

# **SUB-SAHARAN AFRICA: A CASE STUDY ON HOW NOT TO REALIZE ECONOMIC, SOCIAL AND CULTURAL RIGHTS, AND A PROPOSAL FOR CHANGE**

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## I. INTRODUCTION

¶1 Observers of sub-Saharan Africa (SSA)<sup>1</sup> have no doubt become familiar with media images of one gruesome tragedy or another within the region – tragedies which, although essentially economic in nature, have traditionally been highlighted by human rights advocates in terms of its inability to realize the core rights proclaimed under the International Covenant on Economic, Social and Cultural Rights<sup>2</sup>: food, healthcare, housing and education<sup>3</sup> Africa thus continues to challenge the most seasoned of political economists, while reaffirming the prejudices of those who continue to believe in the “civilizing virtues” of colonialism. Theories upon theories have been propounded. Countless “initiatives” have failed to make a difference. Africa has been turned into the most aid-dependent region in the world, while its people languish in misery. Put simply, the African status quo represents a depressing case study on how *not* to realize these basic human rights.

¶2 This article aims to revisit some of the debates surrounding this very *human* (and wholly avoidable) tragedy. The idea is to offer an alternative insight into what might conceivably be the cause of so much human misery. More importantly, the

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<sup>1</sup> Throughout the critique, the terms “sub-Saharan Africa” and “Africa” will be used interchangeably. Both refer only to the 47 countries that lie roughly south of the Sahara desert (including the Islands located in the nearby Atlantic and Indian oceans). These include: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central Africa, Chad, Comoros, Congo (Democratic Republic), Congo, Ivory Coast, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe.

<sup>2</sup> Adopted 16 December 1966, entered into force 3 January 1976, G.A. Res. 2200A (XXI) UN Doc. A/6316 (1966), 993 UNTS 3 [hereinafter ICESCR]. The ICESCR recognizes a variety of rights which fall under the following broad headings: self-determination; gender equality; labour rights; social security; family rights; adequate living standards (including food, clothing and housing); healthcare; education; and cultural rights (including a right to benefit from scientific progress, and to the protection of aspects of one’s intellectual property). It is also necessary to note that although the primary focus of this article is on economic rights, this is in no sense an attempt to separate them from the better known category of civil and political rights as proclaimed under the International Covenant on Civil and Political Rights, adopted 19 December 1966, entered into force 23 March 1976, G.A. Res.2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171 (1967) [hereinafter ICCPR]. Indeed, as will later become apparent, such a distinction is often impossible to maintain.

<sup>3</sup> These being the rights identified by the Committee on Economic, Social and Cultural Rights (the body charged with monitoring the realization of the rights proclaimed under the ICESCR) as “minimum core obligations”. See UN Committee on Economic, Social and Cultural Rights, General Comment 3 (Fifth Session, 1990), UN Doc.E/1991/23, para.10.

article will examine the possibility of using existing principles of international law (broadly defined) in a way that gives hope to a longsuffering people. In embarking on a critique of this kind, however, it is recognized that questions relating to economic development are best left to political economists. Nevertheless, it is also recognized that the nature of the problem demands some measure of interdisciplinarity, if only because this adds context to any legal analysis that will be offered.

#### A. *The Dangers of Generalization*

¶3 It is also necessary to acknowledge that the usual generalizations about the region can be quite misleading: Although homogenous in many respects, it is in fact an amalgamation of countries with varied characteristics. At two notable extremes are the examples of Mauritius and Botswana, which are not only fairly accountable democracies, but have combined economic growth with the progressive realization of their people's basic economic, social and cultural rights; while others such as the bizarrely named "Democratic Republic" of Congo (which is neither democratic nor a republic), Zimbabwe and Somalia have, to all intents and purposes, ceased to exist as viable States. At the same time, countries such as Senegal, Mali, Burkina Faso, and of late, Mozambique and Uganda, although not paragons of democracy, have either remained or have become relatively stable and are making efforts in the right direction. Still, even these categorizations do not sufficiently capture the sheer diversity of the region: Cape Verde, Sao Tome and Principe, the Comoros, and Guinea Bissau have all managed to survive with relatively few natural resources, while Nigeria, Angola, and, of late, Chad and Equatorial Guinea have all been blessed with substantial quantities of oil, although, as will be shown in Part III, the citizens of most of these countries have become victims rather than beneficiaries of these resources. Even the physical geography of the region could justifiably be seen as an example of its diversity: From countries such as Mauritania, Mali, Niger and Chad which endure the harshness of the Sahara desert, to much of west and central Africa which broadly occupy the equatorial rainforest belt; from tiny island States such as Mauritius and the Seychelles, to much of southern Africa with its semi-arid savannah grasslands, Africa's diversity has always been a surprise to the outsider, prompting one respected commentator to assert:

[W]hen discussing the issue of human rights [on the continent as a whole], it is important to remember that the internal dynamics of individual countries are crucial to an understanding of the overall human rights context...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.<sup>4</sup>

#### B. *The Case for a Generalized Approach*

¶4 Although the validity of Oloka-Onyango's assertion is beyond doubt, it is also the case that an outright rejection of this "generalized approach" is, more often than not, the first step in an attempt to deny the very existence of certain common features that have come to define much of the region. Many of its countries, for example, have either experienced fratricidal armed conflict of some kind in their post-colonial

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<sup>4</sup> J Oloka-Onyango, *Human Rights and Sustainable Development in Contemporary Africa: A New Dawn or Retreating Horizons?* 6 BUFF. HUM. RTS. L. REV. 39, 40-41 (2000).

history, or are still enmeshed in one. Almost without exception, they have, at some stage, been ruled by obnoxious regimes of one description or another – from one-party or military dictatorships, to what are, in essence, criminal gangs operating under the legitimacy of statehood – and in some cases, all of these combined. Except for very few exceptions, such as Botswana, Mauritius and South Africa, no government within the region is willing or able to create the basic institutional and infrastructural capacity necessary for supporting any level of sustained economic activity, and by extension, the realization of basic economic, social and cultural rights (hereinafter economic rights). Indeed, even among the so-called “emerging democracies,” very few are truly representative or accountable to their citizens in the manner envisaged under various international human rights instruments.<sup>5</sup> Nor should the widely acclaimed economic growth in countries such as Mozambique, Rwanda and Uganda be taken out of context: Even if growth were a universally accepted yardstick for measuring human development,<sup>6</sup> these would still have to be judged against the lowest possible base of past catastrophic conflicts in these countries, none of which, at any rate, has yet regained its modest pre-war prosperity.<sup>7</sup> Thus, provided the necessary caution is exercised, it is possible to adopt a generalized approach in a project of this kind.

## II. A SNAPSHOT OF THE STATUS QUO

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That sub-Saharan Africa has become synonymous with economic underdevelopment is perhaps too obvious to restate. What is often ignored is that as well as being a depressing economic state of affairs, this is also a very *human* tragedy – and one that appears destined to become much worse as time goes by. A snapshot of the nature of the tragedy is shockingly instructive: More than 300 million Africans – nearly half the region’s population – still live in extreme poverty.<sup>8</sup> The infant mortality rate stands at 91 per 1000 births, while the adult literacy rates for males and females are 30 percent and 47 percent respectively.<sup>9</sup> According to a recent collaborative report by the World Health Organization, the maternal mortality ratio in Africa stands at 830 per 1000,000, compared with Asia’s 330, with Latin America and the Caribbean at 190.<sup>10</sup> As if these were not depressing enough, the HIV/AIDS

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<sup>5</sup> See generally Art.21 (3) of the Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217A (III), U.N. GOAR, 183d plen. mtg., at 75, UN Doc. A/810 (1948) [hereinafter UDHR] (stating that “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections...”); Art. 25 of the ICCPR (broadly echoing the UDHR), *supra* note 2, at 179.

<sup>6</sup> For commentators on the broad political Left, the growth-based model is flawed because it does not take account of factors that are not easily quantifiable in market terms. See, e.g., Gerald Karl Helleiner, *Markets, Politics and Globalization: Can the Global Economy be Civilized?*, 10th Raul Prebisch Lecture, Address at the United Nations Conference on Trade and Development, Palais des Nations, Geneva (Dec. 11, 2000).

<sup>7</sup> The respective growth rates for these countries being: Mozambique 12 percent; Rwanda 9.7; and Uganda 6.2. These, in any event, have been brought about by substantial aid flows of between 50 and 70 percent of their annual budgets. See Robert Guest, *First Get the Basics Right*, *ECONOMIST*, Jan. 15, 2004, at 3.

<sup>8</sup> See AFRICA REGIONAL BRIEF 2002 (World Bank Group, 2002), available at <http://www.worldbank.org/afr/africabrief.pdf>. In discussing extreme poverty, it is important to note that “...Africa’s poor are the poorest of the poor.” See CAN AFRICA RECLAIM THE 21ST CENTURY? 4 (World Bank, 2000).

<sup>9</sup> See WORLD BANK ANNUAL REPORT (World Bank, 2004) 29, available at [http://www.worldbank.org/annualreport/2004/pdf/Volume\\_1.pdf](http://www.worldbank.org/annualreport/2004/pdf/Volume_1.pdf)

<sup>10</sup> MATERNAL MORTALITY IN 2000: ESTIMATES DEVELOPED BY WHO, *UNICEF and UNFPA* 2 (2004) available at [www.who.org](http://www.who.org).

pandemic is destroying lives on the continent at an alarming rate. A recent United Nations report highlights the problems thus:

Approximately 3.5 million new infections occurred in 2001, bringing to 28.5 million the total number of people living with HIV/AIDS in sub-Saharan Africa. Fewer than 30 000 people were estimated to have been benefiting from antiretroviral drugs at the end of 2001. The estimated number of children orphaned by AIDS living in the region is 11 million. Even if exceptionally effective prevention, treatment and care programmes take hold immediately, the scale of the crisis means that the human and socioeconomic toll will remain significant for many generations.<sup>11</sup>

¶6 Neither is the situation regarding nutrition any less disturbing. According to a joint UN mission to southern Africa in 2002, 12.8 million people were on the brink of starvation.<sup>12</sup> At the time, aid agencies were quick to blame the recurring spell of drought within the region. The on-going plague of locusts in the Sahel region may also not be man-made, and, like all natural disasters, almost certainly could not have been prevented. The disturbing fact, however, is that very few, if any, governments in SSA ever have in place even the most rudimentary arrangements for any such emergencies.<sup>13</sup> For example, if nothing else, the provision of simple grain silos would save the ordinary African the indignity – not to mention the agony – of eternally relying on foreign aid when disasters strike.

¶7 According to a collaborative study involving several UK government departments, as of 2000 over half of African countries were afflicted by war.<sup>14</sup> In his report to the UN Security Council, the Secretary-General stated:

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.<sup>15</sup>

¶8 One year later, the Secretary-General also noted: “For many people in other parts of the world, the mention of Africa evokes images of civil unrest, war, poverty, disease, and mounting social problems. Unfortunately, these images are not just fiction...”<sup>16</sup> With all of these factors at play – in some countries at the same time – it is little wonder that the life expectancy at birth in the region is only 47 years.<sup>17</sup> It also

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<sup>11</sup> REPORT ON THE GLOBAL HIV/AIDS EPIDEMIC 2002, U.N. GAOR Spec. Sess. on HIV/AIDS, UNAIDS/02.26E at 22-23. *See also* AFRICA REGIONAL BRIEF, *supra* note 8, at 7.

<sup>12</sup> World Population Foundation, SOUTHERN AFRICA HUNGER REPORTS: 12.8 MILLION LIVES AT RISK (June 7, 2002), available at [http://www.wfp.org/newsroom/in\\_depth/Africa/sa\\_main\\_page020607.htm](http://www.wfp.org/newsroom/in_depth/Africa/sa_main_page020607.htm).

<sup>13</sup> As if to illustrate the point, a BBC report notes: “By responding quickly with pesticides, Arab countries managed to contain the damage. But in western Africa, where governments do not have the same resources to prevent the locusts from breeding, the situation is getting worse day by day.” Jannat Jalil, *UN Appeal to Stop Locust ‘Plague’*, BBC NEWS, Sept. 4, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/3628328.stm>.

<sup>14</sup> DFID ET AL., THE CAUSES OF CONFLICT IN SUB-SAHARAN AFRICA: FRAMEWORK DOCUMENT 5 (2001).

<sup>15</sup> *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General*, U.N. SCOR, 52nd Sess., Agenda Item 10, ¶ 4, U.N. Doc. A/52/871-S/1998/318 (1998).

<sup>16</sup> *Foreign Direct Investment in Africa: Performance and Potential*, U.N. Conference on Trade and Development, at i, U.N. Doc. UNCTAD/ITE/IIT/Misc.15 (1999).

<sup>17</sup> AFRICAN DEVELOPMENT INDICATORS 2003 5 (World Bank, 2003).

comes as no surprise that Africa has already become the only region in the world to miss the crucial economic benchmarks for meeting the UN's Millennium Development Goals (which include the reduction of poverty by half by 2015);<sup>18</sup> as well as being the only region to have become poorer within the past 25 years.<sup>19</sup>

### III. POST-INDEPENDENCE AFRICA: THE BETRAYAL OF A PEOPLE

¶9 The crimes that were committed against the people of Africa during the period of colonization are of course a matter of record. From the systematic massacre and gratuitous mutilations of some 10-20 million Congolese people under Belgian King Leopold's "rubber regime,"<sup>20</sup> to the effective appropriation of the continent at the Berlin Conference; from the conscious desecration of traditional societal arrangements<sup>21</sup> to the systematic process of economic underdevelopment,<sup>22</sup> colonialism constituted a deliberate dehumanization of a people in every imaginable respect. Moreover, it was a flagrant violation of the basic right to self-determination as proclaimed, at the time, under the UN Charter.<sup>23</sup> Indeed, even without the untold suffering and countless deaths that defined the trans-Atlantic slave trade,<sup>24</sup> these crimes were in themselves sufficiently serious to warrant a struggle for independence and self-determination.

¶10 Regrettably, however, independence for ordinary Africans has meant a life of even more flagrant human rights violations—in many instances by their supposed liberators. From the very beginning, the creation of the Organization of African Unity (OAU) in 1963<sup>25</sup> heralded the birth of an institution which was to become, whether by

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<sup>18</sup> See United Kingdom Department for International Development, DEPARTMENTAL REPORT 2002: THE GOVERNMENT'S EXPENDITURE PLANS 2002/2003 TO 2003/2004 58 (April 2002). See also *The role of the United Nations System in Supporting the Efforts of African Countries to Achieve Sustainable Development Report of the Secretary-General*, U.N. Economic and Social Council, ¶ 13, 41, U.N. Doc. E/2001/83 (June 12, 2001).

<sup>19</sup> See *First Get the Basics Right*, *supra* note 7; see also AFRICA REGIONAL BRIEF, *supra* note 8, which notes: "Africa is the only region in the world where the number of people living in extreme poverty has almost doubled, from 164 million in 1981 to 314 million today."

<sup>20</sup> Although these crimes have never been formally documented, various sources have offered credible accounts of these atrocities. See, e.g., A. HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* 233 (1999) (10 million killed); Georges Nzongola-ntalaja, *The Congo From Leopold to Kabila* 22 (2002) (approximately 20 million killed).

<sup>21</sup> For an excellent articulation of this see BASIL DAVIDSON, *WEST AFRICA BEFORE THE COLONIAL ERA: A HISTORY TO 1850* 233-237 (1998).

<sup>22</sup> This took various forms. Examples include: the inheritance, by Guinea Bissau, of an old brewery which had been built to serve the Portuguese troops stationed there, 14 university graduates, and a 97 percent illiteracy rate after three centuries of colonial rule, DAVID LAMB, *THE AFRICANS* 5 (1983); five literate employees at the Mozambique education ministry overseen by a 23 year-old minister, SUSAN GEORGE, *A FATE WORSE THAN DEBT* 86-87 (1994), at 86 and 87; while the Belgians left "a handful of university graduates" in the Congo, *AID AND REFORM IN AFRICA: LESSONS FROM TEN CASE STUDIES* 630 (Shantayanan Devarajan et al. eds., World Bank, 2001).

<sup>23</sup> U.N. Charter art.1, para 2. Even if it were to be conceded that much of Africa was still under colonization (and therefore not covered by this provision), the conduct of the colonialists would have been in breach of Art.73 of the Charter, under which UN Member States "accept[ed] as a sacred trust the obligation to promote to the utmost...the well-being of the inhabitants of these territories..." by ensuring, *inter alia*, "with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment, and their protection against abuses..."

<sup>24</sup> See *ROUTES TO SLAVERY: DIRECTION, ETHNICITY AND MORTALITY IN THE TRANSATLANTIC SLAVE TRADE* (David Eltis and David Richardson eds., Frank Cass & Co, 1997). Ironically, desperate economic circumstances have reintroduced this odious trade to the Continent. See *TRAFFICKING IN HUMAN BEINGS, ESPECIALLY WOMEN AND CHILDREN IN AFRICA* (UNICEF/Innocenti Research Centre, 2003).

<sup>25</sup> See ORGANIZATION OF AFRICAN UNITY CHARTER [hereinafter OAU Charter].

design or not, a legal framework for the perpetuation – and in many cases the aggravation – of the people’s misery. The principles of non-interference and fraternal solidarity became the overriding considerations in inter-African affairs. From a human rights perspective, this meant that even the abuses that characterised the immediate post-independence period received the approval of the organization, at least insofar as it actively discouraged any external inquiry. It follows that even the grisly violations that occurred under Idi Amin in Uganda, Marcias Nguema in Equatorial Guinea, and “Emperor” Jean-Bedel Bokassa in the Central African Republic only managed to attract criticisms from very few African rulers, such as Nyerere of Tanzania and Kaunda of Zambia.<sup>26</sup> Indeed, as a veteran of the United Nations human rights system, Philip Alston reveals that an attempt to include some of Amin’s excesses – e.g., the massacre of 75,000 of his fellow citizens within four years of coming to power – on the agenda of the UN Commission on Human Rights for consideration met with strong opposition from African delegates, supposedly because Amin was the chairman of the OAU.<sup>27</sup> This resistance to scrutiny has continued to this date, the most recent being the disingenuous protection of Charles Taylor by the Obasanjo regime in Nigeria<sup>28</sup> from a UN-backed war crimes indictment for his role in the grisly violations that defined the Sierra Leonean civil war.<sup>29</sup>

¶11 To be sure, the OAU Charter did make references to human rights concerns, including the principles of the UN Charter and of the UDHR, but only to the extent that they both “provide a solid foundation for peaceful and positive cooperation among States”.<sup>30</sup> There was also an allusion to “the welfare and well-being” of the people.<sup>31</sup> Nevertheless, it soon became clear that any reference to international human rights norms was simply a hollow proclamation. At any rate, events on the ground proved that the promotion of the “unity and solidarity of the African States” and the defence of “their sovereignty, their territorial integrity and independence”,<sup>32</sup> however perversely interpreted, were to be the cornerstone of its Charter, as was the principle of non-interference in the internal affairs of member States.<sup>33</sup>

¶12 Oji Umzurike, who was later to become a Chairman of the African Commission on Human Rights, articulated the prevailing attitude within the OAU thus: “The OAU maintained an indifferent attitude to the suppression of human rights in a number of independent African states by unduly emphasising the principle of

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<sup>26</sup> U. Oji Umzurike, *The African Charter on Human and Peoples’ Rights*, 77 AM. J. INT’L L. 902, 903 (1983).

