

# Achieving Human Rights in Africa: The Challenge for the New Millennium

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## Introduction

Fifty-one years after the United Nations adopted the 1948 Universal Declaration of Human Rights and almost nineteen years after the Organization of African Unity (OAU) adopted its own African Charter on Human and Peoples' Rights, the human rights situation on the African continent is decidedly bleak. Indeed, achieving genuine respect for human rights may constitute the greatest challenge facing Africans in the new millennium.

In June 1999 UNESCO Director-General Federico Mayor expressed his deep concern over the ever increasing number of African countries afflicted by war and associated human rights abuses. Fighting has raged in Sierra Leone, Guinea Bissau, Angola, Congo, the Democratic Republic of Congo, Somalia, Rwanda and Burundi, Ethiopia and Eritrea <sup>1</sup>. The same month, a report by the Coalition to Stop the Use of Child Soldiers estimated that more than 120,000 children from ages seven to seventeen were being exploited as soldiers across Africa. Some of these children voluntarily joined government or revolutionary armed forces, but tens of thousands of them were forced to become soldiers at gunpoint <sup>2</sup>.

Amnesty International also reported that twenty-four African countries had serious and widespread human rights violations in 1998 and that armed conflicts, social and political unrest continued unabated, leading to appalling human rights abuse throughout the continent <sup>3</sup>. The United Nations High Commissioner for Refugees estimated that in 1998 there were about 3.5 million refugees in Africa, eighty percent of them women and children under the age of five <sup>4</sup>. In its 1999 survey, Human Rights Watch (HRW) reported that Africa's refugee population had increased to 6.3 million <sup>5</sup>. "Of the ten top refugee producers in the world, five were African: Burundi, Eritrea, Sierra Leone, Somalia, and Sudan" <sup>6</sup>. In general, HRW concluded that "much of Africa made little headway in adjusting to the imperatives of democratic rule and respect for human rights" <sup>7</sup>.

## THE GENERAL CAUSES OF HUMAN RIGHTS ABUSES

What are the causes of extensive human rights abuses in Africa? A recent OAU report attributed Africa's poor human rights record mainly to racism, post-colonialism, poverty, ignorance, disease, religious intolerance, internal conflicts, debt, bad management, corruption, the monopoly of power, the lack of judicial and press autonomy, and border conflicts <sup>8</sup>. Poverty is certainly an endemic factor. More than seventy-five percent of the continent's 700 million

<http://www.africa.ufl.edu/asq/v4/v4i2a2.pdf>

people live below the poverty line, and ten of the world's thirteen poorest countries are in Africa. Africa's troubling situation, however, is not unique. As I have pointed out elsewhere, in many of the world's poorer countries, the following elements comprise the system leading to human rights violations:

- undeveloped economies, with limited resource bases and insufficient employment/income opportunities for large segments of the population resulting in wide-spread povert
- high population growth rates further straining the natural environment and local resources, while intensifying competition for resources
- ethnic diversity and/or regional factionalism promoting local/particularistic identifications, while hindering the development of a national identification;
- ethnic and/or class politics involving competition among leaders of different language, cultural, or regional populations for state positions of political and economic power with the spoils of victory going to supporters;
- lack of regime legitimacy as those large segments of the population not culturally and/or politically affiliated with the ruling elite and not sharing in the spoils refuse to recognize the regime as legitimate;
- resort to military/police force to maintain power by suppressing political opponents and disgruntled civilians;
- violation of economic, civil, and political rights by the regime on the pretext of "national security" <sup>9</sup>.

Unfortunately, most African countries share these elements. Part of the reason stems from the negative impact that colonialism has had on Africa's indigenous ethno-political traditions.

## COLONIALISM AND THE AFRICAN STATE

Because state creation in Africa differed so markedly from the European experience, the Western liberal conception of individual-state relationships does not easily apply to Africa. European imperialists imposed the state structure on collections of ethno-political communities that historically lacked intercommunal coherence. The imperialists forced communities that lived independently of each other to live together in the newly-created colonial state. Most of these new citizens lacked any nationalistic bond to the colonial state. Today, only a few African states bear any territorial resemblance to the political communities that existed prior to European colonialism. The resulting disconnection between Africans and the modern African state has created a crisis of cultural, social, and political identity.

