

THE UNIVERSITY OF ZAMBIA

OBLIG ESSAY

SCHOOL OF LAW

1994/95

L 411 - OBLIGATORY ESSAY

**PROTECTION OF HUMAN AND PEOPLES RIGHTS IN THE
AFRICAN CHARTER. PROBLEMS AND PROSPECTS**

BY

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**BEING A FINAL YEAR DISSERTATION SUBMITTED TO THE
UNIVERSITY OF ZAMBIA, FACULTY OF LAW IN PARTIAL
FULFILMENT TO THE CONDITIONS FOR THE AWARD OF
BACHELOR OF LAWS (LLB) DEGREE**

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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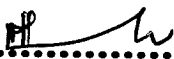
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ACKNOWLEDGEMENTS

My heart felt thanks, first and foremost go to my supervisor, Dr M K Hansungule for the dedicated, skillful advice through the writing of this essay, the provision of useful materials, books, articles and useful information without which the writing of this essay would have been difficult. I am also grateful to Miss Hildah Chibomba, Principal State Advocate, Ministry of Legal Affairs of according me time for an interview and the useful information she provided. I am also thankful to Mrs Kalulu also Ministry of Legal Affairs for the useful material she provided. Mr Robert Eno of Legal Resources Foundation and Non-Governmental Organizations like, Women for Change, Young Women Christian Association (YWCA), ZARD, Legal Resources Foundation. (LRF) and AFRONET for assisting me in one way or another.

Finally, but not at all the least, I would like to thank Miss Musonda C Kasoma and Mrs J M Nyirenda for tirelessly and continuous commitment in typing the essay, to you, I say may God bless you. My friends during my stay at UNZA, Stanley Syamaywa, School of Humanities and Social Sciences, Lisulo Lisulo, Law School. Charles Mkokweza, Mr Rodney Mumpa, James Zulu, Theresa Liswaniso, Mwila Chibwe, Matembo Matongo and others.

DEDICATION

To: My parents, Mr A N Chilundu and Mrs E Nketani Chilundu for properly directing me in life. My brothers and sisters, especially Ms E H Mbozi, for having been very influential in my life as a model, for your financial support and skilled advice when the way seemed so bleak, to you I owe more than you will realize.

Mrs I Simusa, Mrs P Nyambe and Miss Euniver Mbozi, without whom, I could not have reached where I have.

ABSTRACT

Human Rights are part and parcel of the Social, Cultural, political and Economic process in Africa. The general political climate in Africa is sad, in the sense that there is lack of true democratization process. The situations of political break-down and civil unrest in so many African states like Rwanda, Burundi, Angola, Mozambique and many others, the question that is asked, in times of such situations is, where does the Individual lie? The development of International human rights has made it possible to advance human rights issues from national place to international plane hence the birth of international instruments like the Universal Declaration of Human Rights, African Charter on Human and People's Rights, etc.

What prompted me to take up this topic is that, put into such a situation of poverty, lack of resources, recurrent droughts and violent conflicts that are common in Africa, what are the problems that have been encountered in the promotion and protection of Human Rights in the African Charter. I have greatly been attracted to this topic because there is little research that has been done, to investigate the problems and the prospects of the African Charter. However, note should be taken that his topic is not exhaustive and alot of examples will be derived in Zambia being itself a party to the Charter.

Chapter One: Attempts to examine whether Africans can boast of having human rights notions in traditional setting itself before we move to contemporary African in the development of human rights. The definition of human rights is forwarded so that we can develop a concept that will be used in this essay.

Chapter Two: Forwards the historical background of the African Charter its development and how it can be compared to other International Human Rights Instruments.

Chapter Three: Examines the problems that are encountered in the protection and promotion of human rights in the African Charter. This chapter examines areas, from Social, Culture, Political and Economic situation so that human rights can be put into proper framework. The African Charter itself is scrutinised.

Chapter Four: After all is done, this research attempts to forward useful recommendations in the protection and promotion of Human Rights.

CHAPTER ONE

1.0 INTRODUCTION

This chapter attempts to find out how human rights conceptions are understood in Africa and Western Perspectives. The comparison of human rights as understood in traditional and Modern Africa and on the other hand Western theoretical foundations of Human Rights. A general definition of Human Rights and the evolution or historical background of human rights according to different schools of thought is forwarded in this chapter. The main aim in this chapter is to discover whether, there were Human Rights at all in traditional Africa which also includes contemporary Africa. Can Africa boast of having original human rights ideas before the influence of colonialism.

1.1 HISTORICAL EVOLUTION AND DEFINITION OF THE CONCEPT OF HUMAN RIGHTS FROM DIFFERENT PERSPECTIVES

It must be noted for the outset that there is no expressly agreed definition of the concept of Human Rights. Many distinguished authors and scholars have attempted to define and also describe at least what constitutes human rights. It

is important to note also that the definitions of human rights are tainted with which perspective one is using. However, the simplest definition of Human rights is that forwarded by Jack Donnelly and States that:-

"Human rights are the rights one has simply because one is a human being."¹

Comparatively Gaius Ezejiolora defines human rights as:-

"Moral rights which every human being, everywhere at all times out to have simply because he is rational and moral."²

Perhaps what should be understood is the term **"Right"** before the detailed examination of the different understanding of human rights from different perspectives. The term has a variety of meanings in English and the most important ones being: firstly, that rights may refer to something that is morally correct or demanded, the fact of something rights.³ According to this sense what right means is that, to conform with moral standards, righteousness; or moral rectitude.⁴

In the second sense, the term **"Right"** means or refer to the entitlement that one has and in the modern contemporary age,⁵ the rights which human beings are entitled to and provided for

in different statutes, charters or instruments. For instance the bill of rights that are contained in constitutions of individual nations, the Universal Declaration of Human Rights of 1948, International covenant on civil and political rights of 1966, International Convention Economic, social and cultural rights of 1966. African Charter on Human and peoples rights of 1986, etc. As regards to the second meaning of the term right which refers to morally correct, this shows that there are certain actions which are not regarded as correct, in any society and therefore, should be discouraged.

Earlier on, the definitions and evolution of human rights have been given by Western Philosophers making it seem like, in African there has never been human rights in the traditional society. However, this research attempts to show that there are different understandings of human rights and these rights have been in existence in Africa even before, the Western Philosophies started influencing Africa through the tool of colonialism. An examination of perspectives is forwarded in this chapter and that the African meaning and understanding of human Rights will be the foremost perspective that will be used in this research.

A. HUMAN RIGHTS IN A WESTERN PERSPECTIVE

The concept of human rights as understood in the Western perspective can only be well comprehended if it is looked at in the historical evolution. The ideas of human rights in a Western perspective are understood in different schools of thought like the natural law theory, Positive School of Thought and Marxist School of Thought.

(i) NATURAL LAW THEORY

According to this school of thought, there is an objective moral law which is derived from the divine being and grasped by human reason.⁶ These natural laws bind everyone as long as he is a human being and everything that a human being does should be done in conformity with the divine laws and therefore, it follows that whatever law a human being made, if it could not conform to the divine law it was not a valid law. The central notion is that there exist in the natural law theory, objective moral principles which can be discovered by natural reason and that ordinary human law is only truly law in so far as it conforms to these principles.

According to this school of thought the source of human rights is the fact of "**Human Nature.**" Jack Donnelly and Rhoda E Howard argue that the thing in human nature that gives rise to

human rights is that there are human needs from the naturally given requisites for physical and mental health and well-being.⁷

Some of the prominent philosophers who propounded this school of thought were Greek Philosophers. Most prominent of whom were thinkers like Aristotle and Plato.

ARISTOTLE

He believed in natural law but also recognized the law which was laid down by man but said that the law should be just and should conform to natural justice. According to the understanding of Aristotle the role of the state should be to enable man attain the good life which by nature he is destined for.⁸ According to Aristotle, the purpose of the law is to assist man attain his fullest potential in society or to draw out man's best capabilities.

PLATO

His main emphasis was that each individual is assigned to a role by reason of his capabilities. In other words, what Plato was saying is that we are all naturally endowed with certain capabilities and we have to discover those using reason.⁹ Plato and Aristotle were among prominent thinkers in the Ancient Greece and helped in the shaping of the natural

law theory which led to the understanding of human rights.

When the Greek city states collapsed, the natural law tradition was however, continued and it was taken up by a number of Roman Philosophers known as the Sophists. These started off by rejecting the Greek ideal of Justice by contending that there should not be a different city state each with its own peculiar system of Justice.¹⁰

ZENO

One of the stoic philosophers believed that natural law was that perfect law which was universal and equal. He believed that reason was naturally and this was in line with Cicero who propounded that naturally law was a system of a universal application, unchanging and everlasting. And therefore, it follows that natural rights are of universal application to all human nature. He said that it was a law which we have never been instructed but which is inborn in us. He however, was not satisfied with the laws that human beings were formulating for most of what was enacted on earth were unjust no more deserved to be called laws but the rules of a band of robbers which they pass in their meetings.¹¹

The natural law theory was further developed in the medieval Christian doctrines. The doctrines were being made at the

time when the Roman Empire collapsed and the church became very powerful. At this time the element of Christianity was introduced into natural law theories. The church claimed to be the final interpreter of the truth and so the fathers of the church were now seeking to fuse or integrate the earlier natural law teachings of the Greeks and Romans with the scriptures. Among the most prominent thinkers included Thomas Aquinas who sought to combine Christian doctrine with the Philosophical ideas of classical antiquity, especially those of Aristotle.

