

International Human Rights Law Enforcement Challenges in 21st Century Africa

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Abstract

Human rights. Other related subjects: International law, European Union; Africa Charter on Human and Peoples' Rights

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Introduction

Human rights law is a general notion which embraces rights that are attributed to individuals, groups, peoples and mankind. These rights have at one time or the other been asserted and denied, exercised and waived, violated and respected and above all, extensively discussed, interpreted and disputed in numerous contemporary societies and within international communities. However, despite the effects of human rights abuses to global security and development, the world still remain stuck in widespread violations of human dignity due to ineffective and weak enforcement. Because laws in themselves alone do not produce compliance without appropriate enforcement and supervision, the term 'human rights' is now widely used internationally given that people have for long been struggling for dignity, freedom, social justice and equality.

International Human Rights Law and Africa

The emergence of human rights law in the international sphere remains one of the most significant developments since the end of the Second World War.² The growth and expansion of international human rights law, truly, has been so remarkable that it has acquired an important position in legal studies. Although there is no consensus definition of human rights, it is mostly agreed that human rights are those rights one has by virtue of being human.³ With high concern over the observance of human rights which has witnessed the trial of many individual and corporate personalities, one can conclude that the world is not ready to have a repeat of the pre 1945 dark days of human rights abuses. The term 'Human Rights' appeared in the public domain for the first time in the years 1942 to 1944 in the course of the internal policy discussions in the United States on the subject of the principles on which the post-war organization would be based.⁴ It is due to the atrocities of the Second World War that human rights evolved and today, through the efforts of the United Nations, the universality of human rights is established and recognized in International law.⁵ These rights are generally presumed to be inalienable, universal, and inherent and must always be taken seriously.⁶ Human rights concept has its philosophical ancestry in the natural law school and may be seen as being synonymous with natural laws and natural rights. Human rights are natural born rights for every human being and not privileges and everyone is entitled to it without discrimination of any kind. To this end, human rights are at the forefront today for leaders, businesses⁷ and workers in the global economy⁸ given that the idea of human rights is directed not only against the state, but also indirectly against other individuals.⁹ Yet, human rights of the individual is still widely violated, neglected or abused despite its recognition and acceptance under international law in contemporary world.

Following the adoption of the Universal Declaration of Human Rights in 1948, the international and regional human rights systems have been fundamental in the definition and protection of human rights. It is essential that human rights should be protected by the rule of law. Without the maintenance of the rule of law, violations of rights occur. Also where serious violations of the human rights occur, disrespect for the law grows and undermine maintenance of public order. Given that international legal system is a system of sovereign and equal

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² Javaid Rehman, *International Human Rights Law: A Practical Approach*. (Pearson Education Limited, England, 2003) pg 1

³ Marie-Benedicte Dembour, *Who believes in Human Rights?* (Cambridge university press, UK, 2006) pg 1

⁴ Bronlie I, *Treaties and indigenous peoples: The Robb Lectures*. Brookfield, (Oxford: Clarendon Press, 1992) pg 35, cited in Ogbu, O. N., *Human Rights Law and Practice in Nigeria: An Introduction* (Enugu CIOJAP Publishers, 1999) p 3

⁵ Diana Ayton-Shenker, 'The challenge of Human rights and culture diversity' Available at < <http://www.un.org/rights/dpi1627e.htm>> accessed 05/05/2012

⁶ Peter Villiers, *Human rights: A practical guide for managers* (Kogan page limited, UK, 2001) pg 1

⁷ Companies have a responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others.

