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

J. Oloka-Onyango

I. A Background Note

More than at any other point in time, the start of the third millennium of modern Western history, heralds both significantly new and 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. On the other, internal and regional conflicts appear to grow not simply in frequency and magnitude, but also in intensity, viciousness and complexity. This is true even in countries such as Namibia and Senegal that have been relatively stable and sanguine.

International wars, such as those in the Democratic Republic of Congo (DRC) and the one between Eritrea and Ethiopia, do not bode well for the observation and respect 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. The 1994 genocide in Rwanda will stand as vivid testimony to the horrid evils of which human kind is capable of inflicting on its own kith and kin. Despite the opening of some democratic space in countries as diverse as Algeria and Nigeria, the problems have not gone away; they have simply assumed different forms of expression. In a nutshell, the human rights situation on the African continent today can only be described as being in a state of considerable flux.

1 Given that the millennium that was commemorated at the end of 1999 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.

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 have resulted in marginal improvement over what conditions were before the "shock therapy" measures were applied. Moreover, this is true for only some countries on the continent. For the ten years that the Human Development Report has been produced, African countries have dominated the lower quartile of the UNDP's Index. It goes without saying that Africa's human development situation is in dire need of attention.

However, when discussing the issue of human rights from a continental perspective, it is important to remember that the internal dynamics of individual countries 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

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4 As Mkandawire and Soludo have pointed out: "It is remarkable to observe 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." See Thandika Mkandawire & Charles C. Soludo, Our Continent, Our Future: African Perspectives on Structural Adjustment 37 (CODESRIA/IDREC 1999).

5 The last ten countries in both the 1998 and the 1999 Human Development Indi- cies 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. See UDNP, Human Development Report 1998 21 (1998); UDNP, Human Development Report 1999 45-48 (1999).

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 Bull. 33 (1998).
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 with unique issues, including for some like Somalia the questioning of their very raison d'\'etre 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 upon domestic country contexts in numerous ways. Thus, external conditions driven by the forces of the contemporary global political economy, 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 Cable News Network (CNN) and cultural/corporate phenomena such as Madonna and Nike.\(^9\) Major questions of accountability and social responsibility are

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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 STAN. J. INT'L L. 75 (1998).
raised by the dominance of such actors in the economic scene. What is also apparent from the preceding is that no external factor is likely to have as telling an impact on the overall human rights condition in the African continent than the phenomenon of globalization. Although traditionally conceived in its economic manifestations, globalization has significant implications for the social, political, and cultural evolution of humankind in Africa in the coming century. Moreover, the human rights implications of the phenomenon are only just beginning to be critically engaged and comprehensively understood. 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."

In analyzing the human rights context from either the broad continental level, or from a narrower country-specific perspective, concern must invariably be focused on the situation of the individual and the manner in which the protection of his or her individual human rights is enhanced. 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 expanded to encompass the family and 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 raise the correlation between human rights and


human duties or obligations. In my opinion, critical to the 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. These group rights are the right to peace and security (or freedom from conflict) and the right to sustainable human development (or freedom from want, deprivation and marginalization). Ultimately, we are also speaking of the right to self determination. These rights are critical because they provide a holistic context in which more traditional individual human rights can be given 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 is the case in 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

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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.” Bill Berkeley, *Judgment Day*, WASH. POST MAG., October 11, 1998, at 11.

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 where 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. In sum, for a human to be considered whole, he or she must be able to enjoy both civil and political rights and economic, social and cultural rights as well. Moreover, such enjoyment must be exercised in a generalized context that ensures that daily physical existence is not under a threat of predictable extermination by hunger, disease, or conflict. Conceived in this fashion, human rights then becomes 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 primary 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 currently prevails on the continent. Included 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 (hereinafter “the Charter”),\(^{21}\) the

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\(^{19}\) Scott and Macklem 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.” Craig Scott & Patrick Macklem, Constitutional Ropes of Sand or Justiciable Guarantees?: Social Rights in a New South African Constitution, 141 U. Pa. L. Rev. 1, 29(1992).