<sup>27</sup> See THE UNITED NATIONS AND HUMAN RIGHTS A CRITICAL APPRAISAL 149 (Philip Alston ed., Clarendon Press, 1992).

<sup>28</sup> Disingenuous because although some observers might be tempted to commend Obasanjo for “averting a bloodbath,” two facts remain indisputable: First, the feared bloodbath had already been suffered by the Liberian people before the intervention of Nigerian troops. Secondly, given that Taylor had effectively become trapped in his “Executive Mansion,” an offer of asylum could serve only one purpose: saving a beleaguered tyrant from an imminent demise.

<sup>29</sup> For the text of Taylor’s indictment, see *The Prosecutor Against Charles Ghankay Taylor* (aka *Charles Ghankay Macarthur Dakpana Taylor*), Indictment, Spec. Ct. for Sierra Leone, Case No. SCSL-03-1 (Mar. 3, 2003) available at <http://www.sc-sl.org/taylorindictment.html>. See also Press Release, *Liberia: Nigeria’s offer of “asylum” to President Taylor flouts international law*, AI Index: AFR 34/015/2003 (Public), News Service No: 162 (July 7, 2003), available at [www.amnesty.org](http://www.amnesty.org).

<sup>30</sup> OAU CHARTER, *supra* note 254, at para. 9.

<sup>31</sup> *Id.*, para. 10.

<sup>32</sup> *Id.*, Art. II, para. 1(a) and (c).

<sup>33</sup> *Id.*, Art. III, para. 2. For an excellent critique of this topic, see J Oloka-Onyango, *Beyond the Rhetoric: Reinventing the Struggle for Economic and Social Rights in Africa* 26 CAL. W.INT’L L. J. 1, 42 (1995).

noninterference...”<sup>34</sup> Of particular interest is what amounted to a direct admission by Sekou Toure of Guinea that the organization was not “a tribunal which could sit in judgment on any member state’s internal affairs.”<sup>35</sup> Moreover, the rights of individuals were usurped by “the State” in the name of “collective rights,” often in support of a perverse notion of “African values” or of Marxism – an ideology which had become fashionable at the time, but which very few of the region’s rulers seemed to understand. As one commentator noted: “Although claimed in the name of African ideals, collective rights serve state interests as well as the few who control state resources...[M]ost violations of human rights are often against those who speak out against the corrupt use of state resources.”<sup>36</sup> Neither was economic development—and by extension, the realization of economic rights—a priority. As noted by the late Claude Ake, “[t]he struggle for power was so absorbing that everything else, including development, was marginalized.”<sup>37</sup>

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The indigent people of Africa have thus become caught in a tragic paradox: they were “liberated” from the yoke of colonial exploitation and all that went with it, only to become trapped in what have been decades of tyrannical misrule, systematic impoverishment, and merciless exploitation by their own rulers. It follows that the ideals of economic emancipation – the supposed inspiration behind the quest for independence – has become the subject of escapist antics,<sup>38</sup> grandiloquent rhetoric,<sup>39</sup> and/or outright buffoonery.<sup>40</sup> Indeed, although political power no longer seems to induce the same degree of psychosis that appeared to be commonplace in the Banda and Amin days,<sup>41</sup> countries such as Zimbabwe, Guinea Bissau and Equatorial Guinea have still not managed to escape the scourge of psychotic tyranny. It comes as no

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<sup>34</sup>UMOZURIKE, *supra* note 26, at 902.

<sup>35</sup> *Id.* at 902-903.

<sup>36</sup> Sakah S. Mahmud, *The State and Human Rights in Africa in the 1990s: Perspectives and Prospects 15 HUM. RTS. Q.* 485, 493 (1993). Indeed, it had been noted earlier that this was the case regardless of the State’s ideological inclination. HARRY M. SCOBLE, *Human Rights Non-Governmental Organizations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA (Claude E. Welch, Jr. and Ronald I. Meltzer eds., State University of New York Press, 1984).

<sup>37</sup> See C. Ake, DEMOCRACY AND DEVELOPMENT IN AFRICA 7 (1996).

<sup>38</sup> The latest example of such antics being the so-called New Partnership for African Development (NEPAD), which is apparently a substitute for simple practical measures at the domestic level (e.g., the creation of basic State institutions and infrastructure) without which no sustainable economic activity can ever be possible (Relevant information available at <http://www.nepad.org/en.html>).

<sup>39</sup> Indeed, according to one source, Mobutu and his ilk saw themselves as spokesmen for Africa’s economic emancipation. See WINSOME J. LESLIE, ZAIRE: CONTINUITY AND POLITICAL CHANGE IN AN OPPRESSIVE STATE 162-164 (1993).

<sup>40</sup> Amin’s ghoulish escapades aside, Mobutu is known to have changed his name from Joseph Desire Mobutu, to *Mobutu Sese Seko Kuku Ngbendu Wa Zabanga*, which means “the earthy, the peppery, all-powerful warrior who, by his endurance and will to win, goes from contest to contest leaving fire in his wake.” As if not to be outdone, Malawi’s “President-for-Life Ngwazi Dr H Kamuzu Banda” is reported to have decreed thus: “Only to Banda belongs the right to wear a three-piece suit, top hat, carry a fly-whisk and ceremonial cane. Woe betide him that may exhibit the temerity to question or trample on this executive prerogative.” For both accounts, see GEORGE B. N. AYITTEY, AFRICA BETRAYED 105 (1993). Further, Mobutu is reported to have once dismissed his political opponents as power-hungry opportunists, in spite of having wielded unfettered powers for well over three decades himself. See S. Kiley, *Zaire: Apocalypse Now*, TIMES (London), July 31, 1993, at M10. He is also known to have once argued that “Zaire’s one-party state system is the most elaborate form of democracy.” See AYITTEY, *supra*, at 210.

<sup>41</sup> According to one report, a clause in a car hire contract obliged the hirer, on seeing Banda’s motorcade, to drive off the road, switch off the engine, get out of the car, and stand to attention until the motorcade had passed. See Theodore Dalrymple, *Is There a Doctor-President in the House?: The Unhappy History of Physicians as National Leaders*, NATIONAL REVIEW, March 8, 2004, at 28.

surprise therefore, that twenty-nine of the thirty-four – over 85 percent – of the poorest countries in the world (in terms of human development) are from SSA.<sup>42</sup>

#### A. *The Scourge of Incessant Wars*

¶14 It was no less a person than the UN Secretary-General who asserted thus in 1999: “For many people in other parts of the world, the mention of Africa evokes images of civil unrest, war, poverty, disease, and mounting social problems. Unfortunately, these images are not just fiction...”<sup>43</sup> Post-independence Africa has therefore become synonymous with armed conflict. But this reputation has not come about as a matter of ill luck. To begin with, some of the region’s rulers became enmeshed in the Cold War game plan, apparently unable to appreciate that save for the odd evident bluff (such as the Cuban Missile Crisis), the main protagonists never seriously considered engaging each other in direct armed conflict. In the meantime, Africans became victims of supposed ideological wars in countries such as Ethiopia, Mozambique and Angola.<sup>44</sup> Indeed, in the case of Angola, its warring factions were not only unconcerned about the catastrophic impact of the conflict on their fellow citizens, but also became oblivious to the tragic irony that Russia had, by the 1990s, virtually become part of the G-7, and was in fact negotiating the terms of its association with the NATO alliance at the time.<sup>45</sup> In a television documentary highlighting the impact of the war on the Angolan people and expressing the hope that the death of the notorious warlord, Jonas Savimbi, would bring them peace, a visibly exasperated veteran ITN reporter, Michael Nicholson, was moved to remark: “...in Africa, things don’t quite happen the way they should.”<sup>46</sup> Even where there had been no full-scale armed conflict, the impact of the Cold War was no less catastrophic; in Zaire, Mobutu’s role as a supposed bulwark against communism became a license to oppress, brutalize, and impoverish his people in a way that had very few parallels in other parts of the world.<sup>47</sup>

¶15 Although the Cold War provided a convenient excuse for some of Africa’s wars, it was by no means the only one; African rulers do not seem to need any such excuse. Hence, the governments of Ethiopia and Eritrea have, until recently, been enmeshed in what has been widely described as one of the most senseless wars in history.<sup>48</sup> Indeed, Africa has even managed to create its own “world war” right in the

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<sup>42</sup> See *Human Development Report 1999: Globalization With a Human Face*, U.N. Development Programme (1999). Figures computed from pp. 157-158.

<sup>43</sup> Kofi Annan, *Foreword: Foreign Direct Investment in Africa: Performance and Potential*, U.N. Conference on Trade and Development, UNCTAD/ITE/IIT/Misc.15 (1999).

<sup>44</sup> See BASIL DAVIDSON, *THE BLACK MAN’S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE* 253 (1992). It has to be conceded that in this respect, SSA is not unique. In Latin America, for example, the FARC rebels of Colombia have continued to wage a supposed ideological war against the government to this day, both sides having squandered every opportunity for a resolution.

<sup>45</sup> See Ron Popeski, *Milestone as Russia is Finally Admitted to G8*, GUARDIAN UNLIMITED, June 27, 2002, available at <http://www.guardian.co.uk/international/story/0,3604,744830,00.html>. See also Ian Traynor, *NATO Ready to Form Alliance with Russia*, GUARDIAN UNLIMITED, Nov. 23, 2001, available at <http://www.guardian.co.uk/international/story/0,3604,604294,00.html>.

<sup>46</sup> The program was titled *Back to the Front*, an obvious reference to Nicholson’s ordeal while covering the war in the 1970’s, as a result of which he became trapped for more than three months in the jungle. It was aired at 1310 hours on August 25, 2002.

<sup>47</sup> See *In the Heart of Darkness*, ECONOMIST, Dec. 9, 2000.

<sup>48</sup> See David Gough, *Ethiopia Scents Victory in ‘Senseless’ War*, GUARDIAN UNLIMITED, May 19, 2000, available at <http://www.guardian.co.uk/ethiopia2000/article/0,2763,222409,00.html>. See also *Ethiopia’s Divided Families: Split by a Pointless War*, ECONOMIST, Sept. 19, 2002.

heart of the continent.<sup>49</sup> In his report to the UN Security Council, the Secretary-General highlighted the scourge of conflict within the region:

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.<sup>50</sup>

¶16 By 2000, over half of African countries were affected by war, according to a paper published jointly by the UK's Department for International Development, the Foreign and Commonwealth Office, and the Ministry of Defence.<sup>51</sup> Armed conflicts have become something that ordinary Africans must learn to live with.

¶17 Even as the international community is being duped into believing that a supposed peace accord signed by the warring factions in the Congo would bring an end to the brutalization of the people of the region,<sup>52</sup> the Ivory Coast, long regarded as a beacon of hope for other African countries, has descended into bloody anarchy, due, in no small measure, to decades of tribal marginalization – a tried and tested means of exercising political power on the continent – and one which has been successfully exploited by the rebel factions in that country.<sup>53</sup> At the same time, Charles Taylor's tyranny in Liberia would almost certainly have been replaced by the equally murderous rebel gangs that were poised to overrun the country's capital, but for the intervention of foreign troops.<sup>54</sup> Nigeria, for the time being, appears to remain united only because its plundering ruling elite has a common interest in its vast oil reserves. Even here, stability cannot be taken for granted, with past rulers excluded from the plunder apparently determined to accentuate and exploit religious and tribal diversity to their own ends;<sup>55</sup> a situation which will almost certainly result in a repeat of an attempt, between the late 1960s and early 1970s, to exterminate the mainly Igbo tribe in the south east of the country – in retrospect, a precursor to what was to follow over two decades later in Rwanda. There is thus a clear pattern of leadership merely serving the narrow interests of Africa's ruling elites, who, in the meantime, continue

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<sup>49</sup> See *Child Victims of Africa's 'World War'*, OBSERVER, Dec. 10, 2000, available at [http://www.observer.co.uk/uk\\_news/story/0,6903,409239,00.html](http://www.observer.co.uk/uk_news/story/0,6903,409239,00.html). The term was also used on a BBC *Newsnight* programme of July 31, 2002, in reference to the fact that the conflict has sucked in up to six neighbouring countries in the Great Lakes region.

<sup>50</sup> The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General, U.N. SCOR, 52d Sess., Agenda Item 10, U.N. Doc. A/52/871-S/1998/318 (1998), para. 4. See also [U.K.'s] DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, ELIMINATING WORLD POVERTY: MAKING GLOBALISATION WORK FOR THE POOR 28 (White Paper on International Development, 2000) (noting that 20 percent of Africa's population live in countries affected by armed conflict.)

<sup>51</sup> See [U.K.'s] DEPARTMENT FOR INTERNATIONAL DEVELOPMENT ET AL., THE CAUSES OF CONFLICT IN SUB-SAHARAN AFRICA, *supra* note 14.

<sup>52</sup> See *Congo Peace Deal Signed*, GUARDIAN UNLIMITED, Dec. 17, 2002, available at <http://www.guardian.co.uk/congo/story/0,,861649,00.html>.

<sup>53</sup> See Tiemoko Coulibaly, *Rebellion Destabilises West Africa, Cote D'Ivoire: North v South*, LE MONDE DIPLOMATIQUE (English Edition), Nov. 2002, available at [http://mondediplo.com/2002/11/09cotedivoire?var\\_recherche=Tiemoko+Coulibaly](http://mondediplo.com/2002/11/09cotedivoire?var_recherche=Tiemoko+Coulibaly).

<sup>54</sup> Mercifully, the Bush Administration has now intervened using the agency of Nigerian troops.

<sup>55</sup> The latest manifestation of this being the killing of Christians by Islamic mobs supposedly protesting about the hosting of the Miss World contest in the country. See *Nigeria Riots Spread to Capital*, BBC NEWS, Nov. 22, 2002, available at <http://news.bbc.co.uk/1/hi/world/africa/2501893.stm>. Beauty contests, it must be pointed out, have been an intrinsic and uncontroversial part of Nigeria's cultural life since independence.

to exhibit a contemptuous disregard for the basic needs and interests of ordinary Africans.

### B. *The Plague of Kleptocratic Misrule*

¶18 Very few commentators would dispute the fact that Mobutu Sese Seko of Zaire had become the very embodiment of “rule by theft” on the continent of Africa before his death. This, to be sure, is not without foundation: Mobutu not only emptied his country’s treasury into secret bank accounts abroad, but allowed this insidious ethos to permeate every level of government.<sup>56</sup> But Mobutu was not alone; neither was his misrule particularly unique on the continent. As early as the immediate post-independence years, Nigerian rulers had begun to set an example that was to become a living testament to mind-boggling profligacy, if not to supreme folly. This was highlighted in the English Court of Appeal case, *Trendtex Trading Corporation v Central Bank of Nigeria*.<sup>57</sup> Although its legal significance is not of relevance to this article,<sup>58</sup> the facts remain a source of great embarrassment to many African students of commercial law (and indeed, of international law): Defence ministry officials had ordered 20 million tons of cement from some 80 different suppliers, at a cost of over US\$8 billion (in 1975 prices). Unsurprisingly, over 400 ships converged on Lagos, with more arriving daily, completely paralysing a port that was, in any event, inadequate for such shipments. As explained by Lord Denning MR:

All the berths were occupied. There were 300 to 400 ships outside waiting. More ships were arriving daily...All of those waiting were on demurrage. It was because the government departments had ordered far too much. No doubt Nigeria needed cement. It was a country which was developing fast. They were building houses, factories, barracks, and so forth. All of the work required cement. Previously the average rate of import through all ports had been two million tons of cement a year. Yet early in 1975 the government departments then in charge...had ordered 10 times that quantity...to be delivered over the next 12 months...Even for all commodities together, the discharging capacity at Lagos...did not amount to two million tons a year. Yet here was 10 times that amount arriving - of cement alone - leaving nothing for other vital imports of food and materials.<sup>59</sup>

¶19 To be sure, no evidence of corruption was adduced in *Trendtex*; but neither would that have been necessary in light of the nature of the main question put before the Court of Appeal. In any event, given that an incoming military regime found it necessary to describe the various transactions as “unorthodox, imprudent or inequitable,”<sup>60</sup> this cannot be ruled out either. Whatever the case, the *Trendtex* episode was to become a mere prelude to how the country was to be misgoverned, with the Abacha regime taking “Mobutuism” to a different depth, adeptly combining Mobutu’s

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<sup>56</sup> For an insightful account of Mobutu’s misrule, as well as the roles of Western governments and the International Financial Institutions in keeping him in power, see MICHAELA WRONG, *IN THE FOOTSTEPS OF MR. KURTZ: LIVING ON THE BRINK OF DISASTER IN THE CONGO* (2000).

<sup>57</sup> 1 Lloyd’s Rep. 581, 588 (1977).

<sup>58</sup> The question being whether the Central Bank of Nigeria, as an organ of the Nigerian State, could rely on the principle of sovereign immunity and thus escape liability in regard to its irrevocable letter of credit. It was held that it could not, because the transactions were *acta jure gestionis*, and not *acta jure imperii*.

<sup>59</sup> Denning, *supra* note 57.

<sup>60</sup> *Id.* at 589.

plundering disposition with a degree of viciousness unparalleled in Nigeria's history.<sup>61</sup>

¶20 Neither are these the only examples of corrupt misrule on the continent. According to a recent report by Human Rights Watch, between 1997 and 2002, the Angolan government had been unable to account for funds totalling about US\$4.22 billion. The report adds:

In those same years, total social spending in the country – including...government spending as well as public and private initiatives funded through the United Nations' Consolidated Inter-Agency Appeal – came to \$4.27 billion. In effect, the Angolan government has not accounted for an amount roughly equal to the total amount spent on the humanitarian, social, health, and education needs of a population in severe distress.<sup>62</sup>

¶21 Indeed, another report by *The Economist* reveals that up to 20 Angolans are worth \$100m or more. Six of the seven richest of these are government officials; the remaining one only recently retired.<sup>63</sup>

¶22 And, just when these were becoming perhaps the most glaring examples of kleptocratic misrule on the continent, Teodoro Mbasogo of Equatorial Guinea treated viewers of a recent Channel 4 television news programme to an astonishing insight into his approach to governance: It was indeed the case, he admitted, that his country's new found wealth from oil, a "state secret," was kept in his personal bank account in Washington. This, in his words, was because: "I am the one who arranges things in this country because in Africa there are a lot of problems of corruption, the diversion of money. If there is corruption, diversion of funds, then I'm responsible. That's why I'm a hundred per cent sure of all the oil revenue because the one who signs is me."<sup>64</sup> As it happened, the only beneficiaries of this mindless plunder were shown to be his immediate family, with his son shamelessly exhibiting a collection of expensive cars, sampling fine wines and exquisite watches in Paris. In the meantime, the only hospital in the capital – built by Spain during the colonial days – was overwhelmed with victims of malnutrition, as well as patients suffering from malaria and other diseases. Indeed, as if to illustrate the fact that the level of psychosis that defined the Banda and Bokassa years has not diminished on the continent, the country's State-owned radio is reported to have declared that Mr Mbasogo "can decide to kill without anyone calling him to account and without going to hell because it is God himself, with whom he is in permanent contact, and who gives him this strength."<sup>65</sup> In virtually every part of the continent, its people have become helpless victims of rulers who have become insensitive to their suffering, and contemptuous of their basic needs.