As African scholar Makau wa Mutua points out, the post-colonial "African states have largely failed to forge viable, free, and prosperous countries....The new African states have failed to inspire loyalty in the citizenry; to produce a political class with integrity and a national interest; to inculcate in the military, the police, and the security forces their proper roles in society; to build a nation from different linguistic and cultural groups; and to fashion economically viable policies" <sup>10</sup>. This historic, psychological process has adversely affected many

African political leaders, who, lacking a genuine national commitment and sense of obligation, exploit state budgets and power to strengthen their ethnic power bases, enhance personal privileges and thus retain power. Such a strategy ignores the human rights entitlements of common citizens without discrimination.

#### ALTERNATIVES TO THE CLASSICAL FORM

Many African leaders have thus relied on ethnic support in order to achieve and maintain positions of power. In return, these leaders have often favored their supporters with privileged access to the limited available resources. Such politics, by favoring the few over the many, has not and cannot generate the generality of legitimacy necessary for regime stability and internal security. Some African leaders believed that, despite a country's ethnic, cultural, and regional diversity, the development of a shared national identity and state stability could be achieved if ethnic, regional, or other particularistic affiliations were eliminated. Hence, these leaders supported strong central governments, often without tolerance for an independent judiciary or effective local governance.

In the twentieth century, however, ethnonationalism or politicized ethnicity represents a major legitimator and de-legitimator of regimes. A government's legitimacy rests, in significant degree, on its ability to convince the governed that it shares, represents, or respects their ethnicity. In many countries with multi-ethnic populations, the classic "nation-state" has proved to be a dangerous fiction. Attempts by state governments to force diverse cultural populations into a dominant ethnic mold have led to human rights abuses <sup>11</sup>. Clay, an anthropologist, concludes that "Post-independence efforts to eliminate tribal identities may have contributed significantly to Africa's catastrophic problems" <sup>12</sup>.

The bias of the UN and existing states against autonomy or secessionist movements by cultural minorities seeking self-determination and political independence from dominant ethnic power-holders could very well prove detrimental to both the stability of states and the human rights process. Historically, diverse ethnic populations with a tradition of mutual animosity have not found common citizenship in a single state a sufficient basis for social harmony. On the contrary, the state form has simply become the new arena for interethnic political and economic battles.

In cases of intrastate, interethnic strife involving cultural populations who are numerically dominant in different regions of the country, at least two political paradigms or structural alternatives to the pluralistic state are possible. One structural solution involves replacing the state (which in the developing world has commonly been dominated by the military or a single political party) with autonomous, ethnic cantons that can opt for confederation on the Swiss model. Another possibility is the creation of small independent ethnic states whose leaders may (after feeling sufficiently secure) opt for some form of interstate integration on the European Union model. Both the Swiss cantons and the states comprising the European Union opted for forms of legal integration to achieve anticipated political and economic benefits.

The above solutions reverse the historic sequence experienced by most post-colonial peoples who have had the state form thrust upon them without regard to their political preferences. The above solutions first offer regional ethnic populations political autonomy.

Secondly, they offer the resulting ethnic political entities the option of voluntarily forming larger political units for the purpose of attaining mutual political and economic benefits. Parties can negotiate additional legal forms on a relatively equal basis. Hopefully, the mutual benefits of the resulting interethnic cooperation will foster mutual respect for each population's human rights.

However, in cases of intrastate, interethnic conflict involving populations intermingled within the same territory, a culturally pluralistic, single-state solution may be necessary. In order to significantly reduce and, hopefully, eliminate the causes of minority oppression and state instability, the following minimal measures must be taken:

- states must establish an independent judiciary
- states must incorporate the various UN human rights conventions into its domestic law
- state constitutions must place a duty on the state to guarantee all citizens legal equality and non-discrimination, while also granting injured citizens standing in court to initiate claims when these guarantees have been broken;
- state constitutions must guarantee minority cultural rights, including the rights to speak, teach, and write their own language; practice their own religion; and practice other aspects of their cultures to the extent that such practice does not infringe on the rights of others;
- government and military officials as well as the powerful elite must be responsive to judicial decisions;
- minority populations must be permitted some effective means of participating in the political process (this may involve the institution of weighted rather than strictly numerical voting, however the particular mechanisms chosen should vary somewhat with each state's special conditions);
- minority populations must be permitted some effective means of participating in the economic process (in the case of underclass minorities, special programs such as land redistribution, vocational and special education, housing, cooperative formation, etc. may be necessary).

In exchange for the above guarantees and special programs, minority populations must accept the inevitable fact that the majority or plurality population and culture will be predominant at the national/state level. For example, in states where numerous minorities and languages exist, the selection of a single, official national language will be necessary for the practical purposes of facilitating national and international communication<sup>13</sup>. Despite the political problems outlined above, most African leaders have opted to work within existing state structures and fashion a pan-African human rights charter that distributes rights and duties between citizens, peoples and the state. It is now necessary to explore how the suggestions listed above could be integrated into the African Charter on Human and Peoples' Rights.

