

## **Africa, justice and impunity**

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### **Why are we still struggling with the idea of justice at the continental level? A short account of the history of Africa's walk against impunity**

Looking at the trend of events in Africa today vis-à-vis the rule of law in general and within its attitude towards combatting impunity for civic and economic crimes; or examining the mandate, or the resources both financial and intellectual accorded to the African Court on Human and Peoples' Rights; it is worrisome yet self-evident that the continent is driving backwards. The reasons will be revealed in the coming lines. However, this short account only serves as reference point in an evolving discussion on the merits of premising the "Africa We Want" on justice and equity as opposed to barbarism and 'automatic piloting'.

Vision, any that is; is often said to encompass a rear sight, side sight(s), insight and a foresight. In approaching the subject of law and within it human rights and its enforcement in Africa, borrowing this analogy of the vision is appropriate. The rear sight in this context will refer to the genesis or background to the conceptualisation of the human rights doctrine as it is known today. Failure to look back is not only risky but renders assessment of progress impossible. The side view (left, right, up or down) allows for comparison and to appreciate the inter-action with other systems of law and practices. It is equally important for the health and growth of the African human rights system. The front view looks into where one is heading. For this, knowledge, value systems are part of the requirements for effective leadership and safe driving. The contrary is unfortunately also true; ignorance, lack of ethical values are the ingredients of chaos. How did Africa begin the journey toward a just, stable, prosperous and integrated continent is what this short paper contributes to, from a human rights angle.

Equipping Africa with mechanisms for the promotion and enforcement of human rights was a project championed by African lawyers and NGOs soon after the wave of independence of most African countries from colonial domination in the mid-1950s

and mid-1970s. It was a logical consequence of socio-political events on the continent, that after hard-won political liberation, newly independent countries aspired to build their nations on core values such as respect for human rights and human dignity. In this context, it is well documented that having an African regional mechanism for the protection of human rights originated from the 1961 African Conference on the Rule of Law which adopted a declaration referred to as the 'Law of Lagos'. One of the key recommendations in the Law of Lagos was:

In order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.<sup>1</sup>

In essence, the African lawyers and NGOs gathered at the Lagos Conference, called for a court on human rights, accessible to individuals as a guarantee for the effective promotion and protection of human rights as enshrined in the Universal Declaration of Human Rights (UDHR). It should be noted here that the sole reference to the UDHR is justified by the fact that it was, at that time, the only reference available in international human rights law. In 1967, the first conference of Francophone lawyers recalled the Lagos Conference and called for the creation of a regional mechanism for the protection of human rights.<sup>2</sup> However, nearly a decade after the 'independence euphoria', a period of deception set in in parts of the continent with the consolidation

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<sup>1</sup> The first African conference on the rule of law was convened by the International Commission of Jurists in Lagos, Nigeria from 3-7 January 1961 and adopted a declaration known as 'The Law of Lagos'. See <https://www.icj.org/icj-journal-vol-iii-no-1-1961/> (accessed 15 June 2018).

<sup>2</sup> The first Congress of French-speaking African Jurists was jointly organised in Dakar, Senegal from 5-9 January 1967 by *Association sénégalaise d'études et de recherche juridiques* ('The Senegalese Association for Legal Studies and Research) and the International Commission of Jurists'). See MacDermot Niall *Mémoire sur les conclusions des conférences de la Commission internationale de juristes à Lagos (1961), Dakar (1967) et autres régions présenté à la conférence des juristes africains sur le thème 'African Legal Process and the Individual'*, Addis-Ababa (Ethiopia) 18 to 23 April 1971, Document CIJ S-2895 (b) 1.

of one-party systems,<sup>3</sup> the rise of *coups d'état*, and military dictatorships.<sup>4</sup> In southern Africa the struggle for political liberation was on-going in countries such as the then Southern Rhodesia (now Zimbabwe) and South Africa where apartheid was still the

