A Comparative Study of Regional Human Rights Instruments.

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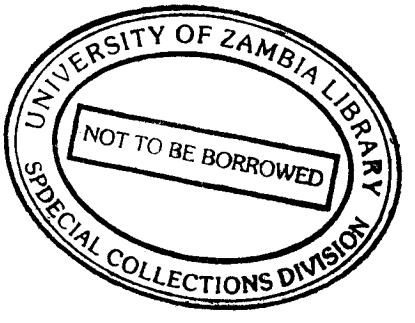

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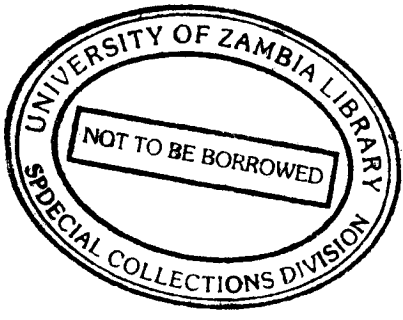

Lameck Ng'ambi entitled:

A Comparative Study of Regional Human Rights Instruments,

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirement relating to formality as laid down in the regulations governing obligatory essays

Date26.12.05

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Profesor Carlson Anyangwe
Supervisor

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Firstly, I would like to thank God for giving me the opportunity to Study in the Law School, giving me strength, and for protecting me.

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A General Introduction To Regional Human Rights And Regionalism

A notable element in the history of the second half of the twentieth century was an intensified interest in the international protection and promotion of human rights. This interest found expression on the global level in the human rights agencies, and on the regional level, principally in similar arrangements and activities. The relationship between the United Nations human rights arrangement and regional human systems is complex. Although the United Nations Charter makes provisions for regional arrangements in relation to peace and security, it is silent with regard to human rights cooperation at that level. The United Nations was ambivalent for a very long time about regional human rights arrangements until the 1960's. Vasak noted some of the reasons for such hesitance and said:

> *For a long time regionalism in the matter of human rights was not popular at the U.N. there was often a tendency to regard it as the expression of a breakaway movement calling the universality of human rights into question.*[1]

But regional human rights protection, as a matter of fact, is indispensable in the world today. Some of the problems of the modern world are international in the largest sense, and can be effectively treated only by global agencies. Others on the other hand, are characteristically regional, and lend themselves to solutions by corresponding delimited bodies. Regionalism is therefore often seen as an alternative to globalism.

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[1]. Steiner and Alston. International Human Rights In Context. (1995). P.564.

The raison d' entre of regionalism is that only within limited segments of the globe can one find the cultural foundations of common loyalties, the objective similarity of national problems, and the potential awareness of common interest. The world is very big and too diverse for the proper functioning of a multilateral institution. The physical, economic, cultural, administrative, and psychological differences are too formidable to permit development of common involvement and joint responsibility. But within a region adaptation of international solutions to real problems can be carried out. Commitment by States to each other within a region can be confined to manageable proportions and sanctioned by clearly evident bonds of mutuality. [2]

As protective mechanisms, regional organizations function at an intermediate level. This means that they exercise authority, which is broader than a sovereign State, yet they are closer to the affected communities than the global organizations.[3]

It is true to say that rational regional divisions are difficult to establish for a range of reasons. But for a number of purposes the United Nations, fortunately, has divided the world into five regions: Asia, Africa, Eastern Europe, Latin America, and Western Europe. Therefore, in this study the word region refers to these.

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[2] Ibid. p. 565

[3] Okugule, S. An Appraisal of regional Models of Human Rights Protection: The European and African Experience, in Zambia Law Journal, Vol., 33 2001

Taking into consideration the space prescribed for this study, it is not possible to exhaust a comparative study of every aspect of regional human rights arrangements. The author, therefore, attempted to describe comparatively the African Charter and the American Convention on Human Rights. The two regions were particularly chosen for the study because they share similar experience in terms of colonialism, political administration, racial groupings, the economy, social and culture.

Economic and Social Conditions in the two Regions

While the two regional human rights systems are primarily concerned with civil and political rights, the economic and social conditions existing in their constituent states are a significant part of the setting within which the two systems function. The importance of economic and social conditions for the operation of regional systems lies mainly in the interaction that can occur between these conditions and the nature and stability of national political systems. The interaction is particularly evident when these conditions produce acute distress, deprivation and actual sufferings among the people, or when austerity measures adopted to cope with a nation's economic woes demand sacrifices that are unacceptable to the populace. One possible result of poor economic and social conditions is the potential they possess for precipitating a coup by the military, which acts ostensibly to rid the country of a regime that has failed to cope with the nation's economic and social problem. In Africa and Latin America there has been a spate of coups that came about as a result of government failure to meet the people's aspirations.

CHAPTER ONE

Protection Of The Right To Life

1.1. Introduction

The right to life is one of the most basic rights. It is one right that many international human rights treaties do not allow derogation from, even during emergencies. The life of an individual is respected because all other rights are contingent on it. Some countries of world have even abolished the death penalty to protect the life of an individual. Though many countries still have the death penalty, it is still regulated strictly, and only applied to serious criminal offences. The aim in this part of the study is to contrast the American Convention and the African Charter in the way they protect the right to life.

1.2. Protection And Formulation Of The Right To Life.

Given the political, social and economic conditions that prevailed in Latin America and Africa, it was inevitable that the human rights violations committed would involve the most basic of rights, that is, to be secure in one's person. In the Inter- American system they experienced forced disappearances and summary executions. This disturbing record emphasizes the formidable nature of the task confronting the Inter- American human rights system as it sought to provide some protection and relief to individuals and groups within its constituent nations.