human rights of women, and the phenomenon of forced displacement experienced by refugees and internally displaced persons (IDPs). In the following and most crucial section of the paper, I examine the existing institutional mechanisms that have been established to enforce human rights on the continent. This section focuses on the Commission established by the Charter and on the African Court on Human & Peoples’ Rights, the protocol for which has only recently been promulgated. Consideration is also paid to human rights enforcement at the national level, 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

A. 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 socio-historical perspective. Such a perspective is essential due to the transmutation of various forms of social organization and expression as a result of both indigenous and external forces, and the fact that history continues to exert its influence on the continent. Pre-colonial historical forms can be seen in the resilience of cultural (so-called “traditional”) norms that govern domestic relations and the family. Colonial influences are apparent in contemporary political systems and economic relations. Nearly half a century after most countries on the continent attained independence, many of them continue to utilize colonial laws governing political association, public health, education and free expression. The consequence is that the claim by African nations’ of 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 clearly violate contemporary notions of human rights.  

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. 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 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, that resulted in highly stratified social formations and critically impacted the ethnic frameworks of the colonized territories. 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." Many such disparities have

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 BUFF. HUM. RTS. L. REV. 105 (1999).


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 285-286 (1996).

persisted into the post-colonial era, resurfacing to wreak havoc with a vengeance.

B. Human Rights in the Organization of African Unity (OAU)

Ironically, in the field of human rights independent African states have 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. The Charter delineated the focus of the OAU as being 1) the right to self-determination and 2) the protection of the incipient and fragile foundations of states that had only just regained their independence. 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. Although noble objectives at the time—given the continued existence of 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." 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 reinforced opposition to the policies of colonialism and apartheid. However, scant attention was paid to broad or specific human rights principles.

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 his-

28 Id.
tory. 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, such as health, education, and just conditions of work, were also relegated to oblivion. It was against this background, in 1981, that the OAU promulgated the African Charter that has evolved to become the principal human rights instrument on the continent. Tokunbo Ige has pointed out that there was a sense of urgency that attended the drafting and adoption of the Charter. This resulted in a number of compromises and weaknesses being incorporated into the instrument. Others have dismissed the African Charter outright. We now turn to a consideration of the substance of the Charter to examine the concrete dimensions of its practical operation on the continent.

III. The Normative African Framework: Radical Departure or ‘Business as Usual?’

A. 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 (UDHR), the ICCPR and ICESR, and the regional body of normative standards. Implicated immediately in this debate is a tension that has come to be characterized as the phenomenon of “Cultural Relativism”.

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 Fundamental Rights and Freedoms in Tanzania 25, 25-26 (Chris Maina Peter & Ibrahim Hamisi Juma eds., 1998). For more background to the evolution of the Charter, see generally Tokunbo Ige, The African Charter on Human and Peoples’ Rights (1998) (unpublished manuscript on file with the author).

33 Id., at 2-4.

This is an 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 distinct regions of the world. That tension is apparent in the text of the African Charter on Human and Peoples' Rights. The African Charter marks itself out as a distinctive human rights instrument while it simultaneously draws inspiration from the UDHR and other international human rights instruments. This is evident from the preamble to the African Charter and from the emphasis on the family, the community, the state, and the concept of duties. In this way, the instrument does indeed mark some conceptual distance from its international precursors. The Charter is definitely an instrument that is married to the socio-cultural context in which it was given birth.

This fact is also reflected in its adoption of the term "peoples" to complement "human" and through its constant references back to the phe-

35 See Muramba, 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 INTERIGHTS BULL. 45, 45 (1998/9).
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 DANIEL PETRASEK, INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, TAKING DUTIES SERIOUSLY: INDIVIDUAL DUTIES IN INTERNATIONAL LAW (A COMMENTARY) 33 (1999).
42 For a detailed discussion of the various meanings of the term 'peoples' as used in the African Charter, see generally Richard Kiwanuka, The Meaning of "People"
nomenon of "African civilization." Thus, the fifth paragraph of the Charter's preamble 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, much of the debate on the subject is, as Yash Ghai has pointed out, unproductive.\(^4\) This is because it adopts concepts from both Universalists and relativists. The “Universalists” 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.\(^4\) At the other end of the spectrum are the “relativists” who assert that there can be no universalities; 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 of 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 norms will produce a solution that is more enduring and ultimately enhances the protection of human rights in that community. Not only is the universalist 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 politicians from the south 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 to the community and the state.\(^4\)

\(^4\) Ghai, supra note 36.