"For Aquinas all law is the expression of divine reason which is made available to mankind in tow principal forms, "divine law" or the revelation of the Bible and natural law, the imprint of divine reason, directly available to all through the exercise of reason."¹²

Thomas Aquinas made three distinctions of the natural law. External law, Divine law and Human law. External law according to St Thomas Aquinas was only known to God by which man could participate by exercising his practical reason and divine law consisted of directions of God as to how men should conduct themselves. He said that this law should be revealed by God through scriptures of the Bible and it is part of natural law but only that it is written. Finally, the human law he said that, the law made by secular rulers and insisted

that this law should not be arbitrary or offend against moral rules, otherwise it would be invalid. Thomas Aquinas said that human law ought to conform to divine law and external law. Thomas Aquinas believed that natural law had its place of divine origin, natural law pointed to everything constructive in life, and he regarded it as valid for all peoples and ages.¹³

INFLUENCE OF LIBERAL THOUGHT

The fall of the church now led to the rise of powerful national states and as a result of these powerful states came the rise of absolute rulers who claimed to have unlimited powers. This gave rise to the political philosophers to try and justify and nationalize the existence of the state, philosophers like John Locke, Thomas Hobbes and J J Rousseau.

Locke's theory being with an account of the state of nature. According to Locke, the state of nature is a traditional where men are free and equal. The state of nature has a law of nature to govern it which obliges everyone. By the time of Locke's second Treaties of Government.

According to the political thought of John Locke the human rights tradition is in its inception at least, closely tied to contraturian political thought.

"In the social contract tradition individuals are seen as possessor of natural rights entirely independent of the state; their basic rights derive from human nature not from the state, law, or tradition."¹⁴

People in the state of nature have agreed to give up the natural powers and they elect a common authority to decide disputes and punish law breakers. John Locke championed and promoted the thought and developed the system of inborn, inalienable human rights which in the end appeared as the proper core of the entire theory of natural law. Locke emphasized both the innate rights of the individual and the necessity of limiting the powers of the governments.

It is important to state that many great natural law theorists link human rights to natural law, in the contrast others do not directly do so. Rhoda Howard and Jack Donnelly argue that,

"... the difference between natural law and natural or human rights indictments is quite important, both theoretically and practically. A state that violates the natural law is guilty of moral crimes, but it has not necessarily violated the rights of its citizens. Natural rights one has "by nature" simply as a human being."¹⁵

They argue that figures such as Cicero, Aquinas, and Richard Hooker never made the link between natural law and natural or human rights. They argue that without legal rights against the state citizens are not entitled to seek redress.

"In particular, without natural (or legal) rights the government, citizens are not entitled to seek redress, natural law by itself gives no one any right to enforce its injunctions."¹⁶

This brings in the other school of thought which is the positive theory.

(ii) **Positive Theory**

This School of thought is diametrically opposed to the theory of natural law. This school of thought was advanced mostly because of the advent of science. According to the positivists, natural law had ignored the realities of actual law. The positivists again contend that we should be concerned about what the law is, what is actually laid down. The law consists of statutes and precedent. The positivists point out to the fact that human rights are only those rights that are provided for in the statutes and not those that are

propounded by the natural law theorists which are not even provided for.

Positive rights may be taken to include those rights enshrined within a legal system, whether or not reflective of moral considerations whereas a moral right does not necessarily exist as enforceable law. The positivists helps us to understand that in the Western Philosophies they do not completely agree as to the origins of human rights and this theory has helped in the development of the concept of human rights in the Western perspective.

(iii) **Marxist School**

The Marxist theory declares that there is no distinction between origins of human rights and citizens rights because all the rights emanate from the state.

"Those fighting for bourgeois society under the slogan of enlightenment called human or external and inalienable rights those rights which expressed or protected the fundamental institutions of social system based or capitalist principles of ownership;

private property and the freedom of enterprise. These then were conceived as human rights because they were of fundamental importance for the said system. Therefore, they tried to lay down such basic social institutions and conditions under the shape of rights which supposedly did not originate from the state, but had existed previously."¹⁷

The Marxist view is quite similar to the positive school of thought in the sense that it brings the idea that rights are only those that are enacted by the state through various statutes.

B AFRICAN TRADITIONAL CONCEPTION OF HUMAN RIGHTS

It is important to emphasize on the onset that according to the African tradition, human rights are not new to Africa both traditional and contemporary Africa. Mokwuyo Okoye says that:

"From time immemorial, Africans have enjoyed the right to free speech and of sanctuary in temples and in matrimonial homes as well as the right to participate in public affairs and land use and to receive communal assistance in illness, attack or bereavement; this is not much different from the modern formulation of human rights."¹⁸

According to the African (traditional) conception of human rights, it is rooted in the origin of the human race itself and from the customs, traditions, norms and that the African people used to uphold. For instance, Africans already enjoyed freedom of religion in that all the different cultures although they may vary each had its particular way of worshiping and they respected each other according to these beliefs. This also brings aspects like right to life, which includes not only the life of man but even that of animals. **Yougindra Khushalani says that:-**

"A man kill only from necessity, in self-defence, to provide food, to perform a sacrifice or to protect anothers' life or a possession."¹⁹

This goes to show how much life was respected, and that through their norms life was highly honoured. Many distinguished African authors have advocated to the effect that human rights are not a Western discovery or origin. All societies have human rights notions and cross-culturally and historically manifest conception of human rights. Khushalani states that:-

"... Human rights and fundamental freedoms did not begin with the Magna Carta and French and American

Declaration of Rights formulated in the seventeenth and Eighteenth Centuries no did the world come to know them through the Philosophic and legal writings of GROTIUS, LOCKE and MONTESQUIEU."²⁰

It should be noted that there are distinctions between the Western and African Conceptualization of human rights. African law in general is a law of the community or group because it applies to Micro-societies, lineage, tribe, ethnic group, clan, family and also that the role of the individual in these groups is important. In the African societies the importance of the community was emphasized and the individual in these groups is important. The importance of the community was emphasized and the individual rights are to be viewed within the context of the community whilst in the Western understanding of the human rights is that human rights are a set of principles and rules made available to the individual with the essential aim of enabling him to defend himself against the group or entity which represents him.²¹ This is evident in the origin of the African concept of human rights in that much emphasis on individual rights is not found but emphasis is placed on what the individual can do to the community according to the set out objectives. Khushalani indicates that;

"It was within the group that the individual found security in some societies members of the family, clan or group shared responsibility for acts of the individual thus further reinforcing social control."²²

The different understanding of the concept of human rights in African context as opposed to Western understanding is also deduced in the Banjul Charter. (African Charter on Human and Peoples' right) Article 17 (3) guarantees the right or duty of states to protect the moral and traditional values of society. Article 17 (3) provides that;

"The promotion and protection of morals and traditional values recognized by the community shall be the duty of the state."²³

Human rights in African originating from the human race itself are not a new concept to African understanding and they should be understood when the Banjul Charter was being drafted, there was an understanding that human rights in traditional African society should be just transported from the Western understanding that human rights in traditional African society should be just transported from the Western understanding but rather

that it must reflect what people of Africa believed were or are the human rights. The other group of factors which have shaped Africa's concept of human rights has to do with culture and tradition. The most emphasis is on the fact that even the legal systems are culture bound and definitely this cannot make the same conceptions of human rights with that of the Western understanding. The former President Leopold Senghor of Senegal charged the legal experts assembled in Daka in 1979 to draft the African charter on Human and People's Rights to take cognisance of African history, cultural realities and aspirations. He argued:-

"Europe and America have constructed their system of rights and liberties with reference to a common civilization, to respective peoples and to some specific aspirations. It is not for us Africans either to copy them or to seek originality for originality's sake"²⁴

Keba M'baye has also argued forcefully that not only did these rights exist in pre-colonial Africa, but also that they were promoted and protected.²⁵ Another distinguished scholar Lakshman Marasinghe, says, that:-

"These systems of law and custom are underpinned by social forces peculiar to each society and are not the creations of colonial constitutions the best guarantees of human rights in Africa are to be found by preserving conceptions of human rights recognized by each society's law and custom."²⁶

Thus even Paragraph 5 of the Preamble of the African Charter of Human and Peoples' rights states that, taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and people's rights.²⁷

1.2 COLONIAL INFLUENCE ON THE CONCEPT OF HUMAN RIGHTS IN AFRICA

Africa's contemporary political realities and the heritage of its colonial past have influenced the African conception of human rights. The bad shape of the economic plight of most African states. Colonialism contributed to social and economic crisis resulting in unfulfilled expectation of the benefits of independence. This situation has contributed to social and political difficulties with the consequent violations of human rights by governments following the latter's inability to cope effecting with these problems.