## THE AFRICAN HUMAN RIGHTS CHARTER

Created under the auspices of the OAU, the African Charter on Human and Peoples' Rights entered into force on 21 October 1986<sup>14</sup>. With the ratification of this Charter, Africa joined Europe and the Americas as one of three world regions with its own human rights convention<sup>15</sup>. The great majority of African states had previously ratified the United Nations Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Since most African states had already committed themselves to respect a broad range of human rights, why was an African Charter deemed necessary? Okoth-Ogendo argues that it is because many African leaders felt the "need to develop a scheme of human rights norms and principles founded on the historical traditions and values of African civilizations rather than simply reproduce and try to administer the norms and principles derived from the historical experiences of Europe and the Americas"<sup>16</sup>.

The African Charter both resembles and departs from the other regional conventions. Charter articles 3-17 list a fairly typical array of individual rights, including rights to equal protection of the law, to life and security, to due process, to education, to own property, to work under equitable and satisfactory conditions, to enjoy the best attainable state of physical and mental health, and to assemble with others. These articles also promise individuals freedom of expression, movement, conscience, religion, and political participation.

These individual rights are followed by a catalog of peoples' rights. The Charter grants "all peoples" the rights to equality (Art. 19), to self-determination, to freely determine their political status and economic development (Art. 20). In addition, "All peoples shall have the right to national and international security" (Art. 23) and "the right to a general satisfactory environment favorable to their development" (Art. 24).

Additionally, the Charter lists obligations that states incur, including the obligation to eliminate every form of "discrimination against women and also censure the protection of the rights of the woman and the child as stipulated in international declarations and conventions" (Art. 18); the obligation to eliminate all forms of foreign and domestic economic exploitation of natural resources (Art. 21); the obligation to promote and ensure the Charter (art. 25); the obligation to guarantee the independence of the courts (Art. 26); and, what is especially African, the obligation to "assist the family which is the custodian of morals and traditional values recognized by the community" (Art. 18).

Articles 27 to 29 spell out the duties that an individual incurs "towards his family and society, the State and other legally recognized communities and the international community" (Art. 27). More specifically, these include duties to exercise rights and freedoms "with due regard to the rights of others, collective security, morality and common interest" (Art. 27); to respect "fellow beings without discrimination" (Art. 28); to respect the family and parents at all times, and "to maintain [parents] in case of need", to serve the national community, both physically and intellectually; not to compromise the security of the state; to preserve and strengthen national solidarity, independence and territorial solidarity; to pay taxes; "to preserve and strengthen positive African values"; and to promote African unity (Art. 29).

This section spelling out a citizen's duties to the state distinguishes the African Charter from other regional human rights conventions and has earned it serious criticism. Some critics

have warned that politicians might use these duties to the state to trump individual human rights and freedoms when the two sets of obligations are in conflict. Donnelly, for example, points out that the former Soviet Union, a totalitarian state, frequently used duties to abrogate individual rights<sup>17</sup>. Although he does not disagree with critics such as Donnelly, Mutua argues that those duties to the state enshrined in the African Charter "are inspired by the continent's history of domination and occupation by outside powers...[they] represent an extension of the principle of self-determination" by demanding citizen loyalty as a shield against foreign exploitation<sup>18</sup>. For example, "the duty to place one's intellectual abilities at the service of the state is a legitimate state interest, for the 'brain drain' has robbed Africa of massive intellect....the Charter [also] asks individuals to promote African unity, an especially critical role given arbitrary balkanization by the colonial powers"<sup>19</sup>. The remainder of the Charter is devoted to the establishment and operation of a human rights commission, an issue to which we now turn.

#### AFRICA'S HUMAN RIGHTS COMMISSION

In 1987, the OAU created the African Human Rights Commission, in accordance with Charter Article 30, to promote human rights and to monitor compliance by African States with their obligations under the charter. The commission is comprised of eleven persons "chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality, and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience" (Art. 31). The Assembly of Heads of States and Governments of the OAU elects members of the commission from a list of persons nominated by States Parties to the Charter (Art. 33). Commissioners serve for a renewable term of six years (Art. 36). The commissioners elect a chairman and vice-chairman from among themselves every two years (Art. 42). Members of the commission are elected to serve in their individual capacities (Art. 32) and should, therefore, act independently. "In practice, as with other international institutions and mechanisms, the process of nomination and election to the Commission minimizes the likelihood of the body being composed of persons who may be substantially or rigorously impervious to state pressure"<sup>20</sup>.