\(^4\) 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,
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. In the first instance, it is impossible to run away from the fact that the human rights instruments 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 when the Universal Declaration was debated. Moreover, many of the most important promulgators of the instrument, including both Britain and France, were colonial powers. This partly explains why the Declaration fails to mention the right to self-determination, a fundamental democratic right of all peoples.

At the time the UDHR was adopted, the United States had yet to recognize the equality of people of colour. On its part, the Soviet Union 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 whose basic principles they breached in both letter and spirit. 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. To compound the problem, the vision


46 See also Kofi Kumado, Africa and the Universal Declaration, in 60 The Review 41-46 (1998).


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
of human rights that most universalists accept and pursue with single-minded devotion is one that has consistently failed to recognize economic, social and cultural rights, and rights to peace, development and the environment as "genuine" human rights.

In the same way that many of the relativists are pursuing a political agenda designed to retain their hegemony over local political space by utilizing the veneer of culture, the universalists are pursuing an equally politicized agenda of extending global hegemony by using the rubric of human rights. 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, due to its more recent conceptual development, there would be considerably more comity of perspective between women of different cultures. Nevertheless, significant tension is still manifest on a variety of issues; from reproductive health rights to the debate over the eradication of female genital mutilation (FGM), to the contention that the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) did not adequately address the situation of rural women.


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 DEV. 15 (1999).


Engaging in an extensive deconstruction of the normative elements enshrined within the existing human rights corpus is not the intention of this article. Nevertheless, it is 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 of economic and social rights, and the debate over their alleged non-justiciability. Further examples include the discussion about the right to development and its stalled implementation, the issue of the debt burden as a human rights question, and the question of non-state actors - particularly transitional corporations (TNC) and their relevance to the international respect for and enforcement of human rights. All of 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?"

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 to the 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"

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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 that 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" that is implicit in several of its provisions, several aspects of the Charter provide evidence of a general acceptance of 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 now turn to a more critical consideration of the specific provisions and the structure of the instrument.

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

The African Charter can generally be divided into five distinct parts: 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 those governing the enforcement mechanisms in the instrument.58 The first category of rights is fairly straightforward. It includes non-discrimination (Article 2), 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 that are similarly covered in the Universal Declaration or in the International Covenant on Civil and Political Rights (ICCPR). Striking omissions from the Charter include the prohibition against being subjected, “without free consent, to medical or scientific experimentation.” This provision appears in Article 7 of the ICCPR. The African Charter also lacks more elaborate 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 that 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 give the African Charter a very prominent position in the pantheon of instruments that seek to extend the parameters of rights, respect, and enforcement.

Arguably the most innovative aspect of the African Charter relates to its provisions on Peoples’ rights and the duties of individuals. Among the peoples’ rights covered are the right to existence and the right to struggle against colonial domination (Article 20). Of course, the interesting point regarding the question of peoples’ rights is how the concept is of such fluidity that it could undermine well established principles in the OAU Charter concerning the inviolability of states and the sacrosanct nature of their borders. The “oppressed peoples” who have the right to free themselves from the bonds of domination, in paragraph 2 of Article 20, 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

59 Ige, supra note 32, at 6-7.
on the right to a "general satisfactory environment" (Article 24), are all rights which have greatly impacted on the jurisprudence of rights in the international arena. The African Charter was the first international instrument to lay down these rights in a legally binding fashion. 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 the Universal Declaration, ICCPR, and ICESR contain reference to the duties individuals owe to society, none of them are as extensive as the African Charter's elaboration. The duties listed extend from the harmonious development of the family to the promotion and achievement of African unity. Most commentary about these duties has considered them to be too onerous and capable of being used by states to effectively trump the individual rights guaranteed. 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 is that the overall observation and protection of individual rights is not undermined by an undue emphasis on duties. This is especially true of the aspect of the Charter dealing with Economic, Social and Cultural Rights and their connection to the pursuit of sustainable human development.

