

N O T E S

Introduction

1. Charter of the Organization of African Unity (March 25, 1963).
2. See Constitutive Act of the African Union (adopted July 11, 2000 and entered into force May 26, 2001), Article 33 (1).
3. See, U. Oji Umzurike, *The African Charter on Human and Peoples' Rights* (1997), Martinus Nijhoff Publishers: The Hague; Boston, p.24.
4. See The Law of Lagos, reprinted in *African Conference on the Rule of Law, Lagos, Nigeria January 3–7 1961: A Report of the Proceedings of the Conference, International Commission of Jurists*, Geneva (1961), p.6. Nnamdi Azikiwe addressed this conference and impressed upon the delegates to adopt an African human rights charter. See Umzurike, *The African Charter*, supra, p.24.
5. The major conferences are reprinted in Claude E. Welch Jr. and Ronald Meltzer (eds.), *Human Rights and Development in Africa* (1984) State University of New York Press: Albany, New York, p.338.
6. See African Charter on Human and Peoples' Rights (adopted June 27, 1981) and entered into force October 21, 1986).
7. For example, see Olusola Ojo and Amadu Sesay, "The O.A.U and Human Rights: Prospects for the 1980s and Beyond" 8 *Human Rights Quarterly* (1986), pp.89–103, especially pp.96–103.
8. See Peter A. Hall and Rosemary Taylor, *Political Science and the Three New Institutionalisms* (1996) copy on file with the author, p.11–12.
9. Ibid.
10. Ibid., pp.13–15.
11. See Anne-Marie Slaughter Burley, "International Law and International Relations Theory: a Dual Agenda" 87 *American Journal of International Law* (1993), pp.205–239, p.206.
12. Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" 36 *International Organization* (1982), pp.1–21
13. On realist theory and the role of power in international relations Jack Donnelly, *Realism and International Relations* (2000) Cambridge University Press: Cambridge, especially Chapter 1.
14. For example, see Martha Finnemore, "International Organizations as Teachers of Norms: The United Nations Education, Scientific and Cultural Organization Science Policy," 47 *International Organization* (1993), p.565, and Michael N. Barnett & Martha

- Finnemore, "The Politics, Power and Pathologies of International Relations" 53 *International Organization*, pp.699–732.
15. See, African Charter on the Rights and Welfare of the Child (adopted 1990) (entered into force November 29, 1999).
 16. See, African Charter for Popular Participation in Development and Transformation (adopted February 16, 1990).
 17. See, Grand Bay (Mauritius) Declaration and Plan of Action (adopted April 16, 1999).
 18. See, African Charter on Elections, Democracy, and Governance (adopted January 30, 2007).
 19. See African Charter, supra, preamble.

One The Origin of the African Human Rights System

1. See Adamantia Pollis, "Human Rights: A Western Construct with Limited Applicability" in Adamantia Pollis and Peter Schwab (eds.) *Human Rights: Cultural and Ideological Perspectives* (1979), Praeger: New York, pp.1–18.
2. See Jack Donnelly, "International Human Rights: A Regime Analysis" 40 *International Organization* (1986), pp.599–642.
3. Realists believe states would never cede to supranational institutions the strong enforcement capacities necessary to overcome international anarchy. Consequently, international organizations and similar institutions are of little interest; they merely reflect national interests and power and do not constrain powerful states. Yet realists underestimate the utility of international organizations even to the powerful. We argue that powerful states structure such organizations to further their own interests but must do so in a way that induces weaker states to participate. This interplay is embedded in international organizations' structure and operations.
4. See Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," 54 *International Organization* (2000), pp.217–252, p.225.
5. *Ibid.*, p.223.
6. See Stephen P. Croley, "Public Interested Regulation," 28 *Florida State University Law Review* (2000), p.7. For the public interest rationale behind international law and organizations, see the following, Sir Arthur Watts, "The Importance of International Law" in Michael Byers (ed.) *International Politics: Essays in International Relations and International Law* (2001) Oxford University Press: Oxford, pp.5–16; and Kenneth W. Abbott, "The Trading Nation's Dilemma: the Functions of the Law of International Trade" 26 *Harvard International Law Journal* (1985), pp.501–525. Analysing the world trading system, Abbott sets out how international law restrains governments from acting unilaterally, providing commonly agreed rules as well as a forum for the resolution of disputes according to previously agreed rules.
7. See Moravcsik, "The Origins of Human Rights Regimes" supra, p.226.
8. See J.M. Buchanan, and G. Tullock, *The Calculus of Consent: the Logical Foundations of Constitutional Democracy* (1962) University of Michigan Press: Ann Arbor.
9. See generally Peter L. Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community" 99 *Columbia Law Review* (1999), p.628.
10. See Chidi Anselm Odinkalu, "Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa," 47 *Journal of African Law* (2003), pp.1–37, p.19.

11. On the OAU and the protection of its members' sovereignty see Gino J. Naldi, *The Organization of African Unity: an Analysis of its Role* (2000), Mansell: New York, p.5.
12. *Ibid.*, p.6. Before the adoption of the Charter, in the view of the OAU's members, human rights instruments were for the sole purpose of promoting peaceful and positive international co-operation. See Olusola Ojo and Amadu Sesay, "The OAU and Human Rights: Prospects for the 1980s and Beyond," *supra*, pp.91–92. Ebow Bondzi-Simpson argues that there are four main reasons for the OAU's disinterest in human rights before its adoption of the Charter. These were the African interpretation of the principle of self-determination, the principle of non-interference in the internal affairs of the OAU's members, the principle of African unity and solidarity, and the fact that Africa was economically underdeveloped. See, Ebow Bondzie-Simpson, "A Critique of the African Charter on Human and Peoples' Rights" 31 *Howard Law Journal* (1988), pp.643–665, pp.644–645. The view that civil and political rights were a luxury that Africa could not afford is discussed in Rhoda Howard, "The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa" 5 *Human Rights Quarterly* (1983), pp.467–490.
13. This is the essence of realism as an explanation for the evolution and adoption of human rights treaties.
14. See Evelyn A. Ankumah, *The African Commission on Human and Peoples' Rights: Practices and Procedures* (1996), Martinus Nijhoff: Dordrecht, p.4.
15. See, 16th Summit Conference: Ugandan Invasion Issue and its Implications, 16 *Africa Research Bulletin: Political Social and Cultural Series* (1979). 16. For instance, Nigeria argued that while Amin's tyranny was reprehensible the use of force to overthrow him as a response to this was not the responsibility of any OAU member. *Ibid.*, p.5329.
17. See Edward Kannyo, "The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background" in Claude Welch jr. and Ronald Meltzer (eds.) *Human Rights and Development in Africa* (1984) State University of New York Press: Albany, New York, pp.128–151.
18. *Ibid.*, p.129.
19. *Ibid.*
20. For example, see, Hugh Davis Graham, "Civil Rights Policy in the Carter Presidency," in Gary M. Fink and Hugh Davis Graham (eds.) *The Carter Presidency: Policy Choices in the Post–New Deal Era* (1998), Lawrence: University of Kansas Press, pp.202–223; Gary M. Fink, *Prelude to Presidency* (1980), Greenwood Press: Westport, Connecticut; and Sunny Thomas, *Jimmy Carter: From Peanuts to Presidency* (1978) Vesta Publications: Ontario, Canada. In 2002 Carter was awarded a Nobel Peace prize for his work to advance, inter alia, human rights and democracy. See http://www.nobel.no/eng_peace_2002.html
21. After his election, Carter initiated measures to give effect to his human rights and foreign policy link. See Jerel A. Rosati, *The Carter Administration's Quest for Global Community* (1987), University of South Carolina: Columbia, South Carolina, pp.134–135, p.146.
22. See Joshua Muravchik, *The Uncertain Crusade: Jimmy Carter and the Dilemmas of Human Rights Policy* (1986), Hamilton Press: Lanham, Maryland, pp.40–42. The head of BHRHA had the rank of assistant secretary of state with direct access to the secretary of state and could participate in top-level staff meetings.
23. See Howard, "The Full-Belly Thesis" *supra*, for an analysis of this view.
24. See *Meeting of Experts*, Dakar (November 25–December 2, 1979), OAU.Doc.CAB/LEG/67/3.Rev.3 (1979).
25. See Foreign Assistance Act 1961, P.L. 87–195.
26. *Ibid.* Section 116 (a).
27. See 1973 Foreign Assistance Act, P.L. No. 93–189.
28. *Ibid.*, Section 32.

29. See 1974 Foreign Assistance Act, Public Law. No.93–559.
30. See International Development and Food Assistance Act 1973, Public Law No.94–161.
31. *Ibid.*, Section 310.
32. See International Security Assistance and Arms Export Control Act 1976, Public Law 94–329, Section 301 (a).
33. There are copious volumes of work on U.S. foreign policy. For example See John Spanier and Steven W. Hook, *American Foreign Policy since World War II* (15th ed. 2000) CQ Press: Washington, DC.
34. For a discussion of post–Carter shifts in the link between human rights and U.S. foreign policy see, David Carleton and Michael Stohl, “The Foreign Policy of Human Rights: Rhetoric and Reality from Jimmy Carter to Ronald Reagan” 7 *Human Rights Quarterly* (1985), pp.205–229.
35. See *Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa* (September 2–15, 1969) UN Document ST/TAO/HR/38, Cairo, Egypt; *Seminar on the Study of New Ways and Means for Promotion of Human Rights with Special Attention to Problems and Needs of Africa*, Dar es Salaam, Tanzania (October 23–November 5, 1975) UN Document ST/TAO/HR/48; and *Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa*, UN Document ST/HR/SER.A/4 (September 10–21, 1979), Monrovia: Liberia.
36. See *Report of the Conference of African Jurists on the African Legal Process and the Individual*, UN Document E/CN/14/521 Addis Ababa, Ethiopia April 19–23, 1971.
37. *Ibid.*, pp.24–25.
38. For instance, in 1967 Nigeria initiated measures culminating in the creation of a United Nations that proposed serious consideration be given to the idea of regional human rights commissions. See Emmanuel G. Bello, “The African Charter on Human and Peoples’ Rights: A Legal Analysis,” 194 *Recueil des Cours de l’Académie de Droit International* (1985), pp.9–268, p.24. Also the Gambia had tried to raise the issue of human rights in Africa at a meeting of Commonwealth Law Ministers in 1975–76. However, this did not receive an enthusiastic response. *Ibid.*, p.29.
39. See Donnelly, “International Human Rights,” *supra*, p.628.
40. *Ibid.*
41. See American Declaration of the Rights and Duties of Man (adopted April 1948) Organization of American States Res. XXX. The duties in the Declaration are set out in Articles XXIX to XXXVIII.
42. See Donnelly, “International Human Rights,” *supra*.
43. *Ibid.*
- 44 See Muravchik, *The Uncertain Crusade*, *supra*.
45. See Clair Apodaca, *Understanding U.S. Human Rights Policy: A Paradoxical Legacy* (2006), Routledge: New York.
46. See Bello “The African Charter on Human and Peoples’ Rights” *supra*, p.30.
47. See R.J. Rummel, *Statistics of Democide: Genocide and Mass Murder since 1900* (1998) Munster: LIT Verlag, p.259. For Amin’s tyrannical rule see George Ivan Smith, *Ghosts of Kampala* (1980) Weidenfield & Nicolson: London.
48. See Rummel, *Statistics of Democide*, *supra*, p.292. For a study of repression in Equatorial Guinea under Macias Nguema, see, I.K. Sundiata, *Equatorial Guinea: Colonialism, State Terror, and the Search for Stability* (1990) Westview Press: Boulder, Colorado.
49. See Rummel, *Statistics of Democide*, *supra*, p.280. For insights into Bokassa’s regime, see Brian Tilley, *Dark Age: the Political Odyssey of Emperor Bokassa* (1997), McGill–Queen’s University Press: Montreal.
50. See “Organization of African Unity,” 12 *Africa Research Bulletin: Political Social and Cultural Series*, no.8 (1979), p.3712.
51. See Rummel, *Statistics of Democide*, *supra*, p.326.