Each State Party to the Charter is obligated to cooperate with the commission and to submit to it a report every two years in which the state explains the measures it has taken and needs to take to ensure its citizens the rights and freedoms guaranteed by the charter. As of 1998, however, thirty of the fifty-one States Parties to the Charter had failed to submit a single report, and all other states, except Zimbabwe, were in arrears<sup>21</sup>. Odinkalu notes that African states generally have not given the commission significant co-operation. In addition to failing to fulfill their reporting obligations, many refuse to respond to the commission's requests for information. In one case, the commission sent twenty unanswered inquiries to Zaire requesting a response to allegations contained in complaints of gross violations of human rights<sup>22</sup>. There also have been cases in which State Parties have refused to admit the commission on missions into their territories to investigate complaints of gross human rights violations<sup>23</sup>. Critics charge that the OAU itself has failed to support the commission with an adequate budget. The commission has had to rely on grants from West European countries for basic operating

expenses. Given these and other criticisms, Mutua has dismissed the commission as "a facade, a yoke that African leaders have put around our necks" <sup>24</sup>.

The charter allows for an interstate complaint procedure whereby one state can charge another state with human rights violations before the commission. Yet, despite the existence of widespread and grave violations in many countries, not a single state has ever filed an interstate complaint. The commission has received petitions only from a limited number of individuals and NGOs. Once the commission reaches a decision on the merits of a case, it has no effective mechanism to enforce its judgment. Consequently, some African states have ignored the commission with impunity.

OAU Secretary General Salim maintains that the absence of adequate institutions to monitor, promote and protect human rights has tarnished Africa's image, so that many view it as being a continent without the rule of law. He maintains that Africa's human rights charter has failed because politicians and strong men have refused to support it <sup>25</sup>. Despite or because of the shortcoming in human rights achievements under the Charter and Commission, African leaders have decided to begin the process of creating a human rights court, similar to what exists in Europe and the Americas.

#### PROBLEMS IN CREATING A HUMAN RIGHTS COURT

On 8 June 1998, members of the OAU meeting in Burkina Faso voted to initiate the process for the creation of an African Court on Human and Peoples' Rights. To come into effect, the protocol for the proposed court requires the ratification of fifteen OAU member States <sup>26</sup>. As of late 1999, only Burkina Faso and Senegal had ratified it. According to the protocol, the court shall consist of eleven judges elected by the Assembly of Heads of State and Government of the OAU from a list of nominees proposed by OAU member States. The assembly shall ensure that there is adequate regional and gender representation among the selected judges (Art. 14). The judges, who may serve two six-year terms, are to function independently and shall enjoy the immunities extended to diplomats in accordance with international law (Art. 17).

The envisioned court will complement the protective mandate of the African Commission on Human and Peoples' Rights. It will have both advisory and contentious jurisdiction over human rights matters. As for its sources of law, the court shall apply the provisions of the African Charter on Human and Peoples' Rights "and any other relevant human rights instruments ratified by the States concerned." (Art. 7). This is a very significant provision, because the great majority of African states have ratified many of the major United Nations human rights conventions, including the Convention on the Elimination of Discrimination against Women (entry into force in 1981) and the Convention on the Rights of the Child (entry into force in 1990). Consequently, the court will be able to apply a much broader array of human rights obligations against states than the African Charter alone affords.

African states, the commission, the OAU and African intergovernmental organizations will be able to submit cases to Court (Art. 5). Individuals and NGOs, however, may not file a petition with the court against any state that has not explicitly made a declaration under Article 36(6) of the protocol recognizing the competence of the Court to consider such petitions. Unfortunately, this protocol provision permits States to shield themselves from complaints by

their own citizens and NGOs who allege human rights violations. Because governments will be reluctant to make such declarations, and because no state has ever filed a human rights complaint against another state before the commission, it is unlikely that the court will see much business.

The protocol authorizes the court to issue appropriate orders to remedy a human rights violation, including the payment of fair compensation or reparation to the injured party (Art. 27). States recognizing the court promise to comply with its judgments (Art. 30), and the OAU Council of Ministers will be charged with monitoring the execution of Court judgments on behalf of the OAU Assembly (Art. 31). Presumably, the Council of Ministers will pressure a non-complying country into honoring a court judgment. Historically, however, the OAU has been extremely reluctant to interfere in the internal matters of member states, even in those that have engaged in gross human rights violations. The expenses of the court are to be borne by the OAU (Art. 32). However, given that organization's inadequate support for its own Human Rights Commission, one must wonder how well it will maintain the court.