Another colonial influence on the concept of Human rights in Africa is that traditional Africa encouraged community based participation rather than the individualistic approach. Colonial influence on the concept of human rights extend to the fact that, the colonial master's perception of human rights can be qualified as individualistic as it concentrated on the rights of the individual against the state.

1.3 INSTANCES OF RIGHTS IN TRADITIONAL AFRICA

1.3.1 Right to Life

In traditional Africa, life was considered a very sacred thing and life could not be taken for any reason. This systems from the respect Africans had for their traditional beliefs. This includes not only the life of man even that of animals.

"... kills only from necessity, in self-defence to perform a sacrifice, or to protect another's life or a possession."²⁸

1.3.2 Rights to Freedom of Expression

In traditional African people could express themselves in any manner that they so wished. Discussion was open and those who dissented were not punished.

These are just some of the examples of rights that existed in traditional Africa even before any influence from colonialism.

1.4 CONCISE COMPARISON OF EUROPEAN AND AFRICAN PERCEPTIONS OF HUMAN RIGHTS

According to the European concept, human rights

"...are a set of principles and rules made available the individual within the essential aim of enabling him to defend himself against the group or entity which represents him. This concept is not found in traditional Africa. There, the individual is subjected by the archetype of the totem of the common ancestor or Protecting Spirit."²⁹

In contrast, Professor Collomb aptly states:-

"Living in Africa means giving up an individualistic competitive, egotistical, aggressive and dominant way of life so as to live along side and the dead with the natural environment and the Spirits which people ... or endow it with life."³⁰

1.5 CONCLUSION

Having exposed the arguments forwarded by the African Scholars, it is evident that the concept of human rights has never been brought to Africa by Western Philosophies but rather, it has existed in traditional society and modern contemporary African. This research will focus on Human rights perspective as understood in Africa in traditional, social, economic and political context.

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CHAPTER 2

"The Africa Charter on Human and peoples' rights is a beautiful jewel conceived by Africa in order to enhance its self-conscience, to present a new image of the necklace of the worlds peoples to make and special place for itself in the concert of nations, to play from that tim on a significant role in management and conduct of world affairs"¹

2.0 INTRODUCTION

In the previous chapter, we discovered that there has been human rights in Africa even before, the Western Philosophies started influencing African states through colonialism. Traditional Africa had a different conception and practice of human rights and these have been conditioned by the continents culture, traditions, values, its contemporary, political and economic development. It should be understood that Western conceptions of rights evolved from Europe own historic experiences. In light of African experiences former President Leopold Sedar Senghar of Senegal charged the African legal experts assembled in Daka in November, 1979 to draft the AFfrican Charter on Human and Peoples rights to take cognizance of African history, cultural realities and aspirations.

Thus the African Charter on Human and People's rights in paragraph 5 of the Preamble also take cognizance of the historical traction. It states:-

"Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights."²

2.1 HISTORICAL BACKGROUND OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

It is necessary that the brief evolution of the African Charter is exposed to develop a context for our discussion. The concern for establishing a regional commission of human rights is traced way back in 1961 even before the birth of the organization of African Unity (OAU). At the end of an unofficial African conference on the rule of law under the auspices of the International Commission of Justice in Lagos in 1961 it was suggested inter alia:-

"That in order to give full effect to the Universal declaration of human rights of 1948, this conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights..."³

The Organization of Africa Unity was founded in 1963 after earlier attempts to found a similar body had failed. Indeed, the birth of the OAU in 1963 did not herald the promotion and protection of human rights internally because it was concerned mainly with unity and the eradication of all forms of colonialism from Africa. Unity non-interference and liberty were the true concerns of Africa and the OAU. The euphoria of the 1960s and 1970s that greeted decolonization process in African continent reached an anti-climax in the early 1970s as a result of the institution of the One Party dictatorships. African governments were attracted by One Party style of governments and these governments continued to disregard human rights in Africa. Because of the events in Uganda at the civilian government led by Milton Obote and because of the atrocities committed by President Marcias Nguema of Equatorial Guinea (1968-79) and President Bedel Bokassa in Central Africa Empire (1965 - 79) who in style of Napoleon Bona Parte crowned himself Emperor and the Rwanda case (1972 - 73) the search for settling up an African Human Rights Commission to redress atrocities was given much attention.

Prior to this period, similar calls had been made in 1957 by Jurists from Francophone African states.⁴ African lawyers were also concerned at the rate human rights were violated in Africa and this culminated in their calling for the establishment of a commission of human rights to operate Pari-

Passu with the International Commission of Jurists or the Amnesty International.⁵

Although there were Pessimistic views of whether the African Charter on human rights would materialize as a result of divergent legal and Political systems, divergent ideologies, cultural, traditional backgrounds, the thought of having an African Charter on human rights which would reflect and incorporate African traditions, culture, ethics and economic needs was strong. This was because the universal Declaration of Human rights did not reflect the values and aspirations of African People but made a general standard to be followed.

The earliest seeds of a regional system of human rights protection was manifested through the conference of independent African states which was held in Accra, Ghana, April 15 - 22 - 1958 and at this conference states concerned themselves with human rights abuses in Africa. Subsequently another conference of independent African states convened at Addis Ababa June 15 - 29 - 1960, with participants pointing at subjugation of the indigenous people by aliens domination and exploitation as a major denial of fundamental rights which is so to both the United Nations Charter and the Universal Declaration of Human Rights.⁶

The attempts did not end here, inspired by the aliens domination and exploitation and many abuses, African leaders had pledged to improve human rights. In 1961, another convention was convened at Lagos, Nigeria with the full sponsorship of the international commission of jurists. This was a major step taken towards formulating at first human rights document with an African image. At this meeting the jurists resolved and made a declaration that;

"In order to give effect to the Universal Declaration of human rights of 1948, this conference invites the African governments to study the possibility of adopting an African convention on Human Rights."⁷

A more comprehensive attempt toward achieving the human rights instrument was in July 1979, when the OAU sponsored a summit of African heads of state and government which was convened at Monrovia, Liberia, to discuss among other things the issues of human rights. It was necessary that an original and typically African instrument should stress the importance that African peoples have always attached to the respect of the dignity of man and his fundamental rights. Thus by the decision adopted in Monrovia, in July 1979, the OAU assembly of Head of States and Governments, basing itself on the resolution of the Human Rights Commission on Regional Arrangements for the promotion and protection of Human Rights.

- (i) Re-affirmed the need for a better international co-operation, the respect of fundamental human and peoples' rights and particularly the right of development;
- (ii) called on the Secretary General of the OAU to convene a high level experts conference to prepare a preliminary draft African Charter on Human and People's Rights providing among other things for the establishment of organs to promote and protect those rights.⁸

Pursuant to those directive, the OAU convened way back in November 1979 a group of eminent African Jurists who worked tirelessly and prepared in record time the draft African Charter on Human and People's Rights which the Assembly of Heads of States and Governments unanimously adopted in Nairobi, Kenya, in June 1981. In the early 1980s, the African Charter was signed and ratified by an increasing number of African States. It came into force on 21st October, 1986 following its ratification or adherence by a simple majority of the member states of the OAU.

Article 63 reads;

- (i) The Present Charter shall be open to signature, ratification or adherence of the members states of the OAU.

- (ii) The instrument of ratification or adherence to the present Charter shall be deposited with the Secretary General of the OAU.
- (iii) The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the member states of the OAU.⁹

By the end of the 1980s most of the OAU's 50 member states had signed, ratified or adhered to the African Charter; only nine states had made no more in this direction. The Charter has so far been ratified by 47 members entered into force in October 1986.

In drafting the Charter, the legal experts commissioned for the purpose, endeavoured to ensure that their work reflected the African concept of human rights, it was deemed necessary to:

- (i) Place emphasis on the Principle of non-discrimination.
- (ii) Highlight the principles and objectives of the OAU defined in Article 2 of the OAU Charter dealing essentially with respect of sovereignty and territorial integrity of each state, respect for inalienable right of each state to self-

determination and the liberation of African territories still under colonial domination.

- (iii) Put human rights and individual rights on the same equal footing.
- (iv) Define the duties of every individual to the community in which he lives, more particularly to his family and the state.
- (v) Demonstrate that African values and norms always have an important place in our societies.
- (vi) Give economic, social and cultural rights the place they deserve. It is this fundamental African spirit and culture that characterize the African Charter on Human and Peoples' Rights based on African traditions and values.¹⁰

The main objective of the Charter on Human and People's Rights is two-fold, to promote and protect human and peoples' rights in Africa. This simply means, to make governments and the people of Africa aware of the existence and importance of human rights on the one hand and to help them promote, defend and protect these rights. The preamble of the African Charter on Human and Peoples' Rights inter-alia states;

"Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand the reality and respect of peoples rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies that performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay a particular attention to the right to development that civil and political rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.¹¹

2.2 STRUCTURE OF AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS

The African Charter on Human and People's Rights has three parts and this is inclusive of the Preamble. Part one gives rights and duties, this deals with civil and political rights. Under this part, the Charter also provides for economic, social and cultural rights. Part two deals with the measures of safeguarding the rights with special emphasis on the African commission on Human and Peoples' rights. Part three, deals with the General provisions of the Charter. The African Charter provides for extensive tribal and ancient rights, civil and political rights and economic, social and cultural rights. Umozorike noted that with respect to the latter group of rights, the African Charter distinguishes itself from, for

example, the Inter-American convention which allows for economic, social and cultural rights to be enjoyed in a progressive manner, by making these rights immediately applicable.

