

HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT IN CONTEMPORARY AFRICA: A NEW DAWN, OR RETREATING HORIZONS?

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I. A BACKGROUND NOTE

More than at any other point in time, the approach of the third millennium of modern Western history¹ heralds both significantly new and even radically different challenges and opportunities for the overall human rights situation on the African continent. On the one hand, a new African "renaissance" has been proclaimed in which the peoples of the continent are being called upon to assume their rightful place in the community of nations and to put the turmoil and tragedy of their past behind.² On the other, internal and regional conflicts—even in countries that until recently appeared relatively stable and sanguine such as Namibia and Senegal—appear to grow not simply in frequency and magnitude, but also in intensity, viciousness and complexity.

International wars such as those in the Democratic Republic of Congo and between Eritrea and Ethiopia do not bode well for the better observation of and respect for the wide corpus of human rights. Explanations for the ferocity and morbid depths of the civil conflagration that engulfed Sierra Leone will preoccupy psychologists of armed conflict for decades to come.³ Despite the opening of

some democratic space in countries as diverse as Algeria and Nigeria, the problems have not gone away; they've simply assumed different forms of expression. In a nutshell, the human rights situation on the African continent today is most certainly in a state of considerable flux.

At the same time, Africa remains a continent marginalized from the tremendous technological, economic and developmental achievements that the world has made over the last few decades. Rigorous measures of economic and social reform and adjustment have produced conditions that are only marginally improved over what they were before the "shock therapy" measures were applied, and even then, only for some countries on the continent.⁴ The countries that have dominated the lower quartile of the UNDP's Human Development Index for all ten years that the Human Development Report has been produced are from Africa.⁵ It goes without saying that Africa's human development situation is in dire need of attention.⁶

However, when discussing the issue of human rights from a continental perspective, it is important not to forget that the internal dynamics of individual country-situations in various parts of the continent are crucial to an understanding of the overall human rights context. Each of Africa's over fifty countries has distinct political economies and historical backgrounds that need to be taken into account in any analysis that seeks to draw broad conclusions of general conceptual veracity. Thus, countries that enjoy stable political systems will differ from those facing irredentist and secessionary movements. States undergoing political transition will manifest distinct problems from those engaged in internal armed conflict.⁷ States struggling against collapsed social and political systems are faced by unique issues, including-for some like Somalia-the very question of their *raison d'être* and viability as states.⁸ The myriad social, religious, cultural, political and even idiosyncratic distinctions between the countries of the continent all need to be taken into account. Thus, making broad prognostications and drawing sweeping conclusions for a continent as diverse and complex as Africa may be an exercise in futility.

There is little doubt that external regional and international forces will impact on domestic country contexts in numerous ways. Thus, external conditions driven by the forces of the contemporary global political economy, and compounded by cultural factors will also be of significance in assessing the overall human rights situation. The influence of global arms-dealers will be as significant as that of the international broadcast media and of transnational corporations (TNCs). Alexandr Kalashnikov's AK-47 assault rifle will vie for domination alongside Ted Turner's CNN and cultural/corporate phenomena like Madonna and Nike.⁹ Major questions of accountability and social responsibility are raised by the dominance of the economic scene that such actors are able to exercise.¹⁰ What is also apparent from the preceding is that no external phenomenon is likely to have as telling an impact on the overall human rights condition in the African continent, than the phenomenon of globalization.¹¹ Although traditionally conceived as an economic phenomenon, globalization has significant implications for the social, political and cultural evolution of humankind in Africa in the coming century.¹² Moreover, the human rights implications of the phenomenon are only just beginning to be critically engaged and comprehensively understood.¹³ As United Nations Secretary General Kofi Annan has pointed out: "Globalization has an immense potential to improve people's lives, but it can disrupt-and destroy-them as well. Those who do not accept its pervasive, all-encompassing ways are often left behind."¹⁴

In analyzing the human rights context from either the broad continental level or from a more narrow country-specific perspective, concern must invariably be focused on the situation of the individual, and upon the manner in which the protection of his or her individual human rights is enhanced or not. This is the essential remit of the human rights text that is just over 50 years of age: protecting the individual against unwarranted and unjustified state interference to body and mind. Needless to say, the contemporary African situation presents wholly new and different contexts within which the realization of such rights extend beyond individual concern, and must be extended to encompass the family and the community. It is also crucially important not to forget the fact that traditional conceptions of human rights in the African context subsume the interests of the individual to those of the community at large, and in this way, also raise the correlation between human rights and human duties or obligations.¹⁵ In my opinion, critical to an understanding of the extent to which the protection and promotion of such rights will actually be enhanced is the degree to which the realization of two essentially group rights will be guaranteed. Those group rights are the right to peace and security (or freedom from conflict)¹⁶ and the right to sustainable human development (or freedom from want, deprivation and marginalization).¹⁷ These rights are considered critical because they provide an holistic context in which the more traditional individual human rights can be given most articulate and wholesome expression. It is meaningless to focus on the right to free expression and association in a situation rife with marauding armed combatants as in the case of Sierra Leone, Burundi or Liberia. The point made by Kofi Annan in his report to the 52nd Session of the General Assembly graphically illustrates this conundrum:

Since 1970, more than 30 wars have been fought in Africa, the vast majority of them intra-State in origin. In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than 8 million refugees, returnees and displaced persons. The consequences of those conflicts have seriously undermined Africa's efforts to ensure long-term stability, prosperity and peace for its peoples.¹⁸

It is just as futile to speak of the right of participation in conditions when basic human necessities such as food, shelter and water are beyond the reach of the majority of the population. What is the meaning of the 'right to vote' when the voter may be too weak from disease and hunger to effectively exercise his or her franchise? Conversely, unless freedom of expression is guaranteed, the hungry voter is unable to articulate the cause of his or her malnourishment and deprivation. The short point is that for a human being to be considered whole, they must be able to enjoy both civil and political rights, as well as economic, social and cultural rights. Moreover, such enjoyment must be exercised in generalized contexts that ensure that daily physical existence is not under threat of predictable extermination on account of hunger, disease or conflict. Conceived in this fashion, human rights then become the bedrock of a wholesome and integrated approach to sustainable human development. An inordinate focus on one category at the expense of another will obviously produce a truncated human reality.¹⁹

The main focus of this study is the regional protection of human rights on the African continent. It provides a short historical backdrop before moving on to an examination of the normative framework that presently prevails at the continental level. Engaged in this section are issues such as cultural relativism or reductionism,²⁰ the structure and content of the African Charter on Human and Peoples' Rights,²¹ the human rights of women, and the phenomenon of forced displacement—represented most graphically by the plight of refugees and internally displaced persons (IDPs). In the pen-ultimate section of the paper, I examine the existing institutional mechanisms that have been established to enforce human rights on the continent. The particular focus is on the

Commission established under the Charter, as well as on the African Court on Human & Peoples' Rights-the protocol for which has only recently been promulgated.²² Consideration is also paid to the national level of human rights enforcement-the level at which human rights must ultimately find concrete expression-and the role of civil society therein. The last section of the paper examines the challenges for sustainable human development that lie ahead and the opportunities available for the enhancement of the human rights situation on the African continent.

II. HUMAN RIGHTS IN AFRICA: AN HISTORICAL RESUME

2.1 Comprehending the effects of the Colonial Legacy

Any analysis of the contemporary situation of human rights on the African continent must approach the issue against the backdrop of a fairly broad sociohistorical perspective. Such a perspective is essential not simply because of the transmutation of various forms of social organization and expression as a result of both indigenous and external forces, but because history continues to exert its influence even up to the present point in time. Pre-colonial historical forms can be seen as much in the resilience of cultural (so-called "traditional") norms that govern domestic relations and the family in the same way that colonial forces are apparent in contemporary political systems and economic relations. Nearly half a century after most countries on the continent attained independence, so many of them continue to utilize colonial laws governing political association, public health, education and free expression. The consequence is that their very claim to having made a difference in the human rights reality of the people they govern is effectively negated. Laws continue to exist on African statute books outlawing the defamation of a foreign "potentate," the barracking of persons with contagious disease, the establishment of civic associations, and a host of penal sanctions that stem from the Victorian era, and which clearly violate contemporary notions of human rights.²³

We need not restate the fact that the colonial epoch in Africa represented the negation of all categories of human rights from the basic right of self-determination to the freedoms of expression and association. Despite the altruistic, moralistic and religious veneer in which the phenomenon was clothed, colonialism was primarily concerned with how much could be extracted from the territories and peoples it brought under its control.²⁴ Based on a system of extra-economic coercion, colonialism had little time for the recognition and protection of rights that would threaten or undermine its primary economic objective. This explains why resources expended on coercion (the police, gendarmarie, the armed forces and on prison services) were far in excess of those devoted to any social service in any colony on the continent. It also explains the apartheid-like differentials based primarily on race but reinforced by class which resulted in highly stratified social formations, and critically impacted on the ethnic frameworks of the colonized territories.²⁵ In the words of Jalali and Lipset, "Over time such (colonial) policies created widespread economic and social disparities between ethnic groups. Certain ethnic groups were selected as collaborators or channels for the transmission of government patronage."²⁶ Many such disparities have persisted into the post-colonial era, resurfacing to wreak havoc with a vengeance.