⁸ Michael Haas, *international Human Rights: A comprehensive Introduction*. (Routledge , London, 2008) 1

⁹ Daniel Friedmann and Daphne Barak-Erez, *Human Rights in Private Law* (Hart Publishing, USA, 2001) 42

states,¹ states reserve the enforcement rights under international law. Although the Articles contained in the United Nations Charter are legally binding on Member States, it however, failed to neither specify what these human rights entail nor ways of its implementation in Member States until 1948 adoption of the Universal Declaration of Human Rights (UDHR).² In general, this declaration lacks the binding force of a treaty; hence, leaving its enforcement at the mercy of the member states. However, as emphasised by the Charter of the United Nations, member states and the United Nations shall promote and encourage respect for human rights and fundamental freedom for all without any distinction.³ This, therefore, is a legal obligation excepted of every state without any exemption. In addition to the development of the substantive norms at the global level, procedures have been established to promote the implementation of these rights at numerous regional levels. Now as then, it may prove practically impossible for some poor states to feed, clothe, educate or provide healthcare for its citizens, though, not disputing that it has a direct responsibility for those actions. Yet, the clear inability of human rights system to deliver effectively on its promises is not, in many ways, surprising.

The adoption of Universal Declaration of Human Rights was followed by the creation of various regional instruments that address concerns of particular importance in the regional context.⁴ Each regional system has originated from shared interest and demand for establishing a framework for human rights enforcement and protection. For the African continent, such interest included safeguarding independence, collective security, territory integration and promoting solidarity.⁵ Today, the world has seen the gradual evolution of regional human rights arrangements. However, though most Africa nations were under colonial rule and many were not duly represented at the time of drafting and signing of the United Nations Universal Declaration of Human Rights, Independence restored the sovereignty of individual African States, while membership in the United Nations guaranteed their sovereign equality with other member states of the United Nations. Currently, Africa's participation can be arguably seen as a co-equal player in international legal norms. However, Umozurike correctly observed that human rights appeared to enjoy low esteem during the 1970s, particularly in Africa.⁶ This view was predicated on the open passiveness maintained by the former Organization of Africa Unity (OAU)⁷ in condemning human rights violations in a number of independent African countries by 'unduly emphasising the principle of non-interference in the internal affairs of the states'.⁸ There was upsurge of violence and gross violations of human rights due to constant conflict among states in pursuit of their sovereignty and independence. Though both UN and OAU during this period overlooked gross human rights violations of several despotic regimes around the world, numerous treaties were concluded at the global and regional levels creating mechanisms to stop impunity.⁹

Enforcement with respect to the obligation to protect populations beyond borders from human rights atrocities remains seriously underdeveloped.¹⁰ Human rights provisions in various treaties can often be argued as ratified by various countries only in principle. This opinion is predicated on the view that human rights observance and implementation differs from one country to country. After-all, it is a system designed with significantly limited enforcement capacity. Therefore, there is a gap between the guarantees and the extent to which the rights are enjoyed in practice. Some United Nations member states are not willing to enforce or lack adequate human rights infrastructure. An adequate human rights infrastructure exist when all of the following three are present namely; legal norms establishing the parameters of human rights; government institutions monitoring, publicizing, implementing and enforcing human rights standards; and nongovernmental groups pressuring government to advance the cause of human rights.¹¹ Thus, even the best strategies for human rights implementation will fail if suitable institutions do not exist to ensure even implementation to all who are entitled

¹ Usha Natarajan, 'Creating and recreating Iraq: legacies of the mandate system in contemporary understandings of the third world sovereignty' (2011) L. J. I. L. 799 pg 5

² See the 'United Nations Universal Declaration of Human Rights', available at <http://www.un.org/en/documents/udhr/> accessed 03/05/2012

³ Article 1 of the Charter of the United Nations

⁴ Jina Kim, 'Development of regional human rights regime: Prospects for and implications to Asia' Available at <http://www.sylff.org/wordpress/wp-content/uploads/2009/03/sylff_p57-1022.pdf>

⁵ *ibid.* pg 60

⁶ Umozurike U, 'The Africa Charter on Human and Peoples' Right', (1983) 77 American Journal of International Law, pg 902

⁷ Established in 1963 by OAU Charter, adopted in 25th May, 1963. For a discussion on OAU see, 'The Organization for Africa Unity: An appraisal' (1989) Zambia Law Journal' pp 1-29.