2.3 COMPARATIVE CONCORDANCE OF BASIC HUMAN RIGHTS IN THE BANJUL CHARTER AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

2.3.1 Civil and Political Rights of Individuals

The Banjul Charter under Article 2 provides that;

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, further, birth or other status.¹² Similarly, Article 2 of the Universal Declaration of Human Rights guarantees that everyone is entitled to all the rights and freedom set forth in the Declaration, without distinction of any kind, such as race, colour, opinion, national or social origin, property, birth or other status.¹³"

It is important to note that both instruments thus Articles 2 of the Banjul Charter and Article 2 of the Universal Declaration of Human Rights guarantees the right to enjoy other rights without discrimination.

The African Charter on Human and Peoples' Rights under Article 3 states that:-

- (i) Every individual shall be equal before the law.
- (ii) Every individual shall be entitled to equal protection of the law and Article 7 of the Universal Declaration of Human Rights;¹⁴

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.¹⁵ It is important to note that comparatively, both instruments guarantee rights to equality before the law and to equal protection thereunder. The Banjul Charter provides for civil political rights of individuals which in comparison to the Universal Declaration of Human Rights it provides except, under Article 12.4 of the Banjul Charter, it guarantees a right of legally admitted non-nationals to reside which cannot be found similarly in the Universal Declaration of Human Rights.¹⁶

2.3.2 Economic, Social, and Cultural Rights of Individuals

The Banjul Charter provides for comprehensive, economic, social and cultural rights of individuals and so do the Universal Declaration on Human Rights.

The main significance of the Banjul Charter, is that under Article 18 (4) it states that;

"The aged and disabled shall also have the right to special measures of protection in keeping with their physical moral needs.¹⁷"

However, there is no equivalent right under the Universal Declaration on Human Rights. It is with such differences that the Banjul Charter is more comprehensive because it gives the right of the aged and disabled to special protection. However, the legal argument that is forwarded under this right is that, there is a problem as to whether such a duty impose legally binding obligation to states or whether they are merely moral duties. The questions that need to be answered here are questions like, can the state party that has failed to give special measures of protecting these physical or moral needs, be obliged to do so. This is more so because a difficult situation to enforce rights such as the one under

Article 18 (4) because state parties to the Charter, most of them have not taken steps to incorporate such rights under their individual constitutions. The argument that is mostly prominent is that, such are not justiciable rights.

2.3.3 Duties of States Parties

The African Charter on Human and People's right gives a duty to state parties which they must observe in order to promote human rights in Africa. Comparatively Article 1 of the Banjul Charter provides a duty to states to recognize other rights in the Charter and adopt legislation to implement those rights on the other hand there is no equivalent duty under the Universal Declaration of Human rights to compel state parties to that instrument to observe the rights as the African Charter has done.

The Banjul Charter, also provides the duty of states to protect the health of their people. Article 16(2) provides that state parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical when they are sick.¹⁸

Article 17 (3) of the Banjul Charter states that;

"Every individual shall have the right of access to public property and services in strict equality of all persons before the law. Comparatively again there is no equivalent right under the Universal Declaration of Human Rights which express that each individual should have a right of access to public property and services in strict equality of all persons before the law.¹⁹"

Article 21 (4) states that;

"States parties to the present Charter shall individually and collectively exercise the right of free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity."²⁰

This duty is imposed to states to dispose of their natural resources with a view to strengthening African Unity. Such a duty is not found in the Universal Declaration of Human Rights is a highly generalized instrument.

Article 21(5) of the Banjul Charter states;

"States parties to the Present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their people to fully benefit from the advantages derived from their natural resources."²¹

Again, there is no equivalent provision under the Universal Declaration of Human rights, Article 21 (5) of the African Charter imposes a duty of states to eliminate foreign economic exploitation in order to enable their people to fully benefit from natural resources.²²

The African Charter provides a duty of states to ensure exercise of the right to development and the duty of states to prevent those whom they grant asylum from engaging in subversive activities against other states, and not to allow their country to become a base for subversive activities against another member state. The Universal Declaration of Human Rights does not provide for such duties.

The only duties that the UN, Universal Declaration of Human rights provides are under Article 16 (3) which provides that; the family is the natural and fundamental groups unit of society and is entitled to protection by society and the state²³ and Article 25(2) which provides that motherhood and childhood are entitled to special care and assistance.²⁴ All children, whether born in or out of wedlock, shall enjoy the same social protection. Similarly a duty is found under the African Charter it gives a duty of states to assist and protect the family.

2.3.4 Rights of Peoples

The Charter does not define the term 'people' and therefore, this vies a difficult task because there is no accepted version. Furthermore, because of its abstract nature it suffers from inherent weakness and it may therefore be as difficult to identify the group entitled to rights as it may be to identify the entity that owes it these rights.²⁵ However, it has been conceived that the African and Western notions of a people are different in that the African notion refers to the national community as distinct from an ethnic, linguistic or tribal community, whereas the Western notion includes tribes and ethnic groups. In the African sense the concept seems to include the whole community, national states, national communities, people or group collectively entitled to a certain right that is provided for. The African Charter provides for comprehensive rights of peoples and the Universal Declaration only provides for social and international order and also that everyone, as a member of society, has the right national effort and international co-operation and in accordance with the organization and resource of each state, of the economic, social and cultural rights indispensable Article 21(1) of the Banjul Charter provides that.

All peoples shall freely dispose of their wealth and natural resources this right shall be exercised in the exclusive interest of the people.²⁶ In this case, no people shall be deprived of it. This is a collective right which everyone in the national community is entitled to, thus natural resources and the wealth of that particular state. Peoples' rights in the Banjul Charter extend to economic, social and cultural rights and particularly Article 22 of the Banjul Charter which provides that all peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in the enjoyment of the common heritage of mankind.²⁷

Furthermore, the Banjul Charter provides that state parties shall undertake to eliminate all forms of foreign economic exploitation thus particularly that practices by international monopolies, so as to enable their peoples to fully benefit from the advantages derived from their national resources. The important question that is asked is whether these are legal rights and are justiciable rights failure to attain them or whether they are merely social and political desirable objectives.

The Banjul Charter also provides for collective rights in the area of development and education. Article 24, provides that all peoples shall have the right to a general satisfactory

environment favourable to their development²⁸ and Article 25 provides that, state parties to the Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.²⁹

2.4 DUTIES AND THE INDIVIDUAL

The African Charter provides for individual duties and limitations on personal rights, a duty of the individual to respect other without discrimination to promote mutual respect and tolerance and other specified duties of the individual under Article 29, which list the duties.

- (i) To preserve the harmonious development of the family and to work for the conservation and respect of the family; to respect his parents at all times, to maintain them in case of need;
- (ii) to serve his national community by placing his physical and intellectual abilities at its service;
- (iii) not to compromise the security of the state whose national or resident he is;

- (iv) to preserve and strengthen social and national solidarity, particularly when the latter is threatened;
- (v) to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
- (vi) to work to the best of his abilities and competence, and society;
- (vii) to preserve and strengthen positive African cultural values in his relations with other members of the society in the spirit of tolerance, dialogue and consultation and in general to contribute to the promotion of the moral well being of society.
- (viii) to contribute to the best of his abilities, at all times at all levels, to the promotion and achievement of African Unity.³⁰

2.5 AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The Charter provides for the establishment of a body called the African commission on Human and Peoples; rights whose task is to promote human and peoples' rights and to ensure their protection in Africa. Article 30 and 45 states respectively;

"An African commission on Human and peoples' rights, hereinafter called the commission shall be established within the organization of African Unity to promote human and peoples rights and ensure their protection in Africa 31 and Article 45 gives the functions of the commission which Inter Alia, to collect documents, undertake studies and researches on African problems in the field of human and peoples' right, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples; rights and fundamental freedoms upon which African Governments may base their legislation's.³²

The commission was first elected in only 1987 by the 23rd Assembly of Head of State and Government of the OAU held in Addis Ababa (Ethiopia) and the commission consists of 11 members called "Commissioners" chosen because of their outstanding reputation and high morality, impartiality and competence in matters of human and peoples' rights Article 31, states that:

"The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights. Particular consideration being given to persons having legal experience.³³

Commissioners who serve in their personal capacity are elected by secret ballot by the entire OAU Assembly of Heads of State and Governments from a list of people nominated by state parties of the African Charter. Commissioners are normally elected for a renewable six-year term although at the first election for commissioners were elected for two years and three having to be re-elected at the same time every six years.