2.2 Human Rights Within the Organization of African Unity (OAU)

Ironically, in the field of human rights independent African states have on the whole performed little better than their colonial predecessors. The first attempt at a continental approach to Africa's myriad problems was pursued under the rubric of the Organization of African Unity (OAU)

established in 1963.²⁷ The Charter of this negated expression of pan-Africanism clearly delineated the twin focus of the organization as the right to self-determination and the protection of the incipient and fragile foundations of states that had only just regained their independence.²⁸ Preoccupied with these two major concerns, it is of little surprise that the Charter contained only scant reference to human rights and focused inordinately on state sovereignty and its accompanying concordat of non-interference in the internal affairs of other states.²⁹ Although noble objectives at the time-given the continued existence of several colonies compounded by apartheid in South Africa and Rhodesia and the debacle of UN intervention in the Congo-the net effect may, in the words of the Commonwealth Human Rights Initiative, "actually have damaged the cause of human rights."³⁰ The OAU Charter-the quintessential instrument governing the conduct of relations between African states-ignored the fact that states were merely a conglomeration of people to whom human rights protection should have been logically extended. The reference in the Charter to the Universal Declaration of Human Rights was made in reinforcement of the opposition of the body to the policies of colonialism and apartheid. However, scant attention was paid to broad or specific human rights principles as such.³¹

Unfortunately, the damage done to the concept of human rights in the early years of independence meant that it remained on the back burner of political debate and activity through two bitter decades of African history. As a consequence, single party states and military dictatorships assumed the dominant forms of governance on the continent. Characterized in the extreme by leaders such as Uganda's Idi Amin and the Central African Republic's Jean Bedel Bokassa, it was also a period in which the Cold War stalemate between the United States and the Soviet Union allowed for the almost unfettered assault on the human rights of the African peoples. Essential aspects of the right to development-health, education and just conditions of work-were also relegated to oblivion. It was against this background that in 1981 the OAU promulgated the African Charter which has evolved to become the principal continental human rights instrument on the continent.³² Tokunbo Ige has pointed out that there was a sense of urgency that attended the drafting and adoption of the Charter. The result was a number of compromises and weaknesses being written into the instrument.³³ Others have dismissed the African Charter outright. It is to a consideration of the substance of the Charter that we now turn to examine the concrete dimensions of its practical operation on the continent.

III. THE NORMATIVE AFRICAN FRAMEWORK: RADICAL DEPARTURE OR 'BUSINESS AS USUAL?'

3.1 Revisiting the Debate about African Cultural "relativism"

Most debates about the human rights framework on the African continent begin from an analysis of the relationship between the international instruments that have evolved over time -the Universal Declaration of Human Rights and the two covenants in particular-and the regional body of normative standards.³⁴ Implicated immediately in this debate is a tension that has come to be characterized as the phenomenon of "Cultural Relativism."³⁵ This is the argument about the extent to which ostensibly universal standards of human rights observance should be tempered and conditioned by the local cultural situation that prevails in the distinct regions of the world.³⁶ That tension is apparent in both the text and in the formulation of the African Charter on Human and Peoples' Rights.³⁷ The African Charter marks itself out as a distinctive human rights instrument even as it simultaneously draws inspiration from the Universal Declaration and other international human rights instruments.³⁸ This is evident from the preamble of the instrument to the emphasis

on the family, the community and the state, as well as on the issue of duties.³⁹ In this way, the instrument does indeed mark some conceptual distance from its international precursors.⁴⁰ The Charter is definitely an instrument that is married to the sociocultural context in which it was given birth.⁴¹

This fact is also reflected in its adoption of the term "peoples"⁴² to complement "human" and through the constant references back to the phenomenon of "African civilization." Thus, the fifth preambular paragraph of the Charter stipulates as follows:

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights." Although the question of culture is certainly an important and relevant one in the discussion about human rights today, unfortunately much of the debate on the subject is-as Yash Ghai has pointed out-unproductive.⁴³ This is because on the one hand it pits those (the "Universalists") who assert that the Universal Declaration and the corpus of norms that have evolved around it constitute a truly universal ethos over which there can be no debate.⁴⁴ At the other end of the spectrum are the "relativists" who assert that there can be no universalities. Consequently, all human rights standards must be subjected to the local conditions specific to the country, the culture or the religion in question. The relativists erect culture as a barrier to criticism or challenge to practices that clearly violate fundamental human rights. Conversely, the Universalists have transformed human rights discourse into an intellectual battering ram, chanting the mantra of universalism even when deference to the local will produce a solution that is not only more enduring, but one that enhances the protection of human rights in that community. Not only is such an approach insensitive to the reality of genuine cultural nuances that exist on the ground, but it negates one of the most fundamental tenets on which a truly universalist human rights ethos is grounded: inclusion and dialogue.

In most instances relativists are southern politicians whose human rights practices are at a minimum questionable, and often extremely violative on a host of fronts. Regarding the situation of women in particular, relativists seek to retain the dominance of patriarchal structures of social ordering and to resist what would amount to a diminution of traditionally-exercised power and control within the family and its attendant implications at the community and the state level.⁴⁵

Between the two there is no middle ground. In scholarly debate, the relativist argument is the one most often easily dismissed. Unfortunately, the Universalists often premise their debunking of cultural relativism and reaffirmation of the universalist ideal on an ahistorical-and near-missionary-conception of the development and contemporary application of human rights.⁴⁶ In the first instance, it is impossible to run away from the fact that the human rights instruments as we know them are culturally, politically and historically rooted in forms of state/individual structuring that have their roots in Western liberal democracy. Very few of the states that make up the international community today were at the table where the Universal Declaration was debated.⁴⁷ Moreover, many of the most important promulgators of the instrument including both Britain and France were colonial powers, which partly explains why the Declaration fails to mention the right to self determination-a fundamental democratic right of all peoples.⁴⁸

The United States was yet to recognize the equality of people of colour, while the Soviet Union had violently suppressed the rights of numerous peoples forcibly incorporated within its ambit. The same country also housed several thousand in virtual concentration camps. It was quite ironic that these four countries were the most prominent in the promulgation of an instrument the basic principles of which they domestically recognized much more in their breach. Current universalist rhetoric notwithstanding, it is quite evident that the UDHR assumed the shape and character most familiar to Judeo-Christian conceptions of democratic governance and individual autonomy.⁴⁹ To compound the problem, the vision of human rights that most universalists accept and pursue with single-minded devotion, is one that has consistently failed to recognize either economic, social and cultural rights, or rights to peace, development and the environment as "genuine" human rights.

The unfortunate fact is that in the same way that many of the relativists are pursuing a political agenda designed to retain their hegemony over local political space utilizing the veneer of culture, the universalists are pursuing an equally politicized agenda of extending global hegemony under the rubric of human rights. And yet, the disparities in the human rights regime have not remained as atavistic relics from a contested and distant past. They are omnipresent even within contemporary struggles over the meaning and the content of human rights. Take the arena of women's human rights as one example. One would imagine that because of its more recent conceptual development, there would be considerably more comity of perspective between women from across cultures. Significant tension is nevertheless still manifest on a variety of issues from reproductive health rights,⁵⁰ to the debate over the eradication of female genital mutilation (FGM)⁵¹ to the contention that the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵² did not adequately address the situation of rural women-the majority of whom are in countries of the "south."⁵³

Engaging in an extensive deconstruction of the normative elements enshrined within the existing human rights corpus is not the intention of the present paper. It is nevertheless critical to an understanding of the issues under examination that we remain cognizant of the limitations of the universalist discourse and its dominance in the human rights debate. This is because that dominance has particular implications for several aspects of contemporary human rights discourse and for their linkage to sustainable human development. For example, the under-emphasis nay, denigration-of economic and social rights, and the debate about their alleged non-justiciability. Further to this is the discussion about the right to development and its stalled implementation; the issue of the debt burden (from a human rights perspective) and the whole question of non-state actors (particularly TNCs) and their relevance to the international respect for and enforcement of human rights. All these issues are implicated in the relativism/universalism discussion. Unfortunately they tend to be relegated to the background once the bogeyman of culture is erected to trump all alternative or contending argument. Nevertheless, as Anne Orford appropriately warns us:

Whatever definition of rights and democracy we adopt, it remains necessary to question the assumption that the powerful international institutions operating in the economic and security areas are the bearers of even these limited liberal versions of democracy and rights in the post-Cold War era. To what extent is that idealization of the international realm based in turn upon selective erasures or motivated forgetting?⁵⁴

Regardless of the distinctions entailed by an approach that is rooted in the particularities of the African cultural experience, important consequences flow from the connection of the African

normative framework as a regional human rights system to obligations concerning human rights under the United Nations Charter and the Universal Declaration. According to Radhika Coomaraswamy-UN Special Rapporteur on Violence Against Women-there is an element of rights discourse and practice that extends beyond geographical location or cultural specificity: Thus human rights discourse has resonance in the everyday experiences of individuals. Otherwise it would not have developed so dynamically and have become used by such different groups throughout the world. In other words-yes, perhaps human rights in its present day incarnation is a product of the Enlightenment, but its general thrust has resonance in diverse spiritual and cultural experiences. In terms of political values like the concept of democracy it is an important step forward for all human beings and all cultures.⁵⁵

Contemporary international standards of human rights and the international machinery erected for their protection are rooted in the obligations established under the UN Charter to promote universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.⁵⁶ The essential point is that despite the distinctive African "cultural fingerprint"⁵⁷ implicit in several of its provisions, several aspects of the Charter provide evidence of a general acceptance of the normative standards (such as non-discrimination, equality of all persons, fundamental freedoms and liberties, for example) enshrined in the international instruments. Having retraced the conceptual issues relating to the African Charter, we can now turn to a more critical consideration of the specific provisions and the structure of the instrument.

3.2 Breaking New Ground? The Structure and Content of the African Charter

The African Charter can generally be divided into five distinct parts, viz., the provisions on civil and political rights; those on economic, social and cultural rights; the group or collective rights; the provisions which elaborate the duties in the Charter, and finally, the provisions governing the enforcement mechanisms in the instrument.⁵⁸ The first category of rights is fairly straightforward, including non-discrimination (Article 2) and equality before the law (Article 3); the right to life (Article 4), and the inherence of human dignity (Article 5). Articles 6 to 13 specify the rights which are similarly covered either in the Universal Declaration or in the International Covenant on Civil and Political Rights (ICCPR). Striking omissions from the Charter are the prohibition against being subjected, "without free consent to medical or scientific experimentation" that is provided in Article 7 of the ICCPR. The African Charter also lacks more elaborated guarantees against arbitrary detention. Similarly, although the right to a fair trial is covered by Article 7 of the Charter, it does not speak about trial in absentia, the issue of legal aid, or the right to an interpreter. Also omitted are compensation for the miscarriage of justice and protection against double jeopardy-all of which are covered by Article 14 of the ICCPR.⁵⁹

Perhaps the issue in the African Charter that has attracted most criticism is its extensive deployment of clawback clauses-phrases which could effectively remove (or at a minimum severely curtail) the right ostensibly guaranteed. In each of the provisions referred to above, clauses such as "... except for reasons and conditions previously laid down by law..." (Article 6), "...subject to law and order..." (Article 8) and "... provided he abides by the law..." (Article 10) abound. Although the grant of the right is supposed to be paramount, the clawback clause may have the effect of taking away the right that is granted. This is especially a problem because in many African states you still have laws and regulations that are directly violative of human rights. For example, some states prohibit the formation of certain types of associations merely at the whim of the registering officer. In other cases, the law to which the right is subjected is so arbitrary that its effect is to completely negate the right ostensibly guaranteed. The clawback clauses coupled with the omission of certain

rights does not therefore give the African Charter a very prominent position in the pantheon of instruments that seeks to extend rather than diminish the parameters of rights respect and enforcement.

