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**OPENING STATEMENT OF THE CHAIRPERSON OF THE AFRICAN
COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

HONOURABLE COMMISSIONER SOLOMON AYELE DERSSO

**DELIVERED AT THE 40th ANNIVERSARY OF THE AFRICAN CHARTER ON
HUMAN AND PEOPLES' RIGHTS**

28 JUNE 2021

His Excellency, Moussa Faki Mahamat, Chairperson of the African Union Commission;

Your Excellency Minister of the Interior of the Republic of The Gambia

Excellencies Representatives of States Parties to the African Charter and African Union Member States;

Your Excellency, the Chairperson of the PRC Sub-committee on Human Rights, Democracy and Governance;

Distinguished President of the African Court on Human and Peoples' Rights;

Distinguished Representatives of other African Union organs;

Mr. Eamon Gilmore, European Union Special Representative for Human Rights;

Representatives of African National Human Rights Institutions;

Representatives of International and National Civil Society Organisations;

Distinguished invited Guests;

Ladies and Gentlemen;

This is an auspicious occasion not only to mark the 40th anniversary of the African Charter on Human and Peoples' Rights but also to take stock of the 4 decades journey of the African Charter.

In celebrating this 40th birthday of the African Charter, it is worthwhile to adequately appreciate the context and the historical background of the African Charter. Here, as in other areas of life in contemporary Africa, history matters. It does so profoundly as it co-constitutes our present context. A doctrinal take of the catalogue of rights, freedoms and duties articulated in the Charter offers us only a very limited understanding of both their meaning and content and significantly their political, socio-economic and international importance vis-à-vis contemporary challenges of respect for and protection of human and peoples' rights.

So why the African Charter? Why its adoption by the OAU in June 1981? These are questions for which there is no single answer but are worthy of serious investigations and study. I therefore would not wish to go into details. I would rather limit myself to noting briefly some of the fundamental conditions that led to the adoption of the African Charter.

In one way, the African Charter represents an exercise of African agency in defining the essence and meaning of the rights that give full expression to Africa's long struggle and

aspirations for dignity, freedom, equality and justice. The articulation of the African Charter made up for not only the lack of representation of the peoples of the continent in the drafting of the Universal Declaration of Human Rights (UDHR) but also for the failure in the UDHR to recognize foreign rule or colonial domination as the antithesis of human rights. Unlike the UDHR, which in its Article 2 proclaims the application of the rights in the Declaration irrespective of the status of a peoples as a subject of colonial rule, for peoples on the continent there could be no human rights without freedom from colonial rule. It is worth recalling that in Africa's political history as far back as the 1919 Pan African Congress and the works of the foremost thought leaders including Frantz Fanon, Nnamdi Azikiwe and Kwame Nkrumah colonial rule and foreign domination were treated as negation of human rights.

Second, the African Charter was also a response to, as one historical study on the political background of the African Charter put it, 'the shame and embarrassment' that many African leaders felt about the activities of some governments, in particular those of Amin, Bokassa and Nguema. This is best illustrated by what the Chairperson of the OAU in 1979, President Tolbert said in his opening address to the AOU summit - 'the principle of non-interference had become 'an excuse for our silence over inhuman actions committed by Africans against Africans...The provisions concerning human rights must be made explicit.' That this shame and embarrassment was a factor that led to the adoption of the OAU decision for the elaboration of a 'Charter on Human and Peoples' Rights' was buttressed by the late Adem Kojo, then the Secretary-General of the OAU. He said the African Charter 'came about as the result of the ordeals which certain African peoples had suffered at the hands of their governments.' Accordingly, the African Charter addresses itself to both colonial rule/foreign domination and the oppression of people in the hands of independent governments.

At this point, it is worth recalling that a similar experience in the 1990s will lead to the adoption under the AU Constitutive Act of the paradigmatically novel principle of intervention in cases of grave circumstances under Article 4 (h). The parallel becomes apparent from President Mandela's speech during the 1994 OAU summit in Tunis where he expressed this sense of shame when he said 'Rwanda stands out as a stern and severe rebuke to all of us for having failed to address Africa's security problems. As a result of that, a terrible slaughter of the innocent has taken place and is taking place in front of our very eyes.'