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<sup>61</sup> The height of this brutality being the murder of the playwright, Ken Saro Wiwa, and eight other activists who had protested against environmental degradation and other abuses by the oil company Royal Dutch Shell. See J G Frynas, *Political Instability and Business: Focus on Shell in Nigeria*, 19 THIRD WORLD QUARTERLY 457-478 (1998). For a response by Shell, see A Detheridge and N Pepple, *A Response to Frynas* 19 THIRD WORLD QUARTERLY 479-486 (1998).

<sup>62</sup> See Human Rights Watch, *Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights*, Vol. 16, No. 1 (A), Jan. 2004, at 1.

<sup>63</sup> See *The Shameless Rich and the Voiceless Poor*, ECONOMIST, Jan. 22, 2004.

<sup>64</sup> See Lindsay Hilsum, *Oil at Any Cost?*, Channel 4 News broadcast, Nov. 18, 2003, transcript available at [http://www.channel4.com/news/2003/11/week\\_3/18\\_guinea.html](http://www.channel4.com/news/2003/11/week_3/18_guinea.html).

<sup>65</sup> See *Equatorial Guinea's "God"*, BBC News, July 26, 2003, available at <http://news.bbc.co.uk/1/hi/world/africa/3098007.stm>.

### C. The Charade of “Democratic” Governance

¶23 An impoverished Nigerian tailor, Muhammad Umaru, reportedly said: “When we were in the military regime, we didn’t get anything from the government, but we had peace. Now we are in a democracy, we don’t get anything from the government, and we don’t have peace.”<sup>66</sup> Regrettably, such views are often ignored in academic literature on Africa. Instead, there appears to be a determination to highlight a supposed new dawn of democracy in the region. A collaborative paper published by the World Bank puts it thus: “Most...African governments conceded the principle of democracy in the first half of the 1990s. By 1999 nearly all countries had held multiparty elections...”<sup>67</sup> An IMF paper also highlights how supposed political liberalization and participatory democracy are complementing economic reforms in the region.<sup>68</sup>

¶24 The reality, however, is that the so-called new breed of leaders are in no way different from their immediate post-independence contemporaries, and are in many ways worse. Indeed, the apparent manifestation of democratic governance has so far proved to be a cynical façade – a smokescreen for the preservation of the past. Even Thabo Mbeki’s much-vaunted quest for an “African renaissance,” for example, appears to be rooted in sheer escapism and astonishing obtuseness: a feckless attempt to challenge the universally accepted scientific fact – that AIDS is caused by the HIV virus – rather than in taking steps to reverse the pandemic itself.<sup>69</sup>

¶25 In Nigeria, this supposed new democratic, post-Abacha era began with legislators awarding themselves up to 3.5 million *naira* in furniture allowances (about \$35,500, in a country where the average monthly civil service salary is only about \$200), rather than taking steps to alleviate the suffering of ordinary Nigerians.<sup>70</sup> The same country’s supposedly democratically elected leader, Obasanjo, has not only proved himself a consummate human rights violator, but has in fact sought to justify the massacre of unarmed civilians by his military forces.<sup>71</sup> Another report highlights systematic and widespread violations of civil and political rights, particularly freedom

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<sup>66</sup> U.N. Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* at 85.

<sup>67</sup> See CAN AFRICA RECLAIM THE 21ST CENTURY?, *supra* note 8, at 54.

<sup>68</sup> EVANGELOS A. CALAMITSIS ET AL., ADJUSTMENT AND GROWTH IN SUB-SAHARAN AFRICA 4 (International Monetary Fund Working Paper, WP/99/51, 1999).

<sup>69</sup> According to a World Bank study, 70 percent of the world’s HIV/AIDS infections occur in Africa. See CAN AFRICA RECLAIM THE 21ST CENTURY??, *supra* note 8, at 11. Thus, the epidemic is not exclusive to South Africa. However, as pointed out by Human Rights Watch, “[t]he most severely affected region was southern Africa, including Botswana, with the highest known prevalence of HIV/AIDS in the world, and South Africa, with the largest number of people living with AIDS in any country in the world.” See Human Rights Watch, *World Report 2002: Africa Overview*, available at <http://www.hrw.org/wr2k2/africa.html> (“[I]n 2001, President Thabo Mbeki’s government seemed to prefer to invest political capital in fighting public relations skirmishes rather than addressing the economic and social challenges that confronted the country...The government was plagued by corruption scandals in connection with a multi-million rand arms deal...President Mbeki’s refusal to confront his country’s catastrophic AIDS epidemic risked undermining all other Achievements.”).

<sup>70</sup> See *Obasanjo’s One Hundred Days*, AFRICA CONFIDENTIAL, Aug. 27, 1999, at 1-3. See also *Self-Service for Nigerian Senators*, ECONOMIST, Aug. 12, 2000, at 41.

<sup>71</sup> Obasanjo may have been democratically elected, but his contempt for human rights have been well documented, and include: extrajudicial executions of innocent civilians by paramilitary forces in the Niger Delta region of the country, the destruction of whole villages, and arbitrary arrests (See Human Rights Watch, *World Report 2001: Nigeria*, available at [www.hrw.org/wr2k1/africa/nigeria.html](http://www.hrw.org/wr2k1/africa/nigeria.html)). The same crimes were to be adopted about one year later in the Middle Belt area of the country. See also Human Rights Watch, *Nigeria: President Ignoring Gravity of Military Massacre*, Apr. 19, 2002, available at <http://www.hrw.org/press/2002/04/nigeria041902.htm>, and William Wallis, *Interview with the President*, FINANCIAL TIMES, Apr. 9, 2002, at 3.

of expression, by the country's security agencies acting with absolute impunity.<sup>72</sup> In a decision remarkably reminiscent of Felix Houphet Boigny's squandering of his nation's resources on a multi-million dollar basilica when the personal incomes of ordinary Ivorians were deteriorating by as much as 50 percent,<sup>73</sup> Obasanjo evidently regards the installation of a satellite system in space to be a more urgent governmental function than improving the healthcare and educational needs of his fellow citizens.<sup>74</sup> The same ruler, for good measure, is currently negotiating the purchase of missile and other defence technologies from North Korea.<sup>75</sup> On his part, Paul Biya of Cameroon, in 1999, had a personal airport built near his presidential retreat of Mvomeka.<sup>76</sup> As if not to be outdone, the King of Swaziland has elected to squander the equivalent of his country's entire health budget of \$45 million on the purchase of a private jet, at a time when his people are either dying of starvation, or of HIV/AIDS, if not both.<sup>77</sup>

¶26

The above are by no means the exception. In 1985, Mengistu and his obnoxious *Dergue* regime in Ethiopia treated the world to what was most probably the worst post-Biblical famine it had ever witnessed – a tragedy which prompted the Live Aid campaign. Roughly two decades afterwards, the people of Ethiopia, this time under a supposed democratic dispensation, experienced a repeat of this tragedy, due in no small measure to a senseless war with neighbouring Eritrea.<sup>78</sup> Indeed, the UN Secretary-General was so infuriated by the conduct of both nations that he cast his diplomatic discretion aside during a newspaper interview and lamented:

The quality of the leaders, the misery they have brought to their people and my inability to work with them to turn the situation around are very depressing...In many countries the wrong kind have made it to leadership. They seek power for the sake of power and for their own aggrandisement rather than having a real understanding of the need to use power to improve their countries.<sup>79</sup>

¶27

In Liberia, a supposed democratic mandate given to Charles Taylor after his brutal war which led to the ousting and the eventual murder of his equally vicious predecessor, Master Sergeant "General" "Doctor" Samuel Doe, became a licence to subject his people to further misery, as he set about plundering his country's

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<sup>72</sup> See Human Rights Watch, *Nigeria: Renewed Crackdown on Freedom of Expression*, Vol. 15, No. 19 (A), Dec. 2003.

<sup>73</sup> See *Ivory Coast Buries Founding Father*, N. Y. TIMES, Feb. 8, 1994, at 4. See also George Ayittey, *The Looting of Africa: African Kleptocracies*, FreeAfrica Foundation, available at <http://www.freeafrica.org/lootingi.html> (estimates the cost of the basilica at about \$360 million).

<sup>74</sup> See *Nigeria's Space Programme: Per Abuja Ad Astra*, ECONOMIST, Sept. 13, 2003, at 62. The programme, which is ready to be launched in Siberia, will cost \$13 million. Indeed, according to a different report, it will cost \$2.5 million a year. See *Nigeria Adopts Space Policy*, BBC NEWS, Jul. 6, 2001 available at [http://news.bbc.co.uk/1/hi/english/sci/tech/newsid\\_1426000/1426573.stm](http://news.bbc.co.uk/1/hi/english/sci/tech/newsid_1426000/1426573.stm).

<sup>75</sup> See *Nigeria Seeking N Korea Missiles*, BBC NEWS, Jan. 29, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/3438539.stm>.

<sup>76</sup> See NICHOLAS VAN DE WALLE, *AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS, 1979-1999* 108 (2001).

<sup>77</sup> Challenged by Jeremy Vine in an interview on the BBC *Newsnight* programme of September 4, 2002, his explanation was that the decision to procure the aircraft was made by his ministers and not by himself. However, as Vine pointed out in his report, the country's cabinet has no say in decision-making. In any event, one might wonder whether, cabinet decision or not, a private jet should have been considered a priority at such a time. The same ruler has recently abducted a teenage girl who is being kept as another of his countless "wives." Unsurprisingly, he appeared on the ITV news programme at about 1730 hours on November 5, 2002, and defended his action of grounds of "tradition."

<sup>78</sup> See GOUGH, *supra* note 48.

<sup>79</sup> See William Shawcross, *Africa: The Black Man's Burden*, SUNDAY TIMES, Apr. 9, 2000.

irreplaceable rainforest for personal gains.<sup>80</sup> Even Nyerere's successors in Tanzania, not long ago, elected to waste the country's meagre resources on the purchase of a sophisticated military air defence system, even though fees have been introduced in schools.<sup>81</sup>

¶28 It is therefore understandable that a recent Human Rights Watch report devoted a section entitled: "Elections, But Not Necessarily Democracy" to highlighting various human rights violations on the continent, including rigged elections, the suppression of press freedom, and torture and political killings.<sup>82</sup> The hollowness of political reforms in Africa has also been illustrated by the newsmagazine *The Economist*, which declared: "A new sort of African leader is trying to break the addiction to foreign aid, and to the idea that Africa's woes can be blamed forever on the legacy of colonialism... Little noticed by the rest of the world, much of sub-Saharan Africa is in the midst of an upturn."<sup>83</sup> Three years later, the same publication highlighted the reality of African leadership in a cover story titled "Hopeless Africa."<sup>84</sup> One keen observer of the region, commenting on freedom of expression, asserted:

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. Multi-party systems were consolidated into single-party systems, then into one-man systems. With the 'second independence' of the 1990s, in which open political competition returned to many countries, freedom of expression seemed to obtain a new lease on life. In my judgment, however, the overall climate remains inhospitable.<sup>85</sup>

¶29 For ordinary Africans therefore, a supposed new era of democracy on the continent has simply been a repeat of the transition from colonial subjugation to one of economic misery and tyranny; the very notion of democracy itself yet another instrument in the arsenals of the region's merciless despots.

#### IV. A PROFUSION OF SPECIOUS THEORIES

¶30 One of the most tragic realities of post-colonial leadership in much of Africa is that the chaos it has created easily lends itself to all manner of theories. One measure of this disorder is that almost every one of these theories seems to carry a certain degree of validity – except when subjected to even the most cursory examination.

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<sup>80</sup> See The Pariah President: How a Tyrant's 'Logs of War' Bring Terror to West Africa, OBSERVER, May 27, 2001. See also Timber 'Fuels Liberia's War Machine', BBC NEWS, Aug. 9, 2001, available at [http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_1480000/1480516.stm](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_1480000/1480516.stm).

<sup>81</sup> See David Hencke and Larry Elliott, *Just What They Need – a £28M Air Defence System*, GUARDIAN, Dec. 18, 2001. Even the World Bank has been sufficiently concerned to seek the opinion of the International Civil Aviation Organization regarding the necessity of such a sophisticated system. According to the World Bank, the ICAO has in turn raised concerns about the system. See *World Bank's Statement on Tanzania's Air Traffic Control (ATC)*, News Release No: 2002/354/AFR, June 13, 2002 available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/>.

<sup>82</sup> See *World Report 2002*, *supra* note 69.

<sup>83</sup> *Emerging Africa*, ECONOMIST, June 14, 1997, at 13.

<sup>84</sup> See *Hopeless Africa*, ECONOMIST, May 13, 2000, at 17. Although the report was primarily about the civil conflict in Sierra Leone, it also highlighted the grim political and economic realities on the continent.

<sup>85</sup> C. E. Welch Jr., *The African Charter and Freedom of Expression in Africa*, 4 BUFF. HUM. RTS. L. REV. 103, 105 (1998).

### A. Africa: A Victim of History and Culture

¶31 One common theory is that Africa's inability to develop is a function of its history and culture. This position has been most forcefully articulated by *The Economist*: "[M]ost of the continent's shortcomings owe less to acts of God than to acts of man...brutality, despotism and corruption exist everywhere – but African societies, for reasons *buried in their culture*, seem especially susceptible to them" [emphasis added].<sup>86</sup> And it concluded: "Africa's biggest problems...were created by African society and history."<sup>87</sup> A major World Bank study, while acknowledging that the "roots of state failure" in the region are "many and complex," nevertheless concludes: "Chief among them has been a continuing struggle between traditional forms of governance and social organization (often based on tribes, lineages, and language and kinship groups) and modern forms of government."<sup>88</sup>

¶32 Yet proponents of this theory have failed to identify this supposedly homogenous cultural pattern amongst the people of the region, which is inherently inimical to the realization of human rights. Indeed, although there is a definite, discernible "culture" of misrule at the level of leadership, Africa is an amalgamation of various "cultures" – a fact acknowledged thus by another human rights advocate from the region: "... [T]he diversity of African peoples and their societies defy easy categorization or generalization."<sup>89</sup> In any event, there are numerous historical accounts of practices in pre-colonial Africa that are in consonance with established human rights norms. For example, according to another African commentator, the virtues of participatory democracy and freedom of expression were well entrenched in the African social order before the arrival of the Europeans; these being particularly evident at village meetings where views were freely expressed and ideas exchanged, in societies where the concepts of justice, order, and fairness were well developed.<sup>90</sup> Indeed, although the practice of slavery is hardly reconcilable with universally human rights norms, a renowned African historian reveals that even those regarded as slaves could own property, elect and send representatives to the King's court, and request an audience with him – hence, a certain Jubo Jubogha (renamed Jaja by the Europeans), who was born in 1821 and sold as a slave to a Bonny trader in 1833 in the Niger delta area of present-day Nigeria, was later elected head of the Anna Pepple House, and succeeded the King in 1863.<sup>91</sup>

¶33 Another African commentator, Kofi Busia, describes a system of checks and balances – an indispensable element to modern democratic governance, and thus, to the realization of human rights – in his native, pre-colonial Ghanaian society: Although the Akan chief is renowned for wielding enormous powers, this is only theoretical; the chief rarely makes policy. In the wider traditional setting, the chiefs are never above the customary norms and taboos that govern everyone else. To check their power, they are surrounded by various bodies and institutions. Before taking office, the chief is often required to take an oath. In the case of the Krontihene of the Ashanti, part of the formal admonition is: "When we give you advice, listen to it. We do not want you to abuse us; we do not want you to regard us as fools; we do not want

<sup>86</sup> See *Africa: The Heart of the Matter*, *ECONOMIST*, May 13, 2000, at 17.

<sup>87</sup> *Id.* at 22.

<sup>88</sup> WORLD BANK WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD 162 (1997).

<sup>89</sup> Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339, 346 (1995).

<sup>90</sup> AYITTEY, *supra* note 40, at 19.

<sup>91</sup> ADU BOAHEN, *TOPICS IN WEST AFRICAN HISTORY* 92 (1986), and DAVIDSON, *supra* note 21.

autocratic ways; we do not want bullying; we do not like beating...take the stool.”<sup>92</sup> Further examples have been proffered, such as the existence of freedom of movement and of association.<sup>93</sup> The right to education, it is explained, was a collective responsibility, although the primary emphasis was on the virtues of good citizenship.<sup>94</sup>

¶34 Whether these practices are reflective of the general state of affairs in pre-colonial Africa is of course a matter of conjecture, not least because much of Africa’s history is rooted in the oral tradition, with its inherent methodological problem of unreliability. Indeed, for every such example of adherence to human rights, it is possible to cite others that point to the contrary: The traditional practices of female genital mutilation<sup>95</sup> and wife-beating<sup>96</sup> are hardly compatible with universally agreed human rights standards. Neither is the usual emphasis on collectivism (at the expense of individualism)<sup>97</sup> unproblematic when set against the language of the UDHR.<sup>98</sup> Nevertheless, to suggest that certain traditional practices are responsible for Africa’s economic backwardness represents a misleading and dangerous extrapolation – and one that has assisted in no small measure in diverting critical attention from the real cause of the region’s dismal economic situation.

¶35 To be sure, many African rulers themselves have often sought to justify their human rights violations by appealing to a perverse notion of what human rights advocates often describe as “cultural relativism” – a theory which holds that because societies are products of their peculiar historical and cultural development, their conceptions of human rights must necessarily be allowed to reflect such experiences. In effect, this theory rejects the universality of human rights,<sup>99</sup> by invoking certain alluring (if ill-defined) notions such as “African culture,” “African values,” or “African civilization.” A good example of this tendency is evident in the continent’s human rights instrument, the African Charter of Human and Peoples’ Rights – itself an absurdity in human rights terms, given the peculiar circumstances of its adoption<sup>100</sup>

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<sup>92</sup> See K. A. BUSIA, *THE POSITION OF THE CHIEF IN THE MODERN POLITICAL SYSTEM OF ASHANTI* 12 (1951).