Article 4 of the American Convention is in the largest sense couched in similar terms as The International Covenant On Civil And Political Rights (ICCPR) 1966. The said article gives a precise definition of the right to life to avoid the greater task of

determining whether a state has violated that right or not. Article 4 of the Convention provides as follows:

> *Every person has the right to have his life respected. This right shall be protected by law, and in general, from the moment of conception. No one shall be arbitrarily deprived of his life.*[1]

From that provision it is clear that the right to life is supposed to be protected by the law of each member state. There is an obligation on every member state to enact laws that would guarantee the right to life. The African Charter, on the other hand, does not provide that law shall protect the right. All that article 7, which protects that right, says is:

> *Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one shall be arbitrarily deprived of this right.*[2]

The Charter does not put an obligation on member states that would guarantee that right. It leaves some leeway, as some countries would overlook that in their domestic laws and thus violate that right.

Under the American Convention the right to life extends to the foetus. The Convention provides that the right shall be protected by law and in general from the moment of conception. Therefore, the Convention does not permit abortion. But the African Charter is silent on the right of the foetus.

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[1]. The American Convention on Human Rights (1969)
[2]. The African Charter on Human and People's Rights (1981)

Furthermore, the death penalty has been abolished under the Inter-American system. To those countries that still maintain it, the Convention has not failed to give details of the internationally recognized elements of the right to life. It may only be imposed for the most serious crimes. Even then, it must be pursuant to a final judgment rendered by a competent court. It cannot be imposed on pregnant women and persons below the age of 18 or over 70 years. The Convention even provides for the right of condemned persons to seek pardon or commutation. But the African Charter, while it sanctions the death penalty, it fails to give the internationally recognized elements of the right.[4]

In terms of formulation the American Convention has adhered to a systematic approach followed by the ICCPR and the European Convention. The first paragraph of article 4 contains a general affirmation of the right to life and the succeeding paragraphs set out the limitations to which that right may be subjected. These limitations are carefully formulated so as not to take away the right.

By way of contrast, the African Charter does not do any of that. It only contains one paragraph, which is broadly and imprecisely worded. The wording of article 4 of the Charter differs completely in content with article 4 of the American Convention. One would have expected the wording to be similar because of the similar experience in human rights violations. Both regions have the sad history of colonialism. In pre- colonial Africa, like Latin America, records reveal several killings of twins, slavery, oppression and the killings of human beings for ritual purposes. These violations were exacerbated by colonial rule, as the European colonizers used their state machinery to suppress and

[4]. Carlson Anyanwe. Introduction To Human Rights And International Humanitarian Law (2003). p.123

destroy any opposition. Unfortunately, even after the attainment of self-rule, the ruling classes in the two regions continued and even perfected these forms of the deprivation of the right to life.[5] Therefore, it is surprising that there should be such a marked contrast between the two regions in the way they guarantee the right to life.

1.3 Interpretation Of The Right To Life.

It is common practice for member states to enter reservations with reference to the rights guaranteed in the regional treaties. Therefore, it is incumbent upon the enforcement bodies to protect the rights guaranteed in their interpretation of the provisions of the treaties. In reservations to the death penalty the Inter- American Court of Human Rights has indicated that since the reservations become part of the Convention they must necessarily be interpreted as an integral part of that instrument. Consequently, a reservation must be interpreted by examining its context in accordance with the ordinary meaning, which must be attributed to the terms in which it has been formulated within the general context of the treaty of which the reservation forms an integral part. The Court has also indicated that since reservations seek to modify a state's obligation within the framework, it should be interpreted restrictively and against the state making it. Article 75 of the America Convention also provides that:

> *This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention...*

The Inter- American Commission and the Court on Human Rights have had opportunity to look at the right to life in the cases of Velasquez Rodriguez and Godinez. The facts of

[5]. Okugbule, in Zambia Law Journal (2001). p. 24-25

the two cases are similar, each involving the enforced disappearances of individuals within Honduras. The case of **Velasquez** involved the enforced disappearance of Manfredo Velasquez Rodriguez, a student political activist, who was abducted by members of the Honduras armed forces and members of the National Office of Investigation. In the case of Godinez, three men abducted Godinez Cruz a school-teacher: one in military uniform and two in plain clothes. The victim was allegedly placed with his motorcycle in a truck and driven away. In these cases the question arose as to which of the rights was violated under the Convention, as there is no direct reference to the issue of disappearances under it. Nonetheless, both the Commission and the Court took the view that disappearances could ultimately be reduced to their component parts thus characterized as breaches of a number of rights explicitly referred to in the Convention, that is the right to life, to freedom from torture, and inhuman treatment, and to due process.[6] Furthermore, under the American Convention the right is non- derogable as compared to the African Charter. Under article 27 of the American Convention, the right to life is non- derogable. The right subsists even in emergency situations. In terms of specific pronouncements relating to interpretation the author did not come across any with regards to the African Charter. But in practice the Commission considers this as very important. In the case of **Forum of Conscience v. Sierra Leone** it stated inter alia that the right to life is the fulcrum of all other rights. It is the fountain through which other rights flow. And any violation of this right without due process amounts to arbitrary deprivation of life.[7]

[6] Scott. D. The Inter- American Court of Human Rights (1992). p.147.
[7] . [2000] AHRLR 293

In the famous case of **International Pen and Others (on behalf of Ken Saro- Wiwa) v. Nigeria** the defence was denied access to documents on which the prosecution was based. Documents and files required by the accused for their defence were withdrawn form their residence and offices when they were searched by the government security forces. The accused was found guilty and sentenced to death. The Commission found that article 7(1) (c) of the Charter was violated. Therefore based on the conclusion, it stated that the execution of the accused which were order in violation of the said section were arbitrary and violated article 4 of the Charter which protects life.[8]

