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## The African Charter on Human and Peoples' Rights and Human Rights in Africa

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### Human Rights Defined

Jacques Maritain argues that individuals possess rights by virtue of the fact that they are human beings. A person to him is a whole, a master of him or herself and consequently an end in and of itself. Human beings are not a means to an end, but are entities and totalities, created in the full image of God and thus deserving no rights, but possessing them as of right. Maritain asks what the dignity of the human person is. He elucidates: "The expression means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owed to man because of the very fact that he is man." (Cranston 1973:7).

Maurice Cranston (1967:52, 1973:23-24) maintained that human rights are universal. They are not earned or deserved. They are not acquired through legislative enactments. They cannot be purchased or contracted. But... "[t]hey are said to belong to man simply because he is a man". Cranston held that if someone is deprived of a human right, that activity of deprivation is a great affront to justice: "There are certain deeds which should never be invaded, some things which are supremely sacred." These things, according to Cranston, are human rights. This readily reminds us of The American Declaration of Independence of 1776:

*We hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness – that to secure these rights, governments are instituted among Men, deriving their just powers from the consent of the governed.* (Encyclopaedia Britannica 1957, p.125).

In the western tradition, the notion of personal rights is based on two fundamental pillars: (a) governmental action operates within a given limited space; and that the decisions of governments are not always binding for all individuals, (b) groups and individuals have the right to challenge governmental excesses where governments have exceeded the given limits of the space for action (Mzizi 1995:129-130).

It is essential to understand that the culture of human rights, despite some visible pitfalls

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caused by religious and ethnic differences, is fast becoming world culture. The global democratisation process which culminated in the collapse of the Soviet bloc, and the maturing of the new democratic movements in post-colonial Africa, draw a lot of inspiration from some global instruments on human rights. On 10 December 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. Threats of conflicts in Europe after 1945 led to the contextualisation of the Declaration in 1953, and thus the European Convention on Human Rights and Fundamental Freedoms was born. The Western hemisphere followed in 1978 with the coming into force of the American Convention on Human Rights. In Africa such an attempt at contextualisation has occurred in The African Charter on Human and Peoples' Rights which is barely 12 years old. Whatever the imperfections of these instruments, the focus remains unchanged. In the words of Stephen Mott (1982:51-53) human rights are about the "desire for the well-being of each person... Human rights are a crystallisation of the claims that a person has when valued as an end... Since human dignity is bestowed, based on God's love, the rights necessary concretely to protect and express that dignity are also bestowed... Every right implies a duty. Rights free us from indignity and oppression and at the same time mandate respect for others."

Human rights holds special importance for those involved in bringing peace to the continent. Many believe there is a direct relationship between an increase in human rights abuses and the increase in violent conflict, and respect for human rights is thus one of the important indicators when mapping the evolution of disputes into violent conflicts. Similarly, human rights field work aimed at improving people's knowledge of human rights, including informing combatants on the rights of innocent civilians and prisoners, is an important contribution to the overall peace effort in any given conflict situation. There has been an increase in the number of Human Rights Observer Missions deployed under United Nations auspices, and human rights are, today, recognized as an integral part of all modern peace missions.

This leads me to the discussion on human rights in Africa. Because of the broadness of this subject, one cannot do justice to it in the course of a short paper. For example, I would have liked to explore in finer detail the existence or absence of rights in the traditional superstructure; or what westernism and its contact with African traditionalism has produced in the context of rights; or what threats there are for the sustenance of rights in an Africa that is in transition yet still restrained by traditional sensibilities; or what the implication of the human rights doctrine is, given the dynamism of religious demographic distribution in African states. These and similar inquiries would provide pointers to the success or otherwise of the human rights movements in Africa, and specifically the African Charter on Human and Peoples' Rights. This discussion shall thus focus on the African

Charter, especially on what the Charter says about the protection of rights. A general critique of the Charter shall be attempted for the sake of continuing the debate on how it can be strengthened as Africa looks beyond the year 2000.