<sup>93</sup> Kéba M’Baye and Birame Ndiaye, *The Organization of African Unity*, in *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 590 (Karel Vasak et al eds., 1982).

<sup>94</sup> *Id.* at 591.

<sup>95</sup> There are, however, encouraging indications that certain societies are beginning to abandon this practice. See, e.g., Barbara Crossette, *A Uganda Tribe Fights Genital Cutting*, N.Y. TIMES, July 16, 1998, at A8.

<sup>96</sup> See, e.g., *Kenyan Tradition Confronted: A Beaten Wife Goes to Court*, N.Y. TIMES, Oct. 31, 1997, at A5.

<sup>97</sup> See, e.g., JOMO KENYATTA, *FACING MOUNT KENYA: THE TRIBAL LIFE OF THE GIKUYU*, Ch. 5 (1965). According to whom the Gikuyu of Kenya view individualism with suspicion. There is, however, a positive side to the idea of collectivism: In societies with no basic State support, it in fact represents the only means of realizing the core aspects of the ICESCR. Its conflict with the UDHR therefore can be said mainly to lie within the sphere of civil and political rights.

<sup>98</sup> Art.2, for example, states: “*Everyone* is entitled to all the rights and freedoms set forth in this Declaration...” [emphasis added]

<sup>99</sup> See, e.g., Adamantia Pollis and Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in *HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES* (1979).

<sup>100</sup> At the time of the Charter’s adoption, very few, if any, of the assembled rulers had any genuine democratic mandate of any kind. See Makau wa Mutua, *The African Human Rights System in a Comparative Perspective* 3 REV AFR. COMM. HUM. & PEOPLES’ RTS 5, 7 (1993).; and C.A. Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples’ Rights*, 23 HUM. RTS. Q. 329 (2001). Although this would not necessarily have been a violation of international law in general (given that their regimes would have been regarded as *de facto* governments and therefore entitled to ratify international treaties) it is nevertheless necessary to note that such regimes would have directly violated Art. 25 of the ICCPR which guarantees the right to vote. Even more bizarre is the fact that the Charter’s adoption directly

– the preamble of which affirms “the virtues...and the values of African civilization.”<sup>101</sup> This, it is safe to assume, reflected a speech by the then Senegalese leader Leopold Senghor, in which he urged the Charter’s drafters to “keep constantly in mind our values of civilization and the real needs of Africa.”<sup>102</sup> Indeed, if the African Charter represents the legal blueprint of this mindset, the earlier cited Channel 4 television news report on Equatorial Guinea highlights its real-life manifestation: In spite of being the world’s fastest growing economy due to its new-found oil wealth, its people continue to languish in economic misery.<sup>103</sup> Challenged by the intrepid Lindsey Hilsum about this, its ruler retorted: “I can assure you that there’s no poverty in Guinea...[t]here’s no deprivation either...You have to understand the level we’re at in Guinea. The first problem is the people’s cultural level. The people are used to living in a very different way, which you people think is poverty. In Guinea what we have are shortages.”<sup>104</sup> An equally absurd explanation was proffered in response to a question on the lack of democratic accountability: “I think Equatorial Guinea’s democracy is the most open, the most transparent. We are following a kind of democracy which fits the style and customs of Equatorial Guinea.”<sup>105</sup>

¶36

Mr Mbasogo, to be sure, is not a trailblazer amongst his peers. As noted by Jack Donnelly, his predecessor and uncle, widely acknowledged as one of Africa’s most vicious tyrants – and who was murdered by Mbasogo in a coup that brought him to power – called himself “Grand Master of Popular Education, Science, and Traditional Culture.”<sup>106</sup> Indeed, as Donnelly points out, similar arguments have been proffered by other African despots. For example, Hastings Banda of Malawi successfully stifled opposition to his rule by subjecting his victims to a very un-African judicial process called “traditional courts,” in which the accused had no right to legal representation, and from which they could appeal only to him in person.<sup>107</sup> Mobutu, for his part, revived the practice of *Salongo* – a kind *corvee* labour inherited from his country’s colonial past.<sup>108</sup> Indeed, it is safe to assert that the usual mantra, “African solutions to African problems,” is an offshoot of this perverse mindset. From the vociferous defence of Mugabe’s conduct by his fellow rulers in spite of the misery he has inflicted upon the Zimbabwean people,<sup>109</sup> to the shielding of Charles Taylor from

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violated its own Art.13(1) which states: “Every citizen shall have the right to participate freely in the government of his country...”

<sup>101</sup> The African Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc.

CAB/LEG/67/3/Rev.5 (1981), entered into force on Oct. 21,1986, reprinted in 21 ILM 59(1982).

<sup>102</sup> Address of President Leopold Senghor to the Dakar Meeting of Experts Preparing the Draft African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/X.

<sup>103</sup> *World Bank Country Brief*, available at <http://www.worldbank.org/afr/gq2.html> states: “By 1998 over 60 percent of GDP and over 90 percent of exports were generated by the oil sector. Per capita GDP has reached a new high of over US\$1,170 in 1999. The expansion of the petroleum sector has largely been the impetus behind the dramatic growth of approximately 71.2% in real GDP during 1997, 22% in 1998 and 15% in 1999. While oil discoveries and rapid expansion of oil exports have caused a striking improvement in economic indicators, there has been no impact on the country’s dismal social indicators.”

<sup>104</sup> For a transcript of the interview, see Lindsey Hilsum, *Oil at Any Cost*, Channel 4 website, Nov. 18, 2003, available at [http://www.channel4.co.uk/news/2003/11/week\\_3/18\\_guinea.html](http://www.channel4.co.uk/news/2003/11/week_3/18_guinea.html). See also Lindsey Hilsum, *Another Nice Friend for President Bush*, NEW STATESMAN, Dec. 8, 2003, at 30-31.

<sup>105</sup> *Oil at any Cost*, *supra* note 104.

<sup>106</sup> *Id.*

<sup>107</sup> JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE 120 (1989). This, it is necessary to note, violates Art. 14 of the ICCPR.

<sup>108</sup> *Id.* (footnote omitted). The use of forced labour violates Art. 8(3) of the ICCPR and Art.6(1) of the ICESCR.

<sup>109</sup> The latest example of Mugabe’s determination to perpetuate his people’s misery was illustrated in a

international justice by Nigeria's Obasanjo, this appeal to cultural relativism has exposed ordinary Africans to a life of unparalleled misery. Little wonder, therefore, that as will be illustrated in Part V, responses by the international community to the continent's tragedies are often based on undisguised cynicism: Africa, it appears, does not deserve the basic rights which the rest of the world is beginning to take for granted because its values and expectations are peculiarly different.

*B. Post-Colonial Africa: A Victim of Berlin*

¶37 Another thesis attributes Africa's wars and economic problems to the outcome of the Congress of Berlin and the consequent partitioning of the continent in 1885 along what is widely believed to be arbitrary boundaries. The resultant dislocation of traditional arrangements, it is argued, has been a source of conflict in much of the continent.<sup>110</sup> Even the usually persuasive Basil Davidson has become one of the main proponents of this viewpoint:

[I]n 1885, half a dozen powerful European nations...decided to share out Africa...but not, of course, without going to war against Africans...Africa was being divided up into many 'colonies'...ruled directly and dictatorially by European governments, along frontiers fixed between the European powers...A great and deep disaster for the peoples of Africa, the colonial period deprived them not only of their political freedom and the right to think for themselves, thus bringing to a stop the onward flow of Africa's own history, but also, in large measure, undermining their sense of confidence and self-respect.<sup>111</sup>

¶38 Yet, it was Nelson Mandela who once asserted: "Africa is beyond bemoaning the past for its problems. The task of undoing that past is ours...we must take responsibility for our own destiny, that we will uplift ourselves only by our own efforts in partnership with those who wish us well."<sup>112</sup>

¶39 It is also hard to ignore the fact that, as pointed out by the former Africa specialist of *The Economist* Richard Dowden, none of the factions in the region's wars is calling for changes to boundaries drawn by the colonial powers; in fact, many, if not all, of the wars have been instigated by individuals seeking access to the trappings of power at the centre.<sup>113</sup> In any event, it is the case that colonialism *did* also

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recent BBC documentary programme, *Panorama*, with first-hand accounts of thousands of children being turned into merciless rapists and killers. The programme, titled *Secrets of the Camps*, and presented by Hilary Andersson, was aired on the Feb. 29, 2004, at 2215 hours, on BBC One. Transcripts are available at <http://news.bbc.co.uk/1/hi/programmes/panorama/3479353.stm>.

<sup>110</sup> William Easterly and Ross Levine, *Africa's Growth Tragedy: Policies and Ethnic Divisions*, 112 Q. J. ECON. 1203, 1213 (1997). . See also AKE, *supra* note 37, at 5 and 7.

<sup>111</sup> DAVIDSON, *supra* note 91, at 233. Indeed, another commentator, in an otherwise insightful thesis, has not only attributed the region's problems to these boundaries, but has called for them to be redrawn in a way that reflects the ethnic make-up of the continent. See Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1118 (1995).

<sup>112</sup> As cited on the UNECA website: <http://www.uneca.org/nepad/>. Commenting in the context of his native Nigeria, the novelist Chinua Achebe once stated: "...There is nothing basically wrong with the Nigerian character. There is nothing wrong with the Nigerian land or climate or water or air or anything else. The Nigerian problem is the unwillingness or inability of its leaders to rise to the responsibility, to the challenge of personal example which are the hallmarks of true leadership..." See CHINUA ACHEBE, *THE TROUBLE WITH NIGERIA* 1 (1985).

<sup>113</sup> *Africa's Bizarre Borders*, *ECONOMIST*, Jan. 25, 1997, at 17. In this regard, some commentators might be tempted to interpret the secessionist attempt by the mainly Igbo tribe from the Nigerian federation in the late 1960s as evidence to the contrary. This, however, would ignore the very events that led to the secessionist bid in the first place, namely, the struggle for power, and corruption among the country's post-independence rulers – events which are in fact highlighted by Mutua. See Mutua

forge what might be described as an artificial union between the native Malays, the Chinese, and the Indians in Malaysia, a country comparable in many respects with Ghana, but which has managed to outperform the entire region of SSA (including South Africa) economically.<sup>114</sup> Indeed, it is ironic that the most heterogeneous country in SSA itself (namely Mauritius), with its medley of racial and religious groups – including Hindus, Muslims, Creoles, native Africans, and Europeans – has achieved a level of development that has eluded even the most homogenous countries in the region.<sup>115</sup> Moreover, even if the redrawing of boundaries were the solution to Africa’s problems, its proponents might wish to explain why it was unable to prevent what was, even by Africa’s standards, a most senseless war between Ethiopia and Eritrea soon after the latter’s secession following a 1993 referendum supported by both sides. The inescapable fact is that a tragic – though by no means unique<sup>116</sup> – event in the continent’s history has become yet another excuse for commentators who are unwilling to accept that African rulers owe certain basic responsibilities to their long-suffering people.

### C. *The Economic Dependency Thesis*

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The dependency thesis, widely attributed to the late Stephen Hymer, posits that international economic relations are premised on an inherent power imbalance between rich and poor countries, mediated by the modern transnational corporation (TNC), whose organizational structures – e.g., the global distribution of its decision-making centres – and policies inexorably result in “specialization by nationality.”<sup>117</sup> Poor countries, it is argued, thus find themselves in a position of “structural subordination” vis-à-vis the industrialized ones.<sup>118</sup> Indeed, much of this thesis is evident in the writings of political leaders such as the late Nyerere of Tanzania, who mused: “First, where in our lands are those citizens who have sufficient capital to establish modern industries; and second, how would our infant industries fight other capitalist enterprises?”<sup>119</sup> Of late, this argument has been revived by no less than Fantu Cheru who, while acknowledging the impact of wrong policy choices by SSA governments, is equally scathing about what he sees as the rules established by Western European powers, by which the region would participate in the global economy. Put simply, Africa was to produce raw materials and agricultural goods for Western industries and consumers: coffee and tropical fruits by Kenya, cotton by Sudan, bananas and pineapple by the Ivory Coast, cocoa by Ghana, and groundnut by

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*supra* note 111, at 1156.

<sup>114</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *AFRICAN DEVELOPMENT IN A COMPARATIVE PERSPECTIVE* 70 (1998/1999).

<sup>115</sup> CAN AFRICA RECLAIM THE 21ST CENTURY? *supra* note 69, at 54. Another study also notes the fact that Somalia became a failed State in spite of its ethnic homogeneity. See WORLD BANK WORLD DEVELOPMENT REPORT 1997, *supra* note 88, at 159.

<sup>116</sup> Africa’s partitioning is not unique in the sense that it is difficult to find one country in the world that has not once been conquered, subjugated and/or exploited in some way by another. Indeed, the boundaries of present-day Europe attest to this reality.

<sup>117</sup> Stephen Hymer, *The Multinational Corporation and the Law of Uneven Development*, in *TRANSNATIONAL CORPORATIONS AND WORLD ORDER* 396 (George Modelski, ed., 1979). Although aspects of the Hymer thesis remain valid, his view of the TNC as a rigid, monolithic, and pyramidal entity is debatable, not least because the modern corporation is typically defined by its amorphous structure. See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* (1999).

<sup>118</sup> See Jack Donnelly, *Human Rights, Democracy, and Development*, 21 *HUM. RTS. Q.* 608, 623 (1999).

<sup>119</sup> JULIUS K. NYERERE, *MAN AND DEVELOPMENT* 116 (1973).

Senegal.<sup>120</sup> The implication, of course, is that Africa remains a casualty of these “rules.”

¶41 There is little doubt that this theory had some validity in the immediate post-independence years, not least because colonial ties were still strong at the time, with many developing countries retaining their roles as sources of raw materials for finished products in Western markets. With the passage of time, however, the theory seems increasingly at odds with the facts. For example, its proponents would have much difficulty in explaining why it is that Ethiopia and Liberia, which have never been colonized in the sense described in Part III – and therefore presumably have never been subject to such “rules” – have become two of the poorest and most chaotic countries in the region. Moreover, it remains unclear why such “rules” should apply more rigidly to Africa than to any other region of the world. Indeed, even if it were the case that certain unknown factors or forces have conspired to keep Africa in such a disadvantageous position, the emergence of countries in “developing Asia” from such apparent colonial designs – not to mention Mauritius, itself a SSA country – makes it possible to argue that such “rules” can in fact be “broken” with imaginative leadership.

#### D. Africa: A Casualty of the Global Economic Regime

¶42 Of all the theories offered to explain Africa’s inability to develop, this one seems the most persuasive. A variant of the dependency thesis, and an article of faith amongst commentators on the broad political left, it holds that Africa is a casualty of an unfair, ideologically-driven global economic order whose interests are inherently detrimental to those of poor countries generally.<sup>121</sup> Indeed, it has become the fuel that propels the engines of the anti-globalization movement, and is often articulated in the contexts of the region’s crippling debt burden and its inability to trade.<sup>122</sup>

¶43 To be sure, the perils of globalization have been acknowledged by even its most ardent proponents.<sup>123</sup> Indeed, the Heavily Indebted Poor Countries initiative (HIPC), if nothing else, represents an implicit admission of the inappropriateness of the structural adjustment policies (SAPs) imposed by the World Bank and the International Monetary Fund on the region following the debt crisis.<sup>124</sup> Yet, as Frances Stewart points out, these policies did not simply emerge from the blue, to be imposed on economies that were otherwise healthy.<sup>125</sup> Flawed though they were,

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<sup>120</sup> Fantu Cheru, *Structural Adjustment, Primary Resource Trade and Sustainable Development in Sub-Saharan Africa*, 20 WORLD DEV. 497, 498(1992).

<sup>121</sup> See, e.g., MICHAEL BARRATT BROWN AND PAULINE TIFFEN, *SHORT CHANGED: AFRICA AND WORLD TRADE* (1994); JOHN MADELEY, *HUNGRY FOR TRADE; HOW THE POOR PAY FOR FREE TRADE* (2000); *BEYOND BRETTON WOODS: ALTERNATIVES TO THE GLOBAL ECONOMIC ORDER* (J Ca vanagh et al, eds. 1994).

<sup>122</sup> See, e.g., JOHN MADELEY, *BIG BUSINESS, POOR PEOPLES: THE IMPACT OF TRANSNATIONAL CORPORATIONS ON THE WORLD’S POOR* (2000); and BELINDA COOTE, *THE TRADE TRAP: POVERTY AND THE GLOBAL COMMODITY MARKETS* (1992).

<sup>123</sup> *Camdessus Details SAF Proposal, New Strategy for Poorest Countries*, IMF SURVEY, June 29, 1987, at 195; WORLD BANK, *WORLD DEVELOPMENT REPORT 1990: POVERTY*, 103 (1990); and PIERRE LANDELL-MILLS, ET AL, *SUB-SAHARAN AFRICA, FROM CRISIS TO SUSTAINABLE GROWTH: A LONG TERM PERSPECTIVE STUDY* 21 (1989).

<sup>124</sup> For a balanced critique of the HIPC, see *The Highly Indebted Poor Countries (HIPC) Initiative: A Human Rights Assessment of the Poverty Reduction Strategy Papers (PRSP)*, U.N. Commission on Human Rights, 57<sup>th</sup> Sess., Provisional Agenda Item 10, U.N. Doc. E/CN. 4/2001/56 (2001) (Report submitted by Mr Fantu Cheru, independent expert on the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights).

<sup>125</sup> FRANCES STEWART, *ADJUSTMENT AND POVERTY: OPTIONS AND CHOICES* 1-2 (1995).