These historical references make it clear that the African Charter is the first legal instrument to pierce the veil of sovereignty that excluded any scrutiny of how independent African states treated people under their jurisdiction. In doing so, the African Charter served as the legal predecessor to and laid the foundation for Article 4(h) of the Constitutive Act.

One of the drafters of the African Charter, The Gambian jurist Honorable Hassen Jallow thus remarked 'the very notion of creating machinery for the promotion and protection of human rights was itself nothing less than revolutionary in a continent where and at a time when the African states were ultra-jealous of their national sovereignty even and brooked no interference in what they regarded as their internal affairs.'

The African Charter also affirms that human rights are not simply an embodiment of abstraction from an ideal theory about the human. Importantly, they are products of specific historical experiences and civilizations. In this sense, at one level the African Charter is an illustration of the late Christof Heyns theory of human rights as struggle. Viewed from this perspective, the African Charter is in part an exercise to articulate catalogue of rights geared towards the conditions of oppression that historically robbed them of their humanity as Africans and continue to impede the exercise of their rights and freedoms. It is within these historical experiences of oppression that African States undertook to 'eliminate colonialism, neo-colonialism, apartheid, Zionism, and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinion'.

It is against this background that, in the landmark case, *SERAC v. Nigeria*, our Commission, thus remarked that the origin of some of the provisions of the African Charter, in the particular instance Article 21, is to be traced to 'colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land.' On how this experience affects the peoples in present day Africa, the Commission stated that the 'aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation.'

At another level, the Charter echoes the opening remarks of President Leopold Sedar Senghor at the first expert meeting for the drafting of the Charter in Dakar in 1979, where he counseled the experts to draw inspiration from and keep constantly in mind 'our beautiful and positive traditions and civilization' and 'the real needs of Africa.' The result of this has been not only the articulation of duties of individuals by the Charter premised on the philosophy of coexistence and harmony between the individual and the society, but also the recognition of the inseparability and interdependence of civil and political rights and economic, social and cultural rights.

In terms of 'the real needs of Africa', the African Charter accorded a prime place of honor to peoples' rights on par with human rights as vividly captured in the title of the African Charter. In so doing, President Senghor pointed out, 'We simply meant ...to show our attachment to...rights which have a particular importance in our situation of a developing country.' Elaborating further, he pointed out, '[w]e wanted to lay emphasis on the right to development and the other rights which need the solidarity of our states to be fully met: the right to peace and security, the right to a healthy environment, the right to participate in the equitable share of the common heritage of mankind, the right to enjoy a fair international economic order and, finally, the right to natural wealth and resources.'

Excellencies, ladies and gentlemen

Today, the African Charter enjoys not only a status of customary international law but also that of being akin to the basic law of the continent. It is not simply one of the few OAU/AU treaties with universal ratification. It is perhaps the only human rights instrument that is widely cited not only in large number of continental legal and policy

documents but also in national and sub-regional instruments. The African Charter also inspired the adoption of various human rights and democracy and governance norms within the OAU and its successor the African Union. Along with other human rights instruments it inspired, the African Charter continues to serve as source of inspiration in the elaboration of national bills of rights and various laws giving effect to specific human rights.

The system that the African Charter established also contributed to the recognition of the legitimacy of the works of civil society organizations, human rights defenders, political opposition and the media, despite the increasing assault to which they have in recent years been subjected.

Ladies and gentlemen, the African Charter was not simply a historically grounded human rights treaty that speaks to the human and peoples' rights issues in Africa emanating from our historical experiences. It is also a living document. As such, it operates to respond to the human and peoples' rights issues also of the present and the future. Thus, Article 45 (1) (b) tasks the African Commission 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms.' Additionally, in mandating the African Charter to apply the rights and duties in the Charter to specific cases that may be referred to the Commission by States or 'other communications', the Charter recognizes the need for its constant interpretation and application to make the rights and duties in the charter responsive to both the specific cases and the evolving needs of Africa. In commanding the African Commission under Article 60 to draw inspiration from international law on human and peoples' rights, the Charter affirms its interconnectedness with international human rights. In doing so, the Charter also opens its provisions to be enriched through cross-fertilization. Indeed, based on Articles 45 (1) (b), 47, 55 and 60 the jurisprudence of the African Commission and since 2006 the African Court, have clarified some of the gray areas and the 'claw back clauses', which inspired the most criticism against the Charter.

