

Reviewing the performance of African governments in respect of selected AU commitments on human rights

Introduction:

The respect for human rights remains at the heart of the search for peace and justice on the African continent. Of much relevance to this search is the concept of human security, which demands, amongst other things, the safeguarding of peoples' vital freedoms. According to one commentator, "realising human rights lies at the core of protecting and empowering people".¹ Lasting stability on the African continent would be difficult to achieve unless people are protected from violent threats to their rights, safety or lives.

The Institute for Human Rights and Development in Africa, under the aegis of the African Human Security Initiative (AHSI), a civil society research network, aims to review the performance of eight States that have pledged themselves to achieve the promotion of respect for and observance of human rights and fundamental freedoms in conformity with standards set at the level of the African Union (AU). The countries to be reviewed, Senegal, Nigeria, Ghana, Kenya, Uganda, South Africa, Ethiopia and Algeria, have also signified their support for the New Partnership for Africa's Development (NEPAD) by signing up to its peer review mechanism (APRM). NEPAD represents an attempt on the part of the continent's leaders to tackle the main problems with which the region is beset, including human rights violations. From our perspective, therefore, the research relates to whether the aforementioned countries have been able to enhance and sustain their commitments to the realisation of human rights.

The Institute will monitor the countries concerned, in order to determine whether they have/are fulfilling the commitments that they had undertaken at AU level. In this concept paper, we will seek to establish the connection between human rights and human security in Africa, indicate the commitments that we have selected for the review exercise, indicate the rationale for the selection of these commitments and propose some indicators that could be used to measure the human rights performance of the countries concerned. The challenge that this research poses, at present, is not so much aligned to the treaties and mechanisms of the African human rights system, as to the question of "operationalising" treaty obligations. It is a matter of quantifying or turning the various human rights commitments undertaken by the AU member States into performance indicators.

Linking human rights and human security in Africa:

Current thinking indicates an important linkage between the concepts of human rights and human security: that improved human rights are essential for human security and that human security inevitably leads to improved human rights. The inverse also holds true: grave and massive human rights violations often lead to greater insecurity.

The Independent Commission on Human Security succinctly captures the important connection between human rights and human security thus: "Respecting human rights is at the core of protecting human security... Human rights and human security are therefore mutually reinforcing. Human security helps identify the rights at stake in a particular situation. And human rights help answer the question: How should human security be promoted? The notion of duties and obligations complements the recognition of the ethical and political significance of human security".²

The State is ordinarily tasked with the primary responsibility for the protection of human rights. In Africa, however, the preponderance of evidence suggests that governments are the most egregious violators of human rights. This argument is subtly echoed by one member of the Commission on Human security, who emphasises that "individuals also require protection from the arbitrary power of the state, through the rule of law and emphasis on civil and political rights as well as socio-economic rights".³ Violation of human rights interferes with the enjoyment of these rights, a situation that has perpetuated insecurity on the continent. The 1994 genocide in Rwanda, together with recent atrocities in countries like Sierra Leone, Liberia, Burundi, Nigeria and the Democratic Republic of Congo, provide glaring examples of human

¹ Editorial: *Human Security Now*, by Sadako Ogata. The editorial is available on http://www.fordfound.org/news/view_reflection_detail.cfm?reflection_index=28 (accessed on 20 October 2003)

² *Human Security Now*, Commission of Human Security (New York, 2003). The report is available on www.humansecurity-chs.org (Accessed on 20 October 2003).

³ Frene Ginwala, *Rethinking security: An imperative for Africa?*, (Box 1.1), *ibid*

security failures on the continent and also demonstrate the need for stronger overall human rights protection.

For the purpose of this paper, human rights signify personal legal entitlements and liberties, which include prohibitions against certain types of conduct directed against persons by States. In other words, every individual, irrespective of gender, race or other considerations, is entitled to some fundamental rights and freedoms that should be respected by others, including the State.