C. 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. Not only is there a lackluster approach to their effective realization, but also lingering questions about their conception. Some have even

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60 On the right to environment, see Christine Echookit Akello, The Right to Environment and Generational Equity, 4 E. AFR. J. PEACE & HUM. RTS. 125 (1998).
63 Ige, supra note 32, at art. 29(1).
64 Id. art. 29(8).
65 Ige, supra note 32, at 9.
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. The argument most often heard is that economic, social and cultural rights are “aspirational” or “abstract”; they cannot be the subject of either affirmative state obligation or immediate realization and enforcement. Both the Indian and South African courts have effectively disproved this thesis. Additionally, the 1993 Vienna Declaration explicitly reaffirmed the indivisibility, interdependence, and interrelatedness of the two categories of human rights. Consequently, the question for debate is not so much the conceptual, but the practical: how do we 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 such as education, health, and shelter 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 is not required to expend resources to address any of the above. The South African Constitutional Court has responded 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) by stating:

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


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, 469.

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, 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 enter the camp of the rich and advantaged and to improve their life conditions.73 Although Gutto argues that the social actions of all social classes tend to "balance out", the more important issue 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

71 Certification Judgment of the South African Constitutional Court, (10) BCLR ¶ 77. See also Gutto, supra note 70 at 92.
72 Id., at 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 DEVELOPING HUMAN RIGHTS JURISPRUDENCE 203-216 (Commonwealth Secretariat/Interrights ed. 1998).
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. It is my view that the Charter conceptually shifted the emphasis from the traditional focus on civil and political rights to one including economic and social 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 of 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 treatment of economic and social rights prior to the drafting of the African Charter is extremely important to understanding why there is a dichotomy between the theory enshrined in the instrument and the practice on the ground in many African states. 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. These issues were central to the prevailing developmental paradigm, which focused 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-

77 African Charter, supra note 21 preamble.
78 Id.
79 Id.
80 See supra note 76, at 192.
theory in top-down and paternalistic fashion. The state was viewed as the “people.” 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 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 lackluster 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, with regard to civil and political rights or 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); 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); such as the right to social security, an adequate standard of living, freedom from hunger, or the right to strike. 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. However, 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

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81 For a more extensive critique of the African leader’s approach to economic and social rights see Oloka-Onyango, supra note 31, at 40-41.

82 Supra African Charter, note 21 art. 18.


84 Id., art. 11(1).

85 Id., art. 11(2).

86 Id. art. 8(1)(d).
social rights that 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 conceptualization of economic and social rights.\(^87\)

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.\(^88\) 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 the bidding of international finance capital has made the protection of these rights less likely. 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.

**D. 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.\(^89\) On the one

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87 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.


89 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, *supra* note 57, at 359. Adetoun Ilumoka, *African Women's Economic, Social and Cultural Rights—Toward a Rele-
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 specific 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. Thus, it is 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." Lisa Kois argues further that there is some proof that the framers of the document were not entirely incognizant 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.

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 submission 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

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90 See id. at 290-291.
92 Id. at 98.
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.

The regional and international framework guaranteeing the rights of women notwithstanding, 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." However, in the famous Botswana case of Attorney General v. Unity Dow, the Court adopted and used values enshrined in the Bill of Rights of the Constitution of Botswana and the African Charter to override traditional customs of unequal treatment of women in 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.

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 18 (1991).


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.* The main issue in contention was whether a woman could inherit her father’s estate if he died without leaving a will. In the first instance, the Court made no reference to CEDAW or to other relevant international instruments, arguing that domestic provisions which discriminate against the human rights of women are “exceptions” that would effectively override the international instruments.

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.” In other words, women were deemed the equivalent of minors. The Court’s use of the African Charter was actually the opposite 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.

The *Magaya* decision is important to the issue of the realization of the human rights of women in Africa for several reasons. First, it brings out the resilience of patriarchal forms of control and discrimination, and other

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96 Judgment No.S.C.210/98/Civil Appeal No.635/92 of the Supreme Court of Zimbabwe (Unreported).
97 *See id.* at 5.
98 *Id.* at 10.
99 *Id.* at 19.
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 Muchechetere 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.\textsuperscript{100}

The \textit{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, both civil and political and economic, social and cultural. Among the reasons why the \textit{Magaya} decision is important are issues relating to participation in both economic and political life.\textsuperscript{101} But even more importantly is that deeming 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 the traditional “discipline” of their husbands \textit{cum} guardians.

