Concept Paper

A Policy Advisory Group Meeting on

“Africa’s Evolving Human Rights Architecture”

Organised by the Centre for Conflict Resolution, University of Cape Town

February 2007
Introduction

The Centre for Conflict Resolution (CCR) at the University of Cape Town, South Africa, will be holding a policy advisory group meeting on the theme of “Africa’s Evolving Human Rights Architecture” on 28 and 29 June 2007. The meeting will review and analyse the experiences and lessons from a number of human rights actors and institutions on the continent. The development and emergence of new continental, sub-regional and national institutions suggests a deeper commitment to human rights by African countries. However, this still has to be reinforced by the political will to ensure human rights protection. Since the tragedy of the Rwandan genocide in 1994, in which one million people perished, human rights protection has been placed on the continental agenda by the African Union (AU) and regional economic communities (RECs) such as the Southern African Development Community (SADC); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD); and the Economic Community of Central African States (ECASS). Addressing human rights abuses are now seen as central to efforts to develop a new system of democratic governance on the continent. The principles and objectives of AU’s Constitutive Act of 2000 emphasises the need to promote and protect human rights and to consolidate peace with justice. In reality, however, the AU’s human rights edifice operates independently from its conflict resolution systems, despite the fact that their mandates often overlap. Conflict resolution practitioners and human rights activists in Africa have a vital role to play in consolidating peace with justice. The Cape Town meeting in June 2007 will analyse and assess how effective the continent’s new human rights institutions are, as well as recommend strategies that can be adopted to strengthen them.

Objectives

The primary goal of the Cape Town policy seminar will be to explore the development of continental and regional human rights institutions in Africa. The meeting intends to identify ways to strengthen the capacity of African governments as well as regional and sub-regional organisations to manage human rights constructively. Participants will identify human rights priorities in Africa and develop policy recommendations of how to redress human rights failures on the continent. The development of African regional systems for the protection and promotion of human rights will be assessed through an examination of structures within the AU and Africa’s sub-regional organisations. The goal is to contribute to ensuring an effective regional judicial system for upholding the rule of law, human dignity and human rights. The infringement of human rights is a global problem. The prevalence of violent conflicts and autocratic rule in parts of Africa means that the continent is yet to witness a paradigm shift towards privileging the human rights of all its 800 million citizens. Previous continental frameworks for human rights protection have had limited success in defending the human rights of African citizens. Therefore, Africa’s human rights regime is still relatively weak despite a growing body of declarations, conventions and protocols such as the Protocol Establishing an African Human Rights Court in 1998 and the AU Protocol on the Rights of Women of 2004.

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CCR is commissioning 14 authors, including academics and scholar-practitioners, to present papers relating to Africa’s evolving human rights architecture, based on original research and practical experience. The papers will be presented at the Cape Town seminar and subsequently edited into a volume, due to be published in early 2008. To date, there have been few comprehensive studies produced by African scholars and practitioners on Africa’s evolving human rights architecture. This meeting will therefore promote new research as well as produce a timely and necessary publication. The volume will seek to make an important contribution to the literature on human rights on the continent. It will be based on African perspectives and will be disseminated widely within and outside Africa.

**Seminar Themes**

About 30 policymakers, scholars and civil society actors will be invited to participate in the seminar. The following six areas will form the basis of presentations and discussions during the policy meeting:

1. African perspectives on human and gender rights;

2. The African Union’s human rights institutions and the challenges and imperatives of a merged African Court;

3. Regional human rights institutions in Africa;

4. National human rights institutions in Africa;

5. The role of civil society and traditional leaders in enhancing human rights on the continent;

6. The Uses and Abuses of the US “war on terror” in Africa.

**Background**

Many African governments - acting nationally and also collectively through the AU - are confronting what some observers have depicted as the “culture of impunity” that exists for those guilty of human rights abuses in parts of the continent. The evidence of the link between gross human rights violations and the emergence of conflicts is no longer contested. Through the African Union, African heads of state have recently expressed their “determination to address the scourge of conflicts in Africa in a collective, comprehensive and decisive manner” and they have identified the need to address human rights violations on the continent in order to achieve this. Within the evolving security and governance architecture created by the AU and RECs is a strong recognition that social justice is necessary for the establishment of democracy, accountability and the rule of law. This new architecture also commits African

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countries to broaden the scope of human rights to incorporate the protection of women, youth and children as well as a defence of environmental rights.