In the case of **Amnesty International vs. Malawi** the African Commission found inter alia that the right to life had been violated. In that case Mr. and Mrs. Chirwa who were prominent opposition figures of the government in Malawi were abducted in Zambia by security forces. They were tried in Malawi courts and given death sentences, which were later commuted to life imprisonment. Mr. Chirwa died in detention while the case pending before the African Commission. The Commission found that Malawi had violated not only the provisions alleged to have been violated in the complaint regarding the Chirwas (i.e. right to fair trial, right to liberty and freedom form torture), but also the right to life. Prior to Chirwa's death, Malawi had been refusing to co-operate with the Commission in its attempts to investigate the matter. The facts alleged were therefore were presumed to have been proved.[9]

[8]. [2000] AHRLR 212 (ACHPR 1998)
[9] .Ankumah (1996) p.114-115

Another case involved **Rwanda** in 1990 where the Commission was called upon to consider complaints alleging severe and massive violations of the right to life. In that case the Commission requested Rwanda for permission to conduct on the spot investigations. When Rwanda agreed, the Commission failed to send a mission to Rwanda. It was only later, after four years, that the Commission was able to send a two-person mission to Rwanda with the assistance of the UN.

Amnesty International is also extremely concerned about the imposition of the death penalty after trials which fail to conform to international standards of fair trial, including Article 7 of the African Charter, as interpreted by the African Commission in its resolution on The Right to Recourse Procedure and Fair Trial. As early as October 1990 Amnesty International drew the attention of the African Commission to the frequency of executions after unfair trials and urged it to address this issue as a matter of priority. Almost two years ago, on 10 November 1995, Ken Saro-Wiwa and eight other members of the Ogoni ethnic group were executed, despite international protests and pleas, after trials before the Civil Disturbances Special Tribunal, which was neither independent nor impartial. There are executions taking place in similar circumstances in many African countries and many prisoners have been sentenced to death after unfair trials and are awaiting execution.[10]

Amnesty International has documented the imposition of the death penalty after unfair trials in many countries including Burundi, Chad, Egypt, Kenya, Liberia, Libya, Rwanda and Tunisia. The execution of prisoners after unfair trials amounts to arbitrary execution,

[10]. The African Commission on Human and People's Rights. www

in violation of Article 4 of the African Charter and contrary to the specific prohibition of the arbitrary deprivation of the right to life.[11]

1.4 Conclusion

There are marked differences in the way the two treaties protect the right to life. The differences are most noticeable in regard to the wording. The right to life is the same everywhere, but despite having passed through similar experiences, these two regions differ in terms of its protection. The African Charter gives a broad and imprecise definition of the right. Although some scholars have suggested that this type wording may have been a conscious desire to formulate them at a higher level of generality and therefore acceptable to contacting parties, this technique leaves much to be desired.[12]These scholars further argue that this technique offers a window of opportunity to the implementing bodies to be creative by adopting a teleological method of interpretation. However, as good, the Charter was supposed to be predictable.

[11]. Ibid
[12]. Carlson Anyangwe (2003) p. 124

CHAPTER TWO

Protection Of The Right To Fair Trial

2. 1. Introduction

The experiences of those held in detention without trial are often traumatic. There are frequently few legal protections available whilst conditions in detention are nowhere pleasant and frequently atrocious. Torture, both mental and physical is common and some of the victims do not survive their indefinite ordeal. Detainees also suffer the same problems as convicted offenders such as loss of employment and family breakdowns. All of this without ever being convicted of any offence and even if convicted the trial was unfair.[1] If, as remains the case in most of independent African and Latin American countries, detention without trial is a fact of life, then necessary safeguards must be provided.

2.2. The Safeguards Of The Right To Fair Trial

The right to fair trial is one of the most important rights in international human rights law and domestic law. It is a right that is designed to prevent and avoid practices of arbitrary arrests and detentions. The fundamental elements of this norm include inter alia, the right to be heard within a reasonable time, to be presumed innocent until proven guilty, of the accused person to be notified of the charges against him, of the accused to defend himself and to appeal to a higher court.

[1] John Hatchard. Individual Freedoms and State Security in the Africa Context. (1993). P.61.

It is particularly important to inform the accused of the reasons for his detention because, as John Hatchard states:

> *It allows him or her to make representation to the review tribunal concerning the loss of liberty. The detaining authority must give the detainee sufficient information to enable him make effective representation.*[2]

Another important aspect of this right is the right to legal representation. International human rights documents firmly uphold the right to legal representation. The only justification for suspending the right is the fear that a legal representative may smuggle contraband to his client or carry messages, which could represent a danger to security.

2.3. Protection Of The Right To Fair Trial Under The Two Treaties.

Article 8 of the American Convention, which guarantees the right to fair trial, provides as follows:

> *Every person has the right to a hearing, with due guarantee and within a reasonable time, by a competent, independent and impartial tribunal previously established by law, in the substantiation of accusation of a criminal nature made against him or for the determination of his rights and obligation of a civil, labour, fiscal, or any other nature.*[3]

Paragraph 2 of the same article guarantees that adequate time and means for preparation of the defence must be provided for the accused. Further, paragraph 2(a) provides that a translator or interpreter must assist the accused without charge, if he does not understand

[2] Ibid., p. 62.
[3] The American Convention on Human Rights (1969)

or does not speak the language of the tribunal or court. But as regards this right, the Commission has not received any complaint, though there are people who cannot exercise that right in local courts. The American Convention also provides for the right to appeal to a higher court.[4]

Under the African Charter the right to fair trial is covered by article 7. That article does not clearly spell out all the elements of this right like the American Convention does. The article only covers five elements which are not adequate, and these include; the right to appeal, to be presumed innocent until proven guilty, to defence, including the right to be defended by counsel, to be tried within a reasonable time. As Professor Carlson Anyangwe properly noted:

> *Nothing is said about public hearing, adequate time and facilities to prepare a defence, presence at one's own trial, the right to free assistance of an interpreter in court if necessary, the right not to be compelled to testify against oneself, and the right to appeal to higher tribunal*[5].