2.6 CONCLUSION

The African Charter on Human and peoples' rights is the most complete international human rights instrument because it shows a special character like the emphasis on the principle of non-discrimination, on solidarity and the struggle against foreign domination, the inclusion of peoples' rights beside the rights of the individual, the enumeration of duties of the individual towards different communities to which it relates and the emphasis of African values and morals.

"In bringing together the three so called 'generations' or dimensions of human rights, namely civil and political, economic, social and cultural and solidarity or peoples' rights in one document the African Charter is the most complete International human rights instruments.³⁴

The African concept of human rights is reflected in the fact that three groups of rights are contained in the African Charter under one roof, namely civil and political, economic, social and cultural as well as peoples' rights, also called solidarity rights or third generation rights.

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"The African Charter on Human and Peoples' rights and the role of the African commission on Human and Peoples' rights.

CHAPTER THREE**INTRODUCTION**

In the previous chapter we examined the historical background of the Banjul Charter and its structure. It was discovered that the African Charter is the most complete international human rights instrument because it shows special characteristics like the emphasis on the principle of non-discrimination on solidarity and the struggle against foreign domination, the inclusion of peoples' rights beside the rights of the individual, the enumeration of duties of the individual towards different communities to which it relates and the emphasis of African values and morals.

The African conception of human rights has been discovered to be contained in the African Charter under one roof, namely civil peoples rights which are also called solidarity rights or third general rights.

The main aim of this chapter is to explore the problems that have affected the protection of human rights in the African Charter. The problems that are encountered range from ideological prejudices, factors of a historical nature, social structures, different political systems, economic crisis, cultural diversity and weakness in the content of the Charter itself.

**PROBLEMS IN THE PROTECTION OF HUMAN AND PEOPLES' RIGHTS IN THE
BANJUL CHARTER**

1. TERRITORIAL SOVEREIGNTY

It is well established that states are subject of International law and that individuals are subject to municipal law. The concept of territorial sovereignty signifies that within this territorial domain jurisdiction is exercised by the state over persons and property to the exclusion of other states. The major problem in developing any system of international human rights protection is that states jealously guard their natural sovereignty, that is their right to order their internal affairs as they see fit ¹. International human rights law has sought to make inroads into the traditional legal doctrine of state sovereignty, to elevate human rights issues from domestic jurisdiction to the international plans. The problem of non-interference is further confounded by the fact that the OAU Charter under Article 3 (2) does also provide for non-interference in the internal affairs of a member state. This poses difficulties in the implementation of human rights in the African Charter as states parties claim that their territorial sovereignty is tempered with, when in actual fact, they are only hiding abuses.

"It is a well-settled principle of customary international law that the individual as an object lacks International personality and, with the exception of such controversial issues as humanitarian intervention, other subjects of international law may not come to the assistance of the individual against his/her own state²".

The national sovereignty poses problems in the protection of human rights in the African Charter as a result of state parties claiming sovereignty over issues which should be removed from national plane to international plane.

2. IDEOLOGICAL PREJUDICES

Ideology is defined as a "manner of thinking characteristics of class or individual, ideas at the basis of some economic or political theory or system"³

Ideological prejudice come as a result of the attitudes and reactions against which have been directed a large number of the efforts of the African commission of Human and Peoples' rights have been the arguments that human rights do not exist in traditional societies and that the policy for the promotion and protection of human rights is an imported product which is imposed from the outside into the African states. Even in contemporary Africa

some people still believe that human rights did not exist in traditional societies and that the promotion of these rights is only imposed from the outside. As a result of which this tends to bring a lot of reluctancy among the people towards full participation in ensuring that human rights are protected. Alot of people do not appreciate the fact that human rights in AFrica have been in existence even before the Western Philosophers started creeping in this continent⁴. Such beliefs stem from ideologies of the past in which it was believed that Africa to be a land of paganism, fetishism and ignorance never having known even religion in the noble sense⁵. Isaac Nguema charges that

...it looks as if these primitive ideology which was used to save the colonial machine is being taken up again by certain people to produce in certain African consequences that are diametrically opposed to the policies of the development of human rights in Africa, that even go so far as to seek its total rejection⁶.

There is need to educate the masses, so that they realize that the protecting of human rights is depended upon themselves. The interviews that were carried out in this research in some Organizations, like Women for Change, Young Women Christian Association showed that a lot of people do not even know that Africa has its on

conception of human rights.

3. HISTORICAL FACTORS

Among the factors which seem to curb the expansion of the theory of human rights in Africa is the weight of historical realities, illiteracy being one of the foremost, a source of ignorance and unawareness, which springs in the eyes of some uninformed people from the essentially oral mode of expression of traditional African culture. It has been discovered that the fact that someone knows how to read and write does not automatically open the mind to the lights and the brilliance of the cordial virtues contained in the Banjul Charter⁷

4. PROBLEMS IN THE CHARTER ITSELF

The content of the Charter may be structured into five categories. Firstly, there are the civil and political liberties, secondly, there are what has been called second-generation rights which relate to economic, social and cultural rights and thirdly the Charter provides for the so called third-generations, for instance, the right to peace, solidarity, a healthy environment and development and fourthly, the Charter has a place for

group rights and it also includes duties.

WEAKNESS AND PROBLEMS

The defects in the Banjul Charter makes it nearly to irrelevant in some cases. Against this background what is looked at are the "Claw Back" clauses that essentially confine the Charter's protections to rights as they are defined in national law. Rights are qualified but no reference is made to the circumstances that may lead to their limitations. For example, Article 6, provided that;

"Every individual shall have the right to liberty and to the security of his persons. No one may be deprived of his freedom for reasons and conditions previously laid done by law..⁸

Analyzing this Article carefully this the result,

"Every his person but with the provision that ... No one may be deprived of his freedom, Except for reasons and conditions previously laid down by law. but the serious inadequately is that nowhere does the Charter define these "reasons and conditions", and it does not even subject them to any test of conformity with standards such as those in the International Covenant on Civil and Political Rights. This provision is rendered weak by the fact that nation law may not lay reasons and conditions which the Charter intended that it have. Richard Gichard concludes;

"The African Charter is usefully deficient with regard to the right to liberty. As that right is subject to national law, the Charter is incapable of supplying even a scintilla of external restraint upon a governments' inability to provide some external restraint in situation where a governmental activity contravenes a national law is highly questionable. Without precise legal guidelines the commission will be severely handicapped in dealing with such situation"⁹.

Another weakness is manifested under Article 10, paragraph (1) which states that "Every individual shall have the right to free association provided that he abides by the law".

Examining this paragraph emphasizing some aspects, it comes out lie this, Every individual shall have their right to free association provided that he abides by the law. This is not a positive feature because the extensive use of "Clawback clauses would make the enforcement of the right dependent on national law or at the discretion of the national authorities. If enforcement of rights is left to the discretion of the national authorities then the very objective of the Banjul Charter is defeated. Article 8, which states that,

"Freedom of conscience, the profession and free Practice of religion shall be guaranteed. No one may, subject to the law and order, be submitted to measures restrictive the exercise of these freedom"¹¹.

Though a persons' freedom of conscience, the profession and free practice of religion are guaranteed, any of those freedom can be a briged by relevant legislation and due process and also in the interest of public order. In this case it is difficult to define what would constitute public order hence the article is rendered depended on the discretion of the national authorities.

The Banjul Charter makes no provision for reservations denunciation and withdrawal as a matter of deliberate policy. However, unless a treaty expressly forbids the making of reservations, which is not the case with the Banjul Charter, states may formulate a reservation when signing or ratifying a treaty as long as the reservation is compatible with the object and purpose of the treaty. The denunciation of, or withdrawal from the Banjul Charter is similarly not prohibited since it was the clear intention of the parties during the drafting stage that this possibility should exist¹² This possibility weakens the protection of human rights because state parties would not take it as state responsibility to the fullest where they have the possibility of withdrawal or denunciation. Whatever, policy would be forwarded for the African Charter not to expressly forbid the making of reservation this weakness the protection of human rights in the African Charter as state parties can withdraw at wish.

Article 2 states that:

"Every individual shall be entitled to the enjoyment of the rights and freedom recognized and guaranteed in the Present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion national and social origin, fortune, birth or other status"¹³.

This article makes reference to different ethnic groups, within their borders and one particular group may often be dominant throughout society. Examples of breach of such provisions have been seen in countries like Rwanda in which Hutu extremists and Tutsis groups have clashed, and yet the African Commission on Human and Peoples rights have done little or nothing to bring the offenders to book. This Article is complemented by Article 19 which states that;

"All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another"¹⁴

This Article reflects the commitment to peoples' right by proclaiming all people to be equal and endowing them with attempts to address the problem of ethnic and tribal tensions that have sometimes have erupted into violence. Although the African Charter has set a standard in respect of Articles 2 and 19, there is no implementation of these rights and African

states have been accused of just staying and watching when these ethnic and tribal tensions occur. There is a need to take full responsibility of protecting human rights.