Africa's human rights record has tended to mirror political developments on the continent. The European colonial powers’ repudiation of the human rights of Africans in the nineteenth and twentieth centuries proved critical in provoking demands for self-government in the 1950s and 1960s. Thus, Africa’s human rights discourse was driven by a desire to reverse the damage that colonialism had exacted on African countries and to secure civil and political rights for all African citizens. Social and economic rights increasingly provided the focus for newly independent African states competing for a place in a global economic order biased towards the interests of western states.

During the Cold War era, many of the democratically elected post-colonial African governments were substituted by one-party states and autocratic regimes under which concerns over human rights were marginalised. The fact that most African countries were either directly or indirectly beholden to one of the ideological superpowers – the United States or the Soviet Union - and their European client states, meant that external actors were complicit in the denial of human rights to African citizens. Leaders such as Zaire’s Mobutu Sese Seko, Somalia’s General Muhammad Siad Barre, Liberia’s Samuel Doe, and Ethiopia’s Mengistu Haile Mariam were supported by the superpowers. Furthermore, for more than 50 years, brutal human rights abuses were perpetuated through institutionalised racism and discriminatory laws enacted by white governments clinging on to colonial rule in Southern Africa, with the tacit collusion of their European and American patrons.

The failure of African leaders to react in circumstances of obvious human rights abuses by their peers was often condoned by the Organisation of African Unity’s (OAU) strict adherence and promotion of the principle of “non-interference in the internal affairs of member states”. The African Charter on Human and Peoples’ Rights (the Banjul Charter) adopted by the OAU, in 1981, enshrined similar principles to those in the United Nations’ (UN) Universal Declaration of Human Rights of 1948. The Banjul Charter was, however, often observed in the breach. Critics dismissed the OAU as a “dictator’s club” which failed to respect the human rights of African citizens, with Uganda’s Idi Amin - whose regime killed an estimated 300,000 people - even becoming the chairman of the organisation.

The democratisation processes that swept through Africa in the 1990s, as well as pressure from civil society and development partners in countries such as Benin, Zambia, and Cameroon, resulted in a paradigm shift in official rhetoric on the promotion of human rights. The scourge of violent conflicts has also left deep scars on the continent and provoked calls for a more cohesive and systematic approach to human rights in Africa as a means of consolidating peace and development. The proliferation of national and intergovernmental human rights institutions reflects this
new attitude. Since the AU replaced the OAU in July 2002, in Durban, South Africa, its policy frameworks as well as those of the New Partnership for Africa’s Development (NEPAD) have reiterated the link between peace, security, human rights, democratic governance and development. The relapse of conflicts in a number of African countries such as Angola, Liberia and the Democratic Republic of the Congo (DRC) has illustrated the importance of the need to address human rights to achieve peace and security. The subsequent creation of an African Peer Review Mechanism (APRM) – to which 25 African governments have since subscribed ⁸ - shows an increasing willingness by many African governments to support – at least rhetorically - human rights protections at the continental level. Critics have, however, noted that the APRM lacks an implementation mechanism to sanction errant regimes.

Despite the emergence of an African human rights architecture, there still remains great uncertainty over the commitment of some governments to these institutions. Many African countries are still failing to confront and address their own national human rights issues, and the performance of regional structures continues to be hampered by a lack of political will and resources. The current conflict in Sudan’s Darfur region has resulted in an estimated 200,000 deaths since 2003, as well as the displacement of two million people from their homes.⁹ Nonetheless, the Khartoum government has so far not been seriously called to account by African governments for the violence or its failure to protect the human rights of its citizens. In Zimbabwe, the government-sanctioned forced removal of people from their homes, in 2005, also known as “Operation Restore Order/Murambatsvina” has been described by a UN report as a “violation of the right to adequate housing and other rights including the right to life, property and freedom of movement”.¹⁰ While the premise of finding local solutions to addressing human rights abuses in Africa may be preferable to external solutions, there nevertheless remains an urgent need to ensure that the international community supports and does not undermine human rights protection on the continent.