In the case of **John K. Modise vs. Botswana** the Commission was required to take a decision on the right to legal aid. The complainant alleged deprivation of the right to the country's nationality. He alleged that he had no funds to seek remedy in local courts. The Commission resolved that the right to counsel included the right to legal aid. The Commission shied from making a decision that would require States to provide legal aid for the need.[6]

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[4]. Article 8 (2) (h)
[5]. Carlson Anyangwe. 2003. p.123.
[6] Ankumah (1996) p.128

From the histories of the two regions, it is clear that the Latin America and Africa have had similar experiences to a large extent. They both have had and still have harsh economic and political conditions, and have a similar record of human rights violations. Despite that, the African Charter has many weaknesses in its provisions protecting or guaranteeing the right to fair trial. Many people in Africa cannot afford to pay an interpreter or legal counsel. There should have been a provision to mitigate the disparity between the poor and the rich. Fair trial entails that the law should not disadvantage one.

The Charter does not make it a right to be present at one's own trial. There is a possibility that some States may try detainees in their absence. It does not also guarantee the right against self- incrimination. To be understood as fair, the law should seen to be fair and be responsive to the needs of the society. A law that is seen as unfair is not a law at all. A good law is the one that protects and promotes the enjoyment of human rights, as the law is made for the benefit of society, not otherwise.

2.4. Interpretation Of The Right To Fair Trial

Questions of interpretation are critical to the functioning of all judicial institutions whether national or international. The Inter- American Court of Human Rights in all its judgments has made it clear that its approach to interpretation of the Convention is based upon the rules contained in the Vienna Convention on the Law of Treaties 1969. These, the Court has said:

may be deemed to be the appropriate rules of international law governing the interpretation of treaties.[7]

Article 31 (1) of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purposes. Article 32 of the same treaty provides that recourse may be made to the preparatory work of the treaty and the circumstances of its conclusion. Further, article 29 of the American Convention gives restrictions regarding interpretation. No State is permitted to restrict a right to a greater extent than is provided for in the treaty. No provision of the Convention shall be interpreted as precluding other rights or guarantees that are inherent in the human personality. Therefore, the right to trial is adequately protected under the American Convention than the African Charter. In terms of pronouncements the African Commission on Human Rights and the recently introduced Court of Human Rights are yet to do so. Although, the Commission is mandated to apply principles from the United Nations Charter, the African Union Charter, the Universal Declaration on Human Rights and other instrument, it does not provide adequate safeguards as the American Convention. It does not contain the internationally recognized elements of that right.

In the Case of **Advocates Sans Frontieres (on behalf of Bwampamye) v. Burundi** the African Commission stated that the right to fair trial involves the fulfillment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for the interest of justice, as well as the obligation on the

[7]. Scott. D. (1995). p. 130.

part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all. In that case Mr. Bwampamye was sentenced to death after being found guilty of inciting public disorder. The Court of Appeal of Burundi in 1997 passed a judgment sentencing Mr. Bwampamye to death. It did not pay attention to the prayer of the accused for adjournment, pleading the absence of his lawyer. The Commission was of the view that the Judge should have upheld the prayer of the accused. This was as a result the consideration of the irreversible nature of the penalty involved.[8] Therefore the Commission found the Burundi in violation of article 7(1) (a) of the African Charter.

In **Abubakar vs. Ghana** the complainant's sister and wife were arrested in order to get information relating to the country of refuge of the complainant after he escaped from prison. But the relief sought was not for the victims.[9] In the case of **Emgba Mekongo** the Commission was requested to award damages amounting to 105 dollars as reparation for injuries caused due to miscarriage of justice. The Commission held that it was not equipped to determine the amount of money, which would constitute adequate compensation.[10]

[8]. [2000] 48 (ACHPR 2000)
[9]. Ibid.
[10]. Ibid

2.5. Conclusion

There are marked differences that exist in the way the two treaties protect the right to fair trial. Although the two systems have had similar experiences in the past are still pass through similar experiences, the American Convention is more embracing in its provisions pertaining to the right to fair trial. The law under the American Convention is more predictable because it gives clear definitions of the elements of the right.

CHAPTER THREE

Protection Of The Right To Political Participation

The right to participation in government allows citizens to take part in the conduct of public affairs either directly or through representatives. It entails genuine periodic elections by secrete ballot. The general conditions in which elections take place must allow the different political groups to participate in the electoral process under equal conditions, that is, there must be similar basic conditions for conducting their campaigns. Therefore regional treaties protect this fundamental right to allow participatory democracy to thrive in the various constituent countries.

3.2. The Importance Of The Right To Political Participation

All governments, as a matter of fact, even the most repressive, permit or encourage some form of institutionalized models of political participation. Most governments enlist popular support and gain international as well as domestic legitimacy through inviting political participation. This political participation can either be direct or through representative, though the most common form is elections of representatives. Of all the models of political participation, elections enlist the largest number of citizens, including the largest number of those towards the bottom of the socio- economic ladder. Elections serve a variety of purpose for both the voters and the representatives. Political activities engaged in by individuals such as membership, raising campaign funds, soliciting votes for a candidate all strengthen participation in government. All these different activities form a complex electoral process, which is itself, part of a larger political process.