Perhaps the most innovative aspect of the African Charter relates to its provisions on Peoples' rights and on the duties of individuals. Among the peoples' rights covered are those on the right to existence and to struggle against colonial domination (Article 20). Of course the interesting point about the question of peoples' rights is how the concept is of such fluidity that it could even undermine well established principles in the OAU Charter concerning the inviolability of states and the sacrosanct nature of their borders. The "oppressed peoples" in paragraph 2 of Article 20 who have the right to free themselves from the bonds of domination do not necessarily have to be under the yoke of a colonial power. The collective rights to development (Article 22), to peace and security (Article 23) and Article 24 on the right to a "general satisfactory environment" are all rights which have greatly impacted on the jurisprudence of rights in the international arena.⁶⁰ The African Charter was the first international instrument to lay down these kinds of rights in a legally binding fashion.⁶¹ Indeed, as we have already argued, these collective rights will become of fundamental importance in the coming millennium.

Final mention must be made of the African Charter's elaborate codification of individual duties. Although both the Universal Declaration and the two covenants contain reference to the duties individuals owe to society, none of them are as extensive as the African Charter's elaboration.⁶² The duties listed extend from the harmonious development of the family⁶³ to the promotion and achievement of African unity.⁶⁴ Most commentary about them has considered them to be too onerous, and focused on the possible use that can be made of them by states to effectively stomp the individual rights guaranteed.⁶⁵ While there has been little action undertaken to test this aspect of the Charter, it is quite clear that the concept of duties is not necessarily antithetical to the respect of human rights. What is clear nevertheless is the need to approach the matter in such a fashion that the overall observation and protection of individual rights is not undermined by an undue emphasis on duties. This point becomes even more clear if we consider that aspect of the Charter dealing with Economic, Social and Cultural Rights and explore their connection to the pursuit of sustainable human development.

3.3 Economic, Social and Cultural Human Rights: A New Approach to Sustainable Human Development?

It is not erroneous to describe economic, social and cultural rights as the "ugly sister" to the more widely recognized civil and political rights.⁶⁶ Not only is there a lacklustre approach to their effective realization, there are even lingering questions about their conception.⁶⁷ Some have even gone so far as to argue that economic and social rights are not rights—they are merely unenforceable individual or group entitlements. Frequent objections focus on the issue of justiciability.⁶⁸ The argument most often heard is that economic, social and cultural rights are simply not justiciable. In other words, they cannot be the subject of adjudication and enforcement through the mechanism of court litigation and judicial enforcement in the same way as civil and political rights. The argument continues to assert that economic, social and cultural rights are "aspirational" or "abstract"; they cannot be the subject of either affirmative state obligation or of immediate realization and enforcement. Both the Indian⁶⁹ and South African courts have effectively disproved this thesis, aside from the fact that the 1993 Vienna Declaration explicitly reaffirmed the indivisibility, interdependence and interrelatedness of the two categories of human rights.⁷⁰ Consequently, the question for debate is not so much the conceptual but the practical:

how to make economic and social rights resonate for the vast majority of the human population for whom these rights are critical?

Several cases from both the aforementioned jurisdictions have affirmed that certain obligations with respect to the realization of the rights to education, health, and shelter, to mention only a few, cannot simply be evaded by the state, irrespective of the question of resources or financial ability. This is because in many instances what is at stake in the disputation over such rights may be issues such as discrimination (on gender or social status); prioritization (concerning budgetary allocations), or access. A state does not require to expend resources to address any of the above. Responding to the claim that the enforcement of social and economic rights must be dependent on the capacity of a state to afford the cost entailed (the so-called "afford ability" argument), the South African Constitutional Court has, for example stated:

It is true that the inclusion of socio-economic rights may result in courts making orders that have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon them by a bill of rights that it can result in a breach of the separation of powers.⁷¹

Indeed, as Shadrack Gutto points out, the incorporation of justiciable rights in the Bill of Rights of a constitutional democracy that respects the Rule of Law and under conditions of social inequalities, "... means that such rights and processes of their justiciability is open to all; rich and poor, the advantaged and disadvantaged."⁷² The rich and advantaged are entitled to use the rights to defend their position while the poor and disadvantaged are entitled to do so in pursuit of their interests to either be given entry into the camp of the rich and advantaged to gain some improvement in their life conditions."⁷³ Although Gutto goes on to argue that the social actions of all social classes tend to "balance out"-a point that I find difficult to accept-the more important issue here is that social and economic rights are not esoteric entitlements. Such rights can indeed be the subject of rights discourse and enforcement at the domestic level. The judgments of the South African court go a considerable distance in clarifying what has traditionally been extremely murky terrain.⁷⁴

The distinctive character of the African Charter has been extolled by numerous authors,⁷⁵ particularly with respect to the recognition of economic, social and cultural rights. ⁷⁶ The Charter commences its approach to economic, social and cultural rights from the Preamble which stipulates that it was henceforth essential to pay particular attention to the right to development. Furthermore, it goes on to assert that civil and political rights cannot be dissociated from economic, social and cultural rights in conception as well as in universality. The preamble concludes, with an affirmation that "... the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."

Some scholars have argued that all that the African Charter accomplished was to place economic, social and cultural rights and group (so-called "third generation") rights on the same footing as civil and political rights.⁷⁷ It is my view that what the Charter did was to conceptually shift the emphasis from the traditional focus on civil and political rights. However, the extent to which it adopted a

genuinely novel and revolutionary approach to the issue is debatable. Indeed, the conceptual shift was not met by a transition in the practical approach to and application of the basic elements of rights-discourse and implementation on economic and social rights whether at the continental or the national level of action in Africa. How is this so?

A review of the historical process by which the African Charter came to approach economic and social rights is extremely important to understanding why there is a dichotomy between the theory enshrined in the instrument and the on the ground practice. In the first instance, the situation of civil and political rights on the continent was dismal, thereby attracting the opprobrium of the international community. African states and the leaders who assembled to discuss the Charter at the end of the 1970s were clearly on the defensive. Simultaneously, the debate over the New International Economic Order (NIEO) had wound its way through the United Nations system but produced little by way of tangible results. The conceptual reversal implicit in the African Charter was a reflection of the prevailing belief that an alteration in the existing structures of the international political economy was a matter of priority. Among those structures was the absence of attention to issues such as basic education, health care and potable water-issues central to the prevailing developmental paradigm with its focus on increased aid. In this respect, by focusing on the Right to Development, the Charter was presaging the subsequent debate that was to lead to an international declaration on the same subject. However, the economic and social rights in question (to better health, improved education, and shelter inter alia) were seen not so much as rights of individual Africans, but rather as rights of the state. It was rights-theory in top-down and paternalistic fashion. The state was viewed as the "people."⁷⁸ From such a perspective, obviously the "people" could not claim these rights against the state.

At the same time, the drafters of the Charter were cautious, at a minimum, about the obligations entailed in a rights-approach towards matters that were traditionally confined to the sphere of political largesse. Thus, a systematic review of what is in the Charter will clearly demonstrate a lacklustre approach to the issue of economic and social rights. Coupled with the manner in which civil and political rights were approached and articulated it becomes clear that the drafters of the document were not genuinely rights-sensitive-whether towards civil and political rights or with respect to economic, social and cultural rights. In the Charter, the latter category commence with Article 14 guaranteeing the right to property. Article 15 is on the right to work (incorporating the right to equal pay) while Article 16 is on the right to mental and physical health, and Article 17 covers the right to education. Finally, Article 18-which we shall consider more extensively when we turn to the issue of the Charter and women's human rights-concerns itself with the family and the obligations of the state towards what is described as the "natural unit and basis of society." The phraseology adopted for all these rights is very broad and nebulous-this in a document which proclaims such rights as a guarantee to the observance of civil and political rights.

There are additional problems with the approach of the African Charter to this category of rights. The Charter does not make mention of several rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷⁹ such as the right to social security, an adequate standard of living,⁸⁰ freedom from hunger⁸¹ or the right to strike.⁸² Furthermore, there is very little elaboration (as is done in the ICESCR) of the specificity of what the rights mentioned entail. This could be because the drafters were wary of duplication. After all, Article 60 allows the Commission to "draw inspiration" from other international instruments. But specifically elaborating these rights in an African instrument would have been in consonance with the conceptual spirit laid down in the

Preamble to the Charter. Indeed the very scantiness and number of economic and social rights the Charter does mention belie the very strong statements of affirmation in the Preamble that refer to the necessity for such rights as a guarantee to the realization of civil and political rights. All in all, the African Charter is a serious let-down in both the formulation and in the reconceptualization of economic and social rights.⁸³

If the normative framework is lacking, the contemporary realization of economic and social rights on the African continent has been compounded by the policies of structural adjustment (SAPs) that have been in place since the early 1980s and by the phenomenon of globalization. The basic tenets of these policies are essentially antithetical to the effective realization of economic, social and cultural rights.⁸⁴ This is primarily because the basic foundation of structural adjustment policies is a reduction of the role of the state in either guaranteeing, or in simply protecting the individual against the violation (or the progressive non-realization) of his or her economic and social rights. Policies such as privatization, trade liberalization and deregulation inordinately expose the individual to a variety of practices-particularly by TNCs-that have the effect of minimizing their options and parameters of choice. The "race-to-the-bottom" effect which has been set in place to attract more investment and on the bidding of international finance capital has entailed a much worsened situation of the protection of these rights. A distinct group that is considerably affected by both the realization of economic, social and cultural rights and by the impact of global policies of economic restructuring is African women.