52. *Ibid.*, p.219.
53. See 16th Summit Conference, *supra*, p.5330.
54. *Ibid.*, p.5329.
55. Notwithstanding the serious human rights violations by its members, the OAU had repeatedly cloaked its attack on the racist regimes of Rhodesia and South Africa in human rights terms. The contention in this regard was that the minority regimes in these two governments, through their policies of racial separateness, violated the rights of their African populations.
56. See 16th Summit Conference, *supra*, p.5329.
57. *Ibid.*, p.5328.
58. *Ibid.*, p.5329.
59. *Ibid.*
60. *Ibid.*
61. *Ibid.*
62. *Ibid.*
63. See Amadu Sesay, "The OAU and Regime Recognition: Politics of Discord and Collaboration in Africa" 4 *Scandinavian Journal of Development Alternatives* (1985), pp.25–41, p.28. Jon Woronoff outlines the division within the OAU. One camp, the radical camp wanted force to be used in the struggle for African liberation. States in this group played a very active role in international affairs, they stressed the need for nonalignment in world politics, and they championed the cause of a stronger OAU as part of a stronger form of African political and economic integration. The moderate camp, on the other hand, were less enthusiastic about decolonization through the use of force; they stressed respect for the sovereignty of the OAU's members, they focused more on economic development over political confrontation, and they still had strong ties with their former colonial rulers. See Jon Woronoff, *Organizing African Unity* (1970) Scarecrow Press: Metuchen, New Jersey, pp.597–601.
64. See Okwudiba Ndoli, *Self-Reliance and Foreign Policy in Tanzania: The Dynamics of the Diplomacy of a New State 1961 to 1971* (1978) NOK Publishers: New York.
65. See David Martin, *General Amin* (1974) Faber and Faber: London, p.53. Tanzania's delegation argued that Amin's new military junta was not in complete control of Uganda and thus was not even the de facto government. See Kofi Oteng Kufuor, "The OAU and the Recognition of Governments in Africa: Analyzing its Practice and Proposals for the Future" 17 *American University International Law Review* (2002), pp.369–401, pp.378–379.
66. See, *Tanzania and the War against Amin's Uganda* (1979) Government of Tanzania: Dar es Salaam, Tanzania, p.2 (noting that "no independent state had the right to act as Africa's policeman.").
67. *Ibid.*, pp.1–2.
68. *Ibid.*, p.16.
69. These were Algeria (signed in 1968); Democratic Republic of the Congo/Zaire (acceded in 1976); Egypt (signed in 1967); Guinea (signed in 1967 and ratified in 1978); Kenya (acceded in 1972); Liberia (signed in 1967); Libya (acceded in 1970) Madagascar (signed in 1969 and acceded in 1971); Mali (acceded in 1974); Mauritius (acceded in 1973); Morocco (signed in 1977 and acceded in 1979); Rwanda (acceded 1975), Senegal (signed in 1970 and ratified in 1978); Tunisia (signed in 1968 and ratified in 1969); and Tanzania (acceded in 1976). See www.unhchr.ch/html/menu3/b/a_ccpr.htm/ (last visited July 17, 2009).
70. Cameroon (acceded 1984); Central African Republic (acceded 1981); Congo (acceded 1983); Egypt (signed 1982); Gabon (acceded 1983); Niger (acceded 1986); Sudan (acceded 1986); Togo (acceded 1984); Zambia (acceded 1984). *Ibid.*

71. Algeria (signed in 1968); Democratic Republic of the Congo/Zaire (acceded in 1976); Egypt (acceded in 1967); Gambia (acceded in 1978); Guinea (signed in 1967 and ratified in 1978); Kenya (acceded in 1972); Liberia (signed in 1967); Libya (acceded in 1970); Madagascar (signed in 1970 and ratified in 1971); Mali (acceded in 1974); Mauritius (acceded in 1973); Morocco (signed in 1977 and ratified in 1979); Senegal (signed in 1970 and ratified in 1978) Tunisia (signed in 1968 and ratified in 1969); and Tanzania (acceded in 1976). See www/unhchr.ch/html.menu3/b/a_ceschr.htm/ (last visited July 17, 2009).
72. Central African Republic (acceded in 1981). *Ibid.*
73. Benin (acceded in 1982); Cameroon (acceded in 1984) Congo (acceded in 1983); Egypt (ratified in 1982) Gabon (acceded in 1983); Niger (acceded in 1986); Sudan (acceded in 1986); Togo (acceded in 1984); and Zambia (acceded in 1984), *ibid.*
74. Article 59 of the Charter contains the confidentiality provisions. Here, all measures taken by the commission in fulfillment of its mandate are to remain confidential until the AHSG decides otherwise.
75. See, African Charter, *supra*, Articles 27–29.
76. See Richard Gittleman, “The Banjul Charter on Human and Peoples’ Rights: A Legal Analysis in Welch and Meltzer, *Human Rights and Development in Africa*, *supra*, pp.152–176, pp.155–156.
77. See C.O.C. Amate, *Inside the OAU: Pan-Africanism in Practice* (1986), Macmillan: Basingstoke, Chapters 14 and 15.
78. See, OAU Charter, *supra*, Article 2 (1) (b) & (c).
79. See William I. Zartman, *Ripe for Resolution* (1989) Oxford University Press: Oxford, p.282.
80. *Ibid.* Other analyses of the OAU’s failings at dispute resolution include, Gino J. Naldi, “Peace-Keeping Attempts by the Organization of African Unity” 34 *International and Comparative Law Quarterly* (1985), pp.593–601.
81. See Woronoff, *Organizing African Unity*, *supra*, p.441.
82. See Amare Tekle, “The OAU: Conflict Prevention, Management and Resolution,” in Howard Adelman and Astri Suhrke (eds.) *The Path of Genocide: the Rwandan Crisis from Uganda to Zaire* (1999) Transaction Publishers: New Brunswick, New Jersey, pp.111–130, p.111.
83. See Elenga M’buyinga, *Pan-Africanism or Neo-Colonialism? The Bankruptcy of the O.A.U.* (1982) (translated by Michael Pallis), Zed Press: London.
84. It did send a peacekeeping force to Chad. However, the mission was abandoned and the force was withdrawn in 1982. See, Terry M. Mays, *Africa’s First Peacekeeping Operation: the OAU in Chad, 1981–1982* (2002) Praeger: Westport, Connecticut.
85. See Woronoff, *Organizing African Unity*, *supra*, p.174.
86. See Seymour Martin Lipset, *Political Man: The Social Bases of Politics* (2nd ed., 1983), London: Heinemann, p.64
87. See Earl Conteh-Morgan, *Democratization in Africa: Theories and Dynamics of Political Transitions* (1997) Praeger: Westport, Connecticut p.54.
88. *Ibid.*
89. See Issa G. Shivji, *The Concept of Human Rights in Africa* (1989) London: Codesria; and Herbert Ekwe-Ekwe, *The State, Human Rights and the People* (1993) International Institute for Black Research: Reading, UK.
90. See Michael G. Schatzberg, *Political Legitimacy in Middle Africa: Father, Family, Food* (2001) Indiana University Press: Bloomington, Indiana, pp.145–173; and Rainer Tetzlaff, “The Social Basis of Political Rule in Africa: Problems of Legitimacy and Prospects for Democracy,” in *Democracy and the One-Party-State* (1989), Peter Meyns and Dani Wadada Nbudure (eds.) Institut Fur Afrika-Kunde: Hamburg, pp.25–42, p.38.

91. A good exposition of this is in George B.N. Ayittey, *Africa in Chaos* (1998) St. Martin's: New York.
92. See Pat McGowan and Thomas H. Johnson, "African Military Coups d'Etat and Underdevelopment: A Quantitative Historical Analysis" 22 *Journal of Modern African Studies* (1984), pp.632–666.
93. *Ibid.*, pp.652–660.
94. See "Algeria-President Ben Bella Deposed by Colonel Boumedienne," 2 *Africa Research Bulletin: Political, Social and Cultural Series* (June 1–30, 1965), p.314; "Congo (DR)—Coup d'Etat" 2 *Africa Research Bulletin: Political, Social and Cultural Series* (November 1–30, 1965), p.397; and "Dahomey—President Deposed," *Africa Research Bulletin: Political, Social and Cultural Series* (November 1–30, 1965), p.398.
95. See "Upper Volta-Provisional Government Formed," 3 *Africa Research Bulletin: Political, Social and Cultural Series* (January 1–31, 1966), p.445; "Nigeria-Military Rule Following Army Revolt and Political Assassination" 3 *Africa Research Bulletin: Political, Social and Cultural Series* (January 1–31, 1966), p.446; "Central African Republic—Coup d'Etat," 3 *Africa Research Bulletin: Political, Social and Cultural Series* (1–31 January, 1966), p.446; "Ghana: President Nkrumah Deposed by the Armed Forces" 3 *Africa Research Bulletin: Political, Social and Cultural Series* (February 1–28, 1966), p.465; "Nigeria: Army Revolt and Change in Leadership" 3 *Africa Research Bulletin: Political, Social and Cultural Series* (July 1–31, 1966), p.571; "Burundi—Crown Prince Assumes Power" 3 *Africa Research Bulletin: Political, Social and Cultural Series* (July 1–31, 1966), p.570; "Burundi-Change of Government" 3 *Africa Research Bulletin: Political, Social and Cultural Series* (November 1–30, 1965), p.658.
96. See "Togo-Change of Government" 4 *Africa Research Bulletin: Political, Social and Cultural Series* (January 1–31, 1967), p.697 "Sierra Leone-Army Assumes Power" 4 *Africa Research Bulletin: Political, Social and Cultural Series* (March 1–31, 1967), p.738; "Dahomey's New Coup," *West Africa* (December 23, 1967), p.1635.
97. See "Sierra Leone: Military Government Overthrown," 5 *Africa Research Bulletin: Political, Social and Cultural Series* (April 1–30, 1968), p.1035; "Congo Republic: Army Assumes Power Following Disturbances" 5 *Africa Research Bulletin: Political, Social and Cultural Series* (November 1–30, 1968), p.1180; and "Mali-Military Coup," 5 *Africa Research Bulletin: Political, Social and Cultural Series* (November 1–30, 1968).
98. See "Sudan: Coup d'Etat" 6 *Africa Research Bulletin: Political, Social and Cultural Series* (1–31 May, 1969), p.1404; "Libya-Coup d'Etat" 6 *Africa Research Bulletin: Political, Social and Cultural Series* (September 1–30, 1969), p.1522; "Somali Democratic Republic: President's Assassination Followed by a Coup" 6 *Africa Research Bulletin: Political, Social and Cultural Series* (October 1–31, 1969), p.1548; and "Dahomey Coup d'Etat" 6 *Africa Research Bulletin: Political, Social and Cultural Series* (December 1–31, 1969), p.1607.
99. See "Uganda: Coup d'Etat" 8 *Africa Research Bulletin: Political, Social and Cultural Series* (January 1–31, 1971), p.1993.
100. See "Ghana: Military Coup," 9 *Africa Research Bulletin: Political, Social and Cultural Series* (January 1–31, 1972), p.2347; and "Dahomey: Military Coup" 9 *Africa Research Bulletin: Political, Social and Cultural Series* (October 1–31, 1972), p.2637.
101. See "Rwanda: Military Coup" 10 *Africa Research Bulletin: Political, Social and Cultural Series* (July 1–31, 1973), p.2922.
102. See, "Burundi: Military Coup" 13 *Africa Research Bulletin: Political, Social and Cultural Series* (November 1–30, 1976), p.4229.
103. See "Upper Volta: Army Assumes Power" 11 *Africa Research Bulletin: Political, Social and Cultural Series* (February 1–28, 1974), p.3131; "Niger: Military Coup" 11 *Africa Research Bulletin: Political, Social and Cultural Series* (April 1–30, 1974), p.3204; and