Elections also serve a vital protective function. Periodically elected officials are subjected to the approval of the electorate. This helps to arrest governmental violations of human rights and protect sufficiently important groups among the electorate. Through elections a citizen is able to influence public policy and governmental action.[1]

However, the type of the electoral system chosen also has a bearing on the right to political participation. The most common form is the "first past the post" or winner takes all. Under this electoral system the one who with the highest number of votes takes all, and those who have the least number of votes do not get representation. The other form, perhaps a better alternative, is the proportional representation system under which the legislature is divided among the parties according to the percentage vote received by each party list in the popular elections. Under this system even those who get the least number of votes are assured of representation. But it is up to a particular government to choose which system would be appropriate.[2]

Furthermore, some theorists have also stated that the electoral process in itself is insufficient to realize democratic ideals. Some have said as Steiner puts it:

> *... the electoral process is indispensable, but themselves insufficient to realize the democratic ideals of the citizens' continuing involvement in public life*[3].

They have argued that voting reduces participation of most citizens to the periodic vote, thus denying them the benefit of continuing experience of involvement in public life, or

1. Steiner (1995) p.665
2. Ibid p. 666
3. Ibid p.667

taking part in the conduct of public affairs. Therefore, they have urged direct participation in the formulation of policies of non-governmental institutions or clubs, or unions. The purposes for popular active and direct involvement in the public life domain are greater self- government and self- realization, which purposes are interrelated. Through direct participation in institutions affecting their lives citizens develop a sense of their worth and significance. They feel empowered to act rather than react.

In some regimes this participation has been achieved through devolution and decentralization. Devolution means giving power to regional and local authorities. These local authorities present an opportunity for participation of local people. It ensures that there is continuous participation, not periodic participation.

3.3.Protection And Formulation Of The Right To Political Participation Under The Two Treaties.

The American Convention in its preamble has a strong affirmation democracy. It declares in the following terms:

> *Reaffirming this intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man...*[4]

Article 23 also declares in similar terms as article 21of the Universal Declaration on Human Rights and article 25 of the International Covenant on Civil and Political Rights. Under paragraph 1 of that article citizens can enjoy the rights to:

[4]. The American Convention (1969)

(a) *take part in the conduct of public affairs, directly or through freely chosen representatives;*

(b) *vote and to be elected in genuine elections, which shall be by universal and equal suffrage and by secrete ballot that guarantee the free expression of the will of the voters.*[5]

Article 27 of the Convention makes this right non- derogable, in times of war, public danger or other emergency. Furthermore, article 29(c) provides that no provision of the Convention shall be interpreted as precluding other rights than are derived from representative democracy as a form of government.

From the provisions of article 27 of the American Convention it is clear that it guarantees free and fair elections. It specifically states that the elections should be genuine and by secrete ballot that guarantee the free expression of will of the voters. By way of contrast, the African Charter does not guarantee free elections. Its wording is imprecise. As will seen later the Charter uses a lot of clawback clauses which takes away the immediately it is given.

Furthermore, the American Convention in article 2 provides that the law may only regulate the exercise of the rights and opportunities under that article on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings. The African Charter on the other hand does not state the circumstances in which the right may be regulated. It does not give protective provisions of the right so as to make it non- derogable. Given the experience in Africa

[5] Ibid

Most governments may enact laws that infringe the right to political participation and later claim that they have followed the law.

Under American human rights system the American Commission on Human Rights has on numerous occasions emphasized the importance of the right to political participation. The Commission values that right very much because it is the bedrock of democratic governance. In its final report on the Situation on Human Rights In Paraguay In 1987, stated that:

> *Exercise of political rights is, in turn an essential factor in the democratic system of government, which is also characterized by the presence of an institutionalized system of checks on exercise of power, the existence of ample freedom of expression, association and meeting; and acceptance of a pluralism that would prevent the use of political proscription as an instrument of power*[6].

For the American Commission on Human Rights, the exercise of political rights is an essential ingredient of a representative democracy. This ensures that there is some institutionalized control over the actions of the powers of the state. It also presupposes the supremacy of the law. The only thing that article 13 of the Charter expressly states is that the citizen shall have the right to participate freely in the government either directly or through representatives. It does not say anything about the right to vote and secrete ballot. The said article states that:

[6] Ibid p.669

13(1) every citizen shall have the right to participate freely in the government of his country, either directly or through representatives in accordance with the provisions of the law[7].

The right to political participation is necessary for the development of a civilized society. A country led by a government of the people, for the people and by the people is more likely to represent the rights of its citizens than a government not democratically elected by the citizens of the country. As Evelyn Ankumah says:

The right to participate freely in the government of one's country complements the freedom of conscience, freedom of association and the right of assembly.[8]

Some of the cases involving the right to life, right to liberty freedom from torture and right to fair trial, also allege violation of the right to participate freely in the government of one's country.

The provisions under article 13 of the Charter, if interpreted in accordance with the letter and spirit of the Charter, should be a welcome relief for many African countries. In many African countries, members of opposition parties are often harassed and intimidated. Persons who are not loyal to the President and the ruling government often are denied the right to participate in government. Evelyn Ankumah says that:

With the exception of limitations imposed on the right, the provision states with sufficient clarity what the right to participate in government. However, the

[7]. Ibid
[8]. Evelyn Ankumah (1996) p.173

African Commission must define under what circumstances the enjoyment of the right may be infringed upon[9].

One of the prominent features in the African Charter is the use of clawback clauses. The use of clawback clauses in the Charter has been criticized in various ways. They have been described as:

Provisions which tend to " take away with the left hand that which it has given with the right hand," provisions which provide avenues for governmental restrictions on previously granted rights, undefined restrictions which are therefore problematic and fallacious[10].