3.4 Women's Human Rights in the African Regional Framework

Opinion on the impact and efficacy of the African Charter with respect to the situation of women on the continent is divided.⁸⁵ On the one hand the Charter contains several provisions that relate to non-discrimination and equality of treatment. On the other, only one article out of more than sixty makes any reference to women. Even then, it is contained in an omnibus clause that covers both the family and upholds tradition thereby reproducing the essential tension that plagues the realization of the human rights of women. Article 18 of the Charter-the single provision that directly refers to women-has been the subject of considerable debate by commentators on the situation of women on the African continent.⁸⁶ It is thus trite to point out that the Charter is a document that makes minimal reference to the human rights of women, although, as one scholar has observed, it did, "... at some level, contemplate the situation of women."⁸⁷ Lisa Kois argues further that there is some proof that the framers of the document were not entirely incognisant of the situation of women:

The proof of such consideration is found through the implicit and explicit identification of discrimination against women as an obstacle impeding the full enjoyment of the human rights of women. Implicitly, the drafters identified the existence of sex-based discrimination found in both the preamble to the Charter and in Article 2. Additionally, Article 18, which specifically addresses the family, contains a provision directing states to eliminate all existing forms of discrimination against women and to protect the rights of women.⁸⁸

Many commentators have argued that both the type of family and the kind of tradition envisaged in the African Charter can be deployed to inhibit the realm and enjoyment of women's human rights. Outside the Charter, the Guidelines on State Reportage that are supposed to provide states with the methodology for their reportage to the Commission follow the principles adopted in Article 18 of CEDAW. However, the emphasis continues to be on marriage, motherhood and child-care, while issues such as employment, property rights and gender violence are given only scant attention. It

is not that the former issues are unimportant. However, a focus that is confined only to those spheres of concern is clearly a limited one.⁸⁹

The regional and international framework guaranteeing the rights of women notwithstanding, at the domestic level in numerous countries around the continent, considerable problems subsist for African women at the national and community levels. Indeed, it is at this level that the full force of discriminatory and exclusionary practices continues to be felt. Different countries have approached the issue of gender-based discrimination in a variety of ways. Mumbi Mathangani states that in practice Courts in Kenya "... have completely disregarded the country's commitments to CEDAW and to other international standards."⁹⁰ However, in the famous Botswana case of Attorney General v. Unity Dow,⁹¹ the Court adopted and used values enshrined in the Bill of Rights of the Constitution of Botswana and the African Charter in order to override traditional customs relating to the unequal treatment of women regarding their citizenship rights. Unity Dow's case was thus important for the conceptual and normative boost it gave to the domestic application of the African Charter. Although Botswana is a state party to the instrument (as is the case with every other African country) it had not adopted enabling legislation incorporating the provisions of the instrument into the domestic legal regime. Regardless of this fact, the court found no problem in holding that the provisions of the instrument bound Botswana.

But victories such as those represented by the Unity Dow case are sometimes counter-acted and even undermined by judicial pronouncements, government policies and resilient cultural practices that have the effect of turning the clock back. To its credit, the government of Botswana eventually amended its citizenship law to remove the discriminatory provisions. However, executive and judicial action in response to discrimination may do the complete reverse. For example, Human Rights activists across the continent were shocked by the recent ruling by the Zimbabwean Supreme Court in the case of Venia Magaya v. Nakayi Shonhiwa Magaya.⁹² The main issue in contention was whether a woman could inherit her father's estate if he died without leaving will. In the first instance, the Court made no reference whatsoever to CEDAW or to other relevant international instruments, arguing that in any event domestic provisions which discriminate against the human rights of women are "exceptions" that would effectively override the international instruments.⁹³

The learned judge went on to observe that, "At the head of the (African) family there was a patriarch, or a senior man, who exercised control over the property and lives of women and juniors. It is from this that the status of women is derived. The woman's status is therefore basically the same as that of any junior male in the family."⁹⁴ In other words, women-irrespective of their age-were deemed the equivalent of minors. The use made by the Court of the African Charter actually run in the opposite direction from that espoused by the Bench in Unity Dow's case. Citing with approval a book by a Prof. Bennet entitled Human Rights and African Customary Law under the South African Constitution, the learned judge extracted the following quotation:

The obligation to care for family members, which lies at the heart of the African social system, is a vital and fundamental value, which Africa's Charter on Human and Peoples' Rights is careful to stress. Paragraph 4 of the Preamble to the Charter urges parties to pay heed to 'the virtues of (the African) historical tradition and the values of African civilisation,' and Ch.2 provides an inventory of the duties that individuals owe their families and society. Article 29(1), in particular, states that each

person is obliged to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.⁹⁵

The Magaya decision is important to the issue of the realization of the human rights of women in Africa for several reasons. In the first instance, it brings out the resilience of patriarchal forms of control and discrimination and the considerable obstacles that stand in the way of the struggle to achieve gender parity and greater respect for women's human rights on the African continent. Many times, the reasons given for the retention of discriminatory practices relate to the ostensible need to retain social harmony and cohesion. Thus, Justice Mucchechere could justify his judgment in terms of the need to approach such matters with caution:

Whilst I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society, I am of the view that great care must be taken when African customary law is under consideration. In the first instance, it must be recognised that customary law has long directed the way African people conducted their lives and the majority of Africans in Zimbabwe still live in rural areas and still conduct their lives in terms of customary law. In the circumstances, it will not readily be abandoned, especially by those such as senior males who stand to lose their positions of privilege.... In view of the above, I consider it prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution initiated by the courts.⁹⁶

The Magaya decision is of critical importance to the discussion of the contemporary human rights situation on the African continent for several other reasons, aside from the points we have already noted. Upholding discrimination against women simply on account of their sex has several implications for their enjoyment of human rights-civil and political and economic, social and cultural. Among them are of course issues relating to participation in both economic and political life.⁹⁷ But even more importantly is the fact that to deem a woman a minor means that actions such as "chastisement" (better known as domestic violence) would also be deemed acceptable means of subjecting women to "discipline."

In this way, customary law is elevated to a status that negates not only the constitutional provisions that are enshrined within the bill of rights and other provisions of the basic legal regime of a country, but it also negates the whole impact of international provisions. At this point the tensions we earlier referred to between an international regime that seeks to guarantee rights and a domestic framework in which such rights are taken away come to the fore. It then becomes necessary to engage the specific practice being endorsed in what Abdullahi An-Naim and others have described as a cross-cultural discourse. Secondly, this means that it is essential to interrogate the interests that underpin the continued support for the cultural practice in question; who is supporting the practice? Why are they doing so? What are its consequences for the particular individual and for the class or group of persons that the practice is being directed against? How can we most effectively convey the point that gender discrimination is not simply a matter of disparate treatment, but that it also affects the realization of sustainable human development? All these questions demonstrate that the African Charter provides an incomplete answer. Not only is there a need to reinforce Article 18 with a more elaborate rendering of the respect for women's human rights-a process being attempted through the drafting of an optional protocol to the Charter⁹⁸-but critical attention must also be paid to the domestic context of each African country.

3.5 The Phenomenon of Refugees and Internally Displaced Persons (IDPs)

The human rights regime in Africa is also concerned with the situation of people who have been forcibly displaced from their homes and have either fled across the border (as refugees) or are internally displaced. Following a growing prominence of refugee flows after the attainment of independence for most African countries in the 1960s, the OAU promulgated the Convention Governing the Specific Aspects of the Refugee Problem in Africa.⁹⁹ Considered among the most liberal regimes governing refugees in the world, the Convention made several significant contributions to the corpus of international refugee law. Among them were its approach to burden sharing, non-rejection at the border, the principle of non-refoulement, voluntary repatriation and temporary asylum.¹⁰⁰ In particular, the definition of the term "refugee" employed in the Convention is extremely wide in that it recognizes the objective conditions that may cause flight rather than the subjective criteria imposed by the international legal regime epitomized by the 1951 Geneva Convention.¹⁰¹ As the Lawyer's Committee for Human Rights has pointed out, the adoption of the Convention was prompted "... more by a concern with large flows of refugees whose exodus was related to Africa's colonial occupation and wars of national liberation than by concern about persecution on an individual basis."¹⁰²

Despite possession of a liberal refugee regime, at the end of the day, the continental spirit embodied in the OAU Convention is tempered by existing realities on the ground. In the first instance, there is no continental-wide agency akin to the African Commission exclusively devoted to the situation of refugees. Although forced displacement is a human rights matter, the Commission has its hands full as it is dealing with the myriad other human rights problems it must address. The OAU Bureau for Refugees that is stationed at the OAU headquarters in Addis Ababa is almost wholly impotent, and has been further subordinated by the establishment of a conflict management and resolution mechanism within the body. Although refugees are indeed a product of conflict, their problems cannot be simply lumped together in omnibus fashion under the overall focus of the question of conflict.¹⁰³ The consequence of the lack of an effective institution at the continental level is twofold; the refugee crisis is dominated by the UNHCR-the global agency concerned with refugees-which sometimes approaches the question of displacement in hot-house fashion, and by individual states. Needless to say, both have their problems. At individual country levels the spirit of the OAU Convention is even less apparent. According to the Lawyers Committee:

Individual status determination procedures are often labyrinthine and incomprehensible to applicants. Frequently, applicants have no access to independent advice or representation, and no possibility of appealing an unfavorable decision. Collective determination may also carry with it serious restrictions on a refugee's rights. For example, refugees may only be recognized as such while they remain in designated rural settlements or regions. Thus, should they attempt to exercise their right to freedom of movement, they may lose their refugee status. They may even risk arrest and detention at the hands of security personnel.¹⁰⁴

For a refugee that does not have any status whatsoever, the implications are even more dire, in both legal and practical terms. The grant of status in many countries is often a prerequisite to a host of human rights-extending from freedom of movement to the possibility of accessing gainful employment. Where a refugee is not recognized by the law they stand wedged between the rock of discrimination in the country in which they have sought solace and the hard place of possible refoulement to the place from which they escaped in the first instance. Furthermore, in many African countries there is a growing spate of xenophobia, in part provoked by conditions of

worsening hardship, such that the old African maxim about African's being their brother's (or sister's) keepers does not necessarily always apply. A country like Tanzania that had traditionally opened its arms to refugees only recently adopted an extremely restrictive approach to refugee settlement and integration in the wake of the Rwandese crisis.