SAPs were an attempt to rescue the region from a leadership unwilling to see beyond its own selfish interests. It is, after all, the case that to this date, no commentator can point to any single poverty-alleviating project in the region that is attributable to the loans that resulted in the debt crisis, although at least some of the proceeds have almost certainly financed the most egregious human rights violations by some governments, such as Mengistu's in Ethiopia and Mobutu's in Zaire – not to mention the apartheid regime in South Africa. Nor can one ignore the fact that the most vociferous advocates of trade liberalization preside over the most protectionist economies, particularly in the areas in which Africa might be said to have what classical economists call comparative advantage, namely primary produce.<sup>126</sup>

Yet too much is often read into this state of affairs, at least insofar as commentators often ignore the fact that the United States and the European Union (amongst the most powerful trading countries) have put in place preferential regimes aimed almost exclusively at SSA.<sup>127</sup> These regimes, to be sure, are not beyond valid criticism. Eligibility for the United States' African Growth and Opportunity Act scheme is based, inter alia, on its beneficiaries' willingness to adopt wide-ranging neo-liberal reforms that are not dissimilar to the much-discredited SAPs;<sup>128</sup> while the EU's Everything But Arms initiative currently excludes certain "sensitive" products, namely, rice, sugar and fresh bananas.<sup>129</sup> But then, to expect a purely altruistic trading regime, or indeed, the morally impeccable practice of "fair trade," would amount to a dangerous misunderstanding of the very essence of international economic relations: the preservation of national self-interest, however defined. In any event, it is also important to note that from all indications, even these relatively preferential regimes have not been utilized to any significant degree<sup>130</sup> – an unsurprising state of affairs given Africa's notorious, near-total lack of institutional and infrastructural capacity,<sup>131</sup>

<sup>126</sup> In 2001, agricultural subsidies in OECD countries amounted to \$311 billion. WTO Trade Policy Review Body, *Overview of Developments in the International Trading Environment: Annual Report by the Director-General*, WT/TPR/OV/8, at 2 (Nov. 15, 2002). While the EU, USA, and Japan accounted for 94 percent of agricultural subsidies as of 1997, to the tune of \$264 billion, with the EU alone accounting for 40 percent or \$110 billion. The USA followed closely with \$72.4 billion, and Japan with \$67.3 billion. By 1999, the total amount of agricultural support in OECD countries had risen from \$267 billion in 1997 to \$361 billion, or 1.4 percent of their collective GDPs. ERICH SUPPER, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *Is There Effectively a Level Playing Field for Developing Country Exports?* at 20-22, U.N. Doc. UNCTAD/ITCD/TAB/2, U.N. Sales No. E.00-II-D-22 (2001).

<sup>127</sup> The African Growth and Opportunity Act regime is based on the United States' Trade and Development Act 2000, while the EU's Everything But Arms scheme is based on regulations of the Council of the European Union. See H.R. Res. 434, 106<sup>th</sup> Cong. (2000) (enacted), available at [http://www.agoa.gov/agoa\\_legislation/agoatext.pdf](http://www.agoa.gov/agoa_legislation/agoatext.pdf); Council Regulation 2820/98 on Applying a Multiannual Scheme of Generalised Tariff Preferences for the Period 1 July 1999 to 31 December 2001, O.J. (L 65/20); Council Regulation 416/2001 on Amending Regulation (EC) No 2820/98 Applying a Multinational Scheme of Generalised Tariff Preferences for the Period of 1 July 1999 to 31 December 2001 so as to Extend Duty-Free Access Without Any Quantitative Restrictions to Products Originating in the Least Developed Countries, O.J. (L 60/43).

<sup>128</sup> See H.R. Res. 434 at §104 (a)-(b), available at [http://www.agoa.gov/agoa\\_legislation/agoatext.pdf](http://www.agoa.gov/agoa_legislation/agoatext.pdf).

<sup>129</sup> See Council Regulation 416/2001 *supra* note 127, at art. 6. (to be phased out in stages, and eliminated by 2006).

<sup>130</sup> See *Handbook on Special Provisions for Least Developed Countries (INT/97/A06)*, UNCTAD, Technical Cooperation Project on Market Access, Trade Laws and Preferences, at 8, U.N. Doc. UNCTAD/ITCD/TSB/Misc. (May 2001). Also, an examination of the region's performance under the OGOA shows that although aggregate US imports from the region increased from \$21,286.8 to \$25,644.3 million between 2001 and 2003, this was evidently influenced by oil and mineral exports from the region (hardly a reflection of genuine domestic economic activity). Indeed, the performance of certain individual countries showed a net decline. See U.S. Dep't of Com., *U.S. Trade with Sub-Saharan Africa*, available at <http://www.agoa.gov/resources/annstats03.pdf>.

<sup>131</sup> See WORLD DEVELOPMENT REPORT 1997, *supra* note 88, at 14; A. Goldman, *Survey – Nigeria*, FIN.

without which no meaningful or sustainable economic activity is possible. Moreover, the very fact that much of “developing Asia,” once in the same state of colonialism and underdevelopment as Africa, is emerging as an economic powerhouse in its own right, globalization notwithstanding,<sup>132</sup> illustrates the simple fact that Africa must not wait until self-interest is completely eliminated from international economic relations before its rulers begin to adopt the very elementary measures necessary for the emancipation of their people from economic misery.<sup>133</sup>

### E. Perspectives From African Rulers

¶45 Unsurprisingly, African rulers have accepted no responsibility whatsoever for the continent’s depressing state. For example, the so-called Lagos Plan of Action – itself a 1980s version of the much-heralded NEPAD<sup>134</sup> – blamed Africa’s economic woes on “[t]he effect of unfulfilled promises of global development strategies...”<sup>135</sup> It adds, “...despite all efforts made by its leaders, [Africa] remains the least developed continent...exploitation has been carried out through neo-colonial external forces...”<sup>136</sup> This view was later echoed by Nigeria’s ambassador to Washington, who reportedly stated: “Certainly, Nigeria is not free from worldwide economic and social malaise, largely caused by external factors, like unfavourable trade terms and fluctuating commodity prices.”<sup>137</sup> And this, in spite of the fact that economic mismanagement and endemic corruption has meant the conscious neglect of the country’s agricultural sector by each of its post-independence regimes in favour of oil, which, as of 2002, accounted for over 95 percent of the country’s export receipts.<sup>138</sup> This escapist mindset has become the basis for Africa’s interaction with the rest of the world, as evidenced during the recent collapse of world trade talks in Mexico, where its delegates were among the most vociferous in blaming protectionism for their countries’ inability to trade,<sup>139</sup> even though as already noted, very few of the region’s countries are in a position to utilize the current preferential regimes, particularly those offered by the EU and the United States.

## V. AFRICA’S MISERY: SOME DISTURBING INSIGHTS

¶46 Of all the explanations often proffered for Africa’s state of chronic underdevelopment, some of the most insightful and persuasive are those offered (separately) by George Ayittey<sup>140</sup> and Nicolas van de Walle.<sup>141</sup> For Ayittey, the

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TIMES, Mar. 30, 2000, at 10.

<sup>132</sup> See *African Development in a Comparative Perspective*, *supra* note 114, at 70; See *Human Development Report 1999*, *supra* note 42, at 137.

<sup>133</sup> As already suggested, a good starting point in this regard would be for governments in the region to show respect for State institutions, as well as striving to put in place the kind of basic infrastructure without which no legitimate economic activity is possible.

<sup>134</sup> See *supra* note 38.

<sup>135</sup> *Preamble to Lagos Plan of Action for the Economic Development of Africa 1980 – 2000*, Organization of African Unity (1980) (adopted by the Assembly of Heads of State and Government of the OAU, Second Extraordinary Summit, Lagos, Nigeria, 28-29 April 1980).

<sup>136</sup> *Id.* at ¶ 5.

<sup>137</sup> See WASH. POST, Jan. 15, 1992, at A22.

<sup>138</sup> See *Country Brief*, World Bank Group, available at <http://www.worldbank.org/afr/ng2.htm>. (updated September 2004).

<sup>139</sup> See WTO Ministerial Conference, 5<sup>th</sup> Sess., *Consolidated African Union/ACP/LDC Position on Agriculture*, WT/MIN(03)/W/17 (Sept. 12, 2003). This conference was held in Cancún on September 10-14, 2003).

<sup>140</sup> See GEORGE B. N. AYITTEY, *AFRICA IN CHAOS* (1999).

<sup>141</sup> See VAN DE WALLE, *supra* note 76.

people of the continent have been betrayed by their rulers – an elitist and “arrogant bunch of oppressive kleptocrats” who, in much of the region, are “worse than the European colonialists.” Africa, he notes, “has been hijacked by gangsters, crooks, and scoundrels,” and has become a continent where government officials do not serve the people, and where “anyone with an official designation can pillage at will.”<sup>142</sup> The infamous excesses of such vicious tyrants as Mobutu and Bokassa, he suggests, are mere manifestations of a wider problem that has bedevilled the continent since independence.<sup>143</sup> One of these, he notes, is the systematic undermining of State institutions by the region’s rulers as a way of strengthening their own grip on power. Thus, although every country in the region has a judicial system, their primary purpose is to serve the interests of the elite, while violating the basic rights of the poor.<sup>144</sup>

¶47 For van de Walle, Africa’s state of “permanent crisis” stems simply from “neopatrimonialism,” an essentially client list approach to governance which relies on a system of “favours” and “privileged access to public resources;” an inherently corrupt system in which the traditional divide between the public and private spheres has become blurred, and which forms the basis of policy choices that ultimately result in economic chaos.<sup>145</sup> This, he argues, has in turn created an “aid-dependency syndrome,” as donor agencies attempt to fill the gap, often assuming the roles of government in many respects, with the result that “[b]y the early 1990s, Africa’s relationship with the international economy was almost entirely mediated by public aid flows.”<sup>146</sup>

¶48 What makes the above two views so instructive is the fact that although there is no evidence of collaboration between the authors, they both point to a single factor: the catastrophic failure of leadership.<sup>147</sup> Both also validate an earlier study by the World Bank, which reached a similar conclusion: “It is in sub-Saharan Africa that the deterioration in the state’s effectiveness has been most severe – the result of eroding civil service wages, heavy dependence on aid, and patronage politics.”<sup>148</sup> The study also notes that the majority now have lower “state capability” than they did at independence, adding, “[a]n institutional vacuum of significant proportions has emerged in many parts of sub-Saharan Africa, leading to increased crime and an absence of security, affecting investment and growth.”<sup>149</sup>

#### A. Africa’s Misrule: Its Unique Features

¶49 Elitist exploitation is not a peculiarly African problem; it could, after all, be argued that every society in the world is ruled by some kind of elitist clique, at least

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<sup>142</sup> See AYITTEY, *supra* note 140, at 129, 151.

<sup>143</sup> *Id.* at 136, 150. Bokassa is believed to have squandered up to \$20 million or 20 percent of his country’s GNP to crown himself “Emperor” of the Central African Republic, while Mobutu is said to have stolen up to \$15 billion from his country’s treasury.

<sup>144</sup> *Id.* at 126-132. Indeed, he illustrates this with examples from his native Ghana, showing a clear pattern in the unequal dispensation of criminal justice between the rich and the poor.

<sup>145</sup> See VAN DE WALLE, *supra* note 76, at 50.

<sup>146</sup> *Id.* at 189-220.

<sup>147</sup> An IMF study also mentions such factors as rapid population growth, armed conflicts, inadequate infrastructure, political instability, all of which are attributable to poor leadership. See CALAMITSIS ET AL, *supra* note 68.

<sup>148</sup> See WORLD DEVELOPMENT REPORT 1997, *supra* note 88, at 162.

<sup>149</sup> *Id.* Whether investment and growth should be placed above human development has, of course, always been debatable. And although human rights advocates have traditionally favoured the latter, the point remains that whichever path Africa chooses, it cannot achieve development (however defined) without effective institutions and basic infrastructure.

insofar as it pursues an agenda that is not primarily or exclusively in the interest of the people it governs. For example, the Bush Administration in the United States, like many of its predecessors, is believed to be deeply beholden to certain corporate interests through an inherently corrupt party funding system which makes a nonsense of America's claim of being a truly representative democracy.<sup>150</sup> Neither are dictatorial regimes an African invention. As highlighted by Wade Mansell, dictatorships are not respecters of geography.<sup>151</sup> Indeed, almost without exception, the entire Arab world is ruled by some of the most corrupt regimes in history. Nor is brutality an exclusively African preoccupation. For every Idi Amin in Africa, there has been a Pol Pot in Asia, or a Hitler in Europe. Moreover, kleptocratic misrule is hardly an exclusively African phenomenon. For every Mobutu or Abacha, the world has witnessed the Marcoses, a Samozza, or the Ceausescus – just a few examples of rulers who regarded their countries' wealth as their own personal assets. Indeed, a recent Channel 4 television programme revealed that Edward Shevardnadze's Georgia was ridden with graft, with aid funds being appropriated by government officials and drug enforcement agents dealing in the very substances they were supposed to be confiscating.<sup>152</sup> Moreover, a recent and rare first-hand account of life in North Korea under the macabre tyranny of Kim Jong Il by a former official of the aid organization, World Vision, reveals that very few African rulers can match this regime in terms of its ability, not just to deny basic human rights to its people, but to also control their very thoughts and daily lives through a bizarre and thoroughly dehumanizing socio-political experiment called "*Juche*".<sup>153</sup> Indeed, a recent BBC documentary, "This World", also revealed, among other violations, the starvation of its citizens by the regime, as well as credible accounts of routine testing of chemical and biological agents on the inmates at its secret Prison Camp 22, the victims including women, and children.<sup>154</sup> Even poverty itself is evidently not a uniquely African experience, at least insofar as it exists, albeit in relative terms, even in the richest societies of the world.

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What makes the African experience unique, however, is a combination of internal and external factors. Internally, there is amongst African rulers themselves a definite, cult-like determination to preserve the status quo, complete with the ritual of annual OAU (now AU) "summits," the purposes of which are only understood by "the brotherhood."<sup>155</sup> Indeed, the very idea of the AU, with its infinite list of impressive aims – such as the establishment of the "Pan-African Parliament", the "Court of Justice" and certain "Financial Institutions" – made up of the African Central Bank, the African Monetary Fund and the African Investment Bank<sup>156</sup> – not to mention some twenty nine other "Treaties, Conventions, Protocols and Charters", is based, like the tenets of secret cults, on an a belief in scientific impossibilities. It is, after all, logically impossible to create such supranational institutions from the economic and

<sup>150</sup> See Douglas Waller, *Campaign Finance: Looking for the Loopholes*, TIME, Feb. 25, 2002; Karen Tumulty, *Bush in the Glare*, TIME, Jan. 21 2002.

<sup>151</sup> See Wade Mansell, *Legal Aspects of International Debt*, 18 J. OF L. & SOC'Y 381, 384 (1991).

<sup>152</sup> These and other revelations were shown on television before Shevardnadze was ousted from power. See Jonathan Miller, *1900 Hours News Programme*, Dec. 2, 2003.

<sup>153</sup> See ANDREW S. NATSIOS, *THE GREAT NORTH KOREAN FAMINE: FAMINE, POLITICS, AND FOREIGN POLICY* (2002).

<sup>154</sup> The programme, titled "Access to Evil" was presented by Olenka Frenkiel, and was aired between 2100 and 2200 hours on the 1st of February 2004, on BBC 2.

<sup>155</sup> Judging, at the very least, from the above statement attributed to Sekou Toure of Guinea which raises questions as to what else such summits were meant for. See UMOZURIKE, *supra* note 26.

<sup>156</sup> See CONSTITUTIVE ACT OF THE AFRICAN UNION, July 11, 2000 (Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government in Lome Togo), available at <http://www.africa-union.org/home/Welcme.htm>.

political shambles that currently constitute the various member-states of the “Union.” Political gimmickry may be an intrinsic feature of international relations (and in this respect, the AU may not be different from the Arab League) but nowhere else in the world has it been turned, effectively, into a development strategy.

¶51 The other level at which this cult-like solidarity manifests itself is in regard to political – and by extension, economic – accountability, where the notion of an “African solution” trumps every other consideration. A reaffirmation of the insidious notion of cultural relativism at its worst, this mindset has little room for victims of human rights violations.

¶52 Two examples illustrate this point. First, in spite of the fact that Mugabe’s conduct has violated every known aspect of African culture, not to mention internationally recognized human rights norms, no African ruler has been willing to condemn him to date. On the contrary, their conduct at recent Commonwealth summits simply confirms their determination to preserve “the brotherhood” at the expense of everything else.<sup>157</sup> Indeed, even Nelson Mandela’s own successor, Thabo Mbeki, has not concealed his anger at the international community for criticizing Mugabe. He is reported to have stated recently: “The land question has disappeared from the global discourse about Zimbabwe, except...to highlight the plight of former white landowners.”<sup>158</sup> So determined has Mbeki been to strengthen (and broaden) “the brotherhood” that he recently travelled to Haiti, where he reportedly spent \$1.5million, effectively celebrating the kleptocratic despotism of the now exiled Jean-Bertrand Aristide.<sup>159</sup> And from all indications, he was even prepared to extend military support to that regime.<sup>160</sup> The attitude of the AU could be contrasted with that of the Association of South East Asian (ASEAN) countries, which, although not composed of quintessential democrats, has demonstrated its willingness to emancipate their citizen from poverty, as noted earlier.<sup>161</sup>

¶53 The evident contempt for human rights by African rulers has in turn prompted near-palpable cynicism from some Western leaders, who appear to regard even the most atrocious amongst the former as a “partner” in the development of the continent.<sup>162</sup> This was much in evidence at a conference organized by President

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<sup>157</sup> See *African Body Slams Commonwealth*, BBC NEWS, December 9, 2003, available at <http://news.bbc.co.uk/1/hi/world/africa/3304461.stm>. A veteran African observer puts it thus: “...solidarity among Africa’s rulers remains more important than the pledges they have made to good government, democracy and respect for human rights.” See Richard Dowden, *Why Blair’s missionary message flopped with African leaders*, OBSERVER, Sept. 8, 2002, available at <http://www.observer.co.uk/Print/0,3858,4496678,00.html>.

<sup>158</sup> See *‘Commonwealth Bias’ Angers Mbeki*, BBC NEWS, Dec. 12, 2003 (UK edition) available at <http://news.bbc.co.uk/1/hi/world/africa/3312991.stm>.

<sup>159</sup> Mbeki’s explanation was that his trip “...was an important sign of solidarity with the world’s first black-led republic and a step towards cementing ties between Africa and communities of the African diaspora.” See *Haitians Shoot at Mbeki’s Chopper*, BBC NEWS, Jan. 2, 2004 (UK edition) available at <http://news.bbc.co.uk/1/hi/world/africa/3363317.stm>.

<sup>160</sup> See *Haiti Arms Row Rocks South Africa*, BBC NEWS, Mar. 15, 2004 (UK edition) available at <http://news.bbc.co.uk/1/hi/world/africa/3513006.stm>.

<sup>161</sup> Indeed, even the Arab League, which is not entirely dissimilar to the AU in many respects, has been willing to isolate the likes of Gaddafi and Saddam, even if not on known human rights grounds.

<sup>162</sup> “Cynicism” because it could be argued that the occasional photo opportunity between a Western leader and an African ruler (despot or not) gives their domestic constituency the impression that “something is being done” for the people of Africa. Moreover, as noted by Human Rights Watch, the “tradition of competitive foreign policies toward Africa” between the French and UK governments (both of which have significant input in the EU’s foreign policy towards the region) has, over the years, dictated that one government’s African pariah becomes the other’s ally. Hence, while the British government was condemning Mugabe’s atrocities (even if merely rhetorically), the French played host to the tyrant. See *World Report 2002: Africa Overview*, *supra* note 69.