Clawback clauses can render the right previously granted meaningless. Governments may enact laws that would unreasonably restrict the enjoyment of that right. The onus of interpreting these clawback clauses lies on the African Commission on Human Rights and the newly constituted African Court of Human Rights. [11]

In the case of **Legal Resources Foundation V. Zambia** the African Commission had an opportunity to consider the use of claw - back clauses. In that case the Zambian Consitution was amended to restrict person who run for presidency. He contestant had to prove that both his or her parents were Zambians (i.e. born in Zambia). This excluded the former President Kaunda from running for President. The Commission found that Zambia violated article 13 of the Charter. The Commission in that case strongly stated

[9]. Ibid p. 176
[10]. Ibid p.172
[11]. Ibid

that no state party to the Charter should avoid its responsibilities by recourse to limitations and claw back clauses in the Charter. It was stated that the Charter cannot be used to justify violations of sections thereof.[12]

The first indication whether the Commission and the Court will liberally construe "clawback clauses" in favour of human rights can be found in the guidelines for submission of State reports. [13]The guidelines call on State parties to the African Charter to report on whether articles 2- 13 of the African Charter are protected by constitutions or by a "Bill or Rights" and whether there are provisions for derogations and in what circumstances the right in question maybe derogated from.

When the Commission reviews individual complaints alleging violations of the civil and political rights in the Charter, it does not concern itself with whether or not there is a State law, which limits or prohibits the exercise of the rights in question. In fact, in specific situations where State legislations restricting participation in government have been challenged. The African Commission has explicitly ruled that such legislations are in violation of the African Charter. But the decisions of the Commission are not supported by clear and persuasive reasoning. It must state why laws that limit or prohibit previously granted rights violate the African Charter.[14] This will send a clear signal to Africans and the rest of the world that African Commission like its counterparts, the Inter-American Commission. European Commission and the United Nations is resolved to protecting human rights in accordance with recognized human rights principles.

[12]. [2001] AHRLR 84 (ACHPR 2001)
[13]. Ibid
[14]. Compendium of Key Human Rights Documents of the African Union 2005. p 178

3.3 Conclusion

Political participation is a fundamental right, which is the very basis of democracy. For democracy to thrive the citizen must be give the right to participate in the movement. The right to political participation entails periodic genuine elections. Devolution should and decentralization through elections should be allowed in order to have a legitimate government based on the popular will of the people. The American Convention has been couched in accordance with international standards. When compared with the African Charter it is more embracing and covers all the elements of the right. This calls for the revision of the Charter in that respect.

CHAPTER FOUR

Protection of the Right to Self- Determination

4.1. Introduction.

The concept of self-determination has continued to play a major role in political and legal debate. Although it is debatable whether the right of self-determination is 'jus cogens', self- determination has undoubtedly attained the status of a right in international law.[1] President Woodrow Wilson was the most public advocate of the right to self-determination as a guiding principle in the post- world war period. He sated when addressing congress in the following terms:

> *National aspiration must be respected; people may now be dominated and governed by their own consent. Self- determination is not a mere phrase. It is an imperative principle of action, which statesman will henceforth will ignore at there own peril.*[2]

4.2. The Meaning Importance Of Self- Determination.

The right to self- determination is eminently a democratic right or principle. This means that a people should freely determine its political status, pursue its economic, social and cultural development. In the case of **Constitutional Rights Project And Another v. Nigeria** the Commission stated that to participate freely in government entails among other things, the right to vote for the representative of one's choice. That case dealt with the Abacha Government's annulment of elections considered free and fair by international observers. The African Commission found that the annulment was a

[1]. Steiner (1995) p.977
[2]. Ibid p. 972

violation of rights of individual voters as well as the rights of all Nigerians as a people to choose their government.[3] An almost complete theorization is found in Lenin's writings where it was established as a Right of Nations to self- Determination. In Lenin's thesis on the Right of Nations to self- determination it is very clear that it was referring to the right of oppressed nations to independence and formation of their own separate states.[4] His definition of annexation also ably serves, as a definition of self- determination for is nothing but a violation of the self- determination of a nation. Lenin characterized annexation as:

> *Any incorporation of a small or weak nation into a large or powerful state without the precisely, clearly and voluntarily expressed consent and wish of that nation, irrespective of that time when such forcible incorporation took, place, irrespective also of the degree of the nation forcibly annexed to the given state, finally, of whether this nation is in Europe or in distant overseas countries.*[5]

Lenin's principle of self- determination was restricted to colonial and colonial like situations.

As Cassese observes, the principle involves the right to independence of colonized or non- self- governing countries and the establishment of their own separate states. He refers to this as the external aspect of the principle. But he further observes that it also involves as a principle elements, the right of oppressed nations, within otherwise sovereign states to self- determination which ranges from some form of autonomy up to and including secession, that is the formation of a separate state. Cassese calls this the

[3] [2000] AHRLR 227 (ACHPR 1999)
[4] Issa (1989) p. 73
[5] Ibid 73

internal aspect. The latter refers to the freedom of people to choose the form of their government and governance. This is where the Western doctrine and propaganda relate the principle self- determination to fundamental freedoms and human rights. The first instrument which fully stipulated this aspect (i.e. internal aspect) of the principle is the Helsinki Accord where it is provided that:

> *By virtue of the principle of equal rights and self- determination of people, all peoples always have the right, in full freedom, to determine when and as they wish their political, economic, social and cultural development.*[6]

The major role of self- determination since 1945 has been to provide a juridical foundation for the process of decolonilization. In this task it has been remarkably successful.[7] The United Nations has taken an unequivocal stand against the continuance of colonial empire. It is significant that there has never been an equivalent endorsement of the right of secession or even an expressly stated endorsement limited to circumstances of clear minority oppression. The distinction between decolonilization and secession is too apparent for political reasons. Most members of the international community have seen colonialism as a palpable evil. The product of the political thinking of the less enlightened centuries, it seemed an ideal candidate for inclusion within the new principle of self- determination, which after all, had to have some content.[8] But the suggestion of an inclusion of secession within the principle of self- determination lacks these political benefits. No state population is so homogeneous that its leaders may openly embrace the right without some lingering uneasiness.

