

been better for the course of human rights.<sup>20</sup> Moreover, it is questionable whether the ‘Strasbourg approach’ prevails even among European countries; neither Recommendation 1233 (1993) on reservations made by Member States to the Council of Europe, adopted by the Assembly on 1 October 1993, nor the document approved in 1995 by the Chief Legal Advisers of some European States point in that direction.<sup>21</sup>

Nevertheless, given that states are at liberty when shaping the content of a treaty, there is nothing to prevent the inclusion of an explicit provision providing that an irregular reservation should be disregarded. By the same token, there is no reason why the subsequent practice of the conventional bodies and the parties should not establish a corresponding norm, as seemingly happened in the case of the ECHR,<sup>22</sup> although such a special rule should carefully be ascertained on a case-by-case basis. This perspective would not amount to fragmenting the law of treaties, whose flexibility leaves sufficient room for a possible reconciliation.

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Ouguergouz, Fatsah. ***The African Charter on Human and Peoples’ Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa.*** The Hague/London/New York: Martinus Nijhoff Publishers, 2003. Pp. xlvii/1016. €298. ISBN 9041120610

This volume, originally published in French in 1993 and now updated and expanded, provides a comprehensive and systematic analysis of the substantive content and institutional framework of the African Charter on Human and

Peoples’ Rights. It does this with a determined and consistent view to revealing the Charter’s true spirit by illustrating its unique features, its legal contribution, and the actual and potential role it can play in the protection of human rights in Africa.

Dr Ouguergouz’s analysis of the legal scope of states parties’ undertakings is methodically supported by reference to the universal and regional human rights systems as well as to principles of general international law where appropriate. In many instances, several textual interpretations are canvassed as the author reasons in favour of ascribing a particular meaning to what are often vague or tersely worded provisions. Whether one agrees with the interpretation ultimately adopted or not, Ouguergouz’s reasoned analysis is a welcome contribution to a field of scholarship in which few studies of comparable depth have been undertaken and for which there is a paucity of interpretative guidance from the system’s supervisory organs, the African Commission on Human and Peoples’ Rights and the more recently established African Court on Human and Peoples’ Rights. The Charter’s potential role can thus be viewed in terms of its largely undefined and untested legal scope and the protective impact it is hoped to have for individual and peoples’ rights on the continent.

The book’s introductory chapter sets the tone in which the rest of the work is to be understood: the true spirit of the African Charter can only be revealed as a complement to its universal equivalent rather than in opposition to it. It is made clear from the start that the singularity of the African approach will be couched in terms of its consistency with the universal standard that inspired it. In the author’s view, if cultural relativism has any meaning for African countries, its expression is to be found in the Charter’s three principal innovations: the rights of solidarity, the duties of the individual, and the designation of ‘people’ as a legal subject. The reasoning behind the inclusion of these features is explained by the process in which the Charter was developed and by the particular philosophy which guided its drafting. The philosophy

<sup>20</sup> See C. Tomuschat, *Human Rights. Between Idealism and Realism* (2003), at 162.

<sup>21</sup> Baratta, ‘Should Invalid Reservations to Human Rights Treaties Be Disregarded?’, 11 *EJIL* (2000), at 416 *et seq.*

<sup>22</sup> See Baratta, *supra* note 12.

of 'assimilating without being assimilated' and of 'borrowing from modernity only that which was compatible with the deep nature of African civilization' is especially reflected in the place given to the right to development and to a system of individual duties rooted in traditional conceptions of African social organization.

In addition to tracing the milestones in the Charter's development, Part 1 includes a summary examination of its contents. This cursory examination provides a useful catalogue of the principal similarities and differences between the African system and its counterpart protection models. Notable differences include: the equal treatment given in the Charter to economic, social and cultural rights, on the one hand, and to civil and political rights, on the other; the inclusion of a detailed set of peoples' rights and individual duties; and slight divergences in the list of guaranteed individual rights. Despite the distinctions, the points of convergence are found to substantially outweigh the differences.