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<sup>3</sup> Almost every newly independent African state experienced a one-party-system during this period. The following is a compilation drawn from web-based literature on the history of the various countries: Algeria (National Liberation Front) 1962-1989; Angola (MPLA) 1975-1991; Benin (People's Revolutionary Party of Benin) 1975-1990; Burkina Faso (African Democratic Rally) 1960-1966; Burundi (Union for National Progress) 1966-1992; Cameroon (Cameroon National Union) 1966-1985, (Cameroon People's Democratic Movement) 1985-1990; Cape Verde (African Party for the Independence of Guinea and Cape Verde) 1975-1981, (African Party for the Independence of Cape Verde) 1981-1990; Central African Republic (Movement for the Social Evolution of Black Africa) 1962-1980, (Central African Democratic Union) 1980-1981, (Central African Democratic Rally) 1987-1991; Chad (Chadian Progressive Party) 1962-1973, (National Movement for the Cultural and Social Revolution) 1973-1975, (National Union for Independence and Revolution) 1984-1990; Comoros (Comorian Union for Progress) 1982-1990; Congo-Brazzaville (Congolesse Party of Labour) 1969-1990; Congo-Kinshasa (Popular Movement of the Revolution) 1970-1990; Djibouti (People's Rally for Progress) 1977-1992; Egypt (National Union) 1956-1958 and 1961-1962, (Arab Socialist Union) 1962-1976; Equatorial Guinea (Worker's National United Party) 1970-1979, (Democratic Party of Equatorial Guinea) 1987-1991; Ethiopia (Workers' Party of Ethiopia) 1984-1991; Gabon (Gabonese Democratic Party) 1968-1990; Ghana (Convention People's Party) 1964-1966; Guinea (Democratic Party of Guinea – African Democratic Rally) 1958-1984; Guinea-Bissau (African Party for the Independence of Guinea and Cape Verde) 1974-1991; Côte d'Ivoire (Democratic Party of Côte d'Ivoire – African Democratic Rally) 1960-1990; Kenya (Kenya African National Union) 1982-1991; Liberia (True Whig Party) 1878-1980; Madagascar (National Front for the Defence of the Revolution) 1976-1989; Libya (Arab Socialist Union) 1971-1977; Malawi (Malawi Congress Party) 1964-1993; Mali (Sudanese Union – African Democratic Rally) 1960-1968, (Democratic Union of the Malian People) 1976-1991; Mauritania (Mauritanian People's Party) 1961-1978; Mozambique (FRELIMO) 1975-1990; Niger (Nigerien Progressive Party – African Democratic Rally) 1960-1974, (National Movement for the Development of Society) 1989-1991; Rwanda (Parmehutu) 1965-1973, (National Republican Movement for Democracy and Development) 1975-1991; São Tomé and Príncipe (Movement for the Liberation of São Tomé and Príncipe/Social Democratic Party) 1975-1990; Senegal (Socialist Party of Senegal) 1966-1974; Seychelles (Seychelles People's Progressive Front) 1977-1991; Sierra Leone (All People's Congress) 1978-1991; Somalia (Somali Revolutionary Socialist Party) 1976-1991; Sudan (Sudanese Socialist Union) 1971-1985, (National Congress Party) 1989-2005; Tanzania (Chama cha Mapinduzi) 1977-1992; Tanganyika (Tanganyika African National Union) 1961-1977; Togo (Party of Togolese Unity) 1962-1963, (Rally of the Togolese People) 1969-1991; Uganda (Uganda People's Congress) 1969-1971; Zambia (United National Independence Party) 1972-1990; Zanzibar (Afro-Shirazi Party) 1964-1977.