Chirac of France on the region titled “Africa and France, Together in Their New Partnership,” to which every ruler on the continent – except leaderless Somalia’s – was invited. Even Mugabe was also invited, in spite of a supposed EU-wide travel ban.<sup>163</sup> In any event, African rulers had reportedly threatened to boycott the conference if Mugabe was excluded.<sup>164</sup> Thus, a coincidence of selfish interests between the French government and African despots took precedence over every other consideration, including the need to isolate rulers who evidently constitute an impediment to the realization of the basic needs of the people of the region.

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To be sure, the French government does not operate in isolation. British Premier Tony Blair also appears determined to safeguard this “partnership” regardless of the outcome: In a speech delivered with characteristic messianic zeal, he told his Labour party activists in October of 2001 that Africa was “a scar on the conscience of the world” which needed to be “healed.” “A partnership for Africa...based around the New African Initiative” he added, “is there to be done if we find the will.”<sup>165</sup> What has become of that “partnership” three years afterwards remains to be explained. In the meantime, the Prime Minister has set up a new Commission for Africa, whose role “will be a comprehensive assessment of the situation in Africa and policies towards Africa.”<sup>166</sup> Indeed, the word “partnership” was more recently echoed, with equal passion, by his former International Development Secretary, Baroness Amos (currently leader of the House of Lords) in a radio debate, in response to a suggestion that Africa is, more than anything else, a casualty of bad government.<sup>167</sup> Nor are these Western leaders alone in this cynical enterprise. A visit to the websites of various multilateral agencies (including the UN’s) reveals an apparently obligatory obsession with the idea of a “partnership” with these rulers.<sup>168</sup> The neo-conservative American think-tank, the Heritage Foundation, may not have much to offer in terms of solutions to Africa’s problems (except perhaps for the much discredited SAPs or its variants); but a description, by one of its commentators, of the region as “a playground for spoilt despots wreaking havoc on their fiefdoms” could not be more appropriate.<sup>169</sup>

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In criticising the nature of the relationship between international actors and African rulers, it is necessary to acknowledge that these same actors are also actively

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<sup>163</sup> Further information on the conference, including speeches, are available at the French Embassy’s website at [http://www.info-france-usa.org/news/statmnts/2003/franceafrica\\_summit.asp](http://www.info-france-usa.org/news/statmnts/2003/franceafrica_summit.asp). The conference took place between February 19<sup>th</sup> and 21<sup>st</sup> 2003.

<sup>164</sup> See Alex Lefebvre, *Franco-African Summit: The Scramble for Africa Intensifies*, World Socialist Web Site (WSWS), March 3, 2003. Available at <http://www.wsws.org/articles/2003/mar2003/summ-m03.shtml>.

<sup>165</sup> Prime Minister Tony Blair, Part One of the Speech by Prime Minister, Tony Blair, at the Labour Party Conference (Oct. 2, 2001) (transcript available at <http://politics.guardian.co.uk/labour2001/story/0,1414,562006,00.html>).

<sup>166</sup> See *PM Launches Commission for Africa*, DIRECT GOV, Feb. 26, 2004, available at <http://www.number-10.gov.uk/output/Page5425.asp>.

<sup>167</sup> *Any Questions: The Royal Society of Arts, London 250<sup>th</sup> Anniversary Panel*, BBC Radio 4 broadcast, Mar. 19, 2004.

<sup>168</sup> A statement by the World Bank, for example, notes: “A new dynamic has emerged on the continent, with African people and leaders increasingly taking the reins of the development agenda...” See YEAR IN REVIEW: ANNUAL REPORT 2002, The World Bank Group, at [www.worldbank.org/annualreport/2002/chap0502.htm](http://www.worldbank.org/annualreport/2002/chap0502.htm) (last visited Nov. 9, 2004). Also, the UN Secretary-General stated in a recent report: “The United Nations system is...uniquely placed to help to create the momentum for a renewed international partnership between Africa and the international community, rooted in the commitment of African leaders.” See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, THE ROLE OF THE UNITED NATIONS SYSTEM IN SUPPORTING THE EFFORTS OF AFRICAN COUNTRIES TO ACHIEVE SUSTAINABLE DEVELOPMENT: REPORT OF THE SECRETARY-GENERAL, UN Doc. E/2001/83, para. 2 (June 12, 2001).

<sup>169</sup> See Nile Gardiner, *A New Vision for Africa: Web Memo #307*, The Heritage Foundation: Web Memo, at [www.heritage.org/Research/Africa/wm307.cfm](http://www.heritage.org/Research/Africa/wm307.cfm) (July 3, 2003).

engaged with obnoxious regimes the world over. Successive US Administrations, for example, have been unflinching allies of the decadent and repressive Saudi dynasty for many decades, as have their British counterparts. The United Nations, for its part, has maintained a presence in various countries with questionable human rights regimes – and appropriately so, given its human rights mandate.<sup>170</sup> Thus, on the surface, it could be argued that engagement by the international community with African despots is not unique. However, this would ignore the very nature of these relationships: As well as being premised on cynicism, they are also based on what might be called deliberate ignorance. This almost certainly stems from the fact that, in general, very few of these actors ever attempt to understand the political, sociological, and indeed the economic environments in which they operate. So much, after all, has been acknowledged by the World Bank’s former Chief Economist who has offered an insight into the astonishingly cavalier and routine manner in which its sister organization, the IMF, conducts its business.<sup>171</sup> This, moreover, is the theme of Graham Hancock’s widely-cited book, *Lords of Poverty*, which highlights how virtually no consideration is given by aid donors to its supposed beneficiaries.<sup>172</sup> It follows that in the context of SSA, their policies are inexorably premised upon a misreading of the relationship between the victims of poverty and their ruling elites. The selfish interests of Africa’s ruling elites, it appears, are the same as those of the region’s long-suffering people. How else can one explain the fact that African rulers continue to receive foreign aid of every description (so much so that the region has become the most aid-dependent in the world),<sup>173</sup> without such inflows being strictly conditional upon the extent to which they are channelled towards poverty alleviation?<sup>174</sup>

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Ignorance of Africa on the part of international actors is also influenced by a debilitating kind of political correctness – a patronizing of interests fuelled by a desire not to be seen to be critical of rulers who are invariably considered to be victims of colonial or some other injustice. Again, this attitude does not recognize the evident distinction between the region’s rulers and their selfish interests, and the real victims of economic misery. As pointed out by Ayittey, to do so would be seen as “blaming the victim.”<sup>175</sup> The upshot of this attitude is that whereas the odious regime in Saudi Arabia, for example, is condemned for what it is, and Kim Jong Il’s North Korea a subject of universal derision or opprobrium, African dictatorships are seen as “partners.” It also explains the fact that although many commentators are willing to

<sup>170</sup> See UN Charter, *supra* note 23, preamble to art. 55 and 56.

<sup>171</sup> See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 23-24 (2002).

<sup>172</sup> See GRAHAM HANCOCK, *LORDS OF POVERTY: THE FREEWHEELING LIFESTYLES, POWER, PRESTIGE AND CORRUPTION OF THE MULTIBILLION DOLLAR AID BUSINESS* (1989).

<sup>173</sup> See World Bank, *supra* note 88, at 235. According to one source, between 1990 and 1995, aid represented over 50 percent of government revenue, and 71 percent of its public investment. Indeed, he also notes: “In many countries in the region, virtually the entire nonrecurrent component of the budget as well as large parts of the recurrent budget were financed by the donors.” See VAN DE WALLE, *supra* note 76, at 220.

<sup>174</sup> In one sense, it could be argued that the HIPC initiative is one such attempt, not least because it makes poverty alleviation a key condition for debt reduction. However, aside from any criticism that could be levelled against other aspects of the initiative itself, it is a near-certainty that African rulers would vehemently oppose any such attempt on grounds of “undue interference.”

<sup>175</sup> See AYITTEY, *supra* note 140, at 274-275. Another commentator on the region asserts: “If Blair wants to help Africa he needs to listen more, preach less and tread softly in the prickly African bush. He must learn that poverty of the people does not mean weakness in the leaders and that Africa’s leaders do not split neatly into goodies and baddies. Most are mixed, but all dance to a drum that will keep them in power...” See DOWDEN, *supra* note 157.

blame Kim Jong Il, for example, for his people's suffering, criticisms of African rulers are often invariably tempered with references to so-called exogenous factors.

¶57 Moreover, this uncritical engagement has spawned what might be called an "initiatives industry," with international actors seemingly determined to match, and in most cases, surpass, every escapist antic embarked upon by African rulers.<sup>176</sup> It comes as no surprise, therefore, that Africa has become the most aid-dependent region in the world, while the basic needs of its people have remained at best largely ignored by both sides in this cynical enterprise, as efforts are intensified towards preserving the "partnership." This is one area in which there needs to be radical change if ordinary Africans are ever to begin to enjoy the basic rights proclaimed under the ICESCR.

#### B. *Economic Rights Violations: An Instrument of Despotic Misrule*

¶58 Much, of course, has been written on SSA, and from various disciplinary perspectives. Regrettably, this vast literature mainly articulates the region's problems in terms of either the consequences of an unfair, neo-liberal global trading regime or of poor policy choices – usually a euphemism for the non-adoption of exclusively neo-liberal economic policies.<sup>177</sup> Even within the context of human rights advocacy, violations of civil and political rights have traditionally been given priority over violations of economic rights, although it is necessary to acknowledge that this appears to be changing.<sup>178</sup> This means that the benefits accruing from violations of economic rights to African rulers have received very little or no attention.<sup>179</sup>

¶59 This, however, is not difficult to understand: the traditional (if fictional) separation of the two categories of human rights aside, it is easier to explain why the violation of civil and political rights might serve a despot's interests – primarily, his determination to remain in power – than it is to comprehend how his violation of economic rights might serve the same purpose. A clampdown on freedom of

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<sup>176</sup> Evidently, some of the multilateral initiatives are not aimed exclusively at SSA. Nevertheless, given the region's state of underdevelopment, it becomes safe to assert that it remains the main intended beneficiary. The following represent a mere snapshot: the World Bank's Comprehensive Development Framework; the Special Facility for Africa (SFA) (later replaced by the Special Programme of Assistance to Africa (SPA); the UN's Strategic Compact; the HIPC initiative; the Poverty Reduction and Growth Facility; the Global Coalition for Africa; the UN's Millennium Declaration; the UN's System-wide Special Initiative for Africa (UNSI); the United Nations Programme of Action for African Economic Recovery and Development (UN-PAAERD) (now succeeded by the New Agenda for the Development of Africa (UN-NADAF)); the Tokyo International Conference on African Development (TICAD); Commitment 7 of the Copenhagen Declaration on Social Development; the EU's EBA initiative, and the US's AGOA regime. Within the GATT/WTO framework, one might cite the Doha Development Agenda, as well as numerous other measures which the WTO has described as a "universe of special and differential treatment," See WTO Committee on Trade and Development, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions: Note by Secretariat*, WT/COMDT/W/77, at 3 (Oct. 25, 2000). The most notable ones from SSA have been the Lagos Plan of Action, and of late, NEPAD.

<sup>177</sup> E.g., Francis Ng & Alexander Yeats, *Open Economies Work Better! Did Africa's Protectionist Policies Cause It's Marginalization in World Trade?*, 1636 THE WORLD BANK POL'Y RES. WORKING PAPERS (1996); and Francis Ng and Alexander Yeats, *Good Governance and Trade Policy: Are They the Keys to Africa's Global Integration and Growth?*, 2038 THE WORLD BANK POL'Y RES. WORKING PAPERS (1999).

<sup>178</sup> See OLOKA-ONYANGO, *supra*, note 33, at 1-71; Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 81, 81-124 (1998); Craig Scott, *Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'*, 21 HUM. RTS. Q. 633, 633-660 (1999); ODINKALU, *supra*, note 100.

<sup>179</sup> Among the very few attempts to do so (which, to be sure, are not in the context of human rights law) are: P CHABAL & J-P DALOZ, *AFRICA WORKS: DISORDER AS POLITICAL INSTRUMENT (AFRICAN ISSUES)* (1999); and P. Harris, *Africa Starves as Rains Fail and Rulers Reap Profits*, THE OBSERVER, Jan. 19 2003.

expression,<sup>180</sup> for example, is a tried and tested means of stifling debate – and thus of popular agitation for change – just as the denial of participatory rights<sup>181</sup> by a one-party regime eliminates effective political opposition.

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On the contrary, it could be argued that because the denial of the rights to food or healthcare might engender a sense of marginalization and provoke a popular revolution, this cannot serve the same purpose as denials of civil and political rights. The recent uprising against Jean-Bertrand Aristide in Haiti, and his ignominious flight from the country might indeed be cited as a case in point. But then, in the case of Haiti, the impact of pressure from the American and French governments, above anything else, cannot be discounted as the deciding factor. Indeed, it is reported that he was “bundled on to a plane” by US troops.<sup>182</sup> With no such geographical proximity (and hence, an immediate threat from refugees) to the United States, SSA remains in an entirely different position. At any rate, a combination of illiteracy, poverty, hunger, homelessness and disease has rendered its people simply incapable of demanding political and economic change. African rulers have therefore come to appreciate their utility – hence, their preference for escapist gimmickry, such as NEPAD or the hopelessly grandiose aims of the AU, as a substitute for simple, practical steps aimed at poverty alleviation. Economic emancipation therefore represents as much a threat to despotism as freedom of expression, or the right to participate in “genuine periodic elections” as envisaged under the ICCPR.<sup>183</sup> It thus becomes possible to assert that in much of Africa, poverty is not simply an unfortunate state of affairs, nor, as is often suggested, a consequence of globalization or other factors; it is, on the contrary, an effective means of mass disempowerment by rulers whose only concern is the exercise of power without the attendant responsibilities.<sup>184</sup> The same is true of Africa’s endless wars, which, aside from the direct material benefits that often flow from them,<sup>185</sup> remove any vestiges of accountability, and make the ruler’s position unassailable. They also make it possible to embark on a “rights violating spree,” including the commission of such horrific crimes as rape, mutilations, and the conscription of child soldiers; thereby making it unnecessary to build hospitals or

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<sup>180</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 19(2), 999 U.N.T.S. 171.

<sup>181</sup> *Id.* Art.25(b).

<sup>182</sup> *See After Aristide, What?*, ECONOMIST, Mar. 4, 2004, at 22.

<sup>183</sup> Or how else might one explain a comment attributed to a former industries minister of Swaziland, who reportedly urged a Taiwanese investor not to pay what he considered excessive wages to his local workers because “they wouldn’t know how to spend the money”? *See* Neil Kearney, *Corporate Codes of Conduct: The Privatized Application of Labour Standards*, in REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION 205, 207 (Sol Picciotto & Ruth Mayne eds., 1999).

<sup>184</sup> Indeed, a recent report on the famine in southern Africa highlights the problem in terms of the “profits” reaped by the rulers of the region. *See* HARRIS, *supra* note 179. Aside from the direct personal benefits accruing to these rulers is the fact that “[w]hile millions of Malawians face starvation, one of the main concerns of President Muluzi is trying to change the constitution to allow him to stand for a third term...”

<sup>185</sup> This has in fact been explicitly acknowledged by the UN Security Council which “[n]otes with concern that the plundering of the natural resources and other forms of wealth of the Democratic Republic of the Congo continues and is one of the main elements fuelling the conflict in the region...” *See* UNITED NATIONS, SECURITY COUNCIL RESOLUTION 1457, U.N. Doc. S/RES/1457 (2003). *See also* Declan Walsh, *UN Calls for Sanctions to Stop ‘Plunder of Congo*, THE INDEPENDENT, Apr. 18 2001, at 14, whose report names Uganda’s Museveni, Rwanda’s Kagame, and Zimbabwe’s Mugabe as the main culprits. A World Bank report also highlights the allure of personal gains in the Liberian conflict: Initially, the war was caused by social and political factors, with control over the central government as the main objective. However, “...control over Liberia’s rich natural resources and other assets, in addition to being a means of ensuring funding for the war, has become an end in itself...” *See* WORLD DEVELOPMENT REPORT 1997, *supra* note 88, at 160.

schools, not to mention the basic State institutions and infrastructure, without which no governmental functions can take place.

### C. Somalia: Experimenting With Mobocracy

¶61 Current developments in Somalia offer what is arguably the best illustration of how leadership has been the impediment to Africa's economic emancipation. Somalia has not only become a failed State in every imaginable respect, but is almost certainly the only "mobocracy" in the world. But Somalia's collapse did not happen by accident. Since becoming independent in 1960, it was plagued by warlordism.<sup>186</sup> The post-independence regime was overthrown in 1969 by a man called Siad Barre, under whom the country became a pawn in the Cold War rivalry. In the meantime, expansionist ambitions on the part of Barre saw the country at war with neighbouring Ethiopia in an attempt to create a "Greater Somaliland," although the massive aid – first from the Soviet Union, later from the United States, and then from the Italian Socialists – it had received never reached its people. The economy, needless to add, was already in ruins by 1980 when the IMF intervened.<sup>187</sup> In the meantime, every sign of protest was met with brutal repression. According to Human Rights Watch, the Barre regime "unleashed a reign of terror against [civilians of the Isaaq clan] killing 50,000 to 60,000 between May 1988 and January 1990."<sup>188</sup> The collapse of the country in the 1990s was therefore a near-certainty.

¶62 What makes Somalia particularly instructive in relation to the African tragedy is the fact that it is, astonishingly, now enjoying a degree of stability that even its previous rulers were unable – or unwilling – to bring about. In what must be one of the most perverse political and economic developments in history, the prevalent anarchy has even spawned a thriving multi-purpose company called al-Barakaat, which had once grown to become the largest employer in the country, its interests including banking, postal services and telecommunications, with a shareholding of 600.<sup>189</sup> Of late, other developments have been noted in areas such as livestock production, road building, water and electricity. Media houses have in fact also sprung up.<sup>190</sup> And although clan warfare and mob rule remain central features of daily life, a BBC source notes that "[t]he country has one of the most dynamic economies in the East African region and is effectively an economy without a state."<sup>191</sup> In one sense, it is possible to dismiss these developments simply as a bizarre fluke, the dynamics of which cannot yet be known, not least because this would be impossible in a state of literal anarchy. If and when normality ensues, future research would almost certainly offer a more revealing insight. This, however, would ignore

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<sup>186</sup> See AYITTEY, *supra* note 140, at 51.

<sup>187</sup> *Id.* There are, of course, alternative accounts of the Somali tragedy, which blame it on the policies of the IMF. See, e.g., MICHEL CHOSSUDOVSKY, *THE GLOBALISATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS* 101 (1998). This article, however, rejects such accounts, not least because they fail to acknowledge the fact that the economy was already in ruins by the time the IMF intervened.

<sup>188</sup> See Human Rights Watch, *Somalia: Beyond the Warlords, The Need for a Verdict on Human Rights Abuses*, Mar. 7, 1993, available at <http://www.hrw.org/reports/1993/somalia>.