Research objectives

The principal aims of this study are to:

1. Monitor progress in the field of human rights since the countries to be reviewed undertook the selected commitments at OAU/AU level in order to determine:
 - Whether the human rights standards to which the eight States had committed themselves protect all people, especially women, children, refugees and migrants.
 - Whether the States to be reviewed have taken any concrete steps to domesticate the relevant standards, in particular, where there are no comparable provisions in national legislation.
 - Whether those who violate these standards are normally held accountable, under the rule of law.
 - Whether national judicial institutions are equipped or adequately resourced to defend and enforce these standards.
 - Whether the States respect and implement the recommendations of quasi-judicial bodies, such as the African Commission on Human and Peoples' Rights, where they may have had communications lodged against them.
2. Determine the level of the actual enjoyment of these human rights commitments within the national sphere and provide specific information on the legal and *de facto* situation in the countries concerned.

Criteria for the selection of commitments

Albeit, our review will focus on the so-called "first generation rights", it is not our intention to rank or prioritise rights. This will undoubtedly detract from the universal goal of realising all human rights. The Institute acknowledges that human rights are indivisible and need to be treated in an integrated manner. Rights should therefore be implemented irrespective of whether they are considered 'important' or 'justiciable', or otherwise.

Accordingly, in selecting the commitments indicated herein, we have considered, amongst other things:

- The unique needs and concerns of the African continent, particularly the needs of the eight countries reviewed. Focus is given to commitments that, if respected, would reflect solutions to endemic problems that are 'urgent' in their nature; they must be addressed if Africa is to get out of the current situation of internecine conflicts and impunity, situations that appear to perpetuate insecurity.
- The reality that universally, the violation of the rights in question does threaten women, children and vulnerable groups⁴, a reality that goes to the core of the issue of human security.
- Time constraints in respect of undertaking proper monitoring of a wide range of civil and political, as well as economic and social rights. It could also be argued that the former are relatively easier

⁴ Refugees, IDP's and migrants.

to enforce at the supranational level, since, amongst other things, their content is more clearly defined.⁵

- The necessity for the avoidance of duplication of the work of other thematic areas of the study, especially the governance and corruption clusters.

Overall justification for the choice of commitments

Human rights guaranteed at the level of the African Union would be given short shrift if they are not transported from the realm of mere rhetoric. Member States of the African Union have committed themselves to improved human rights and human security for the continent.

There are various instruments that seek to promote the respect for human rights and improved human security on the continent. These treaties, including the Constitutive Act of the African Union, the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the OAU Refugee Convention, represent high-level commitments undertaken by State parties that have ratified such treaties, to comply, in good faith, with their obligations under the respective treaties. These commitments are also enshrined in a number of other documents, including protocols, declarations and decisions of the African Union.

In the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance, in particular, African leaders declared their support for a host of instruments, including the principal human rights treaties and reaffirmed their "full and continuing commitment to these and other decisions of our continental organization, as well as the other international obligations into which we have entered in the context of the UN".

Significantly, under the section on Democracy and Good Political Governance, African leaders have emphatically stated:

"9. We are determined to increase our efforts in restoring stability, peace and security in the African continent, as these are essential conditions for sustainable development, alongside democracy, good governance, human rights...

"10. In the light of Africa's recent history, respect for human rights has to be accorded an importance an urgency all of its own. One of the tests by which the quality of a democracy is judged is the protection it provides for each individual citizen and for the vulnerable and disadvantaged groups. Ethnic minorities, women and children have borne the brunt of the conflicts raging on the continent today. We undertake to do more to advance the cause of human rights in Africa generally and, specifically, to end the moral shame exemplified by the plight of women, children, the disabled and ethnic minorities in conflict situations in Africa.

Following the undertaking by African Union member states to rededicate themselves to the respect for human rights and security, the commitments selected for this study are:

1. The right to free expression, inclusive of the freedom of the press
2. The right to personal security, inclusive of the right to liberty
3. Access to justice, inclusive of access to a fair and equitable set of laws, access to popular education about laws and legal procedure and the right to seek redress in an independent and impartial judicial system.

⁵ See Christoff Heyns, *Civil and Political Rights in the African Charter*, in *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (eds., Malcolm Evans and Rachael Murray, Cambridge University Press, 2002).