Part 2, which deals with the undertakings of states parties, constitutes in large measure the substance of the book. It is divided into four chapters addressing, respectively, the rights of the individual; the rights of peoples; the duties of the individual; and the legal consequences of the absence of a derogation provision.

The rights of the individual are considered in Chapter 3 with respect to the corresponding rights set out in the Universal Declaration of Human Rights and the United Nations Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESR). The purpose here is to measure the influence of 'historical tradition' and 'values of African civilization' as referred to in the Preamble on the formulation of rights in the Charter, as well as to assess their compatibility with the two covenants, and to elucidate their meaning. The Commission's interpretation, where available, is also provided.

The result is a clear picture of the existing gaps in protection and of unsatisfactory formulations. In many cases, the author credits the Commission with trying to remedy these inadequacies. This is especially true in relation

to its strict interpretation of the various and poorly worded limitation clauses which run through this section of the Charter. The author also advocates, such as in the case of Article 7 (right to a fair trial) and Article 15 (right to work in equitable and satisfactory conditions), that recourse be had to the practice of the UN Human Rights Committee in the case of the former and to the standards elaborated under the ICCPR and relevant ILO Conventions in the case of the ICESR. Where the language of a particular individual right lends itself to limitation or conflict with a people's right to their culture, such as under Article 17 (right to education and to take part in cultural life), where the promotion and protection of certain values may be seen to justify censure in the name of those values, or where cultural practices such as female circumcision may be seen to conflict with the right to physical integrity under Article 4, the author argues unequivocally for a resolution in favour of the individual.

What emerges from this chapter is a need to fill in the gaps by making reference to the more fully developed universal standard. Fortunately, the Charter provides for this possibility in Articles 60 and 61. The Commission's role in this respect is significant and it has demonstrated its willingness to make use of these provisions. The Commission has also relied on Article 27(2), in the Charter's section on duties, in its effort to clarify and narrow the scope of the limitation clauses in the section on individual rights.

In Chapter 4, the rights of peoples are also situated within the universal context. However, in addition to determining the content and contribution of these rights, the author further resolves to identify the right holders. Much discussion is devoted to the term 'people', which is found to be capable of denoting four types of entities. These are: the 'people-state', meaning all the nationals of a state; the population of a state; peoples under colonial or racial domination; and 'people-ethnic group', meaning the different peoples integrated into one state. However, in order to identify the beneficiary of a particular right, the author first addresses the status of the

right in international law as well as its content and implementation under the African Charter. The rights of peoples are divided into two sections. First are 'the rights to freedom' comprising the right of peoples to existence, the right of peoples to self-determination, and the right of peoples to freely dispose of their natural wealth and resources. Second are 'the collective rights of solidarity', namely, the right to development, the right to the common heritage of mankind, the right to peace and security, and the right to a satisfactory environment.

The African Charter is the first legal instrument to explicitly recognize the right of peoples to existence. It asserts as a right what has previously only existed in the form of a prohibition under the Genocide Convention. In the author's view, the right to existence may require that states come to the aid of a group whose existence – whether physical or cultural – is threatened, regardless of whether genocidal intent is present. The Charter's condemnation is of genocide *lato sensu*. In relation to self-determination, two interpretations are offered, one probable and the other virtual. The probable content of the right to self-determination exhibits no legal added value by comparison with what is recognized by general international law. That is, external self-determination is to be interpreted restrictively and only in favour of peoples under colonial or racist domination. In its internal dimension, the right is merely synonymous with the principle of democratic legitimacy. The virtual content or the original interpretation of the right to self-determination would include recognition of a people's right to rebellion. It is cautioned, however, that the exercise of this right would only come into play as a last resort once all other procedures had been exhausted and where the violating state persisted in systematically violating the political rights of an ethnic group amounting to a denial of the right to internal self-determination. The author concedes, however, that this latter interpretation is highly speculative and is likely precluded on the basis of the politico-legal environment rather than by the wording of the text itself.