5. LACK OF PROPER DEMOCRATIZATION PROCESS

In order for the civil and political rights provided under Article 3 - 14 to be fully realized in Africa, there is need for a true process of democratization, so that the rule of law can be respected.

The problems that are encountered in these African countries is that there is intolerance of different political opinions, harassment of the Press, and the media not focussing on real issues affecting human rights. For instance, in Rwanda, The state-owned Radio Rwanda had been criticized as early as 1992 for its scurrilous attacks on opposition politicians but it was Radio Television Libre Milles Collines (RTLM) which was owned by extremist Hutu Politicians close to Habryarimana which was a shameful and deliberate sponsor of genocide, using its power to incite ethnic killings¹⁵. This is an example of how difficult it is to protect human rights in Africa in situations of total political breakdowns and civil war.

Article 5 provides that;

"Every individual shall have the respect of the dignity inherent in human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruelty, inhuman or degrading punishment and treatment shall be prohibited"¹⁶.

Such rights can only be fully realized if state parties to the Charter respect to the rule of law and proper democratization process is respected. For instance, in Zambia, the One-Party Participatory Democracy was dropped in 1990 and a lot of political parties were formed thereafter. The United Nations Independence Party (UNIP) was the sole party in Zambia from 1973. The Movement for Multi party Democracy (MMD) formed the next government after the 1991 Parliamentary and General elections. This time Zambians thought that true democracy had returned into Zambia. However, there still examples of disrespect and disregard of human rights in Zambia. In 1992 some prominent UNIP Party members were detained because of the Zero Option document, of which they wanted to cause civil unrest in the State. Amongst there was an honorable member of parliament for Chama South Constituency Mr. Cuthbert Ng'uni who was harassed and tortured. He was given degrading punishment and in an interview that was carried out verbatim by Mr. T. Kaabwe with Cuthbert Ng'uni he revealed this:

...They gave me an officer who first of all went to urinate in the toilet. Then before I wanted to go and help myself, they told me to say "you are sweating too much, wash your face in there."

Question: in the urine?

Answer: Yes.

Question: So this officer urinated in the basin?

Answer: No, in the , you know, in the central toilet thing, toilet thing.

Question: They wanted to wash from the toilet?

Answer: Yes and that is where I washed and other was nothing I could do...¹⁸.

This gives testimony to the effect that human rights abuses are still prevalent in Zambia even in the Third Republic. The Munyama Human Rights Commission submitted its report to President of Zambia and revealed that human rights abuses are still ripe in the Third Republic.

In order for these human rights to be fully realized there is need for a stable political environment, tolerance to other opposition parties, respect for rule of law. African countries should strive to promote conducive political

environment that will make the promotion of human rights viable. State parties to the Charter (Banjul) continue to violate human rights systematically despite their ratifying of the international human rights conventions. Individual commitment to the protection of human rights by member states is not being taken seriously. There is a tendency of pleading national laws to run away from the respect of human rights in African Charter. In Zambia, for instance, the validity and legality of the public Order Act has been questioned by many citizens because they feel their rights to assemble and associate are severely infringed. Those in power have found the Act very helpful in controlling their political opponents. The public order Act is being used arbitrarily as evidence by the prosecution of the former President of Zambia Kenneth Kaunda many times in 1995.

Examples, in African of instability in the political scenario, intolerance to other opposition parties can be drawn from many countries, like Rwanda, burundi, Angola, Mozambique. Even where states have ratified the Charter, there is still disregard for human rights. For instance, in October 1987 Sankara was assassinated during a coup. After the bloodiest coup in the country's history, Campore Blaise installed his political regime monitors recorded the highest ever number of assassinations, hid squads and "disappearances". Burkina Faso during this period ratified international human rights

conventions, including the African Charter on Human and Peoples Rights in 1984 but in spite of these formal posturing by the state, the systematic violations of human rights, including assassinations continues¹⁹. There was persecution of University Professors and students and some students of the University of Ougadougou "disappeared" Arrest, detention and torture became a common feature of the political landscape of Burkina Faso. The transition to a democratic political environment in African countries will provide human rights organizations with new opportunities. Human rights organizations have to redefine their relation with political parties in order not to be biased or partisan in the promotion and protection of human rights.

6. ECONOMIC AND SOCIAL PROBLEMS

The Banjul under Article 15 - 18 provide or guarantee economic and social rights. Under Article 1 which states that:

"The member states of the Organization of African Unity Parties to the present Charter shall recognize the rights, duties and freedom enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them²⁰.

The most interesting aspect is that although the African Charter includes some of the rights listed in the International Covenant on Economic, Social and Cultural rights (ESCR), and the third-generation rights are concerned the obligation for each state party to implement measures to grant those rights would not be immediate but relative or progressive. This is to say that, they will depend upon the resources available to each state party yet the obligation created by the African Charter come into force for each state party from the moment that it becomes bound by the Charter. Therefore, there is a need to examine the economic situation of African countries who are state parties to the Charter. Before, we examine the economic situation, there is a debate of the legal capacity of such economic and social rights. Many scholars doubt the legal capacity of such economic and social rights considering them social and political desiderata. There are arguments that the state is not under a legal duty to provide these rights. However, these views do no take account of the growing awareness of the importance of these rights and the work of international bodies in this respect²¹. In the UN, an Expert Committee on Economic, Social and cultural rights was established by ECOSOC in 1985 and became operational in 1987 to supervise the implementation of the Economic, Cultural and Social rights by state parties. This means that there is cause for believing that certain economic, social and cultural rights are legal rights under

International law while other Principles are merely DELEGATE FERENDA²².

Before one may be able to enjoy human and peoples rights embodied in the Banjul, there must be a minimum level of economic development for there must be no good to have rights to HEALTH or EDUCATION when the state concerned does not have a minimum number of sanitary structures or academic establishments. The rights are composite with a wide range of obligations specific to different situations and problems and the monitoring of these rights requires a comprehensive framework which has not so far been developed in Africa.

Economic deprivations extensively affect human rights, for instance in the Sub-Sahara Africa States today a brief picture can be put as follows

"It has been alleged that Africans indebtedness stood at \$292 billion in 1990, which is equivalent to 112 percent of the Sub Saharan's gross domestic production, while debt servicing alone takes up \$20 billion annually, which amounts to about 30% of the export earnings of the Sub-Saharan region"²³

Justice Oput states that tragedy of many African countries is the monster of global structural injustice which continues to choke many African nations pushing them deeper and deeper in to economic doldrums, corruption, mismanagement and pursuit of wrong political and economic might not have been solely responsible for the economic and hence human rights failures of African nations.

A United Nations Report for instance, alleged that:

Africa has lost \$50 billion as a result of falling commodity prices since 1986 while protectionism in northern marketers has made it difficult to expand exports. REcession, high interest rates and volatile exchange rate movements throughout the 1980s in creditor countries have added to the continents' woes"²⁴

Because of the economic crisis in Africa, this has led to a failure of promotion of human rights in many aspects. Article 15 states:

Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work²⁵".

The Banjul Charter states this, the reality of many African states is that there is mass unemployed and the states are not obliged to provide work where the economic situations is a mess and a lot of people are either unemployment or under employed. People are willing to work anywhere as long as they can get a little of money which does not equal to their work. The problem has to be examined in this way, how can state parties to African Charter implement these rights. In Zambia, the draft constitution of Zambia Article 12, under labour policy which states that;

"Every person shall have the right to fair labour practices and to work under safe and healthy conditions"²⁶.

This remains to the state implement these rights. Article 23 (3) provides that the fundamental rights and freedom enumerated shall be interpreted in a manner consistent with international human rights conventions and covenant ratified by Zambia.

However, the starting point should be at least a minimum level of economic development subsequently after the economic development more jobs will be created.

Article 16 provides that:

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. State parties to the Present Charter shall take the necessary measures to protect the health of the people and ensure that they receive medical attention when they are sick and Article 17 states that every individual shall have the right to education.

These rights in the African Charter can only be realized fully if there is at least minimum level of economic development for what is the right to HEALTH or EDUCATION when to begin with the state concerned cannot afford even basic sanitary structures and academic structures. The problem in the protection of human rights in African is that most states are poor. As results of poverty, a lot of problem stem up which have led to the difficulties in the protection of human rights.

...It must be remembered that poverty is not only a complex phenomenon, but also takes multiple forms... many examples...inadequate financial resources, illness, unemployment, under-employment illiteracy, lack of education housing, cultural catracism, marginalization,

insecurity and lack of confidence in the future...²⁸

As a result of poverty, protection of human rights in the African Charter has been met with lot of difficulties.