<sup>189</sup> At least until the Bush Administration included it among its list of terrorist-friendly organizations and threatened to put it out of business. See Hassan Barise, *Somali Company 'Not Terrorist'*, BBC NEWS: WORLD EDITION: AFRICA, Nov. 8, 2001, available at <http://news.bbc.co.uk/1/hi/world/africa/1645073.stm>. Indeed, a university of some sort has also sprung up in an area called Puntland. See Robert Walker, *Puntland University Seeks Peace Dividend*, BBC NEWS: WORLD EDITION, May 23, 2003, available at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/3050481.stm>.

<sup>190</sup> See Rashid Abdi, *Life Amid Mogadishu's Ruins*, BBC NEWS: WORLD EDITION, at <http://news.bbc.co.uk/1/hi/world/africa/3629671.stm> (last modified Apr. 16, 2004).

<sup>191</sup> *Id.*

one important point: that given the right kind of leadership (and one capable of giving vent to the ingenuity already demonstrated by the Somali people), their level of economic development can only be imagined. Indeed, the very fact that so much has emerged from this tragic chaos serves as an eternal indictment against certain so-called governments on the continent of Africa.

## VI. A HUMAN RIGHTS SOLUTION?

¶63 Assuming, therefore, that leadership constitutes the obstacle to the realization of human rights in Africa, this invariably raises questions regarding what measures might be appropriate as a way of emancipating its long-suffering people. In proposing a “human rights solution,” it is recognized that law is merely one possible means of effecting the desired change. It is, after all, the case that concerted political pressure, for example, might prove more effective: As noted in Part V, it was political pressure from the United States and France which, more than anything else, brought the Aristide misrule in Haiti to its belated end. Indeed, an essentially economic measure could be just as effective: the imposition of targeted sanctions against individual actors within a rights-violating regime, which should necessarily involve the confiscation of stolen State assets (and their proceeds), would make a Mobutu or an Abacha-style “rule by theft” inherently unprofitable for those concerned. Regrettably, neither of these can be considered a realistic possibility: A Haiti-style solution, for example, would have to be repeated in over 40 different countries on the continent, while the kind of targeted sanctions envisaged would certainly be resisted by the powerful Western banking institutions in which the stolen funds are hidden.<sup>192</sup> At any rate, given that this is primarily a law-based critique – not to mention the fact that political will on the part of the international community to adopt the above measures is simply non-existent – only the legal possibilities will be explored.

¶64 As of March 2003, the majority of countries in SSA had ratified the two Covenants.<sup>193</sup> By so doing, African rulers, like other world leaders, explicitly pledged themselves to the realization of the rights proclaimed therein.<sup>194</sup> Indeed, even within

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<sup>192</sup> Mobutu may have become notorious for stealing over \$10 billion from his people. See Joseph Hanlon, *Dictators and Debt*, Jubilee 2000 Coalition, at <http://www.jubilee2000uk.org/jubilee2000/news/dictatorsreport.html> (Nov. 1998). However, a BBC report gives some indication of the extent of this sordid enterprise. See *Africa Looted for \$140bn*, *Leader Says*, BBC NEWS: BUSINESS EDITION, at <http://news.bbc.co.uk/1/hi/business/2043403.stm> (June 13, 2002). In Nigeria alone, Abacha is reported to have stolen over \$3 billion. The banks named in the scandal include: Deutsche Bank, Commerzbank BNP Paribas, Credit Agricole, Credit Suisse, UBS, HSBC, Barclays, NatWest, Goldman Sachs, Merrill Lynch, and Citibank. See *Britain Goes After Abacha Millions*, BBC NEWS WORLD EDITION: AFRICA, at <http://www.bbc.co.uk/1/hi/world/africa/1606565.stm> (Oct. 18, 2001).

<sup>193</sup> The following represents the status and year of ratification/accession by the named countries, of either or both Covenants: Angola, both, 1992; Benin, both, 1992; Botswana, ICCPR only, 2000; Burkina Faso, both, 1999; Burundi, both, 1990; Cameroon, both, 1984; Cape Verde, both, 1993; Central Africa, both, 1981; Chad, both, 1995; Congo, both, 1983; DRC, both, 1976; Djibouti, both, 2002; Ivory Coast, both, 1992; Equatorial Guinea, both, 1987; Eritrea ICCPR 2002, ICESCR 2001; Ethiopia, both, 1993; Gabon, both, 1983; Gambia, ICCPR 1979, ICESCR 1978; Ghana, both, 2000; Guinea, both, 1978; Guinea Bissau, ICESCR 1992; Kenya, both, 1972; Lesotho, both, 1992; Madagascar, both, 1971; Malawi, both, 1993; Mali, both, 1974; Mauritius, both, 1973; Mozambique, ICCPR, 1993; Namibia, both, 1994; Niger, both, 1986; Nigeria, both, 1993; Rwanda, both, 1975; Senegal, both, 1978; Seychelles, both, 1992; Sierra Leone, both, 1996; Somalia, both, 1990; South Africa, ICCPR, 1998; Sudan, both, 1986; Tanzania, both, 1976; Togo, both, 1984; Uganda ICESCR 1987, ICCPR 1995; Zambia, both, 1984; Zimbabwe, both, 1991. See ICCPR, *supra* note 180; international Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>194</sup> See ICCPR, *supra* note 180, Art.2, under which “[e]ach State party to the present Covenant

the context of customary international law, the UN Declaration on the Right to Development, for example, explicitly identifies the State as the primary guarantor of human rights.<sup>195</sup> Thus, any examination of the problems faced by the region must necessarily begin with an acknowledgement of the legal obligations that its rulers have voluntarily undertaken, a deliberate breach of which should serve as a convenient basis for the sanctions to be examined. Before exploring such legal remedies, however, it is pertinent to acknowledge that an attempt to invoke them would not be unproblematic, although as will be shown later, these in themselves are not insurmountable obstacles.

#### A. *The Nature of States Parties' Obligations*

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The first of these apparent obstacles relates to the nature of States Parties' obligations as spelled out under the ICESCR itself: to "take steps...to the maximum of its available resources, with a view of achieving progressively the full realization" of economic rights.<sup>196</sup> A number of related problems immediately spring to mind in this regard, the first being the indeterminate nature of the phrase "to the maximum of its available resources." This inherent vagueness means that it lends itself very easily to subjective interpretation, especially by regimes intent on keeping their citizens in perpetual misery. Indeed, the Committee on Economic, Social and Cultural Rights (hereinafter the Committee)<sup>197</sup> alluded to this possibility by noting that this concept is often treated by governments merely as a statement of intent, as opposed to "a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of [economic rights]."<sup>198</sup> The Committee however went on to explain that Article 2(1) "imposes an obligation to move as expeditiously and effectively as possible towards that goal."<sup>199</sup> Interestingly, various experts on this subject, acting in concert with certain interested parties, including the UN Centre for Human Rights, had earlier proclaimed the much-cited Limburg Principles (and ten years later, the Maastricht Guidelines) echoing similar views in an attempt to explain the nature of States Parties obligations.<sup>200</sup>

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undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant..." See also ICESCR, *supra* note 194, Art.2, "[e]ach State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

<sup>195</sup> See Declaration on the Right to Development, G.A. Res. 41/128, Annex, 41 U.N. GAOR Supp. (No.53) at 186, U.N. Doc. A/41/53 (1986). The relevant provisions are: Art.2(3), which recognizes the right (and duty) of States to formulate appropriate policies for the well-being of their peoples "on the basis of their active, free and meaningful participation...and in the fair distribution of the benefits resulting therefrom"; Art.3(1), which imposes a "primary responsibility" on States for "the creation of national and international conditions favourable to [its realization]"; and Art.5, which imposes a duty on States to "take resolute steps to eliminate the massive and flagrant violations" of human rights resulting from *inter alia*, "threats of war."

<sup>196</sup> See ICESCR, *supra* note 193, Art.2(1).

<sup>197</sup> The Committee was created by a Resolution of the UN's Economic and Social Council (See ECOSOC Res. 1985/17 of 28 May 1985, as cited in United Nations Economic and Social Council, Annual Sessions of the Committee on Economic, Social and Cultural Rights, Resolution 1995/39, 52nd plenary meeting, 25 July 1995).

<sup>198</sup> See UN Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States Parties Obligations (Art. 2, para.1 of the Covenant) (Fifth Session, 1990) UN Doc.E/1991/23, para.9 [hereinafter General Comment no.3]

<sup>199</sup> *Id.*

<sup>200</sup> See United Nations, Economic and Social Council, Commission on Human rights, *Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights in the International Covenant on Economic, Social and Cultural Rights*,

But how, it might be asked, are countries that are too poor to realize these rights, supposed to take steps to realize them? There is little doubt that at first sight, this apparent contradiction seems as self-explanatory as the basic legal maxim: *nemo dat quod non habet* – one, after all, cannot give that which he does not have. This, however, must not be the end of the argument, not least because the question of resources can itself become a most convenient excuse for egregious violations. At any rate, as explained within the Limburg Principles, “[t]he obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.”<sup>201</sup> Moreover, in its *Human Development Report* for the year 1990, the United Nations Development Programme stated: “Developing countries are not too poor to pay for human development...Most budgets can...accommodate additional spending on human development by reorienting national priorities...”<sup>202</sup> The report cites defence spending as one area where countries tend to waste their scarce resources.<sup>203</sup> To this could be added the “white elephant” projects and blatant misuse of public funds on the part of African rulers (some of which are outlined in Part III). Thus, this apparently insurmountable problem can be mitigated by a simple reordering of priorities by governments in the region.

The second problem relating to the nature of States Parties’ obligations is that an international tribunal (of the kind envisaged herein) charged with determining whether a ruler of a poor country has violated his people’s right to food, for example, might wonder whether this is not an essentially economic question,<sup>204</sup> as opposed to one involving a breach of international law. What is being proposed in this article, however, is not the indictment of every ruler for every violation of every right proclaimed under the ICESCR, just as the International Criminal Court, for example, is not mandated to adjudicate on every violation of every right under the ICCPR.<sup>205</sup> Nor would a single case of malaria, even if caused by a failure to provide essential drugs in hospitals, necessarily result in an indictment. On the contrary, what is envisaged is conduct that results in the scale of suffering of the kind highlighted at the outset. Much, therefore, would depend on the severity and scale of the violation(s) alleged: The conduct of the accused must have been so objectively blameworthy, and the harm in question so easily avoidable that it could reasonably be held to have been a flagrant violation of not just the relevant right under the ICESCR, but also of the right to human dignity which, after all, is the very essence of human rights, as proclaimed under the various international instruments.<sup>206</sup> In other words, a broad liability threshold would have to be established, to be mitigated only by a “best endeavour” defence on the part of the accused.

*and Study of Special Problems Which the Developing Countries Face in Their Efforts to Achieve These Human Rights: Status of the International Covenants on Human Rights*, U.N. Doc. E/CN.4/1987/17 (Jan. 8, 1987); and *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691, 691-701 (1998).

<sup>201</sup> See *Id.*, para.23.

<sup>202</sup> See United Nations Development Program, HUMAN DEVELOPMENT REPORT 1990, para 7 (1990).

<sup>203</sup> *Id.*

<sup>204</sup> Indeed, the South African Constitutional Court was faced with a similar question (in the context of the right to health) in *Soobramoney v Minister of Health, Kwa Zulu-Natal*, 1998 (1) SA 765 (S. Afr. Constitutional Court). Regrettably, the Court allowed economic arguments to prevail.

<sup>205</sup> See Statute of the International Criminal Court, Rome, 17 July 1998, reprinted in 37 ILM 999 (1998). Under Art 1(1), the Court’s jurisdiction is limited to “the most serious crimes of international concern...” Also, by Art.5(1), “[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.”

<sup>206</sup> See, e.g., Preambles to the UN Charter; the UDHR, the ICCPR; and the ICESCR

The third apparent obstacle in regard to the nature of States Parties' obligations is the very notion of "progressive realization" itself, which invariably entails extensive data accumulation and analysis, a task which poor countries with inadequate manpower, institutions and infrastructure cannot hope to accomplish, and which therefore arguably defeats the essence of the notion itself. Indeed, it was in the light of this that a former Rapporteur to the United Nations Centre for Human Rights proposed her much-cited "violations approach," based, as she explains, on the existing monitoring processes of other human rights instruments.<sup>207</sup> Moreover, as pointed out by Steiner and Alston, the monitoring of economic rights is "especially challenging" because of "the scope of the rights, the diversity of the means by which they might be made operational, and the inevitably complex relationship between rights and resources."<sup>208</sup> From a legal perspective, they assert, the challenge is how to reconcile, through the monitoring process, the notion of progressive realization with the practicalities of resource constraints, while acknowledging the dramatic disparities in financial and administrative capacities between countries.<sup>209</sup> Yet, as the concept itself suggests, what is envisaged is not the immediate realization of universal standards applicable to every right proclaimed by the ICESCR. On the contrary, what is required is a serious attempt on the part of governments to realize these rights, beginning with the most fundamental ones, particularly those relating to basic human needs. This, after all, would explain the reliance, by the Committee, on the so-called "minimum core content" approach, focusing on the realization of such basic rights as food, healthcare, housing, and education.<sup>210</sup> An individual complaints procedure broadly similar to that which already exists under the First Optional Protocol to the ICCPR is also being proposed.<sup>211</sup> It thus becomes possible to argue that these difficulties, at the very worst, are in no sense dissimilar to those that exist within other international human rights instruments.

### B. The Language of the ICESCR

The language employed by the drafters of the ICESCR is widely believed to be merely exhortatory and therefore non-binding.<sup>212</sup> Indeed, even some renowned international lawyers who are known advocates of economic rights have raised questions regarding the extent to which the Covenant lends itself to effective enforcement.<sup>213</sup> Whether such a material difference exists between the two Covenants

<sup>207</sup> See A. R. Chapman, *A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights*, HUM. RTS. Q., vol. 18 no.1,36-37 (1996).

<sup>208</sup> See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT :LAW , POLITICS, MORALS* 305 (2nd ed. 2000).

<sup>209</sup> *Id.*

<sup>210</sup> See General Comment no.3, *supra* note 198.

<sup>211</sup> The ICESCR model would allow for both individual and group complaints, unlike the ICCPR model which does not allow for group complaints. See United Nations High Commissioner for Human Rights, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Sub-Commission on Human Rights resolution 2000/9, 25th meeting, 17 August 2000 (adopted without a vote), available at <http://www0.un.org/cyberschoolbus/treaties/economic.asp>.

<sup>212</sup> See ICESCR, *supra* note 2, art. 2(1), 993 U.N.T.S. at 5. This is often contrasted with the more emphatic language of Art.2(1) of the ICCPR, under which "[e]ach State Party...undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind..." ICCPR, *supra* note 2, art. 2(1), 999 U.N.T.S. at 173.

<sup>213</sup> See Philip Alston, *No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant*, in *THE FUTURE OF HUMAN RIGHTS PROTECTION IN A CHANGING WORLD: FIFTY YEARS SINCE THE FOUR FREEDOMS ADDRESS, ESSAYS IN HONOUR OF TORHEL OPSAHL* 79, 86 (Asbjørn Eide & Jan Helgesen eds., 1991); Philip Alston, *Out of the Abyss: The Challenges Confronting the New United Nations Committee on Economic, Social and Cultural Rights*, 9 HUM.

is however debatable, not least because most of the rights proclaimed under the ICCPR are not expressed in the absolute, non-derogable terms that are often ascribed to them: Even the right to life, for example, is only guaranteed to the extent that it is not infringed arbitrarily.<sup>214</sup> At any rate, even if the ICESCR were to pose such a problem, this would be no more serious than those which confront the municipal courts from time to time; hence, the development of well-established rules of interpretation, particularly in the common law world. For example, where a literal interpretation would result in an absurdity, judges have always been at liberty to adopt the “golden rule,” or its close variant, the “mischief rule,” which gives an intended effect to the instrument<sup>215</sup> – the “mischief” here being the need to uphold the inherent dignity of the human person as proclaimed in the Preambles to the two Covenants). Indeed, the Vienna Convention on the Law of Treaties offers useful guidance in this regard by stipulating that a treaty “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in *their context and in the light of its object and purpose*”<sup>216</sup> [emphasis added]. There is therefore a danger of overstating the significance of this apparent difference, thus accentuating a fictional distinction between rights that have, after all, been universally recognized as interrelated, interdependent, and indivisible.<sup>217</sup>

### C. The Question of Enforcement<sup>218</sup>

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As already pointed out, the “enforcement” of economic rights *as such* takes place through the process of supervision by the above Committee, which merely monitors the extent to which its States Parties claim to have realized the rights proclaimed within it,<sup>219</sup> particularly through the mechanism of State reporting – a process which, by all accounts (and amongst other flaws), relies entirely on the goodwill and sincerity of the very governments that stand accused of the violations in question. It was, after all, a veteran of the same Committee who, reflecting on how it might be seen by a lay person, once described it as: “...a system that makes governments entirely responsible for reporting on themselves, once every five years, subject to soft questioning for a few hours by cautious committees, elected by those very governments, and with almost no likelihood of serious censure or sanctions.”<sup>220</sup>

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RTS. Q. 331, 351 (1991); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 576-577 (5th ed. 1999).

<sup>214</sup> See ICCPR, *supra* note 2, art. 6, 999 U.N.T.S. at 173.

<sup>215</sup> See GLANVILLE WILLIAMS, *LEARNING THE LAW* 99-102 (8th ed. 1969).

<sup>216</sup> Vienna Convention of the Law of Treaties, *opened for signature* May 23, 1969, art. 31(1), 8 I.L.M. 679 (entered into force Jan. 27, 1980) (emphasis added).

<sup>217</sup> See also *Vienna Declaration and Programme of Action*, U.N. GAOR, at ¶ 5, U.N. Doc. A/CONF.157/23 (1993) [hereinafter *Vienna Declaration*]; ; U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, *PROCLAMATION OF TEHERAN* at ¶ 13, U.N. Sales No.E.68.XIV.2, available at [http://www.unhcr.ch/html/menu3/b/b\\_tehern.htm](http://www.unhcr.ch/html/menu3/b/b_tehern.htm) (last visited Nov. 28, 2004) [hereinafter *PROCLAMATION OF TEHERAN*]. The Proclamation of Teheran states, “Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.” *Id.*

<sup>218</sup> The term “enforcement” is perhaps inappropriate when examining the two Covenants (and indeed, many other international human rights instruments), given the non-coercive approach that is often employed. Nevertheless, this term is commonly used, not least by renowned international lawyers. See, e.g., BROWNLIE, *supra* note 213, at 536.