In the area of solidarity rights, the African Charter's contribution lies in its designation of the people as the principal beneficiary. In most cases, the subject of the right is interpreted to encompass both the 'people-ethnic group' and the 'people-state'. The state, as for example in relation to the right to development, acts as an intermediary between the 'people-state' and the international community in working to promote the establishment of a more equitable global system of economic relations. Internally, the state is the primary debtor of the right of the 'people-ethnic group' to development. It is free to approach other states on behalf of its peoples and it has a duty to distribute the fruits of its efforts to its peoples. The author highlights the importance of the inclusion of 'people-ethnic group' because it recognizes an intermediate level in the implementation of the requirement of 'solidarity' which permeates the African Charter. Solidarity in this sense is understood to exist between individuals, between ethnic groups and between states.

Chapter 5, which concerns the duties of the individual, adopts a similar approach in situating the listed duties within the broader international law context. The author examines the legal dimension of the concept in domestic law and in the principal international human rights instruments in order to assess the value of the Charter's conceptual contribution in this area. The overriding preoccupation in this section is, however, to ascertain the legal or practical effect of these duties on individual rights and freedoms. It is concluded that, with the exception of the duty to work and the limitation on freedom of association, the concept of individual duty in the Charter is not in conflict with that of individual rights.

In Chapter 6, the author considers the legal implications of the Charter's lack of a derogation clause in the event of an outbreak of war or of a public emergency threatening the life of a nation. Three possible interpretations are offered for the absence of a derogation power. The first is that the African states decided to preclude the option of derogating from the Charter regardless of the circumstances. This interpretation has been adopted by the

Commission but is dismissed by the author as being extreme and difficult to defend without the existence of an agreement to this effect. The second is that the normative content of the stipulated obligations are so weak that the authors did not consider the need to further relax the obligation. This too is rejected, given the Charter's sufficient intrinsic legal value. It is the third interpretation which is supported by the author. His reading of the omission is that states simply did not aim to regulate the derogation option by treaty but rather reserved the right to invoke the derogations available to them under general international law.

Consequently, the author turns to the law of treaties and the law of international responsibility of states in order to determine the situations and conditions in which a state party to a treaty may be exempted, temporarily or permanently, from complying with all or some of its treaty obligations. These legal regimes yield two narrow grounds on which states may rely. The doctrine of a fundamental change in circumstance under the law of treaties and of necessity is the only circumstance precluding wrongfulness under the law of state responsibility. Should a dispute arise with regard to the reality of the situation or the measures taken, the author argues that the African Commission or Court may assume the right to verify that the required conditions have been met. The conclusions of the analysis in this chapter are meant to apply *mutatis mutandis* to all other human rights treaties that do not include derogation clauses.

Part 3, the last part of the book, considers the effectiveness of the African Charter's institutional framework. This is done in three sections which address, respectively, the role of

the African Commission, the Assembly of Heads of State and Government, and the African Court of Human and Peoples' Rights. The chapter on the Commission, not surprisingly, constitutes the bulk of this part of the book. Of particular interest are the many examples given of the Commission's willingness to liberally interpret its mandate and jurisdiction in the area of protection. As the author notes, 'the Commission has succeeded in creating its "jurisdiction" in this field out of nothing'. The author importantly draws the unmistakable parallel with the Inter-American Commission on Human Rights whose pattern of development also reflects a gradual broadening of its mandate for protection through a courageous interpretation of its Statute.

Ougurgouz's work provides an essential reference tool for human rights lawyers, scholars and advocates. Its structure allows for easy navigation and the concluding sections of each section as well as of the book itself neatly synthesize the author's central message. The book also contains an annex, which includes the texts of the African Charter, the Commission's Rules of Procedure, and the Protocol to the African Charter on the establishment of the African Court, amongst other relevant documents. It would, however, have been useful to have each Charter article fully reproduced at the start of the section in which it is discussed.

Fatsah Ougurgouz's update and expansion of his 1993 publication is a most welcome contribution to a comparative study of human rights protection.

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