The African Charter is also internationalist in other ways. Embracing the internationalism of the theory of Pan-Africanism, the African Charter in articulating duties of individuals states in Article 27 (1) that individuals owe duties, among others, to the international community.

Like other human rights treaties the main target of the African Charter is the state. The experience of the grievous human rights violations to which Africans in independent states have been subjected to before and since the adoption of the Charter, as is evident from ongoing unconscionable atrocities in some of the conflict settings, make it evident why the misuse and abuse of the authority of the state represents a major threat to rights. The Charter thus imposes legal obligations on the state.

In the European experience it was the totalitarianism to which the state is disposed and the threat this posed both to the rights and freedoms of individuals and to peace and security that inspired the development of a system of human rights. As pointed out above, in the African

experience, the historically grounded normative foundation for human and peoples' rights has been the absence and deprivation of self-governing statehood to the peoples of Africa. Moreover, as much as the excesses of the sovereign state, the enormously constrained and distorted character and form of the sovereignty of post-colonial African states also limits the effective realization of human and peoples' rights. As Adom Getachew highlighted, in her landmark study [Worldmaking after Empire: The Rise and Fall of Self-determination](#), this deeply limited and distorted quality of sovereignty makes 'new and weak postcolonial states vulnerable to arbitrary interventions and encroachments at the hands of larger, more powerful states as well as private actors.'

In stating in the preamble that the peoples of Africa 'are still struggling for their dignity and genuine independence,' the African Charter is expressing its recognition of the adverse impact not only of the past but also the burden Africa bears from the unjust power arrangement of the international system. It thus affirmed that 'it is henceforth essential to pay particular attention to development ...and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.' These preambular statements and the substantive rights, in particular collective rights of peoples, expand the conception of injustice undermining the full enjoyment of human rights to encompass the ways in which the international system frustrates the rights of peoples to freely determine their economic and social development according to the policy they have freely chosen as envisaged in Article 20 of the African Charter.

Today as we mark the 40th year anniversary of the African Charter, there is nothing more than the COVID19 vaccine injustice that vividly illustrates how this skewed power architecture of the international system brings peoples in Africa to an existential crisis. The third wave of COVID19 pandemic is gathering pace, with more devastating impact than previous waves. It claims the lives of increasing number of peoples including the highly limited skilled health care workers due to lack of access to the COVID19 vaccine and deals a serious blow to the economies of the continent. African countries, like others in the global South, are witnessing that their concerns – that the protection given to pharmaceutical companies under the treaty on intellectual property rights will prevent them from protecting the right to health of their citizens – is being born by events. Together with major European countries, pharmaceutical companies are blocking the temporary waiver of the application of patent protection to COVID19 vaccines, key for making the generic production of these vaccines on the continent for ending the current artificial scarcity. As [Strive Masiyiwa](#), chief of AU's vaccination acquisition task team pointed out, Africa's inability to access the vaccine is 'a product of the deliberate global architecture of unfairness.'

No. We are not all together on this. Africa, we are on our own. Again. In the 1990s with civil wars and the implosion and collapse of states ravaging parts of Africa, the continent was left on its own. In the apt description of the late former Secretary-General of the UN Kofi Annan, Africa was left 'to fend for itself'. As in the past, Africa rose to the challenge. The OAU transformed into the AU. In pursuit of fending for itself, Africa put in place institutions and processes for resolving conflicts, anchored on the Protocol to the Constitutive Act Establishing the Peace and Security Council.

In the face of the existential crisis facing Africa from the COVID19 vaccine injustice today we have to ask the difficult questions including – what leadership and policy failures have led Africa to be exposed to this existential threat? Will today’s leaders rise to this challenge, as earlier leaders did, by creating the conditions for building the requisite strategic infrastructures for health so that Africa will never again face the injustice of denial of access to medical supplies including vaccines, born out of the skewed power structure of the international system?