- "Ethiopia: Emperor Deposed" 11 *Africa Research Bulletin: Political, Social and Cultural Series* (September 1–30, 1974), p.3360.
104. See "Madagascar: Change of Government and Political Assassination" 12 *Africa Research Bulletin: Political, Social and Cultural Series* (January 1–31, 1975), p.3532; "Chad: Military Coup" 12 *Africa Research Bulletin: Political, Social and Cultural Series* (April 1–30, 1975), p.3593; and "Nigeria: Change in Leadership" 12 *Africa Research Bulletin: Political, Social and Cultural Series* (July 1–31, 1975), p.3695.
105. See "Seychelles: Government Overthrown" 14 *Africa Research Bulletin: Political, Social and Cultural Series* (June 1–30, 1977), p.4465; and "Ethiopia: Head of State Assassinated" 14 *Africa Research Bulletin: Political, Social and Cultural Series* (February 1–28, 1977), p.4323.
106. See "Comoro Islands: President Overthrown" 15 *Africa Research Bulletin: Political, Social and Cultural Series* (May 1–31, 1978), p.4849; "Ghana: Acheampong Ousted" 15 *Africa Research Bulletin: Political, Social and Cultural Series* (July 1–31, 1978), p.4926; and "Mauritania: Bloodless Coup" 15 *Africa Research Bulletin: Political, Social and Cultural Series* (July 1–31, 1978), p.4928.
107. See Uganda- "UR Tanzania: Amin Overthrown," 16 *Africa Research Bulletin: Political, Social and Cultural Series* (April 1–30, 1979), p.5220; "Ghana: Junior Officers Seize Power" 16 *Africa Research Bulletin: Political, Social and Cultural Series* (June 1–30, 1979), p.5306; "Equatorial Guinea: Military Coup" 16 *Africa Research Bulletin: Political, Social and Cultural Series* (August 1–31, 1979), p.5375; and "Central African Empire: Emperor Bokassa Deposed" 16 *Africa Research Bulletin: Political, Social and Cultural Series* (September 1–30, 1979), p.5405.
108. See "Mauritania: Palace Coup" 17 *Africa Research Bulletin: Political, Social and Cultural Series* (January 1–31, 1980), p.5535; "Liberia: Military Coup" 17 *Africa Research Bulletin: Political, Social and Cultural Series* (April 1–30, 1980), p.5645; "Uganda: Army Takes Over" 17 *Africa Research Bulletin* (May 1–31, 1980), p.5682; "Guinea-Bissau: Military Coup" 17 *Africa Research Bulletin* (November 1–30, 1980), p.5861; and Upper Volta: Military Coup" 17 *Africa Research Bulletin* (November 1–30, 1980), p.5868.
- 109 See Douglass North, "Five Propositions about Institutional Change" in Jack Knight and Itai Sened (eds.) *Explaining Social Institutions* (1995) University of Michigan Press: Ann Arbor, pp.15–26, especially pp.15–21.
110. See Harry M. Scoble, "Human Rights Non-Governmental Organizations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter" in Welch and Meltzer (eds.), *Human Rights and Development in Africa*, supra, pp.177–203.
111. *Ibid.*, pp.183–189.
112. See Bello, "The African Charter on Human and Peoples' Rights" supra, pp.24–26.
113. See Chris Allen, "Benin" in Chris Allen, Michael S. Radu, Keith Somerville and Joan Baxter (eds.) *Benin, the Congo, Burkina Faso: Economics, Politics and Society* (1989) Pinter: London pp.1–144, pp.34–37.
114. For civil society's role in bringing removing General Ignatius Acheampong from office in Ghana in 1978 see Kenneth Ingham, *Politics in Modern Africa: the Uneven Tribal Dimension* (1990) Routledge: London, pp.54–56.
115. The Movement for Justice in Africa organized resistance to the True Whig Party that had ruled Liberia since the 1840s and this culminated in the coup d'état in 1980. See Tukumbi Lumumba-Kasongo, "Social Movements and the Quest for Democracy in Liberia: MOJA and its Transformation into a Political Party" in Mahmood Mamdani and Ernest Wamba-dia-Wamba (eds.) *African Studies in Social Movements and Democracy* (1995) CODESRIA: Dakar, Senegal, pp.409–461.
116. The overthrow of Hamani Diouri in 1974 was a consequence of being the rapid economic decline in that country and the failure of the Diouri regime to pacify Niger's

- politically active communities at the time. See Richard Higgott, "The 1974 Coup D'Etat in Niger: Towards an Explanation" 13 *Journal of Modern African Studies* (1975), pp.383–398, pp.388–393.
117. Popular pressures from a range of social actors explain the "recivilianisation" of Niger in the late 1970s. See William D. Graf, *The Nigerian State: Political Economy, State Class and Political System in the Post-Colonial Era* (1988), James Currey & Heinmann: London and Portsmouth, New Hampshire, pp.53–63.
 118. See Roland Vaubel, "A Public Choice Approach to International Organization" 51 *Public Choice* (1986), pp.39–57, pp.48–49.
 119. *Ibid.*, p.43.
 120. *Ibid.*, p.45.
 121. Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics" 51 *International Organization* (1997), pp.513–553, pp.516–520; and Anne Marie Slaughter Burley, "International Law and International Relations: A Dual Agenda" 87 *American Journal of International Law* (1993) pp.205–239, at pp.226–237.
 122. This rationale for why international institutions emerge has been applied to the analysis of the OAU. One scholar has observed that the OAU was never really a public interest undertaking designed to benefit all Africans. Rather, the OAU, by design, was supposed to be weak at birth because of the softness of the postcolonial African state. It thus served as a cover for bad governance and the political banalities of the vast majority of African governments as well as a disguise for close links with extra-African powers. See Tekle, "The OAU" *supra*, p.11.
 123. See Douglass C. North, *Institutions, Institutional Change and Economic Performance* (1990) Cambridge University Press: New York, p.3.

Two The African Commission and the Rewriting of the African Charter

1. This is consistent with the public choice thesis we referred to in chapter one. Public choice theorists see no distinction between bureaucrats in non-market settings and private economic actors seeking to make a profit in their business transactions. Both sets of actors, public choice theorists argue, are motivated by self-interest. As far as bureaucrats are concerned this self interest is manifested, *inter alia*, in the expansion of their turf as they seek to justify their existence.
2. See Takele Suboka Bulto, "Beyond the Promises: Resuscitating the State Reporting Procedure under the African Charter on Human and Peoples' Rights" 12 *Buffalo Human Rights Law Review* (2006), pp.57–92, pp.62–63.
3. The African Commission has construed the provisions of the African Charter to free itself of constraints on its ability to protect human rights. In doing so it has sought to free itself from the constraints imposed by the Charter on the sources of its information. Noteworthy is its attack on the provision in the African Charter which states that communications should not be based exclusively on news disseminated through the media. In *Sir Dawda K. Jawara v The Gambia* the Commission reinforced its role as a redrafter of the Charter. The government of the Gambia in its response to the plaintiff's submission argued that the petition relied on information sourced exclusively from the news media and that this was contrary to Article 56 (4) of the African Charter. The Commission refused to be constrained by this argument stating that this would be an appropriate source of information in certain circumstances such as the genocide in Rwanda, and

- human rights abuses in Burundi, the Congo, and Zaire. See *Sir Dawda K. Jawara v The Gambia* (2000) African Commission on Human Rights Communication Nos.147/95 and 149/96. Prior to its decision in *Jawara*, the Commission received at its 7th Session, media reports of violation of human and peoples' rights in Liberia and this prompted the body to express its concern and anxiety over the matter. The Commission also asked the government if it could visit the state even though no communication had been received. This suggests that the Commission was already indicating that it was not going to place too much a restrictive interpretation on the provision in question. See Rachel Murray, "Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights" 46 *International and Comparative Law Quarterly* (1997), pp.412–434, pp.421–422.
4. The leading texts spanning the Commission's activities since it was constituted include Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (2000) Hart Publishing: Oxford; Ankumah, *The African Commission on Human and Peoples' Rights*, supra Martinus Nijhoff: Dordrecht; and Fatsah Ouguergouz, *The African Charter of Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003). Kluwer Law International: The Hague.
 5. See Michael P. Van Alstine "Dynamic Treaty Interpretation" 146 *University of Pennsylvania Law Review* (1998), pp.687–793, p.692.
 6. On the cultural underpinnings of the African Charter, see Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: an Evaluation of the Language of Duties" 35 *Virginia Journal of International Law* (1995), pp.339–380.
 7. For an introduction to formalist jurisprudence, see Neil Duxbury, *Patterns of American Jurisprudence* (1995) Oxford University Press: Oxford, Chapter 1.
 8. Most probably, formalism would be the tool used to decide admissibility of cases.
 9. On realism see Duxbury, *Patterns of American Jurisprudence*, supra, chapter 2.
 10. See Rosalyn Higgins, "Derogations under Human Rights Treaties" 48 *British Yearbook of International Law* (1976/77), pp.281–320, p.281.
 11. *Ibid.*
 12. *Ibid.*, p.282
 13. See ICCPR General Comment No.29 States of Emergency (August 31, 2001).
 14. *Ibid.*, para. 2
 15. *Ibid.*, para. 1
 16. *Ibid.*, para. 2.
 17. *Ibid.*, para. 3
 18. *Ibid.*, para. 17.
 19. See Richard Gittleman, The Banjul Charter on Human and Peoples' Rights: A Legal Analysis" in Claude Welch and Ronald Meltzer (eds.) *Human Rights and Development in Africa*, supra pp.152–176.
 20. See *Constitutional Rights Project, Civil Liberties and Media Rights Agenda v Nigeria*, African Commission on Human and Peoples' Rights, Communication Nos. 140/94, 141/94, 145/95 (1999).
 21. *Ibid.*, para. 4.
 22. *Ibid.*, para. 40.
 23. *Ibid.*
 24. *Ibid.*, para. 41.
 25. *Ibid.*, para. 42.
 26. *Ibid.*, para. 43.
 27. *Ibid.*, para. 44.
 28. See *Amnesty International vrs Zambia*, African Commission on Human and Peoples' Rights Communication No. 212/98 (1999).
 29. *Ibid.*, paras 3–4.

30. *Ibid.*, para. 50
31. See *Civil Liberties Organisation vrs Nigeria* African Commission on Human and Peoples' Rights Communication (1995) No.129/94.
32. *Ibid.*, para. 14.
33. *Ibid.*
34. See *Commission Nationale des Droits l' Homme et des Libertes v Chad*, African Commission on Human and Peoples' Rights Communication No.74/92 (1995).
35. *Ibid.*, para. 21.
36. See John W. Meyer, John Boli, George M. Thomas and Francisco O. Ramirez, "World Society and the Nation-State" 103 *The American Journal of Sociology* (1997), pp.144–181, p.148.
37. *Ibid.*, pp.170–171.
38. *Ibid.*, p.170.
39. See *Antoine Bissangou v Republic of Congo*, African Commission on Human and Peoples' Rights, Communication No.253/2002 (2006).
40. *Ibid.*
41. See *Article 19 vrs The State of Eritrea*, African Commission on Human and Peoples' Rights, Communication No. 275/2003 (2007).
42. *Ibid.*
43. See *The Social and Economic Rights Action Centre and Centre for Economic and Social Rights vs. Nigeria*, African Commission on Human and Peoples' Rights Communication No.155/96 (2001), para. 57.
44. *Ibid.*, para. 63.
45. We assert here that it is rare for sociological theories to be employed in the study of international law pertaining to human rights in Africa. Our use of sociological institutionalism, hopefully, sheds fresh light on the African human rights system as a whole. See Moshe Hirsch, "The Sociology of International Law: Invitation to Study International Rules in their Social Context" 55 *University of Toronto Law Journal* (2005), pp.891–939.
46. See Vaubel, "Principal-Agent Problems in International Organizations," *supra*, pp.126–127.
47. For an introduction to principal-agent theory see Joseph Stiglitz, "Principal and Agent" *The New Palgrave: A Dictionary of Economics*, Vol.3 (1987), pp.966–971. In its application to international relations see Roland Vaubel, "Principal-Agent Problems in International Organizations," 1 *Review of International Organizations* (2006), pp.125–138; and H. Kasim and A. Menon, "The Principal-Agent Approach and the Study of the European Union: promise unfulfilled?" 10 *European Journal of Public Policy* (2003), pp.121–139
48. This does not mean that other problems do not compound principal—agent relations.
49. This behavior is thus on all fours with the model of the public choice bureaucrat we alluded to before.
50. For a general introduction to rational ignorance, see Viktor J. Vanberg and James M. Buchanan, "Constitutional Choice, Rational Ignorance and the Limits of Reason, in Karol Edward Soltan and Stephen L. Elkin (eds.) *The Constitution of Good Societies* (1996.) Pennsylvania State University Press: University Park, pp.39–56.
51. See African Charter, *supra*, Article 68.
52. On stability of the law see Kenneth A. Shepsle and Barry R. Weingast, "Structure-induced Equilibrium and Legislative Choice" 37 *Public Choice* (1981), pp.503–519.
53. See Vaubel, "Principal-Agent Problems in International Organizations," *supra*, p.128.
54. The only instance of a dissenting opinion that this author knows of is in *Bah Ould Rabah v Mauritania*, Decision of the African Commission on Human and Peoples' Rights No. 197/97 (2004). The basis for the dissenting opinion was that the other Commissioners who heard