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6. Ibid p78
7. Lee (1978) p.16
8. Ibid p.17

The right to self- determination can never be said to belong exclusively to colonial peoples. The UN General Assembly Resolution 1514 (XV) provides in part self-determination is a right of all peoples not only colonial peoples. There is nothing under international law that says people within sovereign states cannot freely secede. International law is silent on that particular issue.

4.3. The Right To Self- Determination In The African Charter.

The African Charter does not confine the right to political self-determination to colonial people. Under article 20(1) the term peoples seem to include even peoples within sovereign states. Article 20 of the Charter provides in the following terms:

> *20 (1) All peoples shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and pursue their economic and social development according to the policy they have freely chosen.*
>
> *(2) Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.*
>
> *(3) All peoples shall have the right to assistance of the states parties to the present Charter in their liberation struggle against foreign domination, be it political, economic, or cultural*[9].

[9] The African Charter (1981)

The right is a continuing right: it is unquestionable and inalienable. It cannot be taken away. The Charter uses the word 'shall have' to emphasize the permanence of the right. The right includes both political and economic rights. As the achievement of political independence by colonial countries soon turned out to be only one step towards real independence, the problem of newly independent countries to freely dispose of their natural resources became apparent. Economic self- determination in the Africa Charter very closely follows the UN and UNCTAD type tradition. It does not go further than the UN Resolution on Permanent Sovereignty over Natural Resources and backtracks even from that position by making that right (1) exercisable by states and (2) subjecting it to the objections of promoting international economic co-operation based on mutual respect, equitable exchange and the principle of international law.[10] The right to economic self-determination is further strengthened by article 21 and 22. Colonized peoples are covered by sub- article two where they are allowed to any means to free themselves including taking arms. Sub-article (3) guarantees the right to receive help from other state parties.

Thus after independence the issue of self- determination persists in Africa. The right did not cease after the independence struggle. There are extends even to post colonial Africa. The self- determination struggles in Katanga, Biafra and Eritrea are well known examples.[11]

Although the Charter does not deny peoples within sovereign states the right to self-determination, African states and the African Union seem to hold the position that self-

[10]. Issa G.S. Ibid p. 101
[11]. Evelyn Ankumah (1996) p. 63

determination does not apply outside the colonial context. They say that Self-determination in postcolonial Africa is likely to undermine African unity and national building. In 1965, President Nyerere stated that the secession movement of Biafra form Nigeria was a set back for African unity, despite the fact that Tanzania did recognize Biafra. This could be may attributed to fact that the right to self – determination belongs to all peoples. As long as they can establish themselves as a people they are free choose their system of government. People are born with these rights and they are inalienable.

The critical issue relating to the right to self- determination has been the definition of the term peoples as used by the Charter, which will be illustrated later. The African Commission has shied from making an affirmative definition of the term on several occasions.

4.4 . Case Studies within Africa.

The first case is that of **Eritrea**, which shows that, the right to self- determination is not specifically tied to colonial peoples. As early as the Kingdom of Axum (1st – 5th century AD) Eritrea was part of Abyssinia. With development of the Empire of Ethiopia, Eritrea became a peripheral part of Ethiopia. It became occupied by Italy in 1885. In 1889 Eritrea became an Italian colony after the treaty Uccialli. It remained so until 1952 when Italian colonial rule came to an end and it was administered by Britain under a trusteeship until 1952. In 1950 it was declared by the General Assembly that Eritrea should constitute an autonomous unity, federated with Ethiopia under the jurisdiction of the Federal Government. The federation was short- lived and on 14th November 1962, the

Eritrean Assembly voted for the incorporation of Eritrea into Ethiopia; Eritrea thus became a province of Ethiopia. In 1961 the Eritrean's had set up an Eritrean Liberation Front **(ELF)** followed by Eritrean People's Liberation Front **(EPLF)** in 1970. These two liberation movements then engaged in an armed struggle with the Ethiopian authorities.

Recently, following the collapse of the Mengistu government, Eritreans acquired full control over Eritrea and after a referendum in 1993, proclaimed their independence. The Eritreans contended inter alia that they had the right to self- determination, which Ethiopia had ignored. They claimed that in 1952 Eritrea was federated with against its will. no plebiscite or referendum was held to establish the will and wishes Eritreans, as in accordance with the UN practice. They further claimed that in 1962 Ethiopia unliterary repealed the federal arrangement and forcibly annexed Eritrea.[12] To date despite the tendency to reject self- determination claims Eritrea has been successfully separated from Ethiopia.

Another example concerns the Katanga peoples. In the case of **The Katanga Peoples' Congress v. Zaire.**[13] the African Commission was faced with the unenviable task of being called upon to determine whether or not the people of Katanga were entitled to secede from Zaire. The complaint alleged that the history of the Katanga people shows that its territory is separated form Zaire. The complaint alleged further that the Katanga people in exile in Zambia faced difficulties with the immigration authorities in Zambia. The complaint therefore called on the Commission to find that the people of Katanga