⁸ Umozurike U, 'The African charter on Human and Peoples' Rights', (1983) 77 American Journal of International Law, pg 902

⁹ Such treaties include the Convention against Torture; Convention on Elimination of all forms of Racial Discrimination 1965.

¹⁰ Luke Glanville, 'The responsibility to protect beyond borders' (2012) H. R. L. Rev. 12 pg 13

¹¹ Michael Haas, international Human Rights: A comprehensive Introduction. (Routledge , London, 2008) 99

to it under the universal declaration.¹ Therefore, it is pertinent to state that lack of enforcement standard of the international human rights law remain the biggest impediment for the even actualization of the human rights across the globe. Further, Michael Haas outlined that three aspects of the struggle to promote international human rights are standard setting, information dissemination and implementation.² Hence, whereas the universal system of human rights played a vital role in the enforcement of international human rights law, factors such as its wide geographical jurisdiction, inadequate resources to accommodate the increasing number of human rights violations and sovereignty undermined its efficacy. Now as then, United Nations structures for human rights implementation may seem adequate; the problem lies with individual states' zeal to implement these human rights principles.³

Human Rights Enforcement in 21st Century

With adequate literature focusing on general modern international human rights law⁴ and contemporary human rights development,⁵ the majority of which elaborates the fundamental rights and freedoms to which we are entitled.⁶ The international human rights system enters the 21st century with a profound anomaly despite the remarkable institutional and normative developments since its inception. Over the years, there has been a rise in neglect of, and standard of enforcement of the core principle of the international human rights value.⁷ Human rights enforcement takes place at two levels-national and international. However, the need for international (regional) enforcement became necessary because the states ignored or neglected to make adequate laws for the promotion and protection of human rights. Hence, international and regional enforcement mechanisms were developed as safety nets for enforcement.⁸ However, upon ratification of either the international or regional treaty on human rights, a legal obligation is expected of states without exemption to implement human rights standards.⁹ It has been argued that the international human rights system's approach to enforcement and implementation has proven unrealistic in a world characterized by oppression, abuse of power and corruption, armed conflict and poverty.¹⁰ As such, other factors such as sovereignty, inadequate resources to accommodate the increasing number of human rights violations, the issue of veto powers and the adverse effect of the cold war, were among the initial challenges of human right enforcement.¹¹

In this context, for a region as diverse as Africa, suggesting an enforcement mechanism ought to take consideration of its diverse components. Arguably, where suitable institutions do not exist to ensure and monitor implementation both at the domestic and regional level, even the best strategies would fail.¹² The burden of enforcement does not start and end with the regional framework, rather with domestic enforcement institutions and the regional methods of promoting and ensuring such enforcement at the domestic level. In Mzizi view,¹³ the African Charter itself was an obstacle to the more effective realization of human rights in the continent which thus needs to be reviewed. Consequently, there is a wide acceptance that the security and development of Africa, and the world at large will be based on human rights; therefore, without practical encouragement of the principles of democracy and human rights, the objectives of the AU may struggle with challenges such as, military coup d'états¹⁴, wars¹, armed religious and ethnic violence², poverty, and hunger³. It is worth pointing out

¹ Navanethem Pillay, 'Human Rights in United Nations action: Norms institutions and leadership' (2009) European Human Rights Law Review 1

² Michael Haas, international Human Rights: A comprehensive Introduction. (Routledge, London, 2008) 98

³ Smith R., 'The united Nations system of human rights and protection' (*Human Rights, peace and justice in Africa: A Reader*. Edited by, C. Heyns and K. Stefiszyn. Pretoria University Law Press, 2006) pg 195

⁴ Rhona Smith, *International Human Rights*, (4th Edition, Oxford University Press, New York, 2010) pg 1