- this communication had relied on a short summary of the facts and that these facts were inaccurate. See Dissenting Opinion by Yasir Sid Ahmad El Hassan, *ibid.*, para. 2.
55. See Laurence R. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes" 102 *Columbia Law Review* (2002), pp.1832–1911, pp.1852–1853.
 56. Members cannot leave the African Charter; treaty exit would have to be through leaving the OAU/AU system. See OAU Charter, *supra*, Article XXXI, and Constitutive Act of the African Union, Article 31.
 57. The AU has been trying to build up its reputation as a more relevant organization than its predecessor, the OAU. It has a wider range of competences and it is hoped it will be more effective in issues such as peacekeeping.
 58. All African countries have either signed, acceded ratified or succeeded to the ICCPR. See ICCPR Status as at July 17, 2009, available at <http://treaties.un.org/Pages/ViewDetails> (last visited July 17, 2009).
 59. See generally Andrew Guzman, "A Compliance Based Theory of International Law" 90 *California Law Review* (2002), pp.1823–1887.
 60. For example respect for Article 13(1) rights of the Charter on the right to participate in government can result in support for governments that are removed by unconstitutional means. President Tejan Kabbah of Sierra Leone was restored to power by the Economic Community of West African States after being overthrown by the army. The main reason for this was that his administration was a constitutionally elected one. The overthrow of the government of Madagascar in 2009 has also met with condemnation by the AU and efforts to restore the deposed president to power on the grounds that his administration was a democratically elected one.
 61. See Frans Viljoen and Livette Louw, "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights" 101 *American Journal of International Law* (2007), pp.1–34.
 62. *Ibid.*, p.5
 63. *Ibid.*, p.6.
 64. *Ibid.*
 65. *Ibid.*, p.5.
 66. For example, see Wolfgang Kasper, *The Political Economy of Global Warming, Rent Seeking and Freedom* (2007) International Policy Network: London; and Jonathan Baert Wiener, "On the Political Economy of Global Environmental Regulation" 87 *Georgetown Law Journal* (1999), pp.749–794.
 67. On this, see Paul Rubin, "Why Is the Common Law Efficient?" 6 *Journal of Legal Studies* (1977), pp.51–63.
 68. Richard Posner, "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)" 3 *Supreme Court Economic Review* (1993), pp.1–41.
 69. See Jean d'Aspremont, Contemporary International Rule-Making and the Public Character of International Law NYU Global Law Working Paper Series (2006).
 70. See Christine Jolls, Cass R. Sunstein, and Richard Thaler, "A Behavioural Approach to Law and Economics" 50 *Stanford Law Review* (1998) 1471–1550. Jolls, Sunstein, and Thaler argue that while utility-maximization is a good tool to understand human decision-making, what constitutes utility-maximization should go beyond the narrow confines of rational choice theory to embrace the concept of people as having bounded self-interest in that they take decisions with wider society in mind and not just their own narrow preferences.
 71. Posner, "What Do Judges and Justices Maximize?" pp.1–41.
 72. Dunstan Wai has challenged the view that liberal conceptions of human rights were alien to Africa prior to the birth and export of the western human rights movement Wai's

assertion is that authoritarianism of the immediate postcolonial era in Africa was inconsistent with the spirit and practice of traditional African political systems and that rather, authoritarian rule is traced to the colonial legacies and reinforced by underdevelopment. See Dunstan M. Wai, "Human Rights in Sub-Saharan Africa" in Adamantia Pollis and Peter Schwab (eds.), *Human Rights: Cultural and Ideological Perspectives* (1979), pp.115–146. Wai describes process for the exercise of civil and political rights in pre-colonial society including constraints on the abuse of executive power and the right to participate in decision making. This position thus challenges the conception touted by some scholars that notions of civil and political liberties were alien to traditional African society.

73. See Howard Gillman, "What's Law Got to Do With It? Judicial Behaviouralists Test the 'Legal Model' of Judicial Decision Making" 26 *Journal of Law and Social Inquiry* (2001), pp.478–504.
74. See George E. Downs, Kyle W. Danish, and Peter N. Barsboom, "The Transformational Model of International Regime Design: Triumph of Hope or Experience?" 38 *Columbia Journal of Transnational Law* (1999–2000), pp.465–514.
75. *Ibid.*, p.472.
76. *Ibid.*, p.477.
77. *Ibid.*, pp.482–488.

Three The African Commission and Its Treatment of Economic, Social, and Cultural Rights

1. See, African Charter on Human and Peoples' Rights, preamble.
2. For a discussion of the issues arising in respect of the justiciability or not of collective rights, see Eric C. Christiansen, "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court," 38 *Columbia Human Rights Law Review* (2007), pp.321–386. For an introduction to economic, social and cultural rights see Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development in International Law* (1998), Oxford University Press: Oxford; and Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2009), Hart Publishing: Oxford.
3. See Issa G. Shivji, *The Concept of Human Rights in Africa* (1989) London: Codesria.
4. See generally, *ibid.*, Chapter 3.
5. When broken down, Shivji sees the right of self-determination as containing the following: equality of all peoples and nations; the right of colonized peoples to independence and formation of their own sovereign states; the right of oppressed nations to self-determination up to and including the right to secession; right of all peoples to culture; freedom of all peoples from alien subjugation domination and exploitation; and the right of all peoples to determine democratically their own socioeconomic and political system of governance and government. *Ibid.*, p.80.
6. *Ibid.*, p.83.
7. Shivji notes that even in the number of articles devoted to collective rights there is a bias, when compared with civil and political rights. He states that points out that the Charter has only six articles on peoples' rights out of a total of twenty-six articles on rights as a whole and even here half of the peoples' rights are mere expressions or statements of principle such as the right to equality, the right to existence and the right to

- national and international peace and security. The other three articles grant rights to people but make them exercisable by the State. *Ibid.*, pp.95–95.
8. See Makau Mutua, “Human Rights in Africa: the Limited Promise of Liberalism,” 51 *African Studies Review* (2008), pp.17–39.
 9. *Ibid.*, p.22.
 10. *Ibid.*, pp.22–23.
 11. *Ibid.*, p.23. However, see Mary Ann Glendon, “The Forgotten Crucible: the Latin American Influence on the Universal Human Rights Idea,” 16 *Harvard Human Rights Journal* (2003), pp.27–39. Glendon has a position opposite to Mutua. She avers that Latin American influences prevented the UDHR from turning into an excessively individualistic human rights document that would have reflected the preferences of just the individualistic and libertarian forces that were determined to shape the UDHR. The Latin American countries were the largest single bloc in the United Nations (UN) conference and they had been oppressing for an international human rights treaty in 1938, in between the collapse of the League of Nations and the creation of the UN. Thus they did not come to the drafting and negotiating table as naïve novices in international diplomacy and negotiations. After the UN was formally established the Latin American delegates continued to articulate and press their agenda in the Human Rights Commission. They did have some success as they managed to have the preamble to the UDHR affirm that all rights it contained applied to women as well as men. They also managed to have Article 23 written to state that the needs of families were a part of the right to just and favorable compensation.
 12. See Mutua, “Human Rights in Africa: The Limited Problem of Liberalism,” *supra*, pp.28–29.
 13. *Ibid.*, p.30
 14. *Ibid.*
 15. *Ibid.*, p.34.
 16. See Shedrack C. Agbakwa, “Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights” 5 *Yale Journal on Human Rights and Development Law Journal* (2002), pp.177–216, p.190.
 17. *Ibid.*
 18. *Ibid.*, p.191.
 19. *Ibid.*, p.204.
 20. See Philip Cerny, “Globalization and the Changing Logic of Collective Action” 49 *International Organization* (1995), pp.595–625. Neoliberalism has complicated the provision of public goods. Stemming from the so-called Washington Consensus, neoliberalism implied a retreat by the state from its traditional function of providing public goods. Africa in particular, was drawn into this current of economic and political thought and the adoption of the African Charter coincided with this period in global political economy when the provision of public goods by governments was under severe attack if not completely circumscribed. See John Williamson, “What Should the World Bank Think about the Washington Consensus?” 15 *World Bank Research Observer* (2000), pp.251–264.
 21. See Cerny, “Globalization and the Changing Logic of Collective Action,” *supra*, pp.597–598.
 22. For a research on this issue, see Joseph Mensah (ed.) *Neoliberalism and Globalization in Africa: Contestations on the Embattled Continent* (2009) Palgrave Macmillan: Basingstoke.
 23. For example, see E. Osei Kwadwo Prempeh, “Anti-Globalization Forces, the Politics of Resistance, and Africa” 34 *Journal of Black Studies* (2004), pp.580–598.
 24. See Agbakwa, “Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights” *supra*, p.193.

25. See Chidi Anselm Odinkalu, "Analysis of Paralysis or Paralysis by Analysis?: Implementing Economic, Social and Cultural Rights under the African Charter on Human and People's Rights," 23 *Human Rights Quarterly* (2001), pp.327–369, especially at pp.358–362.
26. On incomplete contracts in international law see the following Alex Stone Sweet, *The Judicial Construction of Europe* (2004) Oxford University Press: Oxford, pp.24–25; Joel P. Trachtman, "The Domain of WTO Dispute Resolution" 40 *Harvard International Law Journal* (1999), pp.333–377; and Alexander Keck and Simon Schropp, *Indisputably Essential: The Economics of Dispute Settlement Institutions in Trade Agreements* (2007), World Trade Organization Staff Working Paper (available at http://www.wto.org/english/res_e/reser_e/ersd200702_e.pdf) last visited July 23, 2009.
27. On the possibility of defection from obligations in international law, see Kenneth W. Abbot, "The Trading Nation's Dilemma: The Functions of the Law of International Trade," 26 *Harvard International Law Journal* (1985), pp.501–525.
28. See the following: *A Study of New Ways and Means of Promoting Human Rights with Special Attention to the Problems and Needs of Africa*, October 23–November 5, 1973; UN Doc. ST/TAO/HR/48 (1973); *Seminar on the Establishment of Regional Human Rights Commissions on Human Rights with Special Reference to Africa*, UN Doc. ST/HR/SER.A/4, 1979; *Seminar Series on the Creation of Regional Human Commissions on Human Rights with Regard to Africa* UN Doc.ST/TAO/38 (1970). *Seminar Series on Human Rights in Countries in Process of Development*, Dakar, Senegal, February 8–22, 1966, UN.Doc. ST/TAO/HR/25 (1966); and *Report of the African Conference of African Jurists on The African Legal Process and the Individual*, Addis Ababa, Ethiopia, 19–April 23, 1971, UN Doc. E/CN.14/521, June 28, 1971.
29. See Ahmed Motola, "Non-Governmental Organizations in the African System" in Malcolm Evans and Rachel Murray (eds.), *The African Charter on Human and Peoples' Rights* (2002), Cambridge University Press: Cambridge, pp.246–279, p.249.
30. *Ibid.*
31. This kind of activity is called rent-seeking and in essence it takes place when basic thesis of rent-seeking behavior is that people acting individually, or together, seek to manipulate legal and political processes with the objective of creating an environment which enables them to extract transfers of wealth outside the normal process of voluntary market exchange. See G. Tullock, "The Welfare Costs of Tariffs, Monopolies and Theft," 5 *Western Economic Journal* (1967), pp.224–232; and A.O. Krueger, "The Political Economy of the Rent-Seeking Society" 64 *American Economic Review* (1974), pp.291–303.
32. See Todd Zywicki, "Baptists? The Political Economy of Environmental Interest Groups" 53 *Case Western Reserve Law Review* (2002), p.315.
33. For example, under the ECHR, there have been only 21 inter-state applications have been filed in 13 cases regarding 7 situations complaints in more than 50 years of the Convention's existence. See David Weissbrodt and Connie de la Vega, *International Human Rights Law: an Introduction* (2007), University of Pennsylvania Press: University Park, p.316. The African Charter is yet to see any inter-state complaints at all.
34. See Mancur Olson Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (2nd ed. 1971) Harvard University Press: Cambridge, Massachusetts. To date, in respect of collective rights, only two communications have been from a private individual, the case of *Annette Pagoule (on behalf of Aboulaye Mazou) vs. Cameroon* African Commission on Human and Peoples' Rights Communication No.30/90 (1997), and *Aturu vs. Nigeria*, African Commission on Human and Peoples' Rights Communication No. 72/92 (1994).
35. In some instances, individuals will act "irrationally" and so defeat the theory underpinning collective action. See Frank B. Cross, "In Praise of Irrational Plaintiffs," 86 *Cornell*