Table One: RIGHT TO PERSONAL SAFETY

| General Indicators: | Overall Motivators: | Problems: |
|---|---|------------------|
| <ol style="list-style-type: none"> 1. Have communications been brought against the State at the African Commission for Human and Peoples' Rights? If so, what has been the State's reaction to the Commission's findings? Has the State implemented the Commission's decision(s)? 2. Has the State ratified and acceded to relevant regional and international documents? 3. Has the State ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights? 4. Is there national legislation guaranteeing these rights? 5. Does the State have a national human rights institutions? | <ul style="list-style-type: none"> -Constitutive Act of the African Union -Kigali Declaration -Declaration on Democracy, Political, Economic, and Corporate Governance (NEPAD) -Grand Bay (Mauritius) Declaration and Plan of Action -CSSDCA Solemn Declaration (Conference on Security, Stability, Development and Cooperation in Africa) -the African Charter on Human and Peoples' Rights -The Universal Declaration on Human and Peoples' Rights | |

| | Area- Specific Indicators | Motivation | Problems: |
|---|---|--|------------------|
| Freedom from arbitrary arrest and detention | <ol style="list-style-type: none"> 1. Does the State have clear constitutional or legislative protections for arrested and detained persons? 2. What is the average length of time between arrest and trial? 3. What is the average length of time between arrest and charging? 4. What percentage of the total prison population awaits trial? 5. What percentage of the total prison population has never appeared before a court? | <ul style="list-style-type: none"> -African Charter on Human and Peoples Rights (hereinafter African Charter), Article 6: "Every individual shall have the right to liberty and to security of person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrary arrested or detained". -Universal Declaration of Human Rights (hereinafter UDHR), Article 9: "No one shall be subjected to arbitrary arrest or detention, or exile". -International Covenant on Civil and Political Rights (hereinafter ICCPR), Article 9 (1): " Everyone has the right to security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. -Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. (United Nations General Assembly Resolution | |

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| Freedom from Torture and other forms of cruel, inhuman and degrading treatment | <ol style="list-style-type: none"> 1. Do conditions of confinement meet internationally accepted standards ? (See Minimum Standard Rules for the Treatment of Prisoners) 2. Are torture and other forms of cruel, inhuman, and degrading treatment used by government officials? What is the State's record on torture? 3. Is physical violence used against family members of detained individuals as a form of psychological torture on the detainee? 4. Has the State ratified and acceded to the Convention on Torture? 5. Does the State use secret prisons or detention centres? | <p>-African Charter, Article 5: " All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".</p> <p>-Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)</p> <p>-UDHR, Article 5: " No one shall be subjected to torture. Or to cruel, inhuman or degrading treatment or punishment".</p> <p>-ICCPR, Article 7: " No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".</p> <p>-Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</p> <p>-Standard Minimum Rules for the Treatment of Prisoners (United Nations Economic and Social Resolutions 663 C of 31 July 1957 and 2076 of 13 May 1977)</p> | <p>Some countries do not view certain acts as torture, despite the fact that these acts fit the internationally accepted definitions of torture.</p> <p>-Need to determine a baseline for what conditions of confinement should be, taking into consideration the socio-economic realities of each country</p> |
| Personal Security of Women | <ol style="list-style-type: none"> 1. Has the State ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)? 2. Is domestic violence recognized as a form of torture? 3. Does the State have a mechanism in place for responding to domestic violence? 4. Does the State have a mechanism in place for responding to allegations of forced Female Genital Mutilation (FGM)? 5. Do laws protect survivors of rape? | <p>-The Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)</p> <p>-Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa</p> | <p>States may argue that certain acts of aggression against women are not addressed through legal means, due to certain cultural and socially accepted norms.</p> |
| Personal Security of Children | <ol style="list-style-type: none"> 1. Has the State ratified the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child? 2. Is there a situation of child labour in the State? 3. Are "street children" common in the State? Does the state have a mechanism for protecting these children? 4. Does forced marriage of young | <p>-African Charter on the Rights and Welfare of the Child</p> <p>-Convention on the Rights of the Child (hereinafter CDC)</p> | |