[12]. Antonio Cassese. Self-Determination (1995) p. 218-221
[13]. [2000]AHLR72 (ACHPR 1995)

were entitled to and independent and separate state. During the initial discussion most commissioners seemed to take the view that it was not the task of the Commission to redraw boundaries in African states. They expressed that to entertain such a complaint would be inconsistent with the AU basic principles. There was a minority view that the Charter does not only guarantee individual rights but also collective rights of which include the inalienable rights of people to self- determination. This supports the view that the term peoples as used by the Charter includes groups within sovereign states. At the 17th Session in 1995 the Commission declared that the complaint was without merit under the Charter. The Commission shied from making a pronouncement as to whether or not it had the competence to review self- determination claims. It failed to make a decision as to whether or not the term peoples as used in the Charter includes the various ethnic, religious, racial groups within the sovereign African State.[14] Although on the balance, the intention of African States, the AU and the drafters of the Charter might have been to decolonize Africa the intention as Evelyn Ankumah argues should not limit the interpretation of the provisions of the Charter.[15]

4.5. Self- Determination Under The American Convention.

By way of contrast, the American Convention does not contain specific provisions relating to the right to self- determination. Under the American human rights system, the closest provisions protecting the right to self- determination are those articles in the American Declaration on the Rights and Duties of Man. Those articles set out duties of the citizen: the duty to so conduct himself in relation to others that each may enjoy his

[14]. Ankumah (1996) p.164
[15]. Ibid

rights, to obey the law and other legitimate commands of the authorities, to render civil and military service required by his country for the defence of preservation to cooperate with the state with respect to social security.

Africa and Latin America as it was noted earlier in the previous chapters have had a similar history of colonilization; it is surprising why the convention does not specifically provide for the right to self- determination. Having had the same legacy of colonial domination it would have been expected that there should have been some provisions in the Convention to guard against the recurrence of colonial domination. The right to self-determination should be recognized as belonging to all peoples and not just colonized peoples. Oppressed peoples within sovereign states should be allowed to secede from authoritarian regimes. Once the people are recognized as a people they must be allowed determine their political, economic, social and cultural life.

4.6. Conclusion

It has been seen in the foregoing that the African Charter is way ahead of the American Convention in terms of protecting the right to self- determination. It is very difficult to state confidently how the Inter- American Commission and the Court would handle any case of self- determination or secession. On the other hand, it has been seen how the African Commission has interpreted the right to self- determination. It has shied away from making clear declaration on the interpretation of the terms peoples in the Charter. The African Commission should make a step and state precisely the definition of the term people as used in the Charter.

CHAPTER FIVE.

Critical Appraisal Of The African Charter And Conclusion.

5.1. Recommendations

Once looked at closer, it becomes clear that the African Charter and the African Commission and new Court have a great task of promoting and protecting human rights. Although the Charter, which creates the Commission, was tailored to meet the existing conditions in Africa, it leaves much to be desired. There is much it can gain from other regional treaties. In order to be responsive to needs of the people the Charter should be concisely phrased and the rights covered thereunder should be well defined. The Commission should be able to put its foot down when making pronouncements on the violations of human rights.

The African Charter on Human and people's Rights is a flexible document, which if used and interpreted effectively could enhance the promotion and protection of human rights on the continent. As Evelyn Ankumah says succinctly the work of the Commission could be made more effective through a dynamic and purposeful interpretation of the procedural and substantive provisions of the Charter.[1] This would help caution the effect of the vagueness of the wording of the Charter. The provision in article 20(1) that relate to self- determination particularly should be given a concrete meaning.[2] It is possible to give a precise definition to the rights guaranteed while maintaining its distinctiveness.

[1]. Ankumah (1996) p.179
[2]. Okugbule (2001) p.32

Secondly, it is important to reconsider the principle of confidentiality the effectiveness of the Commission. The Commission should adopt a liberal approach in interpreting article 59 of the Charter. Already calls have been made in this respect.[3] Article 59 says that all measures taken within the present provisions of the Charter shall remain confidential. The commission can only publish the same with the consent of the General Assembly. The article has an element which could have a deterrent effect to future human rights violations.

The principle of non-interference contained under article 27 also can be of a debilitating effect on the effectiveness of the Charter. African leaders have been known to rely on that provision to preclude other states from censoring their human rights record. For example the late Nigerian military President Sani Abacha sought to rely inter alia on the principle during his reign (1993- 1998) by the adoption of an inherently defective isolation policy.[4] It is also important that the public should be made aware of the provisions of the Charter. Promotional activities should be carried out to sensitize people with the contents of the Charter. The people should be mad aware of the work of the Commission, NGOs and other groups that promote human rights in order to know how to gain access to the Commission.[5]

The rights to life, fair trial, political participation, self – determination can only be fully respected in an environment where there is respect for the rule of law. The independence of the judiciary and its impartiality should be upheld not just written in statute books. To

[5]. Ibid
[4]. Footnote 60 in Okugbule Article p. 32.
[3]. Ankumah (1996) p.182

do this. Judges should not be appointed solely by the President. They should be appointed by popular vote. Their duties should not be interfered with. In the same vein the legal profession and those who defend human rights should not be intimidated or harassed.

Finally, governments should provide effective and adequate remedies to victims of human rights. Without effective remedies human rights protection would become worthless. States would systematically deny their nationals justice.

5.3. Conclusion.

Regional human rights play a critical role in the promotion of human rights. The Universal Human Rights system does not so much pay attention to cultural, social, political and economic considerations. But under the regional system human rights protection is made to suit the prevailing conditions. Regional human rights protections serve at an intermediary level between the international system and the domestic human rights system. However, although differences occur in the different regions of the world, there are crucial areas the regional instrument can draw from each other. These differences, to some extent serve as a weakness for the regional instrument.

The independence of new Court as was proposed is in accordance with international law. But this should not just be on paper; the Judges should be seen to be independent. They should not be influenced directly or indirectly by they state members.

African States have a huge role to play to make the provisions of the Charter effective and remove the unsavory stigma of a continent ridden with human rights violations. It is only then that economic, social and technological development can be witnessed in the continent.[6]

[6] Okugbule (2001) p 33

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