- Law Review* (2000), pp.1–32. We have argued elsewhere how this sort of public interest action can animate treaty systems that are not operating to the satisfaction of the parties. See Kofi Oteng Kufuor, *The Institutional Transformation of the Economic Community of West African States* (2006) Ashgate: Aldershot, Chapter 5. Also, the organizational advantages that large groups lack are minimized somewhat on account of modern technology. See Arthur Lupia and Gisela Sin, “Which Public Goods Are Endangered?: How Evolving Communication Technologies Affect the Logic of Collective Action,” 117 *Public Choice* (2003), pp.315–331.
36. See Thomas Franck, “Legitimacy in the International System” 82 *American Journal of International Law* (1988), pp.706–759.
 37. *Ibid.*, p.713. There is the view that states do not deliberately avoid their international commitments. Noncompliance is thus not always the consequence of a disregard for international law. Instead, states fail to comply with their obligations because they are uncertain about their obligations. See Abram Chayes and Antonia Chandler Chayes, “On Compliance” 47 *International Organization* (1993), pp.175–205.
 38. See Franck, “Legitimacy in the International System,” *supra*, pp.713–714.
 39. See African Charter, *supra* Article 16.
 40. See *Media Rights Agenda & Others vs Nigeria*, African Commission on Human and Peoples’ Rights Communication Nos. 105/93,128/94, 130/94, and 152/96 (1998).
 41. *Ibid.*, paras 90–91.
 42. See *International Pen, Constitutional Rights Project, Interrights on Behalf of Ken Saro Wiwa Jr and Civil Liberties Organization vs Nigeria*, African Commission on Human and Peoples’ Rights Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998).
 43. *Ibid.*, para. 112.
 44. See *Malawi African Association & Others vs. Mauritania*, African Commission on Human and Peoples’ Rights, Communication Nos. 54/91, 61/91, 98/93, 164/97, and 210/98 (2000).
 45. *Ibid.*, para. 122.
 46. See *Purohit and Moore vs. The Gambia*, African Commission on Human and Peoples’ Rights, Communication No. 241/2001 (2003).
 47. See generally *ibid.*, paras 3–9.
 48. *Ibid.*, para. 80.
 49. *Ibid.*,
 50. *Ibid.*, para. 81.
 51. *Ibid.*, para. 83.
 52. See findings of the African Commission, *ibid.* In its defense, the Gambia drew to the Commission’s attention that it was aware of the problems with the LDA and had already taken administrative measures to complement and reform its outdated aspects. The Commission, however, was of the view that measures already taken were insufficient as individual rights and freedoms were at stake. *Ibid.*, para. 85.
 53. For a general introduction to the right of self-determination, see the following: Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (2007) Oxford University Press: Oxford; and Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: the Accommodation of Conflicting Rights* (1996), University of Pennsylvania Press.
 54. Notable in the ongoing quest for self-determination in Africa include the following: the armed struggles in the Cabinda enclave which seeks independence from Angola, the Casamance Region which seeks independence from Senegal, and Somaliland which seeks recognition as an independent state after it broke away from Somalia.
 55. See comments by Commissioner Isaac Nguema in The African Commission on Human and Peoples’ Rights, Examination of State Reports, Libya-Tunisia-Rwanda, 9th Session,

- March 1991, available at <http://www1.umn.edu/humanrts/africa/communiques.html> (last visited July 23, 2009). There is also the opinion that even if self-determination applies to peoples after decolonization, said rights in the Charter are not legal rights at all; instead they are just statements of aspirations of peoples. See the following, Ebow Bondzie-Simpson, "A Critique of the African Charter on Human and Peoples' Rights" 31 *Howard Law Journal* (1988), pp.643–665; p.657; and Thio Li-Ann, "Battling Balkanization: Regional Approaches toward Minority Protection Beyond Europe" 43 *Harvard International Law Journal* (2002), pp.409–468.
56. See U. Oji Umzurike, *The African Charter on Human and Peoples' Rights* (1997) Martinus Nijhoff: The Hague; Boston; London, Chapter 5. Umzurike was Chairman of the African Commission at the Commission's 9th Ordinary Session in 1989.
 57. See Robert McCorquodale, "Self-Determination beyond the Colonial Context and its Potential Impact on African" 4 *African Journal of International and Comparative Law* (1992), pp.592–608.
 58. See *Katangese Peoples' Congress vs Zaire* African Commission on Human and Peoples' Rights Communication No. 75/92 (1995).
 59. *Ibid.*, para. 3.
 60. *Ibid.*, para. 4.
 61. *Ibid.*
 62. *Ibid.*, paras 5–6.
 63. See *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs Nigeria*, African Commission on Human and Peoples' Rights Communication No. 155/96 (2001). For a good piece of research on this case, expanding on its implications, see Justice C. Nwobike, "The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Centre (SERAC) and Centre for Social and Economic Rights v Nigeria," 1 *Journal of African Legal Studies* (2005), pp.129–146.
 64. The Commission noted this and used this opportunity to stress the significant role played by NGOs in filing complaints alleging violation of the Charter's rights. The Commission pointed out that the complainants are not in any way linked to the people on whose behalf they are alleging a violation of the Charter. Thus the SERAC case reaffirms the crucial role of NGOs in driving the Charter. See *Social and Economic Rights Action Centre and the Centre for Economic, Social and Cultural Rights vs. Nigeria*, *supra*, para. 49.
 65. *Ibid.*, para. 1.
 66. *Ibid.*, para. 2.
 67. *Ibid.*, para. 3.
 68. *Ibid.*, para. 68.
 69. *Ibid.*
 70. See the following: *Malawi African Association and Others vs Mauritania*, African Commission on Human and Peoples' Rights Communication Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000); *Kazeem Aminu vs. Nigeria*, African Commission on Human and Peoples' Rights Communication No.205/97 (2000); *Forum of Conscience vs. Sierra Leone*, African Commission on Human and Peoples' Rights Communication No. 223/98 (2000); *Mouvement Burkinabe des Droits de l' Homme et des Peuples vs. Burkina Faso*, African Commission on Human and Peoples' Rights Communication No. 204/97 (2001); *Achuthan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, African Commission on Human and Peoples' Rights Communication Nos. 64/92, 68/92 and 78/92 (1995).
 71. *Ibid.*, See *Social and Economic Rights Action Centre and Centre for Economic, Social and Cultural Rights vs. Nigeria*, *supra*, para. 60.

- 72. Ibid., para. 61.
- 73. Ibid.
- 74. Ibid., para. 64.
- 75. Ibid., para. 65.

Four System Evolution through the African Commission's Rules of Procedure

1. For a study of these perspectives on rules of procedure see Jan Kolasa, *Rules of Procedure of the United Nations General Assembly: A Legal Analysis* (1967) Wrocław: Zakład Narodowy im. Ossolińskich.
2. See H.L.A. Hart, *The Concept of Law* (1961) Clarendon Press: Oxford, pp.91–92.
3. See Rules of Procedure of the African Commission on Human and Peoples Rights (adopted Dakar, Senegal February 13, 1988), in *First Annual Activity Report of the African Commission November 1987–April 1988*, Annex IV, p.13. Under the Charter the Commission shall lay down its rules of procedure. See African Charter, *supra*, Article 42 (2).
4. See, *Rules of Procedure of the African Commission on Human and Peoples Rights* (adopted October 6, 1995), available at <http://hrlibrary.ngo.ru/africa/rules.htm> (last visited July 25, 2009).
5. See, Anselm Chidi Odinkalu, “Proposals for Review of the Rules of Procedure of the African Commission of Human and Peoples’ Rights” 15 *Human Rights Quarterly* (1993), pp.533–548.
6. See Rachel Murray, “Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples’ Rights” 46 *International and Comparative Law Quarterly* (1997), pp.412–434.
7. See Vincent Nmehielle, *The African Human Rights System: Its Laws, Practices and Institutions* (2001) Kluwer Academic: The Hague, pp.220–222.
8. On its promotional role and the impact of the same, see Victor Dankwa, “The Promotional Role of the African Commission on Human and Peoples’ Rights,” in Malcolm D. Evans and Rachel Murray, *The African Charter on Human and Peoples’ Rights: the System in Practice 1986–2000*, (2002) Cambridge University Press: Cambridge, pp.335–352.
9. On site visits can raise the profile of human rights issues. By making people, national and internationally, aware of a particular human rights situation, the onsite visit can help mobilize resistance to human rights abuses. See Joan Fitzpatrick, “States of Emergency in the Inter-American Human Rights System,” in David J. Harris and Stephen Livingston (eds.) *The Inter-American System of Human Rights* (1998) Clarendon Press: Oxford, pp.371–394, 379–380.
10. See Julia Harrington, “Special Rapporteurs of the African Commission on Human and Peoples’ Rights” and Malcolm Evans and Rachel Murray, “The Special Rapporteurs in the African System” in Evans and Murray, *The African Charter on Human and Peoples’ Rights*, pp.280–304.
11. It is a normal practice of the Commission to adopt resolutions at the end of its sessions. A collection can be found in Rachel Murray and Malcolm D. Evans (eds.) *Documents of the African Commission on Human and Peoples’ Rights* (2009) Hart Publishing: Oxford.
12. The African Charter mandates that Commissioners should be chosen for, *inter alia*, their competence in human rights with a particular preference for those with legal experience. See African Charter, *supra*, Article 31 (1).