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| | girls exist in the State? | | |
| | 5. Are children used in armed conflict? Ie: As soldiers, sex slaves, etc. | | |
| Personal Security of Refugees | <ol style="list-style-type: none"> 1. Has the State ratified the Convention Relating to the Status of Refugees and its Protocol? 2. Has the State ratified and acceded to the OAU Convention on Refugees? 3. Does the State have a system in place for accepting refugees and for legalising their status within the state? | <p>-African Charter, Article 12 (3): “ Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions”.</p> <p>-Convention and Protocol Relating to the Status of Refugees -OAU Convention Governing the Specific Aspects of Refugee Problems in Africa</p> <p>- -UDHR, Article 14: “ Everyone has the right to seek and to enjoy in other countries asylum from persecution”.</p> | States may argue that assistance to refugees is not within their capacity due to the State’s financial limitations. Any adequate assistance to refugees would be removing benefits from the citizenry. |
| Personal Security of Internally Displaced Persons (IDPs) | <ol style="list-style-type: none"> 1. Is there a problem of IDPs in the State? 2. In dealing with IDPs, does the state abide by the Guiding Principles and the Khartoum Declaration? | <p>- Khartoum Declaration on Refugees, Returnees, and Internally Displaced Persons in Africa -United Nations Guiding Principles of Internal Displacement when dealing with IDPs?</p> | States may argue that assistance to IDPs is not within their capacity particularly since the situation of IDPs usually occurs in situations of civil strife and conflict, when the State has little control over its territory. |

Table Two: ACCESS TO JUSTICE

| General Indicators: | Overall Motivators: | Problems: |
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| <ol style="list-style-type: none"> 1. Have communications been brought against the State at the African Commission for Human and Peoples’ Rights? If so, what has been the State’s reaction to the Commission’s findings? Has the State implemented the Commission’s decision(s)? 2. Has the State ratified and acceded to relevant regional and international documents? 3. Has the State ratified the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights? 4. Is there national legislation | <p>-Constitutive Act of the African Union -Kigali Declaration -Declaration on Democracy, Political, Economic, and Corporate Governance (NEPAD) -Grand Bay (Mauritius) Declaration and Plan of Action -CSSDCA Solemn Declaration (Conference on Security, Stability, Development and Cooperation in Africa) -the African Charter on Human and Peoples’ Rights -The Universal Declaration on Human and Peoples’ Rights</p> | |

guaranteeing these rights?

5. Does the State have a national human rights institutions?

| | Area Specific Indicators | Motivation | |
|-------------------------------------|---|---|--|
| Equality before the Courts | <ol style="list-style-type: none">1. Do all persons within a State's jurisdiction have access to the Courts, without distinction of any kind?2. Are there amnesty laws and or sovereign immunity provisions on file which prohibit persons from seeking an effective remedy in court?3. Are certain cases diverted to special or administrative tribunals, or are other legislative measures taken that oust or limit the jurisdiction of the courts? | <p>-African Charter, Article 7: " Everyone shall have the right to have his cause heard".</p> <p>-ICCPR, Article 14: " All persons shall be equal before the courts and tribunals.</p> <p>-UDHR, Article 8</p> | |
| Fair and Public hearings | <ol style="list-style-type: none">1. Are persons presumed innocent?2. Are persons given time to adequately prepare defence?3. Are persons allowed to choose their counsel?4. If unable to afford counsel, is competent counsel provided by the State?5. Is interpreter provided when needed during Court proceedings? | <p>-African Charter, Article 7: " Every individual shall have the right to have his cause heard. This comprises (d) the right to be tried within a reasonable time by an impartial court or tribunal".</p> <p>-ICCPR, Article 14: " ...[E]veryone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law."</p> | <p>Here States may argue that for reasons of State security certain measures must be taken, including the derogation of certain rights under the "access to justice" component. Will have to develop this theme including when derogations are accepted under most internationally and regional standards, and for which derogations of rights are accepted. Note however that the African Charter does not provide for derogations under any circumstances.</p> |
| Independent and Impartial Tribunals | <ol style="list-style-type: none">1. How are courts and tribunals established?2. Are judges chosen from a group of persons qualified to interpret the laws?3. How independent or politicised is the national judiciary? Has there been any press story or other credible report in the past five years stating that this independence has not been honoured.4. Are criminal convictions and sentences subject to review? | <p>-African Charter, Article 7(d) (above)</p> <p>-ICCPR, Article 14 (above)</p> | |
| Habeas | <ol style="list-style-type: none">1. Does national legislation allow | <p>- ICCPR, Article 9(4):" Anyone who is</p> | |

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family members of detained, disappeared, or murdered individuals, the right to seek justice in national courts? (check to see what civil law system provides)

deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.