## The African Charter on Human and Peoples' Rights

There were basically three reasons which made African Heads of Governments want to establish a regional body exclusively for the promotion and protection of human rights. First, there was the geographical factor, as it was for the European and American conventions. This factor brings forth certain historical realities such as the colonial experience of the African, the social, cultural and economic values which were stressed by the fathers of Pan-Africanism, the history of the systematic deprivation of African peoples in areas of self-determination, and the economic and psychological consequences of northern exploitation, which resulted in unabated under-development. Secondly, by the middle of the 1970s some African leaders had become first class violators of human rights. One has in mind such leaders as Idi Amin of Uganda, Bokassa of the Central African Empire, and Nguema of Equatorial Guinea. Many others emerged, all of them inspiring the counter-emergence of new democratic movements, which drew inspiration from the United Nations conventions and protocols. Finally, African leaders and legal experts were convinced that if African governments could embrace a culture of human rights, the seeds of peace, stability and development would have been planted on fertile soil. The result was the creation of the African Charter on Human and Peoples' Rights, which was adopted by the 18th Assembly of the Organisation of African Unity Heads of State and Government in June 1981 in Nairobi. Article 63 of the Charter spells out when it may come into force. Indeed by the middle of 1986 a simple majority of the member states of the OAU had ratified the Charter; hence it came into force on 21 October 1986. To date only Eritrea and Ethiopia have not signed nor ratified the Charter (save Morocco, which is not a member of the OAU)

It is important to mention that the ratification of the Charter does not mean an automatic effect for the state party concerned. Rather, it means that a state undertakes to promote and protect the rights specified in the Charter. This can only be done by developing a domestic law that contextualises the Charter. In the absence of such internalisation of the Charter, the ratification of the Charter is nothing more than an undertaking. The Charter itself is silent about what should be done to those countries which have ratified it and never showed commitment to put in place appropriate domestic mechanisms.

Although there are no standard procedures for giving effect to the Charter, it has been the general practice of many Anglophone African countries to entrench the provisions of the Charter into national constitutions under a Chapter on the Bill of Rights.

Article 47 of the Charter provides that a state can file a com-

plaint to the African Commission against abuses of rights by another state. These are generally referred to as inter-state complaints. Otherwise individuals and NGOs may submit complaints. One need not be African nor a resident of Africa to submit a complaint. But the seven criteria provided under Article 56 must be satisfied for a complaint to qualify for the attention of the Commission. These are: the indication of the author or authors who may request anonymity; the compatibility of the complaint with the OAU Charter or the African Charter; the absence of disparaging and insulting language in the communication; the fact that complaints are not exclusively based on news disseminated through the mass media; the requirements that complaints must have exhausted local remedies where these are available; that complaints must be submitted within a reasonable time frame after the exhaustion of local remedies; and finally, that complaints do not deal with cases which have been settled through the principles of the U.N. or the OAU Charter or even the African Charter.

The Commission may be persuaded by the gravity of a complaint to institute interim measures prior to the intensive treatment of a complaint in accordance with the rules of procedure of the Commission. For example, in 1991 a local Nigeria-based NGO filed a complaint against the Nigerian government to lift the death sentence of some individuals. The Commission made a timely intervention and the death sentences were commuted to terms of imprisonment, some of which were three years. A few years later, however, intervention on the Saro-Wiwa case did not save him from execution.

On interim measures, Evelyn A. Ankumah (1996) points out that: "The Commission may also suggest to visit a state for the purposes of assessing a situation prior to reaching a final decision. The Commission must receive permission from the state concerned before undertaking such a mission. Country visits are requested by the Commission when it appears that there is a series of serious and massive violations of human rights within a state party. State parties have generally been reluctant to grant the Commission permission to undertake such missions. However, states are gradually responding positively to the Commission's requests to undertake country missions."