13. See Ahmad Motola "Non-Governmental Organizations in the African System" in Malcolm Evans and Rachel Murray (eds.) *The African Charter on Human and Peoples' Rights*, supra, pp.246–279,
14. See Kenneth A. Shepsle and Barry R. Weingast, "Positive Theories of Congressional Institutions" 19 *Legislative Studies Quarterly* (1994), pp.149–179; and Arthur Denzau and Robert Mackay, "Gatekeeping and Monopoly Power of Committees" 27 *American Journal of Political Science* (1983), pp.740–762.
15. This Committee is established under the African Charter on the Rights and Welfare of the Child, (adopted July 1990, entered into force November 29, 1999); See Article 32.
16. See Kenneth A. Shepsle and Barry R. Weingast, "When Do Rules of Procedure Matter?" 46 *Journal of Politics* (1984), pp.206–221.
17. See Murray, "Decisions of the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights," supra, p.416.
18. See Rosemary Sandford, "International Environmental Treaty Secretariats: Stage Hands or Actors?" in *Green Globe Yearbook of International Co-operation on Environment and Development* (1994), pp.17–29, p.17. See also generally, Abram Chayes, Antonia Handler Chayes and Ronald B. Mitchell, "Managing Compliance: A Comparative Perspective" in Edith Brown Weiss and Harald Karan Jacobson (eds.) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998) MIT Press: Cambridge, Massachusetts, pp.36–62
19. See Sandford, "International Environmental Treaty Secretariats," supra, pp.17–18.
20. The ECHR, for example, made explicit that the European Commission could entertain communications from individuals. See ECHR, supra Article 34.
21. See 1988 rules of procedure, supra, rule 114 (2).
22. Controversies about the AU's failure to fully censure governments of Sudan and Zimbabwe, for example, are indications of this.
23. See 1988 rules of procedure, supra, rule 101 (1).
24. See 1995 rules of procedure, supra, rule 102.
25. See 1988 rules of procedure, supra, rule 103 (1) (d, f, and g).
26. *Ibid.*, para. 2.
27. See 1995 rules of procedure, supra, rule 104.
28. See 1995 rules of procedure, supra, rule 23 (d).
29. See Constitutive Act of the African Union, Article 30 (1) and (2). The Chairperson of the African Union Commission replaces the Secretary-General of the OAU. In the opinion of some observers the interpretation of the rules and the realization that there is a domination of the secretariat by the OAU implied that there was not going to be a separate secretariat for the Commission and that the OAU, as part of its state-centric treaty objectives, intended to keep the Commission under tight control by refusing to allow it a separate secretariat. See Odinkalu, "Proposals for Review of the Rules of Procedure of the African Commission on Human and Peoples' Rights," supra.
30. See 1988 rules of procedure, supra, Rule 22 (1).
31. *Ibid.*, paras 2–5.
32. *Ibid.*, rule 6.
33. See 1995 rules of procedure, supra, rule 6.
34. *Ibid.*, rule 10.
35. See 1988 rules 28 (1) and (2).
36. *Ibid.*, rule 28 (2).
37. *Ibid.*, rule 32.
38. See 1988 rules, supra, rule 32.
39. See African Charter, supra, Article 59. The 1988 rules coupled with Article 59 did not just undermine the work of the Commission, but also violated the spirit of Article 45 of the

- Charter by preventing the efficient performance of the Commission's functions. The confidentiality rule works against the Commission's ability to secure expert assistance for the performance of its functions. It also works against the use of amicus briefs. See Odinkalu, "Proposals for Review of the Rules of Procedure of the African Commission," *supra*,
40. See 1988 rules, *supra*, rule 105.
 41. *Ibid.*, rule 32.
 42. *Ibid.*, rule 79.
 43. See 1998 rules, *supra*, rule 73.
 44. *Ibid.*, rule 74 (1) (a).
 45. *Ibid.*, para. (b).
 46. *Ibid.*, rule 75.
 47. *Ibid.*, rule 76.
 48. See Odinkalu, "Proposals for Review of the Rules of Procedure of the African Commission on Human and Peoples' Rights," *supra*.
 49. *Ibid.*, 1988 rules, *supra*, rule 77.
 50. See 1995 rules of procedure, *supra*, rule 72.
 51. *Ibid.*
 52. *Ibid.*, rule 108
 53. See 1988 rules of procedure, *supra*, rule 106.
 54. *Ibid.*, rule 99.
 55. See African Charter, *supra*, Article 51 (2).
 56. *Ibid.*, Article 46.
 57. See Nmehielle, *The African Human Rights System*, *supra*, p.232.
 58. See 1988 rules of procedure, *supra*, rule 114 (1) (b).
 59. *Ibid.*, para. 3 (b).
 60. See 1988 rules of procedure 14 (3) (b). Also see African Charter, *supra*, Article 47 which states that inter-state communications should be based on a belief that provisions of the Charter have been violated; by inference, the same applies to Article 55 communications.
 61. See 1995 rules of procedure, *supra*, rule 116.
 62. See AU Constitutive Act, *supra*, Article 3 (1) (c).
 63. See 1998 rules of procedure, *supra*, rule 114 (3) (e). The Charter also had the same position. See African Charter, *supra*, Article 56 (4).
 64. See Murray, "Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights," *supra*, pp.421–422. In *Sir Dawda K. Jawara v The Gambia* the Commission reinforced its role as a redrafter of the Charter. In this communication, and in its response to the plaintiff's submission, the defendant state argued that the petition relied on information sourced exclusively from the news media and that this was contrary to Article 56 (4) of the African Charter. The Commission refused to be constrained by this argument. And it argued that while it did, generally, have reservations about ignoring Article 56 (4) it did stress the important role that the media played in exposing genocide in Rwanda, and human rights abuses in Burundi, the Congo, and Zaire. The Commission thus stated that the burden that the complainant is required to discharge can be lightened if the information from the mass media can be verified. In effect, we can claim here that the "exclusively" barrier of 56 (4) has been lowered if not removed completely and plaintiffs can submit petitions based solely on mass media reports and that the Commission will not reject them out of hand. See *Sir Dawda K. Jawara v The Gambia* (2000) African Commission on Human Rights Communication Nos.147/95 and 149/96.
 65. Before the 1995 rules of procedure were adopted, the African Commission, the Association of Tunisian Journalists, International Organisation of Journalists and the

- UN Centre for Human Rights organized a conference on the theme “the Journalist and Human Rights in Africa” and here the participants acknowledged the role of the media in publicizing large scale human rights violations and thus called for international support for the African Commission to implement a durable and large scale information strategy allowing the African media to publicize the African Charter. The conference also appealed to journalists and the media to monitor international action in the area of human rights and ensure that these rights are respected and that the regimes in place comply with them as pledged in ratifying the relevant international conventions and the African Charter. See Final Report of the African Conference on the “Journalist and Human Rights in Africa,” (October 31–November 1, 1992) reprinted in the Sixth Annual Activity Report of the African Commission 1992–1993, available at http://www.chr.up.ac.za/hr_docs/African/docs/other/other14.doc (last visited July 27, 2009).
66. See *John D. Ouko v Kenya*, African Commission on Human and Peoples’ Rights Communication No.232/99, para. 19.
 67. See Nmehielle, *The African Human Rights System: its Laws, Practices and Institutions*, supra, p.222.
 68. Ibid.
 69. Ibid.
 70. See 1995 rules of procedure, supra, rule 40 (1) and (2).
 71. See 1998 rules of procedure, supra, rule 109.
 72. Ibid., rule 111.
 73. See 1995 rules of procedure, supra, rule 121.

Five The Fragmentation of the African Human Rights System

1. See Laurence R. Helfer, “Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Law Making” 29 *Yale Journal of International Law* (2004), pp.1–83.
2. For an introduction to new regionalism and how it is distinct from old regionalism, see Fredrik Soderbaum, “Introduction: Theories of New Regionalism” in Fredrik Soderbaum and Timothy M. Shaw (eds.) *Theories of New Regionalism: a Palgrave Reader* (2003) Palgrave Macmillan: New York, pp.1–21.
3. Regional integration within SADC and ECOWAS has been led by these two countries respectively. They have provided the incentives to integrate, through their large markets, and they have given these bodies an added purpose through, for instance military action in civil conflicts. On South Africa’s role, see Chris Alden and Mills Soko, “South Africa’s Economic Relations with Africa: Hegemony and Its Discontents,” 43 *Journal of Modern African Studies* (2005), pp.367–392. For a study of Nigeria in West Africa see Katharina Pitcher Coleman, *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (2007) Cambridge University Press: Cambridge, especially Chapter 3.
4. See Helfer, “Regime Shifting,” supra, p.54.
5. We saw this in chapters two and four in particular of this book.
6. See Gunther Teubner and Andreas Fischer-Lescano, “Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” 25 *Michigan Journal of International Law* (2004), pp.999–1046, pp.1004–1005.

7. This lack of harmony is not a new development. In the negotiations leading up to the adoption of the OAU Charter. See generally, Jon Woronoff, *Organizing African Unity*, supra. The tensions between members of this group were such that the overthrow of a government in one camp caused much satisfaction among the members in the other camp. See Kufuor, "The OAU and the Recognition of Governments in Africa: Analyzing its Practice and Proposals for the Future," supra. Adjacent to this process was what has been called the contest for organizational supremacy as the OAU struggled with OCAM for domination as the over-arching regional entity committed to representing the hopes and objectives of Africa.
8. The only members of the OAU that had maintained consistent respect for individual liberties were Botswana and Mauritius. All the other members, at some time in their political development, had authoritarian, in some instances tyrannical, regimes. However, Botswana and Mauritius were never powerful in terms of shaping the AU's agenda and thus their preferences were never expressed in the African Charter.
9. See African Charter for Popular Participation in Development and Transformation (adopted February 16, 1990, Arusha, Tanzania)
10. Competition generally, as globalization draws together political and economic systems, can produce a race to the top, instead of the much feared race to the bottom that tends to be main argument advanced by interests scared of increasing global competition. Enthusiasts of globalization, while claiming that there is very little evidence of a race to the bottom, do insist that competitive process can add value to the life chances of the poor and less-privileged. See generally, Jagdish Bhagwati, *In Defense of Globalization* (2005) Oxford University Press: New York.
11. A race to the top is not always going to be the outcome of regime fragmentation. Sometimes fragmentation can set in motion rivalries that will breed inefficiencies. See Helfer, "Regime Shifting."
12. We do not have a decisive date or period for when the Commission asserted itself and began to break from the constraints of the African Charter as drafted by the states parties. However, the gradual reform of the rules of procedure must have been a decisive moment. The first significant change instituted by the Commission under the umbrella of its rules of procedures to enable it break from the constraints of the African Charter and the OAU was when at its third ordinary session it empowered itself to accept communications from individuals who allege a violation of one of the Charter rights by a State. See chapter four.
13. The larger the number of players each with the power to paralyze decision making, the greater the likelihood of the failure to reach consensus on the development of regional human rights laws and norms. Decision making under the OAU's umbrella then easily came to resemble the dilemmas arising in an anti-commons system. An anti-commons is the opposite of a common system of property ownership. While in a commons system, as popularized by Garret Hardin, there are no owners to a given property and this causes overuse, in an anti-commons there are too many owners each with the power to paralyze decision-making and thus prevent the optimal use of the property. As the rule on decision-making in an anti-commons require unanimity, this leads to suboptimal outcomes. See Michael Heller, *The Tragedy of the Anti-Commons: Property in the Transition from Marx to Markets*; 111 *Harvard Law Review* (1998), pp.621-688; See also Kofi Oteng Kufuor, "The Collapse of the Organization of African Unity: Lessons from Economics and History" 49 *Journal of African Law* (2005), p.132-144, especially pp.138-142.
14. For example, West Africa has a stronger tradition of human rights than North Africa. We can identify episodes of liberalism with respect for bills of rights at the national level in West Africa. For example, Ghana in 1957 to 1960, from 1969 to 1972, 1979 to 1981,