<sup>4</sup> *Coups d'état* occurred in the following countries: Algeria (1972, 1965 and 1992); Benin (1963, 1965, 1967 and 1972); Burkina Faso (1966, 1980, 1982, 1983 and 1987); Burundi (1966 (twice), 1976, 1987 and 1996); Central African Republic (1966, 1979, 1981, 2003 and 2013); Chad (1975, 1982 and 1990); Côte d'Ivoire (1999); Comoros (1975, 1978, 1989, 1995 and 1999); Republic of Congo (1963, 1968, 1979 and 1997); Democratic Republic of Congo (1960, 1965 and 1997); Egypt (1952 and 2013); Equatorial Guinea (1979); Ethiopia (1910, 1916, 1974 (twice), 1977 and 1991); The Gambia (1994); Ghana (1966, 1972, 1978, 1979 and 1981); Guinea (1984 and 2008); Guinea-Bissau (1980, 1999, 2003, 2012); Lesotho (1986, 1990 and 1991); Liberia (1980 and 1990); Libya (1969); Madagascar (1972, 1975 and 2009); Mali (1968, 1991 and 2012); Mauritania (1978, 1979, 1980, 1984, 2005 and 2008); Niger (1974, 1996, 1999 and 2010); Nigeria (1966 (twice), 1975, 1983, 1985 and 1993); Rwanda (1973 and 1994); São Tomé and Príncipe (1995 and 2003); Seychelles (1977); Sierra Leone (1967, 1968, 1992, 1996, 1997 and 1998); Somalia (1969 and 1991); Sudan (1958, 1969, 1985 and 1989); Togo (1963 and 1967); Tunisia (1957, 1987 and 2011); and Uganda (1966, 1971, 1979, 1980, 1985 and 1986). See *coup d'états in Africa 1946-2004* <http://www.systemicpeace.org/africa/ACPP Annex2b.pdf> (accessed 18 November 2013).

guiding policy.<sup>5</sup> In this political climate, it was inconceivable that African states would agree on a legally binding human rights treaty, especially on a court which could deliver enforceable decisions.

The proliferation of one-party systems and military dictatorships in Africa was also facilitated by the 'cold war' during which the Russian Communist party leadership in the then Soviet Union, served as a model for the African one-party system.<sup>6</sup> Naturally, the changing global political context inaugurated by the 'reconstruction/restructuring' program known as the *Perestroika*, and the period of transparency referred to as *Glasnost*, undertaken between 1981 and 1991 by the Russian Communist party under the leadership of Mikhail Gorbachev,<sup>7</sup> largely contributed to the change in attitude amongst African leaders with regard to democracy and human rights. Suffice to observe that these reforms contributed to the creation of an enabling environment for the democratisation process and enhancement of human rights protection on the African continent. Internally, the combined effects of severe economic recession, drought and unequal trade opened the way for social uprisings and NGOs calls for democracy and human rights reform in many parts of Africa.

The 1981 African Charter creates a single enforcement mechanism, the African Commission on Human and Peoples' Rights. To the disappointment of the promoters of the Lagos Law, the African Charter failed to establish a court. Kéba Mbaye, one of the drafters of the first text of the Charter, explained that the absence of a court in the final draft was based on two considerations: First, that the experts commissioned to draft the instrument were instructed, especially by African leaders such as Leopold Sedar Senghor, then President of Senegal,<sup>8</sup> to reflect the conciliatory nature of the African conflict resolution system in terms of which referral to a court is the exception rather than the rule. Secondly, Mbaye argued that the idea of a court was promoted against the background of the struggle against the apartheid regime in South Africa.

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<sup>5</sup> Zimbabwe became independent from Great Britain in April 1980. In South Africa, the apartheid regime was enforced by the National Party (ruling party) from 1948 to 1994. The apartheid regime ended in 1994 with the introduction of the new democratic order.

<sup>6</sup> Mbaye Kéba *Les droits de l'Homme en Afrique* (1992) 8.

<sup>7</sup> Gorbachev Mikhail *Perestroika: New thinking for our country and the world* (1987). See <http://college.cengage.com/history/west/resources/students/primary/perestroika.htm> (accessed 15 June 2018).

<sup>8</sup> Mbaye Kéba *Les droits de l'Homme en Afrique* (1992) 149.