⁵ Henry J. Steiner and Philip Alston, *International Human Rights in Context, Law, Politics, Morals* (2nd Edition, Clarendon Press, Oxford, 2000) p. 2

⁶ Rhona Smith, *Text and materials on International Human Rights* (Routledge-Cavendish, New York, 2007) pg v

⁷ The Rwandan homicide, the atrocities of South Africa Apartheid regime, the ongoing Nigeria incessant human rights abuses by law enforcement agents and various armed groups, the Bosnia civil war 1992-1995, the Sudan conflict 2002- date, the violations and abuses of the Arab Spring of Egypt, Libya, and Syria.

⁸ Smith R., 'Human rights in the United Nations' (*Human Rights, peace and justice in Africa: A Reader*. Edited by C. Heyns and K. Stefiszyn. Pretoria University Law Press, 2006) 191

⁹ Vienna Conference on Human Rights 1993, Available at <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)> accessed 18-06-2012 (Part 1, Para 27)

¹⁰ D. L. Donoho, 'Human Rights Enforcement in the 21st Century', (2006) Bepress Legal Series, Paper 1282

¹¹ Mugwanya G., *Human rights in Africa: Enhancing human rights through the African human rights regional system* 2003 pg 24-29

¹² Navanethem Pillay, 'Human Rights in United Nations action: Norms institutions and leadership' (2009) European Human Rights Law Review 1

¹³ Joshua Bhokinkosi Mzizi, 'Human Rights, Peace and the African Charter on Human and Peoples' Rights' Africa (July – September 1998) Legal Aid Quarterly pg 37

¹⁴ Mali, 2012

that the Africa Charter is a distinctive instrument married to the socio-cultural context in which it was given birth;⁴ the AU is believed to be faced with many challenges with political, economic and social dimensions which require commitment and resources at the highest levels⁵ for it to meet with its democracy and human rights objectives.

Human rights even though originated in the west and have a philosophical basis there; its conceptions have universal validity and applicability in Africa as elsewhere. Regardless of the promulgation of the Africa Charter on Human and Peoples Rights in 1986 with all its enforcement mechanisms,⁶ human rights system in Africa were seen as inadequate and ineffective.⁷ Africa's region human rights system has been described as the least developed and effective when compared to counterpart European and American regional human rights systems.⁸ However, Africa human rights system had undergone several evolutions since its establishment⁹ and has also made strenuous efforts to respect the universality of human rights¹⁰ despite its initial display of laxity to uphold the commitment to human rights promotion and protection. The establishment of a regional court in Africa was perceived as geared towards a more effective regional human rights system. It has further been argued that the African human rights institutions, the recently established African Court of Human and Peoples' Rights¹¹ and the African Commission on Human and Peoples' Rights, have not been known for their strong stance during times of highly charged political events that saw gross abuse of human rights in the continent.¹² It is pertinent to note that though the Africa Charter is ratified by all member states of the Africa Union, human rights have continued to be relentlessly violated in the continent.¹³ Presently, under the European system, member states are encouraged to incorporate the Convention¹⁴ into their national law or may suffer pressure for violations of any provisions of the Convention. This therefore, empowers the court at the national level to adjudicate matters relating to the provisions of the Convention and implement same while the European Court of human rights¹⁵ acts as a subsidiary to national courts. In Alston's opinion, the region is assumed to lack comprehensive policy given that fundamental doubts persist on its competence in relation to the wide range of human rights issues arising from community policies.¹⁶ Yet, the European Convention of Human Rights is seen as a product of realistic idealism anchored on the belief that democratic regimes' respect of fundamental rights are not pure domestic jurisdictional issues by implementing the UDHR¹⁷ through binding court decisions to which member states abide.¹⁸ European Community/union¹⁹ has as a major achievement the adoption of the European Convention on Human Rights²⁰ with a revolutionary enforcement