1. African Perspectives on Human Rights

Some African leaders have argued that the promotion of an international human rights standard is a strategy that is used and abused by hypocritical western governments to justify their intervention in the affairs of African countries. The tacit objective behind this articulation is sometimes a desire to avoid an external evaluation or monitoring of the internal affairs of their countries. If such an assumption is admitted and accepted, then one possible conclusion is that there are no indigenous notions of human rights in Africa. The Cape Town seminar will discuss whether there are indeed African perspectives on human and gender rights. The Universal Declaration of Human Rights of 1948 was not developed through a worldwide consultative process of the different values from around the world, but reflected the western-dominated international legal system. Others have challenged this idea and noted that, among the 18 members of the

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⁸ These include: Algeria, Burkina Faso, Democratic Republic of the Congo, Ethiopia, Ghana, Kenya, Cameroon, Gabon, Mali, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa, Uganda, Egypt, Benin, Malawi, Lesotho, Tanzania, Angola, Sierra Leone, Sudan and Zambia.


original Human Rights Commission that drafted the Universal Declaration included influential international scholars like P.C. Chang from China, Charles Malik from Lebanon, and Chilean, Hernan Santa Cruz. So in this sense, the Declaration did in fact have substantial input from developing and ‘non-Western’ countries. However, Africa was not represented at this meeting since the majority of its countries were colonised at the time that the Declaration was drafted.\textsuperscript{11} In particular, with reference to the contribution of Africa to international human rights debates, there has not been an adequate recognition of the way in which African thought systems can contribute towards advancing the cause of human dignity for all.

The African Charter on Human and Peoples’ Rights of 1981 sought to codify a notion of communality through its emphasis on “peoples”.\textsuperscript{12} This led to the creation of the African Commission on Human and Peoples’ Rights as an institution of the OAU. The Banjul Charter noted that “fundamental human rights stem from the attributes of human beings which justifies their national and international protection”.\textsuperscript{13} This can be considered to be an African interpretation of the referents to human rights. With specific reference to communal groups, Article 19 of the Charter states that “all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another”. Article 20 further notes that “all peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen”. Even though the Charter existed in the second half of the existence of the OAU, as with many other regions of the world, the rhetoric was not upheld in reality. African governments, which had a monopoly over the instruments of coercion, did not always respect the provisions of the Banjul Charter.

\section*{2. The African Union, Human and Gender Rights}

The AU’s Constitutive Act of 2000 includes a number of provisions placing human rights firmly on the agenda of the organisation. The Act states that African leaders are “determined to promote and protect human and peoples rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law”.\textsuperscript{14} Article 3(g) of the Act also notes that the “promotion and protection of human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments” is an objective of the Union.

The OAU/African Union’s human rights system includes five treaties, two of which include implementation mechanisms:

1. The Convention on Specific Aspects of the Refugee problem in Africa, (entered into force in 1974);

\textsuperscript{14} Constitutive Act of the African Union. (Full text available at \url{http://www.africa-union.org/organisms/pan-%20african-%20parliament/AbConstitutive_Act.htm}; accessed 18 April 2006)
3. The African Charter on the Rights and Welfare of the Child which came into force in 1999 and established an African Committee of Experts on the Rights and Welfare of the Child to promote and protect the rights and welfare of the child;
4. The Protocol on the establishment of an African Court on Human and Peoples’ Rights (entered into force January 2004); and

On 25 January 2004, the Protocol to the African Charter on Human and Peoples’ Rights was ratified and led to the establishment of the African Court on Human and Peoples’ Rights. The Court further reinforces the Pan-African system for the protection of human and minority rights. The Court is empowered to act both in a judicatory and advisory capacity. Article 2 of the Protocol states that “the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples’ Rights conferred upon it by the African Charter on Human and Peoples’ Rights”. Article 3 further notes that “the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned”. This means that AU member states that have ratified the Protocol establishing the Court are subject to its jurisdiction. With regard to the Court’s judicatory power, Article 5, paragraph 1, states that cases can be submitted by: i) the AU’s African Commission on Human and Peoples’ Rights; ii) the State Party which has lodged a complaint to the Commission; iii) the State Party against which the complaint has been lodged at the Commission; iv) the State Party whose citizen is a victim of a human right violation; or v) an African Intergovernmental Organisation.

Other guiding principles of the AU have implications for the protection of human rights in Africa. These include: the promotion of gender equality - the AU Commission has mandated a 50 percent representation of women; the endorsement of social justice; and the support of “good governance” through the rejection of unconstitutional changes of government, articulated in Article 30 of the AU’s Constitutive Act. The Act has also made provision for the participation of civil society actors in the AU’s work through structures such as the Pan-African Parliament (PAP) and the Economic, Social and Cultural Council (ECOSOCC), as well as NEPAD. The hope is that the creation of these organs will promote the involvement of civil society in continental institutions and provide for greater protection and monitoring of human rights.