Finally, the OAU Convention is completely silent on the issue of refugee women, and also on the question of internal displacement (of both sexes)-an issue that has come to the fore as a major humanitarian and human rights crisis not only on the African continent.¹⁰⁵ Internally displaced persons (IDPs) do not have an international regime to cover their specific situation, which is compounded by the fact that although they face the same conditions as refugees, there is neither a normative nor an institutional mechanism to cater to their situation. And yet, in the words of Cohen and Deng, their condition is appalling:

Of the world's populations at risk, internally displaced people tend to be among the most desperate. They may be forcibly resettled on political or ethnic grounds or find themselves trapped in the midst of conflicts and the direct path of armed attack and physical violence. On the run and without document, they are easy targets for roundups. Arbitrary detention, forced conscription, and sexual assaults. Uprooted from their homes and deprived of their resource base, many suffer from profound physical and psychological trauma. They are more often deprived of shelter, food and health services than other members of the population.¹⁰⁶

If the most important mechanism for refugees is recognition of their status and the existence of a regime of legal protection to cover undue assault and discrimination against them, it is easy to appreciate why the lack of a similar framework for IDPs is particularly disconcerting. Moreover, the elaboration of an international legal regime is unlikely to be developed beyond the Guiding Principles on Forced Displacement produced by the UN Secretary General's Representative on Internally Displaced Persons, Francis Deng.¹⁰⁷ The connection to the issue of human rights is manifest in the fact that the major reason for forced displacement in Africa is according to Susanne Schmeidl, "... brutally repressive regimes, ethnic conflict, and external destabilization campaigns."¹⁰⁸ The magnitude of the problem is better appreciated if we consider the fact that the population of IDPs in Africa outnumbers that of refugees. The implications for sustainable human development are obvious. In the absence at a minimum of an effective regime to address the issue in a rights-sensitive fashion, the phenomenon of internal forced displacement will act as a significant impediment to the realization of sustainable human development in Africa. Of course, this issue is directly linked to the question of the institutional mechanisms that exist on the African continent.

IV. AFRICA'S INSTITUTIONAL ENFORCEMENT MECHANISMS

4.1 The Role and Place of the African Commission and a Note on the New Court

The African Charter has been ratified by every single African state with the exception of two- perhaps the most significant rate of ratification of any international instrument. If ratification per se were to be the yardstick by which adherence and implementation of the principles within the instrument were to be judged, then the African human rights situation would be considerably less troubled than it is. Unfortunately, even the most positive reviews of the performance of the major mechanism of implementation of the Charter-the African Commission on Human & Peoples' Rights-generally agree that the institution has performed at less than par.¹⁰⁹ Several reasons can

be advanced in explanation for this situation, extending from the conceptual and infrastructural to the political. A disillusioned Professor Oji Umozurike-former member of the Commission-was reported to have made several succinct observations on the problems of the African Commission:

Most cases of human rights violations filed by individuals and organizations take an average of two years to process. State parties rarely provide prompt answers or any answers at all until threatened with a finding in default. Complainants' costs are prohibitive and, until very recently, little or no publicity could be given to the proceedings and issues. Rules ... ensure that public embarrassment and shame cannot act to remedy current situations or prevent new occurrences.¹¹⁰

Additional problems that plague the Commission relate to the facilitative or infrastructural bottlenecks that it faces as an institution. The question of funding has long been a major problem for the Commission, with member states being extremely lacklustre in meeting their dues, and thereby preventing the body from operating effectively. As a consequence, the Commission has been forced to rely on funding sources that mainly emanate from outside the continent-a situation which, as Shadrack Gutto points out-is not a sustainable one in the long run.¹¹¹ Indeed calls have been made for the establishment of an African Human Rights Fund to facilitate the operations of the Commission.¹¹²

Joshua Mzizi has observed that the Charter itself is an obstacle to the more effective realization of human rights on the continent:

The Charter provides for a broad spectrum of rights and responsibilities, but it is woefully deficient in the enforcement machinery. The Commission has the mandate to compile reports on violations for the attention of Heads of State and Governments. The internationally respected norm of non-interference in the domestic affairs of a sovereign state makes timely intervention impossible even when urgent measures have to be taken in order to protect human life.¹¹³

Mzizi touches upon the most fundamental of the problems faced by the African Commission, the issue of political will-an issue that is both internal and external to the institution. Internally, there are questions such as the independence and expertise of the Commissioners, as well as the genuineness of their commitment to the protection and promotion of human rights. There is also a reluctance to make decisions that would displease the appointing authority-the Assembly of Heads of State and Government. Thus far, more than ten years after it commenced operations the Commission has not even slightly threatened the 'business-as-usual' modus operandi that prevails among African states and within the OAU. Its operations do not even marginally affect the status quo. To compound it all, the mechanism of state reportage which is supposed to be the bedrock of the system has proven a dismal failure. New initiatives such as the appointment of a Special Rapporteur on Summary and Extra-Judicial Executions and another on Prisons are yet to make any significant inroads on the African human rights scene. Externally, the over-bearing presence of African states will always be a factor to countenance. Odinkalu and Christensen put their finger on the issue when they state: "Whether the Commission will be perceived as an effective institution for the protection of human rights in Africa will largely depend on how far and how much the state parties to the African Charter take seriously, and respect, the Commission's views and recommendations."¹¹⁴ So far, they have not.

Against such a background, the establishment of a Court on Human Rights for Africa is a development that can only be greeted with caution.¹¹⁵ It is likely that the Court will be plagued by

the very same problems that have hampered the work of the Commission. Even if by some miraculous occurrence the infrastructural issues were to be tackled, the paramount issue of political will remains an outstanding one. If the Court is to be relevant to the human rights scene on the continent, then it must be able to make decisions that in the end assist individual African men and women. Otherwise, it will have to adopt a "softly-softly" approach mirroring that of the African Commission. And if after more than a decade of existence the Commission has hardly made a dent in the human rights scene, the Court would be doomed to a similar fate. But there are additional institutional mechanisms designed to address aspects of the human rights question in Africa, especially with regard to the issue of conflict.

4.2 The OAU Mechanism on Conflict Resolution and the Bureau for Refugees

Given that the issue of armed conflict and its impact on human rights has surfaced to the fore so dramatically in the contemporary African context, it is not surprising that the OAU established the Mechanism for Conflict Prevention, Management and Resolution in June, 1993.¹¹⁶ Designed basically to foster the speedy and peaceful resolution of conflicts on the continent, the Mechanism is the newest institution that attempts to ensure that the situation of human rights violations does not escalate out of hand.¹¹⁷ Some scholars contend that the Mechanism has met with some success, for example, in the brokering of an agreement in Congo Brazzaville between rival political groups.¹¹⁸ However, since its establishment, conflicts have broken out in Rwanda (with the genocide that followed), Burundi, Sierra Leone and a host of other countries around the continent. In both the Democratic Republic of Congo and in the Eritrean/Ethiopian war-Africa's most recent conflagrations-the Mechanism has been largely absent or simply silent. Indeed, in the admission of the officer in charge of the Mechanism, "... much of the OAU's time is allocated to dealing with the effects of conflicts, rather than preventing situations of tension from growing into full-blown confrontation."¹¹⁹

On its part, the OAU Bureau for Refugees, Displaced Persons and Humanitarian Affairs has always had a minimalist role with respect to the human rights or other issues relating to forced displacement on the continent.¹²⁰ Even before its mandate was extended to include the issue of forced displacement, it was fairly clear that it had not executed its mandate very well on the sole issue of refugees. Like the African Commission, it is hamstrung by infrastructural and financial inabilities. Cohen and Deng indeed understate the problem: "In the case of the internally displaced, it has no specific programs, and in the area of protection, it does little, whether for refugees or internally displaced persons."¹²¹ Cohen and Deng also point to the possibility of developing a joint collaborative role between the Bureau, the Mechanism and the African Commission-a collaboration they believe would greatly enhance the overall protection of the human rights of all the concerned parties on the continent. But it is doubtful whether collectively they would be able to overcome their individual limitations.

Is there a possible role for sub-regional bodies in addressing the human rights situation on the continent? Organizations such as the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC) and the Inter-Governmental Authority on Development (IGAD) in eastern Africa, are at least geographically well situated to address some of the major issues on the human rights scene in their individual regions. Unfortunately, in many respects these institutions are simply microcosms of the OAU with regard to both financial capacity as well as in relation to the critical factor of political will. None of the organizations have explicitly incorporated matters relating to human rights within the operational frameworks of their mandates.

Several have broad statements of commitment to, for example, "... encourage the observance of human rights as provided for in the charters and conventions of the Organization of African Unity and the United Nations."¹²² This is clearly insufficient and requires to be matched by much more concrete manifestations of action on the issue. But regional institutions can only build on the strengths of their individual membership. Individual countries therefore constitute the building blocks on which regional organizations must rely in order to make a serious impact in the human rights and human development arena.

4.3 Enforcement at the National Level and the role of Civil Society

Promoting a culture of human rights discourse and practice at the national level is perhaps the real struggle, as opposed to the regional or international one. While there are certainly significant benefits that flow from a regional approach to human rights protection and enforcement, ultimately, human rights must be enforced at the national level. This can only take place through a twofold process-in the first instance by encouraging individual governments to establish the necessary frameworks and institutional mechanisms such as human rights commissions or ombudspersons with the specific function of promoting and protecting human rights. A precursor to doing so must be a process of engagement with national constitutional frameworks in order to review them to ensure that they are broadly reflective of the necessary human rights content. Such content must not simply confine itself to a focus on civil and political rights, but be extended to include economic, social and cultural rights, as well as the so-called Third Generation rights. In the context of constitutionalism, Judiciaries have a critical role to play as both mediators of tensions and conflicts that may emerge between the Executive arm of government and the population at large. They must also effectively and progressively translate international and regional human rights instruments into the domestic context, even where the constitutional regime may not be reflective of a progressive human rights approach.