## CHALLENGES AND PARADIGMS

Can Africa meet the human rights challenge of the new millennium? There has been no shortage of rhetoric and ceremonial commitment. In April of 1999 the OAU held its first ever Ministerial Conference on Human Rights. At that conference, held at Grand Bay, Mauritius, OAU Secretary-General Salim called for the integration of human rights in school curricula and the strengthening of institutions responsible for promotion and respect for human rights<sup>27</sup>. He emphasized that Africa "needs to inculcate in its people a culture of peace, tolerance and respect of human rights, to energetically fight poverty, illiteracy and intolerance, to strive to overcome the scourge of conflicts and ensure that human rights violations are not only condemned but also effectively opposed and eliminated"<sup>28</sup>.

The ministers concluded the conference with a Declaration and Plan of Action that reaffirmed their commitments to human rights, the rule of law, and democracy<sup>29</sup>. They recognized that human rights are founded on respect for the sanctity of life, human dignity, tolerance of differences, prosperity and stability. The declaration "urges all African states to work assiduously towards the elimination of discrimination against women and the abolition of cultural practices which dehumanize or demean women and children." The declaration also calls on African states to eradicate genocide on the continent and to ratify the African Charter on the Rights and Welfare of the Child, the Protocol on the Establishment of an African Court on Human and Peoples' Rights, the Four Geneva Conventions, the UN Statute of the International Criminal Court, and a number of other major UN human rights conventions. Furthermore, the declaration recognizes that the promotion and protection of human rights are primarily state responsibilities. Therefore, it calls on African states to establish and adequately fund national human rights institutions and to "engage in a process of continuous dialogue with the African Human Rights Commission."

But will the states act? It took nine years to get fifteen African states to ratify the African Charter on the Rights and Welfare of the Child so that it could come into force<sup>30</sup>. After a year and a half, only two of the OAU's fifty-one members have ratified the protocol to create an

African human rights court. Some African observers have high hopes for the court. They believe its existence will make African leaders more conscious of their human rights obligations. Others doubt that the court will do little to improve a grave human rights situation whose causes are primarily economic, demographic and political.

An Africa suffering from severe economic, demographic, health, and political problems cannot easily achieve the human rights status its people want. Speakers at the first African Development Forum emphasized the need for a new paradigm for African development based on a vibrant domestic private sector, a stable state, effective policy analysis, and good governance<sup>31</sup>. Such a paradigm will also need a marked change in Africa's relations with international financial institutions and donor states<sup>32</sup>.

At the forum, OAU Secretary-General Salim stressed the linkage between governance, economic development and human rights. "Good governance and democracy or the respect for human rights cannot thrive on empty stomachs," he said. "Democracy must deliver on bread-and-butter issues, otherwise democratic transitions will be reversed and the continent will slide back into situations where the politics of poverty gives rise to the poverty of politics"<sup>33</sup>. Meeting the human rights challenge in the new millennium will require Africans to adopt new political and developmental paradigms that also meet the continent's economic, demographic, and health challenges. It remains to be seen if this will happen.

## Notes

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21. Ibid., p. 401.
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23. Ibid., p. 401.
24. Ibid.
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26. "Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Adopted 8 June 1998." Reprinted in *Human Rights Law Journal*, vol. 20, no. 4-6, pp. 269-271 (1999).
27. "Dr. Salim Speaks at 1st Ministerial Conference on Human Rights," *Africa News* 16 April 1999.
28. "Protection of Human Rights Concerns OAU," African News Service, 15 April 1999.
29. CONF/HRA/DECL (1), 16 April 1999.
30. Entry into force in Nov. 1999. The ratifying states are Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Lesotho, Malawi, Mali, Mauritius, Mozambique, Niger, Senegal, Seychelles, Togo, Uganda and Zimbabwe. See, "Governments Urged to Ratify Children's Charter," Inter Press Service, 29 Nov. 1999.
31. Forum held in Addis Ababa, 14-28 Oct. 1999. See "Africa Needs a New Paradigm for Development in the Twenty-first Century," M2 Presswire, 26 Oct. 1999.
32. A comprehensive discussion of the recommended ways the World Bank and other foreign assistance programs should redesign their projects is beyond the scope of this paper. For an excellent treatment of this matter, see Hellinger, S., D. Hellinger, and F.M.

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33. Ibid.

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