¹ Joseph Oloka-Onyango, 'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizon?' Available at ><http://hdr.undp.org/en/reports/global/hdr2000/papers/joseph%20oloka-onyango1.pdf>< accessed 03/08/12 (Since 1970 more than 30 wars have been fought in Africa)

² Book Haram Islamic military group in Nigeria (2009 till date)

³ East and sub-saharan African countries of Somalia, Ethiopia and Kenya

⁴ Joseph Oloka-Onyango, 'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizon?' Available at ><http://hdr.undp.org/en/reports/global/hdr2000/papers/joseph%20oloka-onyango1.pdf>< accessed 03/08/12

⁵ Bience Gawanas 'The African Union: Concept and implementation mechanisms relating to human rights', available at > http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/6_Gawanas.pdf< accessed 03/08/12

⁶ African Commission on Human and Peoples Rights

⁷ Mubanzigi J, 'Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains', (2006) 6 African Human Rights Law Journal, pg 147

⁸ *ibid.* pg 148

⁹ From OAU to AU; The establishment of the Africa Court etc

¹⁰ see Article 60 of the Africa Charter on Human and Peoples Rights

¹¹ Adopted in 1998, came into force in January 2004 while Judges were elected in January 2006.

¹² Rachel Murray, 'The African court of human and peoples' rights order for provisional measures against Libya: greater promise for implementation of human rights in Africa' (2011) E. H. R. L. R. 464

¹³ See the Sudan, Central Republic Africa civil wars; Rwanda's genocide, despotic and autocratic Mugabe rule in Zimbabwe, armed conflicts in Nigeria etc

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (Known as European Convention on Human Rights) available at < http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf > accessed 05-08-12

¹⁵ Situated at Strasbourg, France

¹⁶ Philip Alston and H. Weiler, 'An 'ever closer union' in need of a human rights policy: The European union and human rights' in Philip Alston (eds.) *The EU and Human Rights* (Oxford University Press, New York, 1999) 6

¹⁷ Universal Declaration of Human Rights available at <http://www.un.org/en/documents/udhr/> accessed 03/05/2012

¹⁸ Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in [Jonas Christoffersen and Mikael Madsen, *The European court of human rights between law and politics*. (Oxford University Press, New York, 2011)] 205

¹⁹ Set up in 1949 to ensure peace and security in the region.

²⁰ Signed in 1950 and came into force in 1953

approach whereby petitions which emanate from both the states and the individuals are adjudicated by an international court.¹ In view of the then problems created by the enforcement system in Europe such as delay, reform was imperative and this abolished the commission and created a single permanent court² with every member state presenting a judge.³ Thus, European enforcement system can be seen as a future torchbearer and a de facto model for developing human rights enforcement mechanisms elsewhere irrespective of its few implementation challenges.

Because human rights law is still evolving, its enforcement mechanisms should be in line with the contemporary needs of the society.⁴ There is an apparent need to devise systems of accountability, particularly, of behaviour that may infringe upon human rights in Africa. Even as we witness dynamic evolution of accountability mechanisms ranging from a structured form of economic pressure⁵ to legal liability enforced by the domestic courts, new frontiers should be explored in theory and practice to crystallize a working framework for human rights enforcement in Africa. Significantly, the Constitutive Act⁶ of the AU in its bid to promote and protect human rights in the region also provided for a right of humanitarian intervention in member states by the Union, where cases of grave human rights violations are anticipated. Unfortunately, this medium is rarely used in the region. In *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*⁷, wherein several articles⁸ of the African Charter were alleged to have been violated during the Arab Spring and the violent suppression of the uprising in Libya by both forces loyal to Colonel Gaddafi and the rebels, the Court upon receiving the case from the Commission, ordered provisional measures on its accord against the Respondent to immediately refrain from any action that is in breach of the provisions of the Charter or of other International human rights instruments to which it is a party. No doubt, the most important but difficult task in such situation lies in enforcement at the national level which requires a legal system that protects human rights just as the region creates safety nets for those issues and cases not effectively dealt with at the national level. It can now be deduced that the period of conceptual battle is over, and focus now must be shifted to implementation of the treaties on human rights in AU member states.