<sup>219</sup> The Committee is a subsidiary of the UN’s Economic and Social Council and derives its authority from it, by virtue of the latter’s Resolution. See E.S.C. Res. 1995/39, U.N. ESCOR, 52d Sess., plen. mtg. ¶ 2, (1995), available at <http://www.un.org/documents/ecosoc/res/1995/eres1995-39.htm> (last visited Nov. 28, 2004).

<sup>220</sup> Scott Leckie, *The Committee on Economic, Social and Cultural Rights: A Catalyst for Change in a System Needing Reform*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 129, 130 (Philip

However, the absence of a more effective mechanism for their enforcement should in no sense imply their unenforceability in a coercive sense. Indeed, as will be shown in this section, there are instructive precedents in this regard, both under municipal and international law. In any event, the ICESCR is not unique in not having its own *coercive* internal enforcement mechanism. An examination of the ICCPR reveals that it has no such mechanism either.<sup>221</sup> Yet, such internal limitations have been shown to constitute no bar to the effective enforcement of the rights recognized under the ICCPR. The establishment, by the UN Security Council, of ad-hoc tribunals for the prosecution of individuals accused of serious violations of international humanitarian law in the former Yugoslavia<sup>222</sup> and Rwanda<sup>223</sup> serve as examples of how such internal instrumental limitations can be overcome, while the establishment of the International Criminal Court puts this ad-hoc approach (though primarily to the enforcement of civil and political rights) on a permanent basis.<sup>224</sup> Indeed, the fact that the UK authorities were legally obliged (by virtue of the Torture Convention)<sup>225</sup> to arrest and examine the possibility of extraditing Pinochet to Spain on allegations of torture was further illustration of this reality,<sup>226</sup> although this must now be read in light of a decision by the International Court of Justice concerning a Congolese foreign minister accused of violating the 1949 Geneva Conventions and of crimes against humanity.<sup>227</sup> What these demonstrate, nevertheless, is that there are no conceptual or practical obstacles to holding State officials to account for grave violations of economic rights in the manner envisaged, albeit only after they would have left office, provided the political will exists at the international level.

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Alston & James Crawford eds., 2000).

<sup>221</sup> Its own supervisory mechanism being the Human Rights Committee established under Art.28 of the ICCPR, and whose functions (per Arts.40-45) are broadly similar in all material respects to those of the Committee on Economic, Social and Cultural Rights.

<sup>222</sup> See S. Res. 827, U.N. SCOR, X Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

<sup>223</sup> See S. Res. 955, U.N. SCOR, X Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

<sup>224</sup> See Statute of the International Criminal Court, *supra* note 205.

<sup>225</sup> See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art.7(1), 23 I.L.M. 1027 (1984).

<sup>226</sup> See *R v Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (No.3)* [2000] 1 A.C. 147. The Pinochet extradition hearings effectively became an opportunity for the House of Lords to clarify the position regarding the liability of public officials (including heads of State and governments) for human rights violations, and centred around three related questions: Whether Pinochet was immune from prosecution in respect of acts performed in exercise of his functions as head of State; whether governmental acts of torture are attributable to functions of a head of State; and whether a former head of State was entitled to immunity in relation to acts of torture. The relevant decisions were: that a former head of State had immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity as head of state pursuant to s. 20 of the State Immunity Act 1978 when read with Art. 39(2) of the Diplomatic Privileges Act 1964; but that because torture was a crime against humanity (and *jus cogens*) and in light of the Convention Against Torture of 1984, there had been a universal jurisdiction in all the Convention States Parties to either extradite or punish a public official who had committed torture; that in the light of that universal jurisdiction the State Parties could not have intended that an immunity for ex-heads of State for official acts of torture, or for systematic and widespread acts of official torture, would survive their ratification of the Convention; that since Chile, Spain and the United Kingdom had all ratified the Convention, Pinochet could have no immunity for crimes of torture or conspiracy to torture after that date.

<sup>227</sup> See Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v Belg.), 2002 I.C.J.(Feb. 14), pp.20 and 22, particularly at paras. 54 and 60, *available at* [www.icj-cij.un.org](http://www.icj-cij.un.org). At the risk of oversimplification, the Court held that a foreign minister could not face an indictment while in office, as this would interfere with his ability to perform his duties, although it also acknowledged that this did not exculpate him from criminal liability once he leaves office. For an interesting critique, see Antonio Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v Belgium Case* 13 EUR. J. INT'L L. 853 (2002).

#### D. The Problem of National Sovereignty

¶72 The vexed question of national sovereignty poses a real obstacle to the indictment and punishment of rulers who violate their people's economic rights. Arguably the cornerstone of international relations, it is rooted in Article 2(7) of the UN Charter which states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State..." What this means is that governments that, as noted in Part IV, are notoriously resistant to external scrutiny are even less likely to be receptive to any interference in regard to matters that are essentially economic. Indeed, they may even invoke their right to self-determination as guaranteed under the two Covenants with some justification.<sup>228</sup> Moreover, although developments post-WWII have consistently shown that national sovereignty represents no bar to external scrutiny where serious human rights violations are alleged, such developments have primarily (and almost exclusively) been confined to the broad sphere of civil and political rights.<sup>229</sup> Thus, any attempt to extend them to economic rights would, *prima facie*, be breaking new ground.

¶73 Paradoxically, however, these same post-war developments also suggest that indictments for violations of economic rights would not necessarily involve such a radical change, conceptual or practical. For example, whether by design or by default, even the UN Security Council has explicitly invoked its powers under Chapter VII of the UN Charter to prevent what were essentially, though by no means exclusively, violations of economic rights in certain countries, Somalia being a prime example.<sup>230</sup> Indeed, it could be argued that any intervention on humanitarian grounds is essentially aimed at protecting the economic rights of those affected, at least insofar as such Resolutions include a mandate to guarantee the delivery of emergency relief such as food, shelter and medical care. The principle, therefore, is that where violations are considered to pose a threat to international peace and security, the sovereignty of the State concerned becomes an irrelevant consideration.

#### E. The Question of Liability by Omission

¶74 One further apparent problem with an indictment for violations of economic rights would be the fact that the very nature of the rights proclaimed under the ICESCR strongly suggests that liability would be incurred mainly by way of an omission, and not by positive conduct. Indeed, the Limburg Principles employ the term "failure" in describing what amounts to a violation of economic rights.<sup>231</sup> The question, therefore, is whether the notion of criminal liability by omission is a known concept in international law. A good starting point would be a brief consideration of

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<sup>228</sup> Arts.1(1) common to both the ICCPR and the ICESCR, which proclaim the right of peoples to *inter alia*, "freely pursue their economic, social and cultural development." ICCPR, *supra* note 2, 999 U.N.T.S. at 173; ICESCR, *supra* note 2, 993 U.N.T.S. at 5.

<sup>229</sup> For an insightful account of this gradual evolution, see Nigel S. Rodley, *The Evolution of United Nations' Charter-Based Machinery for the Protection of Human Rights* 1 EUR. HUM. RTS. L. REV. 4 (1997).

<sup>230</sup> See S. Res. 814, U.N. SCOR, X Sess., 3188th mtg. at 4, U.N. Doc. S/RES/814 (1993). Of particular note is paragraph 4, which "[r]equests the Secretary-General...to provide humanitarian and other assistance to the people of Somalia..."). *Id.* A similar Resolution recognizes that "the restoration of law and order throughout Somalia would contribute to humanitarian relief operations..." S. Res. 837, U.N. SCOR, X Sess., 3229th mtg. at 1, U.N. Doc. S/RES/837 (1993).

<sup>231</sup> Indeed, the Limburg Principles employ the term "failure" in describing what amounts to a violation of the ICESCR. See *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, *supra* note 200, at ¶¶ 70-73.

English law, where this principle has had a long history. At the risk of oversimplification, the general principle is that liability can flow from an omission, provided it can be shown that the accused had a *duty of care* (an obligation not dissimilar to those undertaken by governments under Article 2 of the ICESCR) towards the victim. By a remarkable coincidence, many of the judicial authorities in this regard relate to aspects of economic rights.<sup>232</sup> The most authoritative decision to date is *R v Adomako*,<sup>233</sup> where the House of Lords upheld a conviction for *gross negligence manslaughter*, because the accused, an anaesthetist, had treated his patient (to whom he obviously owed a duty of care) in a manner that was considered to be abysmally below what could reasonably be expected of a physician of his experience. In other words, he had *failed* to exercise this duty to the standard expected of a person with his skills and experience.

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At the international level, the relevant authorities are to be found in the areas of international criminal or humanitarian law, where the position is not dissimilar to that under English law. As pointed out by a former judge (and later, President) of the International Criminal Tribunal for the Former Yugoslavia, “[i]nternational criminal liability may arise not only as a result of a positive act...but also from an omission, that is, failure to take action...when the law imposed a clear obligation to act and the person wilfully or recklessly failed to do what was legally required.”<sup>234</sup> Examples cited include the duties imposed by various provisions of the Geneva Conventions of 1949 governing the conduct of parties during armed conflict, breaches of which constitute violations of the law of war.<sup>235</sup> Indeed, duties very similar to those undertaken under the ICESCR can be found under the Second Geneva Convention, which provides that enemy combatants who are wounded, sick, or shipwrecked “shall not be wilfully left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.”<sup>236</sup> Even more remarkable are Articles 55 and 56 of the Fourth Geneva Convention which impose an obligation on an Occupying Power to provide food, medical supplies, public health and hygiene to the civilian population “to the fullest extent of the means available,”<sup>237</sup> and Article 69(1) of the First Additional Protocol which obliges an Occupying Power to provide the means for satisfying the basic needs of the civilian population, again, “to the fullest

<sup>232</sup> See *R v Gibbins and Proctor*, 13 Crim. App. Rep. 134 (1918) (cohabiting partners were held liable for a child’s murder because they had withheld food from it); *The Queen v. Instan*, 1 Q.B. 450 (1893) (accused held liable for manslaughter following death of her helpless aunt, with whom she was living, for failure to feed or seek medical assistance); *R v. Stone and Dobinson*, Q.B. 354 (1977) (couple held liable for manslaughter for failure to seek appropriate medical help for S’s sister, who had come to live with them, even though D, a 43 year old man, was described as “ineffectual and inadequate” and S, 67, was partially deaf, nearly blind, and of low intelligence). Criminal liability for omission also exists under statute, an example being s.19(2) of the Terrorism Act 2000, under which a person commits an offence if he fails to disclose certain information known to him to the police, relating to the subject-matter of the Act. See Terrorism Act, 2000, c. 11, § 19 (Eng.).

<sup>233</sup> 1 A.C. 171 (1995).

<sup>234</sup> See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 200 (2003).

<sup>235</sup> See, e.g., Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, art. 16(4), 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 14(2), 6 U.S.T. 3316, 75 U.N.T.S. 135. (which imposes a duty to protect prisoners of war from violence or intimidation).

<sup>236</sup> Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 12(2), 6 U.S.T. 3217, 75 U.N.T.S. 135.

<sup>237</sup> These provisions are remarkable because of its obvious similarity to the “progressive realization” clause of the ICESCR.

See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1948, arts. 55-56, 6 U.S.T. 3516, 75 U.N.T.S. 287.

possible extent of the means available.’<sup>238</sup> Violations of these instruments, it is worth noting, constitute war crimes.<sup>239</sup> These thus make it possible to argue that if breaches of obligations similar to those imposed by the ICESCR could attract that level of liability, there is indeed no excuse for not regarding breaches of the Covenant (particularly those relating to the “minimum core obligations” already spelled out) as being of the same degree of seriousness.

¶76 The “human rights solution” proposed herein is therefore not new in any sense, at least insofar as clear and authoritative precedents exist both under municipal and international law, for punishing those who cause death or unnecessary suffering by omission, specifically in relation to certain basic rights now recognized within the ICESCR. The idea is that rulers who either *deliberately* abandon their elementary obligations towards their citizens, or expose them, for example through massive corruption, to avoidable economic misery such as famine, homelessness (e.g., through wars, which result in mass migration), and/or disease would be treated in the same way as those who violate the peremptory norms of international law. This would have two related positive outcomes for human rights advocacy: It would reaffirm the importance of the core elements of economic rights to the notion of human dignity (without which other human rights become meaningless) and in the process, elevate economic rights to the level of importance that is increasingly being accorded to civil and political rights. This, after all, would be the only logical meaning implied by the various UN Declarations proclaiming the “indivisibility” and “interdependence” of human rights.<sup>240</sup>

#### F. A “Crimes Against Humanity” Approach?

¶77 In proposing the possible indictment of rulers for violations of economic rights, one commentator has persuasively advocated a “Crimes Against Humanity” approach, to be based on existing frameworks in international criminal law.<sup>241</sup> Her thesis is that “the definition of crimes against humanity is open-ended enough to include economic...rights...and the concept does not require an international conflict, but rather systematic and large-scale abuse for it to be triggered.”<sup>242</sup> Of particular interest, amongst the various instruments cited is Article 7(k) of the Statute of the International Criminal Court (hereinafter ICC Statute) which defines crimes against humanity to include: “other inhumane acts...intentionally causing great suffering or serious injury to body or mental and physical health.”

¶78 There is little doubt that the phrase “other inhumane acts...” would clearly cover certain violations of economic rights. For example, the infliction of bodily harm on a prisoner, while primarily a violation of the Torture Convention,<sup>243</sup> is also an inherently inhumane act. Indeed, very few observers would deny that this would also

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<sup>238</sup> Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 (1977).

<sup>239</sup> For example, Cassese cites certain post-WWII cases involving the treatment of detainees by Japanese military authorities: *Sumida Haruzo and others (The “Double Tenth” Trial)*, and *Gozawa Sadaichi and others* (citations omitted). Both cases involved the denial of food and basic medical care to the detainees, as well as their general mistreatment. See Cassese, *supra* note 234, at 202 n.2.

<sup>240</sup> See The Proclamation of Teheran, and the Vienna Declaration 1993, *supra*, note 217, which states that both sets of rights are “universal, indivisible, interdependent and interrelated.” It also asserts that “[t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”

<sup>241</sup> See Sigrun I. Skogly, Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?, 5 INT’L J. HUM. RTS. 58 (2001).

<sup>242</sup> *Id.* at 58.

<sup>243</sup> See Convention Against Torture, *supra* note 225.

be a direct violation of the victim's right to health – a core aspect of economic rights. Yet, the ICC Statute does not recognize violations of economic rights *as such*. At first sight, this should not pose any insurmountable difficulty, since the envisaged tribunal would almost certainly not be concerned with any apparent distinction between the two categories of rights, especially given that that would be against the established rules of customary international law.<sup>244</sup> Indeed, as the above cases (*Sumida Haruzo & others*, and *Gozawa Sadaichi & others*) illustrate, violations of economic rights had been punished as war crimes even before the drafting of the ICESCR. The point to note, however, is that the core elements of economic rights, particularly the rights to food, health, and housing, are too essential to human existence and dignity to be treated, in effect, merely as incidental rights.

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Moreover, although the ICC Statute does not address itself explicitly and exclusively to crimes committed during armed conflict, the very nature of the crimes outlined under Articles 5-8,<sup>245</sup> and the degree of seriousness required,<sup>246</sup> lend themselves easily (rightly or wrongly) to this interpretation. This being the case, it becomes safe to argue that for violations of economic rights to be punished under the heading of crimes against humanity, there must almost certainly have been an armed conflict (in which case a violation of economic rights would be considered under the category of “other inhumane acts”) which, in any event, excludes liability for omissions on a literal interpretation. Yet, although contemporary Africa has come to be defined by endless wars (as noted in Part III) many of the most serious violations of economic rights in the region take place in non-conflict situations. Moreover, although mass impoverishment of the kind described therein might be said to be a function of positive conduct (e.g., the transfer of State assets into personal accounts abroad), the resulting human rights violations remain, essentially, crimes of omission. Thus, while a “crimes against humanity approach” is undoubtedly an attractive proposition, it would not be adequate to deal effectively with the African status quo. What is being proposed herein, therefore, is a recognition of the inherent importance of economic rights, either by broadening the jurisdiction of the International Criminal Court by an Additional Protocol, or by the establishment of a separate tribunal for the same purpose. There is, in other words, a need for a degree of clarity that befits the nature of the rights in question, as well as the nature of the punishment envisaged.

## VII. CONCLUSIONS

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This article became necessary in the light of the very *human* tragedies that have defined sub-Saharan Africa since decolonization, and which continue to inflict untold suffering on its people even as the world begins to settle into the 21st century. In the course of the critique, it became clear that contrary to common assumptions, these tragedies are simply the direct consequence of an inability (or unwillingness) on the part of its rulers to attach any degree of seriousness to their legal responsibilities towards their citizens. Yet, the tragic irony is that as the people of Somalia have so clearly demonstrated, ordinary Africans are a remarkably self-reliant and resourceful people – a people quite capable of liberating themselves from economic misery if given the chance.

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<sup>244</sup> See Vienna Declaration, *supra* note 217.

<sup>245</sup> These being: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

<sup>246</sup> See Statute of the International Criminal Court, *supra* note 224, at arts. 1(1), 5(1).

¶81 Given, however, that they are very unlikely to be given that opportunity (for reasons discussed in Part V), it becomes necessary to argue that the necessary change would have to be initiated from outside the region, and at two levels: First, international actors must desist from predicating their engagement with the region's rulers on the gratuitously emotive notion of a "partnership" and instead, should adopt a more discerning approach, with the aim of offering appropriate inducements to those who take their people's rights sufficiently seriously.<sup>247</sup>

¶82 Change is also considered necessary in the very nature of human rights advocacy itself. First, there is a need to highlight the fact that in addition to the explicit undertaking by States Parties to the two Covenants, customary international law (as evidenced by the UN Declaration on the Right to Development) imposes the primary responsibility for the realization of human rights on governments. Thus, the traditional exclusive focus on exogenous factors in an attempt to explain Africa's problems is no longer tenable. Secondly, as with civil and political rights, where the violation of economic rights undermines the dignity of the victims on a scale already described, the possible criminalization of those concerned should be a foremost consideration in human rights advocacy. This, after all, would be one way of giving any real meaning to the rhetoric proclaiming the indivisibility and interdependence of human rights.

¶83 To be sure, any permanent solution to Africa's problems will have to come from Africa; this, if nothing else, is the very essence of the right to self-determination. However, given how disempowered many of its people have become, this cannot be a practical possibility in the short term. Neither can the world afford to wait for long-term solutions to emerge, given the urgency of the situation. The international community cannot therefore afford to abandon millions of helpless people to the whims of rulers who have proved themselves so instinctively contemptuous of their basic needs, and totally insensitive to their suffering.

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<sup>247</sup> It could be argued that the HIPC initiative is based on this principle. However, its main drawback as identified by the UN's independent expert on the issue, is inadequate funding. *See The Highly Indebted Poor Countries (HIPC) Initiative: A Human Rights Assessment of the Poverty Reduction Strategy Papers (PRSP)*, *supra* note 124, at ¶ 13.