The role of civil society organizations in pursuing the greater promotion of human rights has traditionally been an important one in Africa, at both the individual country level, and even with respect to the mechanisms established at the continental one.¹²³ Indeed, since the late 1980s there has been a literal explosion of associational activity in the vast majority of countries around the continent.¹²⁴ For civil society to effectively execute its role an enabling environment must be established in which associations dedicated to the promotion of human rights and civil liberties are actually able to operate. Thus, archaic laws that inhibit the registration and operation of civic associations need to be amended. At the same time, civil society cannot confine itself to the pursuit of civil and political rights alone as has been the case in almost all African countries to date. There is a need to marry the actions of organizations that are involved in traditional development work to those who pursue action within a rights framework. There is also a need for such organizations to themselves directly engage economic and social issues from a rights-grounded perspective. Only then will some progress be registered in the struggle to marry the struggle for human rights to the quest for sustainable human development.

V. THE WAY AHEAD: MEETING THE CHALLENGES, EXPLOITING THE OPPORTUNITIES

As this account demonstrates, Africa faces considerable obstacles in meeting the challenges entailed by the coming of a new century, and by the social, political and economic conditions that prevail on the continent. But there are also numerous opportunities which can be ably exploited in

order to ensure that human rights serves the objective of attaining sustainable human development. The issue of education or sensitization in human rights is a fundamental one. As Carlson Anyangwe points out however, most African states have been lacklustre in pursuing an obligation clearly imposed by the African Charter:

... the reality is that in many an African State overall human rights law per se and rights ideology generally are little promoted and continue to have little or no place in teaching (and practice) whether in primary, secondary, or tertiary levels of education. For one thing, in many States the discipline of human right is not yet a recognised subject for generalized education. There are few teaching aids. There is little common methodology. Most of those actively involved in human rights advocacy are not teachers. Information on the Charter, key to teaching about the rights and duties therein contained, is often inaccessible to the general public and generally there is a serious lack of knowledge of the content of that instrument. What is more, African Governments still remain deeply suspicious of the teaching and popularisation of human rights.¹²⁵

But such education must be coupled with active promotion and protection. In this respect the challenge is to marry the theoretical analyses that abound to strategies that lead to the development a culture of human rights respect.

Considerable challenges are also presented by the existence of significant Non-state actors (NSAs) such as the family, arms-dealers, guerrilla groups and transnational corporations who impact on the human rights situation in varying ways. Similarly a multitude of strategies must be employed to address them. Furthermore, we must expand the network of agencies and persons doing human rights. This is one area which cannot remain the exclusive domain of professionals or experts if it is to be of any utility. For example, the process of demonstrating that economic, social and cultural rights are indeed rights and can be made justiciable must be made a popular project. As Shadrack Gutto points out in reference to the South African case to confine the notion of justiciability to the courts "would greatly limit the realization of human rights, or undermine the construction of a culture of human rights."¹²⁶ This point obviously has continental applicability.

There are still considerable normative challenges that need to be addressed, both with respect to the existing frameworks (in the African Charter and the OAU Convention, for example), as well as where there are lacunae, as in the case of IDPs.

The place of the state in Africa-irrespective of the condition in which it is in-is critical to ensuring that the human rights message (especially concerning economic, social and cultural rights) is not only transmitted, but also becomes popularized. A weak state cannot do much against powerful multinationals; an indifferent state ultimately stands to lose from a labour force that exploits child labour and is paid below the minimum wage; a state does not have to seek recourse in military methods to resolve a political conflict. Finally, in none of these instances does the state need to place the choice as one relating to resources. And maybe that is the biggest challenge of them all.

Footnotes

1 Given that the millennium that is to be commemorated at the end of this year is one that relates to the supposed birth of Jesus Christ, it is quite clearly a commemoration that does not have universal validity for all the peoples of the world.

2 The notion of an African "renaissance" has been frequently invoked by South African President Thabo Mbeki, and

taken up by numerous other leaders on the continent.

3 A vivid description of the kinds of abuse that became the norm in Sierra Leone is provided by Abdul Tejan-Cole, Human Rights under the Armed Forces Revolutionary Council (AFRC) in Sierra Leone: A Catalogue of Abuse, 10 AFRICAN JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (1998), at p.481.

4 As Mkandawire and Soludo have pointed out: "It is remarkable how Africa, over the decades, has been the pawn of international interests experimenting with development models. Most countries have followed passively; at each turn, previous policies implemented with all the technical assistance and massive support of the donor agencies have been berated as Africa's mistakes, and new policies are recommended. Africa's problem has not been its failure to learn but its learning too well from all and sundry." Thandika Mkandawire & Charles C. Soludo, OUR CONTINENT, OUR FUTURE: AFRICAN PERSPECTIVES ON STRUCTURAL ADJUSTMENT, CODESRIA/Africa World Press/IDRC, Dakar, Trenton, Ottawa, 1999, at p.37.

5 The last ten countries in both the 1998 and the 1999 Human Development Indices were African. Only one of those in the last 10 in 1998-the Gambia-left the list, with a marginal improvement of its ranking from 165 to 163. The African country with the highest ranking HDI in 1999 was Mauritius which was ranked at 59, followed by the Libyan Arab Jamahiriya at 65 and Seychelles at 66. Only these three countries make it to the top 100, with South Africa standing at 101.

6 Part of the problem is that developmental discussions and strategies are still dominated by the World Bank and the IMF to the neglect of alternative prescriptions that place an emphasis elsewhere than on production for the external market. Indeed, even in discussing the market, the orthodoxy that continues to prevail in the international financial institutions (IFIs) adopts what Giovanni Cornea has described as a "reductionist" role for the state with little attention to the need to equalize economic opportunities. See, Giovanni Cornea, Convergence on Governance Issues, Dissent on Economic Policies, 29 IDS BULLETIN, (1998), at p.33.

7 For a discussion of the impact of conflict on the protection of human rights and the broader issue of reconstruction, see, Yashushi Yakashi, Development Foregone: The Negative Impact of Crisis and Conflict in West Africa, in UNDP (ed.), BACK TO BASICS, POST-CONFLICT PEACE-BUILDING IN WEST AFRICA: POLITICAL AND DEVELOPMENT INITIATIVES, New York, UNDP, 1997, at p.22.

8 The phenomenon of statehood and its collapse is an issue that has once again emerged to capture intellectual imagination and discourse following the 1970s debates that took the state as a given, stable and unchanging entity in the African reality. See, for example, Julius Ihonvbere, The "irrelevant" State, Ethnicity and the Quest for Nationhood in Africa, 17 ETHNIC & RACIAL STUDIES (1994), at p.42. See also I. William Zartman (ed.), COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY, Lynne Rienner, Colorado, 1995, and Herbert Dittgen, World Without Borders? Reflections on the Future of the Nation-State, 34 GOVERNMENT & OPPOSITION (1999), p.161.

9 Recent developments on the African continent have seen the emergence of a new non-state actor which has significant implications for the situation of human rights in conditions of armed conflict, viz., mercenary companies-the so-called new "dogs of war." See, Juan Carlos Zarate, The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder, 34 STANFORD JOURNAL OF INTERNATIONAL LAW (1998), p.75.

10 On the issue of accountability, see Christopher G. Weeramantry, Human Rights and the Global Market place, 25 BROOKLYN JOURNAL OF INTERNATIONAL LAW (1999), p.41.

11 For an analysis of the nexus between human rights and globalization, see Philip Alston, The Universal Declaration in an Era of Globalization, in Barend van der Heijden & Bahia Tahzib-Lie, (eds.), REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A FIFTIETH ANNIVERSARY ANTHOLOGY, 1998, at p.29.

12 J. Oloka-Onyango, Globalization in the Context of Increased Incidents of Racism, Racial Discrimination and Xenophobia; Working Paper of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/1999/8.

13 A good initial engagement is undertaken by Frank J. Garcia, The Global Markets and Human Rights: Trading Away the Human Rights Principle, 25 BROOKLYN JOURNAL OF INTERNATIONAL LAW, (1999), at p.51.

14 Kofi A. Annan, PARTNERSHIPS FOR GLOBAL COMMUNITY: ANNUAL REPORT OF THE WORK OF THE ORGANIZATION, New York, United Nations, 1998, paragraph 168 at P.59.

15 For an analysis of this issue from the perspective of refugee law, see, Isabelle Gunning, Expanding the International Definition of Refugee: A Multicultural View, 13 FORDHAM INTERNATIONAL LAW JOURNAL, (1989-1990), at pp.73-74.

16 The question of conflict-particularly of the ethnic kind-and those who instigate them (Ethnic Engineers or Conflict Manufacturers) has led some observers to target the phenomenon as the main human rights issue of the contemporary era. According to Bill Berkeley, "They (ethnic conflicts) are all provoked from on high. In Africa, as elsewhere, the role

of states and political leaders in fomenting ethnic and sectarian conflicts is the paramount human rights issue in the post-Cold War era." See, Bill Berkeley, *Aftermath: Genocide, the Pursuit of Justice and the Future of Africa*, WASHINGTON POST magazine, October 11, 1998, at p.11.

17 The right to development of course has a whole declaration dedicated to its realization. Unfortunately, very little progress has been made in ensuring its global enforcement. See, the Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 3d Comm., 41st Sess., Annex 1, Agenda Item 101, U.N. Doc. A/41/925 (1986). For an analysis, see, Richard Kiwanuka, *Developing Rights: The UN Declaration on the Right to Development*, 35 NETHERLANDS INTERNATIONAL LAW REVIEW (1988), pp.257-272, and James C.N. Paul, *The United Nations and the Creation of an International Law of Development*, 36 HARVARD INTERNATIONAL LAW JOURNAL, (1995), p.307.

18 Kofi Annan, *The Cause of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa* (General Assembly, Security Council Fifty-Second Session, Fifty-third year; Report of the Secretary-General on the Work of the Organization of African Unity); reproduced in 10 AFRICAN JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (1998), pp.549-550.

19 Scott and Macklen put the point succinctly when they argue that, "A constitution containing only civil and political rights projects an image of truncated humanity. Symbolically, but still brutally, it excludes those segments of society for whom autonomy means little without the necessities of life." See, Craig Scott and Patrick Macklen, *Constitutional Ropes of Sand or Justiciable Guarantees?: Social Rights in a New South African Constitution*, 141 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (1992), p.1, at p.29

20 For a good discussion of the background and content of the relativism or reductionism debate, see Samuel K. Murumba, *Cross-Cultural Dimensions of Human Rights in the 21st Century*, in A. Anghie & G. Sturjee (eds.), *LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY*, Kluwer Law International, The Hague, 1998, at pp. 207-240.