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 also the whole content and intent 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

\textsuperscript{100} Id. at 17-18.

\textsuperscript{101} Minors are not allowed to contract or to vie for political office.
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 Charter, but critical attention must also be paid to the domestic context of each African country.

E. 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. 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. 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. As the Lawyer's Committee for Human

102 Nyamu supra, note 53, at 301, 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, supra note 93.
105 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
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." 106

Despite possession of a liberal refugee regime 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. 107 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, that 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

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107 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*, 10 *Afr. J. Int'l & Comp. L.* 625, 652 (1998).
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.\textsuperscript{108}

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 additional 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 \textit{refoulement} to the place from which they escaped in the first instance. Furthermore, in many African countries there is a growing state of xenophobia, in part provoked by conditions of worsening social and economic hardship. Consequently, 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). The latter is an issue that has come to the fore as a major humanitarian and human rights crisis not only on the African continent.\textsuperscript{109} Internally displaced persons (IDPs) do not have an international regime to cover their specific situation, which is compounded by the fact that there is neither a normative nor 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

\textsuperscript{108} See Lawyers Committee, \textit{supra} note 106, at 41.

\textsuperscript{109} See generally FRANCIS M. DENG, \textsc{Internally Displaced Persons: Compilation and Analysis of Legal Norms} (1998).
and health services than other members of the population.110

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.111 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."112 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 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

A. 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, which is 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 an 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 & Peo-

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ples’ Rights, generally agree that the institution has performed at less than par. Several reasons can be advanced in explanation for this situation, extending from the conceptual and infrastructural to the political. A disillusioned Professor Oji Umozurike, a 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.

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 lax 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. This situation, as Shadrack Gutto points out, is not a sustainable one in the long run. Indeed, calls have been made for the establishment of an African Human Rights Fund to facilitate the operations of the Commission.

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

113 See Kisanga, supra note 32.
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.\(^{117}\)

Mzizi touches upon the most fundamental of the problems faced by the African Commission, the issue of political will. This issue 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.”\(^{118}\) Thus 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.\(^{119}\) 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

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119 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.
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 will assist individual African men and women. Otherwise, it will have to adopt a "softly-softly" approach mirroring that of the African Commission. 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.

B. 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. 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. Some scholars contend that the Mechanism has met with some success. For example, the OAU brokered an agreement in Congo Brazzaville between rival political groups. 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."

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 conti-

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120 On the background to the Mechanism, see Bertrand G. Ramcharan, The Evolving Doctrine of Democratic Legitimacy, 60 THE REVIEW 179, 182-188 (1998).
122 Cohen and Deng, supra note 110, at 215.
123 Bakwesegeha, supra note 121, at 216.
Even before its mandate was extended to include the issue of forced displacement, it was fairly clear that it had not performed very well on the sole issue of refugees. Like the African Commission, it is hamstrung by infrastructural and financial inabilities. As a matter of fact, the problem relates to the manner in which the bureau was initially conceived and the political framework within which it operates. Cohen and Deng thus understated 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."\(^{125}\) 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 and 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."\(^{126}\) 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.

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\(^{124}\) Lawyers Committee, *supra* note 106.

\(^{125}\) Cohen and Deng, *supra* note 110, at 217.

\(^{126}\) See Objective (h) of the SADC Organ on Politics, Defence and Security; quoted in Ramcharan, *supra* note 38, at 189.
C. 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. First, individual governments must be encouraged 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.127 Indeed, since the late 1980s there has been a literal explosion of associational activity in the vast majority of countries around the continent.128 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 develop-

128 For a general analysis, see Civil Society and Democracy in Africa: Critical Perspectives, (Nelson Kasfir, ed., 1998).
ment work to those who pursue action within a rights framework. There is also a need for such organizations to directly engage economic and social issues from a rights-grounded perspective. Only then will some progress be registered in the struggle to marry 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:

Unfortunately 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.129

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. All these impact on the human rights situation in varying ways. A multitude of strategies must be employed to address these challenges. 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 in South Africa.” 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 strong 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, in the quest for sustainable human development, that is the biggest challenge of them all.

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130 Gutto, Beyond Justiciability, supra note 70, at 86.