Dear sisters and brothers

Today is also an occasion for thanks giving for those who bequeathed us this fine African Charter. I wish in particular to pay homage to first the distinguished Senegalese Jurist Judge Keba Mabayé who, more than any other, played the role of being on the one hand a strategist and campaigner for securing the buy in within the OAU of the idea of the African Charter and on the other hand the lead drafter of the African Charter.

I also equally wish to extend our profound gratitude to President Leopold Sedar Senghor of Senegal and President Dawada Jawara of The Gambia for initiating the resolution for the adoption of the African Charter and for providing the guidance and support for the drafting of the African Charter.

Our deep gratitude also goes to the then Secretary-General of the OAU Adem Kojo who threw his full weight behind the implementation of OAU Decision 115(XVI) mandating the drafting and worked tirelessly for its adoption.

The generation of Mbayé, Senghor and Kojo discovered its mission and fulfilled it. We owe today’s celebration of the 40 years birthday of our Charter.

For the generation celebrating the 40 years of Our Charter, have we discovered our mission? Will we fulfil it, or betray it?

As to the mission of this generation, to which we are all a part, I am sure you agree with me that it lies in rendering the rights and freedoms of the African Charter meaningful in the lives of the masses of our peoples. Will we fulfill this mission by overcoming the challenge of implementation of the African Charter and by confronting the human rights challenges of our time namely – the deadly democratic governance deficit, widespread poverty and deepening inequality, pervasive gender oppression, the rising insecurity and violence and the climate emergency?

All the indications are that, we are on course for betraying this mission.

'How else can we explain the fact that in 2021 as in the 1990s we have the conditions forcing 'millions of our people, including women and children, into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope'?

How else can we explain 29 million people and counting being displaced and forced to flee their country unless states are failing to shoulder their responsibilities under the African Charter?

How can this be possible unless those entrusted with managing the affairs of our societies are betraying the trust of the public in pursuit of their own narrow self-interest thereby perpetuating the vicious cycle of misgovernance and authoritarianism?

It cannot be that we continue to have millions of our brothers and sisters forcibly displaced in states with even the most basic attributes of statehood, in societies with responsible leadership and in a continent with effectively functioning institutions.

It is indeed an indictment on all of us that we have sisters and brothers who expressed their thanks to the COVID19 virus for being provided with water, a basic necessity to which they have been denied access by leadership and policy failure of our governments. How is it that while the resources of the continent are fueling the development of other parts of the world, we are not able to provide even for the most basic necessities of life for the masses of our people? How is it that the leaders entrusted with the management of our affairs indulge in the embezzlement of resources that are meant for securing health workers and the public from the COVID19 pandemic?

What more represents the betrayal of the mission of this generation for translating the African Charter into reality than the way the Charter is observed by being routinely breached through not only the closing of the civic space, the assault on civil society, human rights defenders and the media but also the indiscriminate attacks against civilians and the display of complete lack of regard to the sanctity of human life in the various conflict settings on our continent and the attendant total impunity?

What is more to show how the leaders of the continent are failing the public than the deepening sense of despair that is pushing our people, particularly the youth, to embark on the perilous journey across the Sahara for crossing the Mediterranean Sea despite the death of no less than 20,000 migrants in only five years on this sea?

It is indeed a betrayal of epic proportions that our societies could not assure women and girls a life free from violence so much so that there is no place, from home to the work place and even places of worship, where they can feel safe and free from

violence. How else can we explain the fact that sexual and gender-based violence have become the other pandemic within the COVID19 pandemic in nearly all our societies?

Distinguished participants

As we celebrate the 40 years anniversary of our Charter, these are some of the questions we must face honestly if we are going to come closer to achieving the Africa we want. I do hope that today's event offers us an opportunity for further reflections on these and other questions that will make it possible for us to pull back from the brink of betraying our mission.

I thank you all for your kind attention and I look forward to very candid and fruitful

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