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2.1 The Merged African Court of Justice and Human Rights

In January 2005, the AU legislated the merging of the African Court on Human and People’s Rights and the African Court of Justice to form the African Court of Justice and Human Rights. Some observers claim that this demonstrates the continental body’s growing commitment towards streamlining mechanisms to uphold human rights. The rationale for an amalgamated Court came from concerns that there was insufficient financial and personnel justification for two Courts within the AU. The ability of both Courts to adjudicate human rights matters was considered a further rationale for the merger. Nonetheless a number of continental actors maintain that financial constraints afflict all AU institutions and are not sufficient cause to merge the two Courts. It has also been suggested that merging the two Courts would “relegate” human rights in terms of priority to other issues on the African continent. Critics have further expressed concern at the lack of consultation with civil society before this decision was taken.

Another key concern in the merger of the Courts has been that the development of the Human and Peoples’ Rights Court was well underway, since its judges had already been appointed, while the creation of the Court of Justice was still at an embryonic stage. Concern has also emerged over the merger of the Courts due to the status of the Courts within the AU’s evolving legal regime. Article 5 of the AU’s Constitutive Act created the Court of Justice as an institution of the African Union. By contrast, the African Court on Human and Peoples’ Rights is established under a protocol to the African Charter on Human and Peoples’ Rights, which means that it is a treaty body, rather than an organ of the Union. A further concern voiced by observers is that there might be a conflict of jurisdictions between the Court and the existing regional Courts, for example in West Africa.

The merged African Court is to be composed of 12 judges and within this, the Human Rights section is to be composed of a quorum of just three judges. Concern exists that the small number of judges will lead to delays in case management; in the issuing of decisions; and ultimately in the administration of justice in the area of human rights. Furthermore, Africa currently has diverse languages in common usage as well as an array of historically distinct legal systems inherited from colonial rule. Therefore, trying to institute one universal human rights legal authority may create problems. Currently, individual African countries subscribe to a variety of legal processes ranging from: common law practices; Roman-Dutch law traditions; Napoleonic law practices; and increasingly Islamic legal traditions/Sharia law, in cases such as Sudan and northern Nigeria. Nonetheless, it is possible that this diversity of traditions may become a strength of the merged Court, and could allow it to build a unique regional legal institution.

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3. Regional Human Rights Institutions

There has been an increasing number of regional developments in human rights structures through the creation of regional courts and tribunals such as the ECOWAS Court of Justice in Abuja, Nigeria; the Court of Justice of the Economic and Monetary Union of West Africa (UMOEA) in Ouagadougou, Burkina Faso; the SADC Tribunal in Windhoek, Namibia; the Common Market for East and Southern Africa (COMESA) Court of Justice in Lusaka, Zambia; and the East African Court of Justice in Arusha, Tanzania. Additionally, there are two other proposed Regional Courts: the Court of Justice of the Arab Maghreb Union (AMU) and the Court of Justice of the Central African Economic and Monetary Union (CEAMAC) countries.

The creation of these regional human rights institutions has raised questions over which Courts will have primacy in adjudicating human rights issues in Africa. There is also the unresolved issue of which Court is mandated to resolve human rights issues in instances where there is an overlap in the jurisdiction of two Courts. For example, a country such as Tanzania is a member of the East African Community and therefore subject to the jurisdiction of the East African Court of Justice. However, Tanzania is also a member of the Southern African Development Community and thus accepts the jurisdiction of the SADC Tribunal. The country is also a member of the African Union and subject to the jurisdiction of the merged Court of Justice and Human Rights. The Cape Town seminar will address this issue of overlapping jurisdiction and propose policy recommendations on how to ensure the effective protection of human rights through Africa’s numerous institutions.

4. National Human Rights Institutions on the Continent

National mechanisms to address human rights abuses are also viewed as critical in ensuring the protection and promotion of human rights in Africa. By 2007, the number of national human rights commissions in Africa had grown from just one national agency in 1989 to 24 in 2005. The large number of these bodies demonstrates the growing recognition that human rights protection is the responsibility of national governments. However, while some national human rights commissions have been established in an effort to promote human rights, critics point to the fact that, in many contexts, these commissions have been established by governments wishing to deflect international attention away from their human rights record. In March 2006, for example, the Zimbabwean Human Rights Commission was proposed in the face of criticisms of flagrant human rights violations within the country. Nonetheless, commissions established in Ghana, South Africa, and Uganda, among others, have been praised by observers for their independence and their protection of the rights of their citizens.