- and from 1992 to date has had a fairly robust system in place for the respect of human rights. The Gambia and Nigeria also have such episodes in the past. The same cannot be said for North African countries which, just after independence did away with the liberal systems bequeathed to them and have remained virtually authoritarian to date.
15. The preamble to the OAU Charter asserts that the parties are, "Desirous that all African States should henceforth unite so that the welfare and well-being of their peoples can be assured." The AU Constitutive Act states that the states parties are "Inspired by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan Africanists in their determination to promote unity, solidarity, cohesion, and cooperation among the peoples of Africa and African States." See OAU Charter, *supra* and Constitutive Act of the AU, *supra* respectively.
 16. The African Charter reaffirms the pan-Africanist objectives of the OAU Charter. See African Charter, *supra*, preamble.
 17. Not only will repeated meetings enable the cross-fertilization of ideas on the pan-African agenda, such repeated interactions will also facilitate compliance with the various human rights instruments that African countries have drafted and adopted. Repetitive interactions help decision-makers' overcome the International Prisoners' Dilemma that tends to compound compliance with international obligations. See Kenneth W. Abbot, "The Trading Nations Dilemma," *supra* pp.506-507.
 18. See Helfer, "Regime Shifting," pp.58-59.
 19. The Conference aimed at contributing to the implementation of the UN Programme of Action for African Recovery and Development. In particular, the Arusha Conference was convened out of concern for the collapse of African economies in the 1980s, the lack of progress in realizing meaningful popular participation, and the allegation that there was ignorance about the importance of citizen participation for economic recovery and development. For an analysis of the Arusha Charter see, Kofi Oteng Kufuor, "The African Charter for Popular Participation in Development for Transformation: A Critical Review," 18 *Netherlands Quarterly of Human Rights*, no.1 (2000), pp.7-22.
 20. See African Charter for Popular Participation in Development and Transformation, *supra*, Article 11.
 21. *Ibid.*, Article 16.
 22. Africa's postcolonial reservation about allowing for open markets stemmed largely from their experiences as colonies of countries that had open market systems.
 23. See Arusha Charter, *supra*. Whether this role of the state entails it being more intrusive in economic life to achieve a specific end or whether it implies the state itself stepping back from economic activity and allowing its citizens to fill in any gap it creates is unclear.
 24. See Kufuor, "The African Charter for Popular Participation," *supra*, pp.15-16.
 25. *Ibid.*
 26. *Ibid.*
 27. See African Charter, *supra*, preamble.
 28. *Ibid.*, Articles 27-29
 29. See Arusha Charter, *supra*; and see Kufuor, "The African Charter for Popular Participation in Development and Transformation," *supra*.
 30. See Arusha Charter, *supra*.
 31. See Kufuor, "The African Charter for Popular Participation," pp.17-18.
 32. *Ibid.*
 33. See *Sir Dauda K. Jawara v The Gambia*, African Commission on Human and Peoples' Rights Communication Nos. 147/95 and 149/95 (2000).
 34. See Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government AHG/Decl.5 (XXXVI) 2000. This has served as the cornerstone of

- the AU's new approach to the overthrow of governments. While in the past the OAU did have some concern for the overthrow of governments and, on occasion refused to recognize governments that came to power through unconstitutional means, generally speaking the OAU avoided internal changes of government by unconstitutional means, declaring them to be internal matters that it had no jurisdiction over. It has since changed its position and has suspended Madagascar and Mauritania on the grounds that incumbent governments had been overthrown by unconstitutional means.
35. See CEDGA, *supra* Article 2 (1).
 36. *Ibid.*, para. 3.
 37. *Ibid.*, para. 6.
 38. *Ibid.*, para. 8.
 39. *Ibid.*, para. 10.
 40. *Ibid.*, Article 3 (1)
 41. *Ibid.*, para.3
 42. *Ibid.*, para. 4
 43. *Ibid.*, para. 11.
 44. *Ibid.*, Article 17 (1).
 45. *Ibid.*, para. 2.
 46. *Ibid.*, para. 3.
 47. *Ibid.*, para. 4.
 48. *Ibid.*, Article 18 (1).
 49. Adopted at the first Ministerial Conference on Human Rights in Africa April 12–16, 1999 and reprinted in 11 *African Journal of International and Comparative Law* (1999), pp.352–357.
 50. *Ibid.*, Article 2
 51. *Ibid.*, Article 8 (b).
 52. *Ibid.*, Article 8 (e)
 53. *Ibid.*, Article 23 (13).
 54. See Protocol on the Establishment of an African Court on Human and Peoples' Rights, Article 6 (1).
 55. *Ibid.*, Article 8.
 56. See Kufuor, "The OAU and the Recognition of Governments in Africa," *supra*, pp.369–401 (pointing out that Nigeria's hosting of a meeting allowed it to influence the recognition of the Liberia's interim government under President Amos Sawyer. This was consistent with Nigeria's support for Sawyer during the Liberian conflict.)
 57. See African Charter, *supra*, preamble.
 58. In Africa, until the 1990s and the rise of new regionalism as a conceptual model, we only have a record of the Tribunal of the Common Market of East Africa sitting in on any cases. This tribunal of course was short-lived as the East African Community collapsed in 1977 after only ten years of existence. We have no evidence to indicate that it had jurisdiction over human rights issues and, even if it did, any were submitted to it at all.
 59. See Protocol Relating to Free Movement of Persons, Residence and Establishment, A/P/1/5/79, Articles 2&3.
 60. See Economic Community of West African States, Declaration A/DCL/1/7/91 of Political Principles of the Economic Community of West African States (adopted July 6, 1991).
 61. ECOWAS had actually premised its intervention in the Liberian conflict on the grounds that it had to prevent an armed seizure of power in that country. See Abiodun Alao, *The Burden of Collective Goodwill: the International Involvement in the Liberian Civil War* (1998) Ashgate: Aldershot. ECOWAS stressed the need for good governance and respect for human rights as part of its efforts at reconstructing postwar ECOWAS society. See Kofi

- Oteng Kufuor, "Developments in the Resolution of the Liberian Conflict" 10 *American University Journal of International Law and Policy* (1994), pp.373–396. Similar sentiments were expressed in ECOWAS restoration of constitutional rule in Sierra Leone.
62. ECOWAS adopted a Revised Treaty in 1993 to replace its founding 1975 Treaty. For analysis of these developments see Kofi Oteng Kufuor, *The Institutional Transformation of the Economic Community of West African States* (2006) Ashgate: Aldershot.
 63. See ECOWAS Political Principles, *supra*, preamble.
 64. *Ibid.*, paras 4–6.
 65. See Economic Community of West African States, Revised Treaty (adopted Cotonou, Benin, July 24, 1993)
 66. *Ibid.*, preamble.
 67. *Ibid.*, Article 4 (1) (g).
 68. See Charter of Fundamental Social Rights in SADC (adopted Dar-es-Salaam, Tanzania, August 26, 2003). For an analysis see Zolomphi Nkowane, "When Elephants Dance, the SADC Charter of Fundamental Social Rights, a Beacon of Hope of Confusion Compounded," 33 *Commonwealth Law Bulletin* (2007), pp.41–57.
 69. Article 4, paras a–i
 70. Article 6
 71. See Charter of Fundamental Social Rights, *supra*, Article 3.
 72. *Ibid.*, Article 4 (1) (a).
 73. *Ibid.*, para. (b).
 74. *Ibid.*, para. (c).
 75. *Ibid.*, para. (e).
 76. *Ibid.*, para. (i).
 77. This was one of the main reasons why the OAU was weak and eventually collapse. See Kufuor, "The Collapse of the Organization of African Unity" *supra*, pp.138–139. It would seem that with the introduction of rules on unconstitutional change, new governments are not guaranteed the right of entry to the AU.
 78. See Treaty Establishing the East African Community (adopted at Arusha, Tanzania, 1999)
 79. *Ibid.*, Article 3 (3) (b). This does not apply to the founding members, Kenya, Tanzania and Uganda. However, membership of subregional bodies tends to be fluid and other African states can apply to join provided they meet the geographical criteria and the conditions in Article 3 as well.
 80. See *Katabazi and 21 Others vs. Secretary General of the East African Community and Another* (November 1, 2007), East African Court of Justice.
 81. *Ibid.*
 82. See *Essien v Gambia and Another* (2007) African Human Rights Law Reports 131
 83. *Ibid.*, para. 9.
 84. *Ibid.*
 85. See *Mike Campbell (pvt) Ltd and Others vs Republic of Zimbabwe*, SADC Case (T) Case No.2/2007.

Six The Future Direction of the African Human Rights System

1. The Ordoliberals were a group of intellectuals who came to prominence in the 1930s. With some of their early proponents based at Freiburg University in Germany, the Ordoliberals argued for the constitutionalization of economies as a vital ingredient for

- economic development and prosperity. The early intellectuals who shaped the tradition included Walter Eucken, Franz Bohm, and Wilhelm Ropke.
2. See Wilhelm Ropke, *International Economic Order and Disintegration* (1960) Dordrecht: Reidel Publishing Co. (translated by Gwen Trinks, Joyce Taylor, and Cicely Kaufner), pp.74–75.
 3. Under Article 26, states parties have an obligation to allow the establishment and improvement of national human rights institutions. See African Charter on Human and Peoples Rights, Article 26.
 4. Here the African Commission is charged with the responsibility of encouraging national and local institutions concerned with human and peoples' rights. *Ibid.*, Article 45 (1) (a).
 5. Michael Crowder has questioned the true ideological commitment of the nationalist leaders to liberal conceptions of human rights. Thus just after independence it was not surprising that the postcolonial constitutions were dropped and replaced with models that allowed for legitimate authoritarian rule. The commitment to liberal democracy thereafter became the concern of opposition parties yet; the only party that managed to come to power as a consequence of the exercise of peoples' right to change their governments through the ballot box promptly became an authoritarian one. See Michael Crowder, "Whose Dream was it Anyway?: Twenty-Five Years of African Independence" 86 *African Affairs* (1987), pp.7–24, especially pp.18–20.
 6. See, for example, H. Kwesi Prempeh, "Africa's Constitutionalism Revival: False Start or New Dawn?" 5 *International Journal of Constitutional Law* (2007), pp.469–506 (explaining the collapse of liberal democracy and effort to revive the same in the 1990s).
 7. See *The Republic vs. Akosah* (1975) Ghana Law Reports, p.406.
 8. See *Labone Weavers Enterprise Ltd vs. Bank of Ghana* (1977) 2 Ghana Law Reports, p.156.
 9. For instance, in the view of some observers, South Africa has not been that insistent in tackling human rights abuses in neighboring Zimbabwe. Despite the view that it is the only country in the subregion capable of imposing sanctions on Zimbabwe as a means of coercing it to respect the rights of its citizens, in the wake of election violence and the seizure of land belonging to white farmers. See Miriam Prys, *Regions, Power and Hegemony: South Africa's role in Southern Africa*, paper presented at the Sixth Pan-European International Relations Conference, Turin September 12–15, 2007 (copy on file with the author), pp.6–7.
 10. While the point that the African Charter has no teeth is a valid point, it is perhaps a bit unjust to single it out for this regular attack as if it was (or still is) then only human rights treaty, or international treaty, that has this supposed defect. International law generally, tends not to assign enforcement powers to its treaties. Compliance is usually based on persuasion. This is not strange, as the international legal system is seen by leading scholars as a primitive system with no central government. See, for example, Hersch Lauterpacht, *The Function of Law in the International Community* (1933) Oxford University Press: Oxford, p.405. However, the absence of a central government does not mean there was no compliance with the law. For law without government in primitive societies see "Bruce Benson, Enforcement of Private Property Rights in Primitive Societies: Law without Government" 9 *Journal of Libertarian Studies*, pp.1–26.
 11. See Frans Viljoen and Lirette Louw, "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004" 101 *American Journal of International Law* (2007), pp.1–34.
 12. Partial compliance is not necessarily a reflection of the disagreement with a decision and thus a lackadaisical approach to compliance. Perhaps the order was ambiguous and thus the state genuinely felt it had complied with the decision. See Abram Chayes and Antonia Handler Chayes, "On Compliance" 47 *International Organization* (1993),