21 OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 ILM 59 (1982). Otherwise known as the Banjul Charter-after the Gambian capital in which it was promulgated-the African Charter came into existence in 1981. It came into force in 1986, and to date almost all African countries-with the exception of Ethiopia and Morocco-have ratified the instrument. See, Jean-Marie Bernard, *International Instruments Relating to Human Rights*, 18 HUMAN RIGHTS LAW JOURNAL (1997), p.79.

22 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights by the Assembly of Heads of State and Government (ASHG) of the Organization of African Unity, OAU/LEG/MIN/AFCHPR/PROT.(I)Rev.2 (1997). The Protocol was adopted by the ASHG at its 34th session held in Ouagadougou, Burkina Faso. By the end of December 1998, twenty-four states had signed the Protocol. Article 34 of the Protocol stipulates that the instrument shall come into force thirty days after ratification by fifteen OAU member states. See, Makau Mutua, *The African Human Rights Court: A Two-Legged Stool* 21 HUMAN RIGHTS QUARTERLY (1999), p.342.

23 Prof. Welch puts the matter in proper perspective: "Freedom of expression was subjected to significant restraints when Africa was divided among various colonial powers. The limits imposed in the colonial period were in many respects enhanced following independence, rather than relaxed or abolished. The veneer of democratization that accompanied the achievement of self-government was rapidly stripped away by leaders anxious to preserve their version of national unity, and/or by military elites who shot their way into power." Claude E. Welch Jr., *The African Charter and Freedom of Expression in Africa* 4 BUFFALO HUMAN RIGHTS LAW REVIEW, (1999), at p.105.

24 See, Theophilus Maranga, *The Colonial Legacy and the African Common Market: Problems and Challenges Facing the African Economic Community*, 10 HARVARD BLACKLETTER JOURNAL, at p.105.

25 For an analysis of how racial and economic considerations designed by colonial powers affected conceptions of inclusion and exclusion, see Mahmood Mamdani, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM*, Princeton University Press/Fountain Publishers, Princeton/Kampala, 1996.

26 Rita Jalali & Seymour Martin Lipset, *Racial and Ethnic Conflicts: A Global Perspective*, in Michael W. Hughey (ed.), *NEW TRIBALISMS: THE RESURGENCE OF RACE AND ETHNICITY*, MacMillan, Basingstoke/London, 1998, at p.321.

27 The Charter of the OAU is reprinted in 58 AMERICAN JOURNAL OF INTERNATIONAL LAW (1964), at p.873.

28 *Id.*, Articles II and III.

29 See, Solomon Gomes, *Sensitivity to the Principle of Non-interference in the Internal Affairs of States: A Political Imperative*; paper presented at the International Negotiation Network (INN) Consultation held at the Carter Centre, Emory University, Atlanta, Georgia, USA, February 17-19, 1993.

30 See Commonwealth Human Rights Initiative, *PUT OUR WORLD TO RIGHTS: TOWARDS A COMMONWEALTH HUMAN RIGHTS POLICY*, CHRI, 1991, at p.59.

31 For a more comprehensive background analysis to the place of human rights in the establishment and evolution of

the OAU, see, J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL, (1995), at pp.42-44.

32 The impression should not be given that over this time there were no attempts to address the issue of human rights from a continental perspective. Indeed, the first attempts were commenced in 1961-pre-dating even the debate and promulgation of the OAU Charter. See, Robert H. Kisanga, *Fundamental Rights and Freedoms in Africa: The Work of the African Commission on Human and Peoples' Rights*, in Chris Maina Peter & Ibrahim Hamisi Juma (eds.), *FUNDAMENTAL RIGHTS AND FREEDOMS IN TANZANIA*, Mkuki na Nyota Publishers, Dar es Salaam, 1998, at pp.25-26. For more background to the evolution of the Charter, see Tokunbo Ige, *The African Charter on Human and Peoples' Rights* (unpublished paper on file with the author).

33 Ige, *Id.*, at pp.2-4.

34 For a recent exposition of this approach see Satvinder Juss, *The Coming of Communitarian Rights: Are 'Third-Generation' Human Rights Really 'First-Generation' Rights?* 3 INTERNATIONAL JOURNAL OF DISCRIMINATION AND THE LAW, (1998), at p.159.

35 Murumba, *supra.*, note 20.

36 Yash Ghai points to at least four assumptions that underlie the phenomenon of cultural relativism: (a) that the world's cultures can be divided into distinct categories; (b) that each state has a homogenous culture; (c) that culture is unchanging, and (d) that culture provides a state with its values. See Yash Ghai, *The Critics of the Universal Declaration*, in 12 INTERRIGHTS BULLETIN (1998/9), p.45.

37 Nana K.A. Busia, *The Political Economy of the African Charter on Human and Peoples' Rights*, 7 MENNESKER OG RETTIGHETER (1989), p.68.

38 See Bertrand G. Ramcharan, *The Universality of Human Rights* 53 THE REVIEW (1994), p.105 at p.112. See also Article 60 of the African Charter.

39 Preambular paragraph 7 of the African Charter stipulates that: "Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone." A recent study on the phenomenon of duties in International Human Rights Law pointed out that the African Charter contains a total of three articles and eleven paragraphs devoted to the issue of individual duties. See, International Council on Human Rights Policy, *TAKING DUTIES SERIOUSLY: INDIVIDUAL DUTIES IN INTERNATIONAL LAW (A COMMENTARY)*, 1999, p. 33.

40 For a comparative analysis with other regional instruments, see B. Obinna Okerre, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems of Human Rights* 9 HUMAN RIGHTS QUARTERLY (1984), pp.141-159.

41 See Mohamed Komeja, *The African System of Human and Peoples' Rights: An Annotated Bibliography* 3 EAST AFRICAN JOURNAL OF PEACE AND HUMAN RIGHTS (1996), p.262, at pp.263-265.

42 For a detailed discussion of the various meanings of the term 'peoples' as used in the African Charter, see Richard Kiwanuka, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW (1988), p.80.

43 *Supra.*, note 36.

44 Prominent among the Universalists are scholars like Jack Donnelly, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (1989).

45 Arati Rao makes an incisive analysis of how and why this takes place. Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse* in Julie Peters & Andrea Wolper (eds.) *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES*, 1995, pp.167-175.

46 See for example Kofi Kumado, *Africa and the Universal Declaration*, in 60 THE REVIEW (Special Issue, 1998), pp.41-46.

47 For a good discussion of who made the UDHR and its implications for the contemporary debate about human rights, see Dianne Otto, *Rethinking the "universality" of Human Rights Law*, 29 COLUMBIA HUMAN RIGHTS LAW REVIEW, (1997), at pp.18-30.

48 See, Issa Shivji, *Human Rights and Development: A Fragmented Discourse*, in Peter & Juma, *supra.*, note 32, at p.9. For an extensive examination of the glaring loopholes in self-determination theory and practice as it has evolved over the ages, see, J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Problems and Prospects for the Twenty First Century Future* (forthcoming in 15 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW (1999).

49 In fact, we could describe these conceptions as essentially white and essentially male, regardless of the ideological divide between the capitalist and socialist models that vied for supremacy at the UDHR debating table. As Shelly Wright points out, the terms of debate were the control of property-whether accumulated capitalist, or redistributed socialist-and in this sense it was the language of control and ownership. That language clearly did not resonate with African conceptions of rights or even of property. See Shelly Wright, *Economic Rights and Social Justice: A Feminist*

Analysis of Some International Human Rights Conventions 12 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW (1992), p.241, at p.255.

50 Khawar Mumtaz has argued that at the World Conference on Population and Development in Cairo in 1994 women from the so-called "north" did not reciprocate with the same degree of solidarity over issues that were of concern to their "southern" sisterhood when the latter had initially supported them. See Khawar Mumtaz, *Bringing Together the Rights to Livelihoods and Reproductive Health*, in 42 DEVELOPMENT (1999), p. 15.

51 See Asma Mohamed Abdel Halim, *Tools of Suppression*, in Centre for Women's Global Leadership (ed.) GENDER VIOLENCE AND WOMEN'S HUMAN RIGHTS IN AFRICA (1994), p.27, and Hope Lewis, *Between Irua and Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARVARD HUMAN RIGHTS JOURNAL (1995), p. 1.

52 Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 December, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No.46) at 193, U.N. Doc. A/34/36, reprinted in 19 I.L.M. 33 (1980) (entered into force 3 September, 1981).

53 Celestine Itumbi Nyamu, *Rural Women in Kenya and the Legitimacy of Human Rights Discourse and Institutions*, in E.K. Quashigah & O.C. Okafor (eds.), LEGITIMATE GOVERNANCE IN AFRICA, Kluwer Law International, The Hague, 1999, at pp.265-266 ff.

54 Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARVARD INTERNATIONAL LAW JOURNAL (1997), at p. 464.

55 Radhika Coomaraswamy, *REINVENTING INTERNATIONAL LAW: WOMEN'S RIGHTS AS HUMAN RIGHTS IN THE INTERNATIONAL COMMUNITY*, Harvard Law School, Cambridge, 1997, at p.7.

56 See, Beyani, *op.cit.*, at pp. 289-290.

57 The phrase is taken from 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), p.339.

58 For a good discussion of the structure of the Charter and of the operation of the Commission created under it, see Evelyn, A. Ankomah, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS*, The Hague/London/Boston, Martinus Nijhoff, 1996.

59 Ige, *op.cit.*, pp.6-7.

60 On the right to environment, see Christine Echokit Akello, *The Right to Environment and Generational Equity* 4 EAST AFRICAN JOURNAL OF PEACE & HUMAN RIGHTS (1998), p.125.

61 Inger Österdahl, *The Jurisdiction Ratione Materiae of the African Court of Human and Peoples' Rights: A Comparative Critique*, 7 REVIEW OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (1998), at p.149.

62 See International Council on Human Rights Policy, *Taking Duties Seriously*, *op.cit.*, at pp.19-28.

63 Article 29(1).

64 Article 29(8).

65 Ige, *op.cit.*, at p.9.

66 J. Oloka-Onyango, *Economic and Social Rights, the Universal Declaration and the New Millennium*, in 12 INTERRIGHTS BULLETIN (1998/9), p.11.