Its proponents wanted to use the court to forestall or punish the human rights violations occurring under the apartheid regime as an additional tool in their struggle to dismantle racial discrimination. But the idea of the court did not win universal support among African leaders at that time because some of them were in favour of dialogue (and cooperation) with the South African apartheid regime, while others were strongly opposed to such dialogue.<sup>9</sup> I fully agree with the African scholar, Makau wa'Mutua, who maintained that having an enforcement mechanism with very limited powers and non-binding decisions was a 'comfortable' option for dictators – either civilian operating under a one-party regime, or military. It was not until after the fall of the apartheid regime and the advent of the African Union that the notion of an African court on human rights gained meaningful support among African states. In the mid-to-late 1990s, events on the continent, especially the genocide in Rwanda (1994), and the civil wars in Sierra Leone (1991) and Liberia (1997), prompted NGOs and other actors to push for the creation of a court in the hope that it would strengthen human rights protection in Africa. As Mutua reports, there were two polar views on the creation of the court.<sup>10</sup> One view (to which Mutua subscribes) held that a human rights court should be established as soon as possible to salvage the entire system.<sup>11</sup> The other saw the work of the African human rights system as evolving gradually and primarily for promotional rather than adjudicative purposes. The proponents of this position suggested that the African regional system should focus on human rights promotional

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<sup>9</sup> It is generally argued that President Felix Houphouët-Houphouët Boigny of Côte d'Ivoire was among the strongest proponents of the 'dialogue' with the apartheid regime of South Africa in the mid-seventies. He was reportedly supported by Francophone African leaders such as Jean-Bedel Bokassa of the Central African Republic, Omar Bongo of Gabon, and Philibert Tsiranana of Madagascar. Critics link this to the fact that France was a strong supporter of the apartheid regime and a key economic partner (while the United Nations imposed sanctions against this regime). See, for example, *'la France était le meilleure alie de l'Afrique du Sud'* available at <http://lesactualitesdudroit.20minutes-blogs.fr/archive/2013/06/29/la-france-etait-le-meilleur-soutien-de-l-apartheid-en-afriqu.html> (accessed 15 June 2018). It then followed that France's key allies on the African continent, especially among its former colonies, followed its position at the level of the Organisation of African Unity. An investigation into this issue is beyond the scope of this work. For a more detailed discussion on this issue see, for example, Comte G *Le Président Houphouët-Boigny aura du mal à rallier les Etats francophones a sa thèse* in *Le Monde Diplomatique* (juin 1971) 147.

<sup>10</sup> Makau wa'Mutua *The African human rights system: a critical evaluation* (2000) 24-25. See <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 15 June 2018). wa'Mutua Makau is an American of Kenyan origin. He is professor of law and the Dean of the University at Buffalo Law School, where he is also a SUNY Distinguished Professor and the Floyd H and Hilda L Hurst Faculty Scholar. This article was written as reference material to the 2000 Human Development Report published by UNDP on the theme: 'Human rights and development'. wa'Mutua was chair of the Kenyan Human Rights Commission (NGO) at the time of his writing.

<sup>11</sup> Komeja M 'The African system of human and peoples' rights: An annotated bibliography', (1996) 3 *East Afr J of Peace and HR* 271 284-85.

activities.<sup>12</sup> Reactions of representatives of African states to reports on human rights situations thirty years on show that this stance against scrutiny is being consolidated and this is of concern.

As a way forward it is my view that there will be no rule of law or culture of respect for human rights at the continental level until such a time that genuine reforms occur at municipal level. Expecting that a top bottom approach inferring the adoption of principles at continental level would enhance best practices at regional or national level is a mistake that has been repeated so often and should now be abandoned. As shown in this short account of the historical evolution of the notion of human rights protection at the continent level, the roots of the failure to have an effective regional mechanism for the enforcement of human rights are not difficult to trace. They emanate from the disregard for the idea of law, constitutionalism and justice in general at domestic level. Discrediting human rights defenders, judicial activists and scholars adds to the driving backward agenda.

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<sup>12</sup> Ankumah Evelyn A *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 195.