- pp.175–20, p.188. They argue that language often failed to expressly convey meaning and that drafters of treaties do not foresee many of its possible applications. We assert that this can be extended to court and tribunal decisions. This plausible explanation for noncompliance thus, most probably, explains the World Trade Organization Dispute Settlement provision on implementation of its Panel and Appellate Body Decisions. See World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (1995), Article 21 allows for the Dispute Settlement Body to monitor and keep under surveillance implementation of recommendations and rulings. Paragraph 5 acknowledges that there can be a disagreement over measures taken to comply with a ruling or recommendation.
13. See Viljoen and Louw, “State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights,” *supra*.
 14. *Ibid.*, pp.4–7.
 15. *Ibid.*
 16. On this see Andrew T Guzman, “A Compliance-Based Theory of International Law” 90 *California Law Review* (2002), pp.1826–1887, especially pp.1860–1872.
 17. See, Janet Koven Levit, “Bottom-Up International Lawmaking; Reflections on the New Haven School of International Law” 32 *Yale Journal of International Law* (2007), pp.393–420.
 18. This interpretation of why states comply with decisions of international tribunals takes us back to the concept of the logic of appropriateness that we saw in chapter three. Although we drew on it to explain the constitution of international orders, it can be used to explain compliance with their decisions.
 19. On the importance of this see Harold Hongju Koh, “Why Do Nations Obey International Law” 106 *Yale Law Journal* 91997), pp.2599–2659, especially p p.2643–2658.
 20. See Obiora Chinedu Okafor, *The African Human Rights System: Activist Forces and International Institutions* (2007) Cambridge University Press: Cambridge.
 21. *Ibid.* p.232.
 22. See Okafor, *The African Human Rights System*, *supra*, p.232.
 23. *Ibid.*, pp.233–234.
 24. See Constitution of the Republic of Benin (adopted December 2, 1990 [1991]) Cotonou: Onepi.
 25. Monist legal systems make no distinction between national and international law. Unlike dualist systems when a monist state accepts and ratifies a treaty, that treaty does not have to be incorporated into its national laws by way of an act of the legislature. Upon ratification at the international level, automatic incorporation is assumed.
 26. See Constitution of the Republic of Benin, *supra*, preamble.
 27. *Ibid.*, Article 7.
 28. See Anna Rotman, *Benin’s Constitutional Court: An Institutional Model for Enforcing Human Rights* (2003) *Beppress Legal Series Paper 104*. The Constitutional Court, Benin’s paramount court on constitutional matters has relied on the African Charter as a source for rights invoked before it, p.7, note 26.
 29. See *Dow vs. Attorney General* (1992) *Law Reports of the Commonwealth* (Constitutional and Administrative Law), p.623.
 30. *Ibid.*, p.656
 31. See *Inspector General of Police vs. All Nigeria Peoples Party* (2007) *Africa Human Right Law Reports*), p.179.
 32. *Ibid.*, p.187.
 33. This position was the result of a number of factors. See Kofi Oteng Kufuor, *The Institutional Transformation of the Economic Community of West African States* (2006) Ashgate: Aldershot.

34. See generally, Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (2002, 3rd ed.) Basingstoke: Palgrave Macmillan.
35. This was based on their view that after decades of colonial rule, they held dear their new found independence. Also, the international system was dominated by ex-colonial and imperial powers and thus engaging with this system required basic preconditions paramount of which was that African states were sovereign and would not compromise on this principle. Whether in practice this actually happened is open to discussion as repeatedly, African government protested their powerlessness in international relations and how more powerful states continued to meddle in their domestic affairs.
36. If non-state actors found any room it was to do with the tail-end of decolonization and the struggle against minority rule in the Southern part of the continent. The only time Africa came together on human rights issues on the continent was to deal with independence from colonial rule and on issues regarding South Africa and what was then Rhodesia. Thus although with decolonization came some degree of cooperation yet this still respected state sovereignty.
37. See David Held, "Democracy: From City-States to a Cosmopolitan Order?" supplementary chapter to David Held, *Models of Democracy* (2006), p.37.
38. The possible availability of these avenues is referenced for points raised by Cinneide; see Cinneide, "Human Rights and within Multi-Layered Systems of Constitutional Governance: Rights Cosmopolitanism and Domestic Pluralistic Tensions," supra. See also Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (June 9, 1998).
39. See Constitution of the Republic of South Africa, Act 108 (1996), Article 9 (3). For how this was possible see Carl F. Stychin, "Constituting Sexuality: the Struggle for Sexual Orientation in the South African Bill of Rights" 23 *Journal of Law and Society* (1996), pp.455-483; and Eric C. Christiansen, "Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process" 32 *New York University Journal of International Law and Policy* (2000), p.997-1058.
40. For instance, in 2008 Burundi outlawed homosexual acts between consenting adults. See International Gay and Lesbian Human Rights Commission, "Burundi: Government Moves to Criminalize Homosexuality; Activist Groups Express Outrage" available at <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease> (last visited August 3, 2009). Nigeria has also moved to criminalize the right to sexual orientation. It is proposing to adopt legislation which will have serious implications for homosexuals. A Bill placed before the National Assembly aims to forbid same-sex marriages whether civil or religious. The Bill also seeks to extend its scope to cover anyone who aids, assists, presides over, witnesses, or even caters for a same-sex marriage. In addition, the law will not recognize same-sex marriages contracted outside Nigeria and any such marriages will become null and void in Nigeria. Furthermore, homosexuals will be prevented from organization or forming associations to publicize or defend their lives. The right of organization is further forbidden as the law seeks to criminalize any organization that works on gay and lesbian issues, even if it does not do so overtly. Public displays that include homosexuals in them, even if the display is not organized primarily to advance the right to sexual orientation, becomes a criminal act. Homosexual literature that is published in anyway will also be a criminal act. Anyone who exercises his or her right to associate and work collectively with people to write and express ideas, to witness for and advocate on behalf of others, whether those others are actually gay, will have committed a crime. And finally, whether Nigerian citizens do these things in public or in private, they will be legally liable for them. See Uhuru-Wazobia, *Criminalizing Homosexuality the Nigerian Way* (February 12, 2008) available at <http://www/awid.org/eng/layout/set/print> (last visited August 3, 2009).

41. See Murray and Viljoen, "Towards Non-Discrimination on the Basis of Sexual Orientation," *supra*.
42. See the work of national homosexual organizations that we point out below.
43. See Murray and Viljoen, "Towards Non-Discrimination on the Basis of Sexual Orientation," *supra*.
44. See Murray and Viljoen, "Towards Non-Discrimination on the Basis of Sexual Orientation," *supra*.
45. *Ibid*.
46. See 43rd Ordinary Session: African Commission on Human and Peoples' Rights (ACHPR) Ezulwini, Kingdom of Swaziland, May 3–5, 3008 (copy on file with the author).
47. See 45th Ordinary Session of the Commission, Summary report on the NGO Forum held from May 9 to May 11, 2009, Gambia.
58. See African Commission on Human and Peoples' Rights, Communication No. 136/94 (1995). The communication was withdrawn by the author.
49. *Ibid*.
50. See *Free Legal Assistance Group v Zaire*, African Commission on Human and Peoples' Rights Communication No.25/89.
51. *Ibid*.
52. See *Kalenga vs. Zambia* African Commission on Human and Peoples' Rights Communication No.11/88.
53. See *Civil Liberties Organization v Nigeria*, African Commission on Human and Peoples' Rights, Communication No.67/92 (1994).
54. Other friendly settlement cases include Peoples' Democratic Organization for Independence and Socialism (PDOIS) vs. Gambia African Commission on Human and Peoples' Rights Communication No. 44/90; Modise vs. Botswana African Communication on Human and Peoples' Rights Communication No. 97/93.
55. See Lloyd Kuveya, *The Effectiveness and Propriety of Friendly Settlements in the African Regional System: a Comparative Analysis with the Inter-American and European Regional Systems*" (2006 unpublished LLM Dissertation submitted to the University of Pretoria), p.23.
56. There is the opinion that hardliners in countries where massive human rights abuses take place tend to hide behind nationalism to defend their positions.
57. *Ibid*. We should mention here that in instances of extremely egregious human rights violations, exposure is crucial and thus friendly settlements can help sweep such abuses under the carpet. There might be the pacification of the complainants but the long-term problems will persist. This is indeed a real fear especially when one considers atrocities perpetrated in countries such as the Sudan, *ibid*. Furthermore, no matter the commitment to broker friendly settlements on lines consistent with a given Charter, there is always the probability that power of the respondent party will skew the path of the settlement. Thus we could have a situation where the rules do not shape the final decision. See John H. Jackson, "The Crumbling Institutions of the Liberal Trade System" 12 *Journal of World Trade Law* (1978), pp.93–106 (where he delineates the differences between and implications of a rules-oriented adjudication of disputes and power-oriented adjudication of disputes).
58. See ECHR, *supra* Article 38.
59. See ACHR.
60. See ECHR, *supra* Article 38 (1) (b).
61. *Ibid*., Article 39.
62. *Ibid*., Article 38 (1) (a).
63. *Ibid*., Article 37 (1) (b).

64. See *Case of Saki v. Turkey*, European Court of Human Rights (Application No. 29359/95).
65. See ACHR *supra*, Article 48 (1) (f).
66. See Christina Cerna, "Commission Organizations and Petitions" in David Harris and Livingstone (eds.) *The Inter-American System of Human Rights* (1998) Oxford University Press: Oxford, p.65.
67. See ACHR, *supra*, Article 49.
68. Friendly settlements are an established practice in international dispute resolution. For example, this is the case under the World Trade Organization's Dispute Settlement Understanding and its predecessor the GATT. See *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* (1995), Article 4. The Torture Convention also provides for friendly settlements. The Convention establishes the Committee against Torture to mediate between disputing states. Parties are to negotiate with one another prior to either party referring the matter to the Committee. See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (1984) Article 21 (1).
69. As noted in the previous chapter, African countries have largely seen the value of a supranational system for the continent, be it either a quick move towards this system (as mooted at independence) or a gradual process suggested by some states also at independence. Whether they want this in regard to the protection of human rights is another question.
70. See for example, Treaty Establishing the East African Community, Articles 8 (2) and also Economic Community of West African States (Revised Treaty) Article 9 (4).
71. See Joseph Weiler, "The Community System: The Dual Character of Supranationalism," 1 *Yearbook of European Law* (1981), pp.267–306
72. We referred to the import of these cases in chapter one of our book.
73. See for instance, Laurence R. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes" 102 *Columbia Law Review* (2002), pp.1832–1911. Helfer sets out how the Commonwealth Caribbean countries have denounced their international human rights obligations and withdrawn for their treaty commitments all on the back of decisions by international treaty bodies that they viewed as unfavorable to their preferences. Eric Posner and John Yoo point out that independent tribunals or courts with supranational powers such as that of the European Court of Justice are actually bad and that the evidence supports their contention that dependent courts and tribunals, subject to the control of their principals tend to produce the best judgments and rulings. See Eric A. Posner and John C. Yoo, "Judicial Independence in International Tribunals" 93 *California Law Review* (2005), pp.1–74.
74. See Helfer, "Overlegalizing Human Rights," *supra*.
75. *Ibid*.
76. See, for example, Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (1998), Basingstoke: Macmillan, pp.135–141.
77. The most recent effort is captured in the Sirte Declaration (adopted in Libya, September 9, 1999).
78. The ability of decision-makers to take bold steps when unencumbered by social pressures generated by special interest groups is at the heart of the institutionalist theory we drew attention to in chapter one of this book. See Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities* (1982) Yale University Press: New Haven and London. Olson applies this theory to the transformation of postwar Germany and Japan. He posits that their rapid redevelopment was down to the fact that their societies had been so destroyed by the ravages of the war that in government efforts at rebuilding, there were no social forces capable of organizing and pressuring

government to adopt policies suitable for them but, most probably inimical to society at large. Our view on subregional courts stems from this.

79. See Kenneth W. Abbot, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, "The Concept of Legalization" (2000) 54 *International Organization*, pp.401–420.
80. *Ibid.*, p.401.
81. *Ibid.*, p.414.
82. *Ibid.*, p.415.
83. *Ibid.*, p.417.
84. The absence of a regional hegemon allows us to use the argument in chapter one to challenge the presumption that a hegemonic power is needed to jump-start the adoption of an international treaty and the creation of an organization as part and parcel of it. For general questions on the role of hegemonic powers see, Isabelle Grunberg, "Exploring the "Myth" of Hegemonic Stability," 44 *International Organization* (1990), pp.431–477.

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