Ratification of treaties in itself does not mean enforcement, though; all the available evidence suggests that the treaties have had an enormous influence in shaping the understanding of what are the basic human rights. Hence, the success or failure of any international human rights system should be evaluated in accordance with its impact on human rights practice on the country level. The challenges herein are to ensure that the promises contained in the treaties and affirmed through ratification are realized in the lives of the people around the world.

Conclusion

One of the challenges of human rights is that it demands new ways of thinking. Today, the enforcement of basic human rights remain one of the most pressing and yet most elusive goals of the international community⁹ and of African region. The universal system of human rights established under the United Nations played a vital role in the enforcement of international human rights law immediately after its inception in 1945; however, its wide geographical jurisdiction undermined its efficacy.¹⁰ Africa's contention that its region was largely un-represented at the time of drafting and adoption of the human rights laws/standards¹¹ also contributed to the efforts towards an effective enforcement and realization of human rights law by necessitating regional human rights systems. Yet, enforcement of international human rights law provisions and standards are not at its best. Africa's enforcement challenges also includes an array of institutional and conceptual weaknesses such as, lack of

¹ Marie-Benedicte Dembour, *Who believes in Human Rights?* (Cambridge university press, UK, 2006) pg 22

² European Court of Human Rights Came into force in 1998

³ Marie-Benedicte Dembour, *Who believes in Human Rights?* (Cambridge university press, UK, 2006) pg 24-25

⁴ From the African region such challenges like repression in opposition groups and parties, unlawful killings, torture, armed conflicts and child trafficking and labour, child soldier, sexual violence, discrimination against disabled persons. See Human rights Watch, available at <<http://www.hrw.org/africa>> accessed 05/06/2012 . From European region we have intolerance to minority and migrants, counterterrorism attack and the rise of populist extremist parties. See Human Rights Watch, available at <<http://www.hrw.org/world-report-2012/europe-s-own-human-rights-crisis>> accessed 05/06/12

⁵ Such economic as consumer boycotts

⁶ Article 3, paragraph of AU Constitutive Act, available at <http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf> accessed 19/06/2012

⁷ Unreported March 25, 2011 (Central African Republic)

⁸ Articles 1,2,4,5,9,11,12,13 and 23 of the African Charter of Human and Peoples' Rights

⁹ Emilie Hafner-Burton and Kiyoteru Tsutsui, 'Human rights in a globalizing world: The paradox of empty promises' Available at <https://umdrive.memphis.edu/rblanton/public/POLS_7508_Fall_2009/hafner_paradox.pdf> Accessed 03-04-12

¹⁰ During this period, the United Nations was the sole enforcer of human rights globally and therefore making it practically impossible to effectively enforce all concerns of human rights violations.

¹¹ Mutua M., 'The ideology of human rights' (1996) 36 *Virginia Journal of International Law*, pg 605.

policies that would ensure a more realistic voluntary state compliance, and, absence of an effective structure or institutions to encourage observance of such international conventions. Rachel Murray opined that the African regional court has not been visible in human rights enforcement as same is hampered by the failure of most states parties to the Protocol to permit individuals and NGOs direct access to the court.¹ However, Courts can play two roles in the enforcement and promotion of human rights in Africa. Firstly, through the law-making functions of interpreting legislation and developing rules of law, and secondly, by delivering judgment in constitutional and other cases that are intended to advance those rights. Therefore, the institutional framework provided by the Africa Charter to promote and ensure enforcement and compliance could either be seen as inadequate and underused.

¹ 'The African court of human and peoples' rights order for provisional measures against Libya: greater promise for implementation of human rights in Africa' (2011) E. H. R. L. R. 464 pg 7

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