7. THE EFFECT OF STRUCTURAL ADJUSTMENT PROGRAMMES

Most African economies are severely depressed because the World Bank and International Monetary Fund (IMF) have come up with a set of conditions which governments must fulfil before they can qualify for developmental aid. For instance, Loans, Grants. The Structural Adjustment Programmes have been adopted by many African countries. The negative aspects of these programme is that governments are forced to out government spending on social services and amenities thus many people are deprived of free medical care services, access to subsidized education opportunities and job opportunities. The removal of subsidies, devaluations of currency, re-deployment, redundancies and trade liberalizations policies all impact on people. This lead to increased costs to the individual in health care facilities and education. Because of these factors, it is difficult to promote the human and peoples' rights that are enshrined in the Banjul Charter. The continent of Africa is in deep economic crisis resulting from declining terms of trade, a growing burden of bent and over population. The measures taken to address this crisis usually consisting of some form of structural adjustment carry

enormous social costs which are met by the poorest sections of society. In most African countries, as a result of the strong tendency of International Financial Institutions (I.F.I) such as World Bank and International Monetary Fund (IMF) to dictate the political agenda, both government and opposition parties support structural adjustment measures and effectively abdicate responsibility for economic policy - making to the International Financial Institutions. One of the consequences of this abduction is that political parties offer the population no alternatives among which to choose with respect to economic policy. In the absence of such choices, parties tend to draw support on the basis of factors such as regional and ethnic affiliations²⁹.

In Practice movements for political change and respect for civil and political rights in countries such as Zambia and Nigeria, Malawi have often been stimulated by the failure of the state to enforce economic and social rights.

Article 20 of the Banjul Charter states that:

"All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue the economic and social development according to the policy they have freely chosen "30.

it is clear that it is difficult for African States who are members of the Charter to implement such rights because most states are forced into borrowing and most of them have ended up over borrowing and are riddled with heavy and big debts. The biggest problem is that there are strings attached and most states do not freely determine their economic and social policies they want to pursue for economic development. paragraph 2 of Article 16, for, instance states that, state parties to the present Charter shall take the necessary measurements protect the health of their people and to ensure that they receive medical attention when they are sick³¹. Such rights cannot be realized fully as a result of the removal of subsidies on medical facilities and people are required to pay more on health hence mostly poor citizens are deprived of their rights to physical and mental health.

The satisfaction of economic, social rights will guarantee for the enjoyment of civil political rights and this is firmly stated in the preamble of the African Charter paragraph 8 which states that

...convinced... essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception of well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the

enjoyment of civil and political rights³²

As a result, of economic and social problems it has made the realization of the civil and political rights difficult in the Banjul Charter.

CULTURE AND TRADITIONS IN AFRICA

According to the oral interviews carried out in some women organizations such as Women for change, ZARD, they feel that although the African concept of human rights includes the promotion and protection of morals and traditional values recognized by the community many governments in Africa often plead African culture and tradition to deny some groups of people in society of their fundamental human rights. thus a closer analysis of some of the customs reveals the selectivity and discriminatory nature of the cultures which have been retained and practiced. Women in most non-governmental organizations feel that, only those aspects of culture which support the subordination and discrimination against women are being considered as culture. In many African countries entire aspects of women's lives are governed by customary and religious laws with the consent and approach of the governments, women have no access to land and other economic resources and they are subjected to discrimination in marriage divorce, inheritance and citizenship. For instance in

traditional marriages, divorce has to be negotiated. It is very difficult for an African woman to divorce a man. A lot of the time her family puts pressure on her to stay in the marriage even if it is an abusive relationship. This is contrary to the spirit of the African Charter under Article 18 (3) which states that states shall ensure the elimination of every discrimination against the rights of the woman and also ensure the protection of the rights of the woman and child as stipulated in international declaration and convention³³.

Most customary law as in Zambia allows a man to chastise a wife for wrongdoing and do not allow a woman to sue for divorce due to ill-treatment by the husband unless under very extreme circumstances. In most customs, in Zambia, for instance, the traditional perception of values is that even constitute a sector of society which has a low status and are expected to be subordinates³⁴. As such whenever a woman seeks to establish her human rights, customary law would be very reluctant to appreciate that.

THE AFRICAN COMMISSION ON HUMAN RIGHTS AND PEOPLES' RIGHTS

The implementation of the rights enshrined in the Banjul Charter is entrusted to the African Commission on Human and Peoples' Rights. The Commission consists of eleven members elected by the Assembly of Heads of State and Government of

the OAU (the Assembly). Members sit on the commission in their personal capacity so as to ensure and enhance their independence and impartiality, although they exercise their powers and perform their duties in their countries of origin or residence, away from the seat of the commission which is in Banjul, the Gambia³⁵.

The functions of the commission include the duty to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conference, disseminate information, encourage national and local institutions concerned with human and peoples' rights and should the case arise give its views or make recommendations to Governments. to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation. To co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.³⁶.

One weakness and perhaps very big problems in the implementation of the rights in the Charter is that, the commission does not have enough funding. According to Article 23 of the OAU Charter the budget is provided by the contributions from member states. However, some member

countries do not pay or pay in time the contributions to the OAU. The African Charter on Human and People's rights being a complement of the OAU also suffers with respect to funding, hence the African commission is given the huge task of collecting documents, undertake studies and researches on African problems in the field of human and peoples rights, organize seminars, symposia and conference disseminating information and even making recommendations to Governments. Without serious contributions by member states, this task has not even made any impact by the commission in the promotion of human rights.

This problem is worsened by the fact that there is a significant Lacuna in the OAU Charter in that no provision exists for penalizing those who fail to pay contributions regularly. For instance the 1988/89 budget amounted to US \$25.3 million of which only amounted to \$45 million³⁷. An interview conducted at the ministry of Legal Affairs with Principal State Advocate Hildah Chibomba revealed that the commission has not properly carried out its functions, for instance disseminating information and even collecting documents simply because it is financially handicapped. The research also carried at the Ministry of Legal Affairs revealed that, they had not even received formulated and laid down principles and rules aimed and fundamental freedoms upon which Government may base its legislation an yet Article 62 of

the Charter provides that:

Every state Party shall undertake to submit every two years, from the date the Present Charter comes into force a report on the legislative or other measures taken with a view to giving effect to the rights and freedom recognized and guaranteed by the Present Charter'³⁸.

member states are not complying with this duty because to begin with the commission itself fails to formulate and lay down principles upon which African Governments can base their legislation. This has weakened the promotion of human and peoples' rights in the African Charter, mainly because of inadequate funding.

Article 33 provides that:

"The members of the commission shall be elected by secret ballot by the Assembly of Heads of State and Government form a list of person nominated by the states parties to the Present Charter³⁹.

This procedure has been criticized in the sense that, states parties to the Charter likely nominate persons they feel will decide cases in their favour. This threatens the independence of the commission although the elections are conducted by secret ballot by the Assembly of Heads of State and Government. Although the Charter require African

personalities of highest reputation, known for their high morality, integrity, impartiality and competence in matter of human and peoples' rights. This does not remove the possibility of state parties to the Charter in nominating someone who will favour them. The number of commission is small, 11 commissioners to monitor the progress of human rights in about 53 countries in Africa. This has made the commission not to be effective enough in the carrying of the functions laid down in Article 45, among other things to collect documents, undertake studies and researches on African problems in the information pertaining to human rights in Africa. In addition, to the small number of commissioners, the commission operators from Banjul, Gambia and this location is too remote for the people (individuals), who would like to lodge their complaints, called other communications in the Charter is long and cumbersome. This discourage individuals from complaining to the commission because of the time that is taken in dealing with complaints.

The other weakness with respect to the studying of cases by the commission is that, Article 59(1) provides that all measures taken within the provisions of the Present Charter..⁴⁰ remain confidential until such a time as the assembly of Heads of State and Government shall otherwise decide. This procedure makes the commission not perform well because it cannot take independent decisions because of the influence

from the Assembly of State and Government. The Assembly is the only organ which has the power to decide a course of action in any member of violations which the commission has failed to resolve amicably thus the commission has no Judicial powers, which means there is no legally effective machinery of enforcement.

Umzorike has said that, this is "a serious set back which could not be outweighed or excused by the principle of non-interference in the domestic affairs"⁴¹ of state parties. it has been suggested that an African human rights court should be established as the ultimate enforcement machinery and to this end, the additional protocol to the African Charter on Human and Peoples' Rights has been drafted.

The preamble of which states among other things that:

Considering the Charter of the Organization of African Unity recognizes that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.

Recognizing further, the efforts of the African commission on Human and peoples' rights in the Protection and Promotion of Human and Peoples' rights since its inception in 1987.

Firmly convinced that the objectives of the African Charter on Human and Peoples' rights to ensure protection and promotion of human and peoples' rights can best be realized by the establishment of an African court of Human and Peoples' Rights to supplement the efforts of the African commission on Human and Peoples' rights⁴².

The problem which immediately comes to mind, is will this court have adequate financial support to achieve any meaningful result, if some countries have consistently and persistently failed to pay up their financial contributions to the OAU. Article 14(2) of the additional protocol which establishes the African court reads'

...the court shall draw up its own budget which shall include the expenses of the court and its secretariat and submit it for approval to the assembly through the General Secretariat of the OAU⁴³.

