening of these instruments.<sup>69</sup>

## Conclusion

While the concept of human rights in the West rests on the philosophy of protecting the individual against state intervention, in Africa, the concept of social relation and cultural relativism are taken as the basis for build human right standards. Accordingly, the African Charter on Human and Peoples' Right aims to represent an African conception of human rights and incorporate a number of distinctive features which reflect the traditional African cultural value. It is believed that the realization of individual rights can find their fullest expression and fulfilment only within the context of the community. The conception of an individual who is utterly free, such as to be irresponsible and opposed to society is not consonant with African philosophy. Such contextualization is a welcoming step; the Charter nevertheless allows a considerable degree of autonomy to state parties in respect and enforcement of human rights by incorporating extensive claw-back clauses. The African Charter on Human and Peoples' Rights virtually guarantees all the established civil and political rights, socio-economic and cultural rights as well as the third generation rights (solidarity right). Because of the fact that the Charter provides these different categories of rights in the same level of resonance, it is accepted

<sup>66</sup> Protocol to the establishment of African Court on Human and Peoples' Rights art. 5/3 and Art 34/6. The first two draft protocols furthermore provided that in exceptional cases in the event of serious, systematic and grave breaches of human rights, individuals should be provided access to the court irrespective of the existence of such declaration by their home state. Ultimately, however, it was decided that a provision of this kind should not be included and that the ability to file suit should be made dependent on the submission of corresponding declarations of recognition of competence. See Andreas Zimmermann and Jelena Bäumlner, Current Challenges facing the African Court on Human and Peoples' Rights, KAS INTERNATIONAL REPORTS 7-2015 pp 46

<sup>67</sup> Namely Burkina Faso, Ghana, Malawi, Mali, Tanzania, Benin, Rep. Tunisia and Rwanda

<sup>68</sup> Zimmermann and Bäumlner, Current Challenges facing the African Court on Human and Peoples' Rights pp. 46

<sup>69</sup> Zimmermann and Bäumlner, Current Challenges facing the African Court on Human and Peoples' Rights pp. 46



as an endorsement of the idea of interdependence and indivisibility of various kinds of rights, which are traditionally classified into discrete groups and viewed as having their own character and enforcement potential. With regard to enforcement, Governments often find it easier to make a declaration of commitment for human rights protection and incorporate human rights standards in national documents such as the constitution. We can easily observe that human rights standards have gained wider acceptance in Africa as elsewhere in the world. However, observance and respect for these standards never match the promise. The regional realities with regard to the protection of human rights demonstrate that states often fall short of their human rights obligations. Such mismatch between promise and practice emanates from the ineffectiveness of institutional mechanisms. Adopting an individual complaint mechanism is considered a step forward for the implementation of human right. The protocol on the establishment of the African court of human and peoples' right provides that individuals and NGOs are entitled to submit a case before the court. However, the court will be able to exercise the mandate to receive individual complaint only when the concerned state makes a declaration that enables individuals to take their case to the court. Accordingly, the court's competence to accept individual complaint is subject to the declaration of the state concerned. Because of the fact that most African states are too reluctant to submit such declarations individual complaint mechanism is not as effective as it has to be.

## REFERENCE

- Algan, B. (2004, Yaz). Rethinking "Third Generation" Human Rights, *Ankara Law Review*, 1(1), 121-155.
- De Vos, P. (2004). A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples' Rights, *Journal of Law democracy and Development*, University of the Western Cape press.
- Demir E. (2006). *İnsan Hakları Bağlamında Evrensellik ve Kültürel Rolativizm Çatışması* (Yayınlanmamış Yüksek Lisans Tezi), İstanbul Üniversitesi. İstanbul.
- Ewunetie, N. and Alemayehu, A. (2009). *The African Human Rights Law Teaching Material*, Addis Ababa: Justice and Legal System Research Institute.
- Kalabalık H. (2004). *İnsan hakları hukuk ders notları*, İstanbul: Değişim Yayınları.
- Killander M. and Abebe A. (2011). Human rights developments in the African Union during 2010 and 2011, *African Human Rights Journal*, 12(1), 199-222.
- Okafor, O. C. (2007)., *The African human rights system, activist forces, and international institutions*, New York: Cambridge University Press.
- Okere, O. (1984, Mayıs). The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems, *Human Rights Quarterly*, 6(2), 141-159.
- Ouguegouz, F. (2003). *The African Charter on Human and Peoples rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, The Hague: Martinus Nijhof.
- Rehman, J. (2003). International human rights law; a particular approach.
- Rehman, J. (2000). The concept of "peoples" in international law with referance to Africa. (Editör: S. Bakut etal). *Development in Africa for the 21<sup>st</sup> Century*, London, Macmillan publisher, pp. 270-284.
- Sepulveda, M., Van Banning, T. and Van Genugten, W. J. M. (2004). *Human Rights Reference Handbook case and commentator*, Costa Rica: niversity for Peace.
- Turhan A. (2013). İnsan Hakkı Kuşakları Arasındaki Tamamlayıcılık İlişkisi, *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, 4(2), 357-378.

- Umzurike, U. O. (2007) "The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness," *Annual Survey of International & Comparative Law*: Vol. 13: Iss. 1 , Article 8.
- Welch, C. E. Jr. (1992) The African commission on human and peoples' rights 'a five year report and assessment, *The Johns Hopkins University Press*, 14(1), 43-61.
- Zimmermann A. ve Bäumlér J. (2015). *Current Challenges facing the African Court on Human and Peoples' Rights*, Kas International Reports 7. 38-52.

### Conventions

- UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, available at: <http://www.refworld.org/docid/3ae6b39ec.html> [accessed 28 October 2018]
- Vienna Declaration on Human Right, Population Council, Population and Development Review, Vol. 19, No. 4 (Dec 1993) pp. 877-882 Available At. <http://www.jstor.org/stable/293842p> Accessed 10 April 2019
- UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, available at: <http://www.refworld.org/docid/49c226dd0.html> [accessed 28 October 2018]
- Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998, available at: <http://www.refworld.org/docid/3f4b19c14.html> [accessed 16 November 2018]
- Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000, available at: <http://www.refworld.org/docid/4937e0142.html> (accessed 26 October 2018)
- The Lomé Convention <http://www.acp.int/sites/acpsec.waw.be/files/Lome-Convention-I-en.pdf> (accessed 26 October 2018)