Articles 57 to 59 indicate the dependence of the Commission on the Heads of State and Government when executing the final stages of their job. For example, the Commission has no authority to reveal its findings to any person or body before the Heads of State and Government in an Assembly have so decided. Secondly, the Commission cannot act on an emergency before the Chairperson of the Assembly of Heads of State and Government gives his/her mandate. This has been considered by many analysts as the single most serious weakness of the Commission. On the one hand, commissioners, after being elected into office by the Assembly, are considered independent. On the other hand, they are not autonomous when it comes to the critical aspects of their function. There is currently a debate to give

teeth to the Commission, but the results are yet to be seen. I have observed elsewhere that:

*Perhaps the most lamentable aspect of the African Charter is that not only are the Commissioners elected by Heads of State and Government, they are responsible to them. The Commission can, however, try to resolve internal violations of rights using existing national channels and with reference to the Charter, and guided by the principle of amicability; but upon failure to resolve an internal matter, the Commission prepares a report and a set of appropriate recommendations to the Assembly of Heads of States and Governments. It is this body which also receives the Commission's report of its activities. In this regard, it can be safely assumed that the Commissioners' propensity to act "at their master's voice" at both national and OAU levels is inevitable. If an independent African court existed which would listen to cases brought by the Commission, the story would be different. As the situation obtains, and with the OAU's expressed intention to respect local governments, no aggressive redress of human rights can be possible (Mzizi 1995:137).*

I must note, however, that there is much talk nowadays on the establishment of an African Court of Justice. This idea is a recreation of the 1963-1964 Commission of African Jurists which was killed in 1966. The mandate of the 1964 Commission was not to try cases of violations of rights *per se*. It was rather to promote a spirit of co-operation amongst African jurists; to promote the development of the concept of justice; and to consider the legal problems of common interests and those referred to the Commission by the OAU, amongst other functions. This, in my opinion, would have provided fertile ground for the establishment of the African Court much earlier than after 35 years of independence.

## Conclusion

The efforts at peace-keeping and peace-building in Africa will continue to face various challenges. Some of these challenges – which not only affect the prospect of peace at domestic levels, where such issues as ethnic cleansing are being manifested, but are also a result of international conflicts such as the fast escalating "Cold War" between Islamic extremism and Western (American) democratic idealism – will continue to dog the continent.

There are numerous ways in which human rights can play a role in addressing these challenges. Human rights abuses seem to be a key contributing factor in almost all conflicts currently raging in Africa, and it would appear as if there is a dire need to improve the way in which information about human rights are disseminated in Africa. At the same time we need to see human rights being taken more seriously by governments in Africa. It is only when African governments are seen to implement the institutional and legal frameworks required for a sustained human rights culture in Africa, that ordinary people will start experiencing human

rights as a reality in their daily lives. This also implies that human rights issues should be included in all peace agreements or other initiatives to bring violent conflicts to an end. In this way human rights issues and programmes will form an integral part of the peace process and will address those human rights aspects that could have contributed to the conflict in the first place. The United Nations, and African organisations such as the Organization of African Unity (OAU), should include human rights programmes in their peace initiatives and deploy Human Rights Observer Missions in the field, as part of their overall peace mission field strategies.

Perhaps the most fundamental challenge lies in strengthening the African Charter itself. The Charter provides for a broad spectrum of rights and responsibilities, but it is woefully deficient in the enforcement machinery. The Commission has the mandate to compile reports on violations for the attention of Heads of State and Government. The internationally respected norm of non-interference in the domestic affairs of a sovereign state makes timely intervention impossible even when urgent measures have to be taken in order to protect human life.

The presence of derogation (claw-back) clauses is another cause for concern. For example, Article 13 provides for the right of every citizen to freely participate in the government of his or her country. But such participation must be "in accordance with the provisions of the law". This means that domestic law is viewed as supreme. Where it is silent on any issue, the African Charter plays no role in jurisprudence. Where it negates the provisions of the Charter, or rather restricts the rights concerned to such a level that such rights are glaringly divisible and therefore meaningless, the Charter has no provision on what should be done to such a state.

One positive aspect about the African Charter is that it provides in Rule 76 for the granting of observer status to some NGOs, including Amnesty International. Since 1986 the Commission has granted observer status to a great number of NGOs. The proximity of NGOs to the Commission might yield positive results in the long run, especially in the shifting of the locus of control of the Commission from being centrally controlled to being people-driven, i.e. by the people who experience real suffering and violation of rights. It has been as a result of the representations of NGOs that proposals for the drafting of special protocols to the Charter, including the idea of the African Court, the rights of the African Child, and the Human Rights of Women, have been entertained. This is a great leap forward in the direction of popularising the human rights culture in an African climate beset by conservation.

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