Although the establishment of the court is an important development if no effective measures are taken what good will it be, if domestic courts are far beyond the means of the greater majority of the people, how will the people gain access to and benefit from this court.

How will the people know of this court when another problem in the promotion of human rights has been lack of information to the people at the grassroots. What measures are taken to avoid a situation where it will be an elitist, exclusive judicial establishment that will only benefit only a modicum of African populations.

Article 31(1) of protocol states that...

...Protocol shall be open for signature and ratification by any member state of the OAU which has signed the Charter⁴⁴.

This raises another problem which has been prevalent in the promotion of human rights in African, in the sense that, those nations which were not members of the OAU are not parties to the Charter. Usually these states were not members because of oppressive political system (South Africa) or civil war. by not opening entrance to such states, the whole purpose of the Charter is defeated. The same mistake has been repeated in the additional protocol that establishes the courts in that members of the court are only states which are members of the OAU, although almost all states in Africa are members of the OAU now, it was discriminatory against those nations which were not members.

The commission also receive communications from NGO's but the weakness has been found to be that, it has restricted itself in its rules of procedure and there is too much confidentiality and there is a lack of conciliatory and urgency procedures. This means that, when a complaint is lodged which needs which response, it is not dealt with until all the procedures have been complied with, which normally takes time and in the process, rights continue to be violated.

Article 45(a) gives the commission the function, to collect documents, undertake studies and researches on African problems in the field of human and people's rights, organize seminars, symposia and conferences disseminate information, encourage national and local institutions concerned with human rights⁴⁵. The largest problem in the promotion of human rights in Africa has been lack of awareness of the rights that are embodied in the Charter. Many people for instance in Zambia do not even know the existence of the Charter and the task of disseminating information has often been left to non-government organizations, which are facing a number of problems.

**NON GOVERNMENTAL ORGANIZATIONS IN THE PROTECTION AND PROMOTION
OF HUMAN RIGHTS (AFRICAN CHARTER)**

(a) LACK OF REGIONAL COORDINATION

Most of the non-governmental organizations in Africa do not liaise well with other NGOs in different state parties. The end result is that, there is lack of contact and exchanges of experience, findings and progress among different African countries⁴⁶. Even within the same country like Zambia where there are: Legal Resources Foundation (LRF), National Women's Lobby Group, Zambia Civic Education Association (ZCEA), Women in Law and Development in Africa (WILDAF), Women's Rights Committee of the Law Association of Zambia (WRC), organizations often fail consult with each other and coordinate their activities and hence failure in the promotion of human rights effectively, let alone they fail to coordinate with sectors of society which particularly need their attention.

There is a tendency of bias or lack of commitment among NGO's. They tend to protect the state in which they operate from to serve the embarrassment for abuse of human rights. For instance, the case concerning Zambian Communication No. 71/92.

The facts:

The communication was presented by a Senegalese NGO on behalf of 517 West Africans who were expelled from Zambia on 26 and 27 February 1992, on grounds of being in Zambia illegally. Prior to their expulsion, most had been subject to administrative detention for more than two months. The deportees lost all the material possessions they had in Zambia, and many were separated from their Zambian families.

The breach was allegedly that of Article 12 paragraph 5 which provides;

"The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups⁴⁷."

and Article 2 of the Banjul Charter provides;

"Every individual shall be entitled to the enjoyment of the rights of freedom recognized and guaranteed in the Present Charter ...⁴⁸."

Although the expulsions were happening in Zambia, no Non-Governmental Organizations based in Zambia could take the matter to the commission which implies that they are after protecting their own state. It had to take a non-

governmental organization in Senegal to take up the case to the commission.

TOO MUCH EMPHASIS ON CIVIL AND POLITICAL RIGHTS

Many non-governmental organizations are placing too much emphasis on civil and political rights. This has made the economic and social, cultural rights to be reflected. The resources are being committed to the protection of civil and political rights but a lot of work need to be done in the economic and social rights. To monitor the promotion of these economic rights requires a comprehensive framework which has not yet been developed in most African States. Most of the NGOs although left with a huge task of disseminating information are cash-stripped and most depend on donor funding⁴⁹.

URBAN - RURAL DRIFT

The promotion and protection of human rights in the Charter can be fully realized if the rural populace is paid the attention which they deserve. However, the tendency is that most NGOs are based in cities where the population is high and the rural people are not paid attention to⁵⁰. The traditional, cultural and economic rights are not promoted in the manner that they should be.

CONCLUSION

This chapter has revealed a lot of problems in the promotion and protecting of human and peoples' rights. The African Charter has primarily been affected as a result of the political crisis in Africa, economic depression, social problems and illiteracy in Africa.

As already noted, there is lack of proper democratization process and these has bred a lot of intolerance to opposition parties in Africa. Traditions and culture although vital need to be examined. The African Charter itself has some weakness which need to be paid attention to. Most of the work of educating the people of Africa about human rights has been left to Non-governmental organizations which are themselves not properly funded and some of them do not have clear defined objectives.

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CHAPTER FOUR

GENERAL CONCLUSION AND RECOMMENDATIONS:

"Human Rights have become a permanent part of the International agenda for peace and development. The African Charter is an indication of Africa's desire to contribute to world peace and development within the contextual framework of human rights"¹.

In this essay, what has been discovered is that Africa has its own concept of Human Rights which is reflected in the fact traditional values, customs and African civilization are condensed in the African community based, and the human rights have been in existence long before there was influence of colonialism. The African conception of human rights is reflected in the African Charter under ground rights, namely, civil and political, economic, social and cultural as well as peoples' rights which are also called solidarity rights or third general rights.

The primary importance of the African Charter is that it offers a framework for self-assessment against international standards of a country's effort at promoting and protecting human rights. Although there are a lot of problems in the protection of human rights in the African Charter, the Charter

is useful for standard settling and all state parties should strive hard to achieve the highest standards in the promotion of human rights clearly determined political and economic will.

The African Charter is the most complete regional instrument in the protection and promotion of human and peoples' rights. The other three regional human rights treaties are the European Convention for the protection of Human Rights Fundamental Freedom, the European Social Charter and the protection of Human Rights and Fundamental Freedoms, the European Social Charter and the American Convention on Human Rights. The major usefulness of the African Charter lies in the fact that there is an objective framework against, which we can test whether a government is behaving justly or unjustly to its inhabitants. Having looked at the problems and prospects in the African Charter, it is vital that also the recommendations are forward:

There is need to educate, to disseminate information to the African peoples about the rights that they are entitled to in the African Charter. Even the so called educated people who may well be aware of the existence of the Charter but this research showed that, most of them do not even understand the Charter. African people should be taught and made to realize that the ideas of human rights is not something of western

origin and therefore, the ideological prejudices should be washed away in order for people to remove the reluctance in human rights issues. Illiteracy being one of the biggest problem in the promotion of human rights should be reduced by state parties, putting human rights as there national life.

State parties should undertake there duties serious and more especially Article 25 which provides

...have a duty to promote and ensure through teaching, education and publication, in respect of the rights and freedom contained in the present Charter...⁴

The Charter contains a lot of claw backs which in some aspects makes it irrelevant because it realises on the discretion of national laws and the discretion of national authorities. The Charter dos not define those limitations which can be imposed on it and hence it does not serve its purpose where national law is of primary consideration. With regard to this weakness, I recommend that the Charter should be amended so that it can define conditions when national law should prevail. Article 68 provide that

.... may be amended it a state party makes a written request to that effect to the Secretary General of the Organization of African Unity..⁵.

This might sound too much costly a suggestion, however, it will serve the purpose, of realizing the human rights in full in future by clearly defined conditions.

State parties to the Charter must, strive to attain high level of democracy, because without proper democratization as long as there is intolerance against opposition parties, suppression of the media. Democracy and Human Rights cannot be separated, because without democracy, obviously there is lack of respect for human rights. In countries where there is total breakdown of political life, there is gross human rights violations as evidence by Rwanda, Burundi situations.

African states should learn not to rely heavily on international aid, and over borrowing in form of loans, because that has led many states to follow economic policies which do not even suit their environment. The Structural Adjustment Programme, for instance has bred more problems hence, the social, economic and cultural rights are affected. African states should learn to strive on their own through sound economic policies which in turn will promote social and cultural life of the people.

State Parties should be encouraged to retain good traditions and customs which do not discriminate either women or otherwise but those which are discriminatory should be

discarded. The Promotion and Protection of Human rights in African will not succeed as long s some customs ar still maintained which inhibit the realization of human rights.

The OAU should penalize those member states who persistently fail or do not pay contributions because it is with these contributions that the commission draws a budget from, without filling up this lacuna the functions of the commission will be hard to carry.

There is also a need to make commissioners to work on permanent basis in order to add more stability to the commission and even to secure high level of independence of commission. The number of commissioners should be increased in order to cover this vast area of Africa effectively. The commission should have seating in any state where violations of human rights is a matter of urgency.

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