23 These include Algeria, Benin, Cameroon, Central African Republic, Chad, Ethiopia, Ghana, Kenya, Liberia, Malawi, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Togo, Tunisia, Uganda, and Zambia. See Michelle Parlevliet, Guy Lamb and Victoria Maloka, National Human Rights Institutions in Africa: Defenders of Human Rights, Managers of Conflict, Builders of Peace? (Cape Town: Centre for Conflict Resolution, 2005)


25 Human Rights Watch, Protectors or Pretenders?
In recognition of these recent national efforts to uphold citizen’s rights and to secure accountability, the AU has started to engage with national human rights institutions on the continent. In collaboration with the UN Office of the High Commissioner for Human Rights, the AU hosted a meeting of human rights commissions in October 2004 to discuss how these institutions could be strengthened, as well as how they could work with the AU and its various organs.  

5. The Role of Civil Society and Indigenous Leadership Structures in Enhancing Human Rights

The Protocol Establishing the African Court of Human and Peoples’ Rights allows the Court to empower both relevant non-governmental organisations (NGOs) with observer status in the Court, and permits individuals to submit directly to it cases of serious, systematic or massive human rights violations. In particular, Paragraph 3 of Article 5 of the Protocol establishing the Court also states: “the Court may entitle relevant Non Governmental Organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it”. This is considered an innovation in international human rights instruments since the European and American systems did not originally have any such stipulation, and such mechanisms evolved only over time. Civil society groups are often best placed to report on and monitor human rights abuses, so Africa’s evolving institutions need to factor in their participation into their work. Likewise, a majority of Africa’s local communities still subscribe to the authority of indigenous leadership structures. The role that these structures can play in enhancing human rights will also be explored by the Cape Town seminar.

6. The Uses and Abuses of the US “War on Terror” in Africa

Since the “war on terror” was declared by United States (US) in 2001, a number of initiatives to combat terrorism have emerged in Africa. With the recent American bombings of purported Al-Qaeda bases in Somalia and revelations of the establishment of a US Central Command, in Africa the question of US involvement on the continent has taken on particular significance. The 2002 attacks on an Israeli-owned hotel and an El-Al passenger aircraft in Mombasa, Kenya, resulted in increased American counter-terrorism activities in East Africa and the Horn of Africa. The US has taken a particular interest in Africa due to the large Muslim population of over 308 million people, particularly in countries such as Somalia, Nigeria and West Africa’s Sahel region. An American army base, with 900 troops, was established at Camp Lemonier in Djibouti in 2002. Currently there is talk of further bases being built in


Senegal, Uganda, Ghana, Djibouti, Cameroon, Gabon and Equatorial Guinea. Specific American-sponsored counter-terrorism initiatives include the Trans-Sahara Counter-Terrorism Initiative (TSCTI); the Joint Task force AZTEK SILENCE; the $100 million East African Counter-Terrorism Initiative (EACTI) and the Combined Joint Task Force, Horn of Africa (CJTF-HOA). These initiatives involve, among other things, military training, military assistance and terrorist financing prevention. Critical questions have thus emerged over the consequences and ramifications of the US “war on terror” in Africa both politically and economically. Accusations have been made that this could constitute a new “Cold War” in Africa in which anti-terrorism (rather than anti-communism) determines US support for sometimes autocratic African regimes. Washington has also been accused of having pressured some African governments into passing anti-terrorism legislation that could be used to violate civil liberties and undermine legitimate domestic opposition. These issues will be addressed at the Cape Town seminar.

7. Dissemination Strategies

The 14 authors who are commissioned to prepare papers for the seminar encompass a diverse group of Pan-African researchers and policymakers (see table of contents). The meeting will focus on several case studies that will draw on first-hand knowledge, primary sources, and published secondary literature. Practitioners have been encouraged to share their experience and practical insights during the seminar. Authors who have been commissioned to write draft chapters will present these at the seminar. The chapters will then be edited into a volume. CCR will oversee final publication of the volume including editing and external peer review, and arrange for its dissemination.

The proceedings of the policy seminar will also be documented in the form of a policy report. The findings will be widely disseminated both within and outside Africa. Follow-up activities will take place to implement the recommendations of the policy seminar including meetings with the AU, REC, and key policymakers to discuss ways in which the recommendations from the seminar can be incorporated into their current work. The policy report and edited volume will be launched in Tshwane (Pretoria) and Johannesburg as well as in Addis Ababa, the headquarters of the AU.

The edited volume will also be made available to educational institutions across Africa. Policy research will continue on these topics, and policy, journal, and newspaper articles will be published in major African and other publications to sensitise the general public and specialists about these issues.

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