Table Three: FREEDOM OF EXPRESSION

| General Indicators: | Overall Motivators: | Problems: |
|---|---|--|
| <ol style="list-style-type: none"> 1. Have communications been brought against the State at the African Commission for Human and Peoples' Rights? If so, what has been the State's reaction to the Commission's findings? Has the State implemented the Commission's decision(s)? 2. Has the State ratified and acceded to relevant regional and international documents? 3. Has the State ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights? 4. Is there national legislation guaranteeing these rights? 5. Does the State have a national human rights institutions? | <ul style="list-style-type: none"> -Constitutive Act of the African Union -Kigali Declaration -Declaration on Democracy, Political, Economic, and Corporate Governance (NEPAD) -Grand Bay (Mauritius) Declaration and Plan of Action -CSSDCA Solemn Declaration (Conference on Security, Stability, Development and Cooperation in Africa) -the African Charter on Human and Peoples' Rights -The Universal Declaration on Human and Peoples' Rights | <p>States may argue that for reasons of State security, threats to the State, etc, limitations must be placed on these rights. May have to develop a theme on derogations from rights and when derogations are accepted under international standards. Note however, that the African Charter does not allow derogations, however it does contain several "clawback clauses" which could potentially allow the State to derogate .</p> |

| Indicators | Motivation | Problems |
|--|--|-----------------|
| Freedom to Express Opinions | <ul style="list-style-type: none"> -African Charter -UDHR, Article 19 -ICCPR, Article 19 | (see above) |
| Freedom to Seek, Receive, and Impart Information | <ol style="list-style-type: none"> 2. Does the State allow these groups/organisations to carry out their work without government interference? 3. Does the State allow individual members of these groups/organisations to carry out their work without government interference? 4. Are individuals, primarily those most vocal against the State, (ie: journalists politicians, and activists) free to express opinions and disseminate information without fear of government recourse? 5. Does the State react violently to demonstrations, rallies and protests? 6. What is the State's policy on licensing of Internet Service Providers (ISPs)? 7. Are their independent radio stations and private television | |

stations?

Table Four : WORKPLAN

| Areas under Review | Desk research <i>Time Frame:</i> November –mid January | Field Trips <i>Time Frame:</i> December- January | Post- Visit <i>Time Frame:</i> January and February | Country |
|--------------------------|---|---|---|---------|
| Right to Personal Safety | <ol style="list-style-type: none"> 1. Collect General Human Rights Data from Reliable Sources via the internet(ie: UN, Amnesty, HRW US State Department Reports on Human Rights Practices) 2. Also look for Data from organisations whose work touches on women, children, refugees (ie: UNHCR, CEDAW Committee) 3. Seek information from Local NGOs in the participating States 4. Research officials and/or organisations (in country) with whom we should meet in order to collect proper information. Set up meetings where possible. (Seek interpreters where might be necessary during in country visits) | <ol style="list-style-type: none"> 1. In countries visited: -Meet with local NGO representatives. -Any representatives of international NGOs located in country or in region. 2. Meet with Minister of Justice 3. Visit 2 largest prisons and meet with prisoners 4. Meet with regional UNHCR representative, local if available (for information on security of refugees). | <ol style="list-style-type: none"> 1. For those countries not visited, process all data into final report. 2. For those countries visited, collapse desk research and country research into final report. | |
| Access to Justice | <ol style="list-style-type: none"> 1. Collect Data from Reliable Sources (ie: UN, Amnesty, HRW, US State Department) 2. Seek information from local NGOs. 3. Set up meetings with local NGOs, relevant government agencies and officials. | <ol style="list-style-type: none"> 1. Meet with Minister of Justice/ Attorney General or Procureur 2. Meet with members of local “legal aid” offices (if exist). | | |
| Freedom of Expression | <ol style="list-style-type: none"> 1. Collect Data from reliable sources (UN agencies, Amnesty, HRW, US State Department) 2. Seek information from local NGOs, relevant government agencies. 3. Review national legislation on procedures for obtaining government recognition by associations. 4. Review national legislation on | <ol style="list-style-type: none"> 1. Meet with representatives of 3 (or 5) most popular or best selling newspapers 2. Meet with representatives of 3 political parties 3. Meet with representatives of student university group (as students often hold demonstrations) | | |

procedures for holding
demonstrations, rallies, et c.

Potential Problems within Workplan:

- Might find an imbalance between desk research and in country research.
- Finding statistical information will be difficult, if not impossible.