67 Paul Sieghart, *AN INTRODUCTION TO THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS*, Commonwealth Secretariat, London, 1988.

68 For a summary of the non-justiciability arguments see E. Nii Ashie Kotey, *Some Fallacies About Rights: Of Indivisibility, Priority and Justiciability*, in International Commission of Jurists (ICJ) & African Development Bank (eds.), *REPORT OF A REGIONAL SEMINAR ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, ICJ, Geneva, 1999, p.101.

69 See for example the remarks of former Indian Chief Justice Bhagwati on Public Interest Litigation (PIL) as a necessary tool to foster the enforcement of economic and social rights in the case of *People's Union v. Union of India* [1983] 1 S.C.R 456, at 469.

70 Shadrack Gutto, *Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa*, 4 BUFFALO HUMAN RIGHTS LAW REVIEW (1999), pp.89-91.

71 Certification Judgment of the South African Constitutional Court, (10) BCLR at ¶ 77. Quoted in Gutto, *op.cit.*, at p.92.

72 *Id.*, at p.92.

73 *Id.*

74 Again, we can also cite the Indian examples where the process of Social Action Litigation (SAL) has considerably expanded the parameters of the judicial enforcement of human rights. See, P.N. Bhagwati, *Liberty and Security of the Person in India*, with a particular emphasis on Access to Courts, in *Commonwealth Secretariat/Interights* (eds.),

DEVELOPING HUMAN RIGHTS JURISPRUDENCE, vol.7, London, 1998, pp.203-216.

75 Among them see Rose D'sa, Human and Peoples' Rights: Distinctive Features of the African Charter, 29 JOURNAL OF AFRICAN LAW (1985), pp.72-81.

76 For a good analysis of the conceptual debates and their African dimensions, see Nana K.A. Busia & Bibiane Mbaye, Filing Communications on Economic and Social Rights under the African Charter on Human and Peoples' Rights (The Banjul Charter), 3 EAST AFRICAN JOURNAL OF PEACE & HUMAN RIGHTS (1996), especially pp.191-193.

77 *Id.*, p.192.

78 For a more extensive critique of the African leader's approach to economic and social rights see, J. Oloka-Onyango, Beyond the Rhetoric, *op.cit.*, at pp.40-41.

79 U.N.G.A. Res. 2200 A (XXI), adopted 16 December 1966; entered into force 3 January 1976.

80 *Id.*, Article 11(1).

81 *Id.*, Article 11(2).

82 *Id.*, Article 8(1)(d).

83 The silence and broadness of the Charter on economic, social and cultural rights must be married to the manner in which the same instrument delimits the ambit of civil and political rights through the claw-back clauses. The claw-back clause in Article 10 (on freedom of association) that allows it provided the individual exercising it "abides by the law" can clearly be linked to the bar on active trade union activity.

84 See Fantu Cheru (Independent Expert of the Commission on Human Rights), Effects of Structural Adjustment on the Full Enjoyment of Human Rights (E/CN.4/1999/50), esp. pp.10-11.

85 Adetoun Ilumoka considers the issue to be one of interpretation, while Florence Butegwa does not see any contradiction in the Charter provisions-specifically Article 18-relating to the protection of women's human rights. Mutua argues that it is wrong to assert that the Charter "... sees itself as the savior of an African culture that is permanent, static, and unchanging." Mutua, *op.cit.*, note --, at 359. Adetoun Ilumoka, African Women's Economic, Social and Cultural Rights-Toward a Relevant Theory and Practice, in Rebecca J. Cook (ed.), HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, University of Pennsylvania Press, Philadelphia, 1994, pp.307-325 at p.313, and Florence Butegwa, Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa, in Cook, *Id.*, pp.495-514, especially at p.504.

86 *Id.*, at pp.290-291.

87 Lisa Kois, Article 18 of the African Charter on Human and Peoples' Rights: A Progressive Approach to Women's Human Rights, 3 EAST AFRICAN JOURNAL OF PEACE & HUMAN RIGHTS, at p.97 (1996).

88 *Id.*, at p.98.

89 According to Women in Law & Development in Africa (WILDAF)-a regional women's human rights organization-the provisions of Article 18 are inadequate precisely because it is confined to discrimination within the family: "In addition, explicit provisions guaranteeing the right of consent to marriage and equality of spouses during and after marriage are completely absent. These omissions are compounded by the fact that the Charter places great emphasis on traditional African values and traditions without explicitly addressing concerns that many customary practices, such as female genital mutilation, forced marriage, and wife inheritance, can be harmful or life-threatening to women. It follows that by ignoring critical issues such as custom and marriage, many believe that the Charter inadequately defends women's human rights." See, WILDAF, The African Charter on Human and Peoples' Rights and the Additional Protocol on Women's Rights, Wildaf News, p.18.

90 See, Mumbi Mathangani, Women's Rights in Kenya: A Review of Government Policy, 8 HARVARD HUMAN RIGHTS JOURNAL (1995), 179, at 191.

91 C.A. Civ. App. No.4/91, Botswana (Unreported).

92 Judgment No.S.C.210/98/Civil Appeal No.635/92 of the Supreme Court of Zimbabwe (Unreported).

93 *Id.*, judgment of Mucchetere, J.A., at p.5.

94 *Id.*, at p.10.

95 *Id.*, at p.19.

96 *Id.*, at pp.17-18.

97 Minors are not allowed to contract or to vie for political office.

98 Nyamu, *op.cit.*, note 53, at p.301 and 307. For an examination of the process the draft has undergone since the idea was first mooted in 1995 until the present, and for a look at the draft protocol, see WILDAF News, *op.cit.*

99 September 10, 1969 1001 UNTS 45 (entered into force on 20 June 1974).

100 J. Oloka-Onyango, The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa, 24 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY (1996), pp.374-375.

101 For a background analysis to the OAU Convention and the situation relating to refugees at the time it was

promulgated, see, J. Oloka-Onyango, *Plugging the Gaps: Refugees, OAU Policy and the Practices of Member States in Africa*, US Committee for Refugees, Washington DC, 1986.

102 Lawyers Committee for Human Rights, *AFRICAN EXODUS: REFUGEE CRISIS, HUMAN RIGHTS AND THE 1969 OAU CONVENTION*, New York, 1995, at p.29.

103 Indeed, as Carlson Anyangwe has pointed out, there is also a security dimension to the refugee issue which also partly informed the debates leading up to the promulgation of the OAU Convention of 1969. Although security is indeed a significant factor, it is important not to reduce the refugee factor to only that dimension. See Carlson Anyangwe, *Obligations of States Parties to the African Charter on Human and Peoples' Rights*, in 10 *AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW*, pp.625-659, at p.652.

104 Lawyers Committee, *op.cit.*, at p.41.

105 See Francis M. Deng, *INTERNALLY DISPLACED PERSONS: COMPILATION AND ANALYSIS OF LEGAL NORMS*, United Nations, New York/Geneva, 1998.

106 Roberta Cohen & Francis Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, Brookings Institution Press, Washington DC, 1998, p.2.

107 Louise Ludlam-Taylor, *Recent Literature on IDPs*, in Janie Hampton (ed.), *INTERNALLY DISPLACED PEOPLE: A GLOBAL SURVEY*, Earthscan, London, 1998, at p.38.

108 Susanne Schmeidl, *Comparative Trends in Forced Displacement, 1964-96*, in Janie Hampton Id., at p.29.

109 See for example, Kisanga, *op.cit.*

110 See, Commonwealth Human Rights Initiative (CHRI) News, *The African Commission on Human and Peoples' Rights, Special Harare Conference Issue*, (1999), at p.28.

111 Shadrack B. Gutto, *Non-governmental Organizations, People's Participation and the African Commission on Human and Peoples' Rights: Emerging Challenges to Regional Protection of Human Rights*, in Bård-Anders Andreassen & Theresa Swinehart (eds.), *HUMAN RIGHTS IN DEVELOPING COUNTRIES; 1991 YEARBOOK*, Scandinavian University Press, 1992, at pp.49-51.

112 See, *Human Rights News*, *NETHERLANDS QUARTERLY OF HUMAN RIGHTS*, at p.97.

113 Joshua Bhekinkosi Mzizi, *Human Rights, Peace and the African Charter on Human and Peoples' Rights*, *AFRICA LEGAL AID QUARTERLY* (July - September, 1998), at p.37.

114 Chidi Anselm Odinkalu & Camilla Christensen, *The African Commission on Human and People's Rights: The Development of its Non-State Communication Procedures*, 20 *HUMAN RIGHTS QUARTERLY* (1998), at p.279.

115 Both Österdahl and Mutua welcome the idea, but both assert that it is only workable in the face of a far-reaching reform of the African Charter.

116 On the background to the Mechanism, see Bertrand G. Ramcharan, *The Evolving Doctrine of Democratic Legitimacy*, 60 *THE REVIEW*, (1998), p.179, at pp.182-188.

117 Chris J. Bakwesegeha, *The Role of the OAU in Conflict Prevention, Management and Resolution*, *INTERNATIONAL JOURNAL OF REFUGEE LAW* (Special Issue, 1995), p.207.

118 Cohen and Deng, *op.cit.*, at p.215.

119 Bakwesegeha, *supra.*, note 114, at p.216.

120 Lawyers Committee, *op.cit.*

121 Cohen and Deng, *op.cit.*, at p.217.

122 See Objective (h) of the SADC Organ on Politics, Defence and Security; quoted in Ramcharan, *op.cit.*, at p.189.

123 Wolfgang Benedek, *Enforcement of Human and Peoples' Rights in Africa-The Communication System and State Reporting Under the African Charter*, 15 *Studie- en Informatiecentrum Mensenrechten (SIM)*, (1995), p.22.

124 For a general analysis see Nelson Kasfir (ed.) *CIVIL SOCIETY AND DEMOCRACY IN AFRICA: CRITICAL PERSPECTIVES*, Frank Cass, London/Portland, 1998.

125 Carlson Anyangwe, *Obligations of States Parties to the African Charter on Human and Peoples' Rights* 10 *AFRICAN JOURNAL OF INTERNATIONAL & COMPARATIVE LAW* (1998), at p.625.

126 Gutto, *Beyond Justiciability op.cit.*, at p.86.